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CON 210

Cases, Problems & Appendices

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GOVERNMENT CONTRACT LAW (CON 210)
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CHAPTER ONE CASES

MATTER OF: SSR ENGINEERS, INC.
B-282244; June 18, 1999

DECISION

SSR Engineers, Inc. protests the Department of the Navy's determination to exclude SSR from a procurement for changes to the electrical distribution system at Keesler Air Force Base, Biloxi, Mississippi, under request for proposals (RFP) No. N62467-99-R-0883, because of an organizational conflict of interest. The agency's determination is based on SSR's prior preparation of the statement of work and development of the cost estimates being used by the agency for the protested procurement.

We deny the protest.

The record shows that, in April 1996, SSR was awarded an architect-engineering services contract requiring that it "develop a long range comprehensive master plan to replace the overhead primary electrical, cable television, and Energy Management and Control System (EMCS) lines with new underground lines at Keesler AFB in Biloxi, Mississippi." The agency states that volume I of the three-volume master plan prepared by SSR under the prior contract is being used as the statement of work for the protested procurement, and that volume I also contains the cost calculations that are the basis for the agency's budgetary estimates. Volume II of the master plan, as described by SSR itself, "includes the power flow analysis, short circuit analysis, and coordination analysis for the proposed underground distribution system" and "contains printouts from the computer programs used to evaluate the distributions systems." Volume III of the master plan reflects SSR's efforts to "develop generic specifications that would be given to an A/E firm as a guide for developing detailed construction specifications."

On February 5, 1998, the agency's contracting officer advised SSR that, due to the conflict of interest created by SSR's work under the prior contract, SSR would not be permitted to participate in this procurement. Subsequently, this protest was filed with our Office.

Subpart 9.5 of the FAR generally requires contracting officials to avoid, neutralize or mitigate potential significant organizational conflicts of interest, including precluding a particular firm from competing, so as to prevent unfair competitive advantages, the existence of conflicting roles that might impair a contractor's objectivity, or the existence of biased ground rules created, whether intentional or not, in situations where, for example, a firm writes the statement of work or specifications. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12; GIC Agric. Group, B-249065, Oct. 21, 1992, 92-2 CPD ¶ 263 at 6. Specifically, FAR § 9.505-2(b)(1) states:

> If a 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-- that contractor may not supply the system, major components of the system or the services unless: (i) It is the sole source; (ii) It has participated in the development and design work; or (iii) More than one contractor has been involved in preparing the work statement.

The responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency, and we will not overturn such a determination unless it is shown to be unreasonable. Ressler Assocs., Inc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230 at 2-3; LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531 at 4.

SSR does not dispute that it essentially prepared the statement of work and the cost estimates being used by the agency in this procurement. Further, SSR does not suggest that any of the exceptions contained in FAR § 9.505-2(b)(1), quoted above, are applicable here. Rather, SSR first argues that the conflict of interest provisions of FAR subpart 9.5 should not be applied because "FAR [§] 36.302 [which deals with construction and architect-engineer contracts] specifically addresses how the Government can utilize a consultant to develop a scope of work for a design-build project" and "[n]o where in [FAR] Part 36 does it state that the firm developing the scope [of work] is precluded from being part of a design-build team." SSR concludes that, "if the intent of the FAR ... was to preclude the firm developing the scope [of work] from participating on a design-build team the exclusions would be discussed or referenced in [FAR] Part 36."

We find without merit SSR's assertion that the provisions of FAR subpart 9.5 are inapplicable to this procurement. FAR § 9.502(a) provides that, "[t]his subpart applies to contracts with either profit or nonprofit organizations," and FAR § 9.502(b) further states that, "[t]he applicability of this subpart is not limited to any particular kind of acquisition." Accordingly, the fact that FAR part 36 does not specifically address conflict of interest provisions in the context of construction and architect-engineer services contracts does not somehow render the organizational conflict of interest provisions of FAR subpart 9.5 inapplicable to such contracts.

SSR also complains that it has not obtained any competitive advantage based on its prior work. Specifically, while acknowledging that "[n]umerous contractors have expressed their desire to have SSR on their design/build team," SSR asserts that "[c]ontractors are interested in using SSR on the Keesler AFB project not because of any competitive advantage, but because of the design capabilities SSR brings to the team." Additionally, while acknowledging that "SSR's cost estimates established the ceiling for the budget cost," SSR asserts that "[n]o established contractor . . . would rely on SSR to determine the pricing for labor and materials to construct the project." [FN3] Finally, SSR maintains that it should be permitted to assist a prime contractor in preparing its proposal because SSR's fees for such assistance would not constitute a major portion of the total contract cost, arguing that "[w]ith an insignificant share of the contract, the so called competitive advantage is also insignificant."

Based on the record here, there is no basis to question the agency's determination that, due to an organizational conflict of interest, SSR should be precluded from participating in this procurement. Specifically, on the basis of the undisputed facts that SSR prepared material leading directly to the statement of work and prepared costs estimates which established the ceiling for the agency's budgeting of costs, we conclude that the agency reasonably determined that SSR's prior activities created an unfair competitive advantage as expressly contemplated by FAR subpart 9.5. SSR's assertions to the contrary provide no basis to object to the agency's determination.

The protest is denied.

LORAL WESTERN DEVELOPMENT LABS
B-256066, 94-1 CPD ¶295

DECISION

Loral Western Development Labs protests the award of a cost-plus-award fee, level-of-effort contract to HRB Systems, Inc. under request for proposals (RFP) No. MDA904-93-R-I001, issued by the National Security Agency (NSA), Maryland Procurement Office, for the agency's Worldwide Software Lifecycle Support Program. Loral asserts that NSA used undisclosed criteria to evaluate its proposal, improperly made award to a higher-cost offeror, and failed to consider that HRB violated the procurement integrity provisions of the Office of Federal Procurement Policy Act.

We deny the protest.

BACKGROUND

The RFP contemplated award of the Worldwide Software Lifecycle Support contract (WSLSC) for a base year and 3 option years. The contractor is required to provide specified labor categories and associated hours necessary to perform highly-skilled support services at locations inside the continental United States (CONUS) and outside the continental United States (OCONUS). The services include professional engineering, software support and maintenance, technical support, configuration management, and documentation required to supervise and support the performance of these services.

The RFP statement of work (SOW) listed the categories of personnel that the contractor was required to provide along with the number of years of required experience for each category and the required skill mix for each category. The RFP also required the contractor to use personnel with top secret/access to compartmented information (TS/SI) clearances to perform the contract.

The RFP provided for award to the responsible offeror which submitted the proposal most advantageous to the government and stated that proposals would be evaluated against the following criteria: technical/personnel, management, and cost. Technical was weighted 50 percent, management 15 percent, and cost 35 percent. Under the technical factor, personnel qualifications and personnel availability were listed as subfactors and each was worth 25 percent of the evaluation score. Under the cost factor, the RFP stated that the evaluation would consider evaluated cost, worth 15 percent, and cost realism, worth 20 percent.

NSA received proposals from Loral and HRB. After evaluating the offers, conducting discussions with both offerors and receiving and evaluating best and final offers (BAFO), NSA determined that the RFP did not accurately reflect its needs and issued amendment No. 4 to the solicitation which deleted the phase-in plan, changed the basis of award, decreased the level-of-effort and provided HRB and Loral with written discussion questions. After evaluating the responses to the discussion questions, NSA provided Loral with additional cost and technical questions and requested both offerors to submit second BAFOs by November 23. NSA received, evaluated, and scored the BAFOs and, after applying the RFP assigned weights to the raw scores for each factor, gave Loral a technical/management score of 56.10, a cost score of 33.8, and a combined score of 89.90. Loral's weighted total score, however,

was decreased to 86.15 after the chairperson of the technical evaluation committee determined that Loral's raw score of 89 for personnel qualifications should be reduced to 74 because Loral proposed four individuals without TS/SI security clearances. HRB received a weighted technical/management score of 61.43, a cost score of 32.6, and a combined score of 94.03. Loral's BAFO cost was 17 percent lower than HRB's BAFO cost. The evaluation board recommended award to HRB based on the difference in point scores and, consistent with the RFP, recognized that the point scores took into account the technical/management evaluation factors and cost. The source selection authority reviewed the evaluation results and agreed that HRB should be selected for award. The contract was awarded to HRB and this protest followed.

* * * * *

PROCUREMENT INTEGRITY

Loral protests that NSA failed to follow applicable procurement regulations in awarding the contract to HRB in the face of an alleged violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §423 (1988 and Supp. IV 1992). Loral explains that in September 1993, after the first BAFOs had been evaluated, a Loral employee informed Loral management that an HRB employee stated that he had been told by HRB management that Loral's proposal was approximately $8 million lower than HRB's and that a second round of BAFOs would be requested. Loral states that it informed the agency of this "rumor" and was told that the alleged violation was being investigated by the Inspector General. Loral complains that the agency improperly made award to HRB before the investigation was completed. Loral further complains that even if the agency could properly award the contract to HRB while the investigation was pending, it failed to obtain approval from a level higher than the contracting officer before doing so as required by the Federal Acquisition Regulation (FAR). Finally, Loral argues that since its proposal was in fact about $8 million lower in cost than HRB's and since a second round of BAFOs was requested, it is clear that there was a violation of the act and that HRB had provided Loral proprietary information. According to Loral, HRB thus should not have received the award because HRB was able to use this information to revise its cost and technical proposals to offset Loral's lower cost.

Under FAR §3.104.11(a), if the contracting officer learns of a violation or possible violation of the procurement integrity provisions of the act, he or she must determine if the violation has an impact on the pending award. If the contracting officer determines that there is no impact, he or she may proceed with the procurement with the concurrence of a designated official. FAR §3.104.11(a)(1). The designated official must then refer the matter to the head of the contracting agency who reviews all available information and determines what action to take, including whether to advise the contracting officer to continue with the procurement, initiate an investigation, refer the matter for criminal investigation, or determine if a violation occurred. FAR §3.104.11(b). If the head of the contracting agency determines that a violation occurred before an award was made, he or she may cancel the procurement, disqualify an offeror, or take other appropriate action. FAR §3.104.11(d). If the head of the contracting agency decides that a violation occurred after an award has been made, he or she may void the contract, effect appropriate contractual remedies, or refer the matter to the debarment official. Id.

The regulations specifically provide the head of the contracting agency with a number of options when a possible violation is reported. These include advising the contracting officer to continue with the procurement and initiating an investigation.

We find that the agency acted consistently with the FAR in conducting the procurement once it was aware of the alleged violation. When Loral informed the agency that it had heard a rumor that HRB knew its cost was $8 million lower than Loral's and that a second round of BAFOs would be requested, the agency referred the matter to the Chief of the Maryland Procurement Office, an official higher than the contracting officer. The chief instructed the contracting officer to request both offerors to execute special procurement integrity certificates stating that they were not aware of any violations of the procurement integrity provisions of the act. Finally, he determined that there was no reason to stop the procurement because at the time the alleged violations were classified only as rumors. Thus, as required by FAR §3.104.11(a)(1), the contracting officer continued with the procurement only after being advised by a higher level official to do so. Also as required by the FAR, the matter was referred to the head of the contracting agency who considered the matter before the contract was awarded to HRB. Before the award was made, the head of the contracting agency, with the contracting officer and the Chief of the Maryland Procurement Office, reviewed the issue and determined, as permitted by FAR §3.104.11(b), that there was no basis to conclude that there was a violation of the act. They reached this conclusion because HRB had not acted on the information--that is, HRB did not raise its price, because Loral never provided any further information, and because the offerors executed the special procurement integrity certificates. They also considered that the issue was still under investigation. Thus, the agency followed the requirements of the FAR in deciding to award the contract. Finally, while Loral argues that the facts show that there was a procurement integrity violation, NSA reports that the investigation is still pending before the Defense Criminal Investigation Service. Accordingly, we will not consider this issue further.

The protest is denied.

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MATTER OF: CREATIVE MANAGEMENT TECHNOLOGY, INC.
B-266299, 96-1 CPD ¶ 61

DECISION

Creative Management Technology, Inc. (CMT) protests the award of a contract to AJT and Associates under request for proposals (RFP) No. F08650-95-R-A078, issued by the Department of the Air Force for technical engineering and spacelift services (TESS) to support the agency's 45th Space Wing Eastern Launch Range Space Program. CMT contends that the Air Force failed to apprise the firm of informational deficiencies in its proposal, thereby depriving the protester of the opportunity to improve its moderate risk proposal rating. CMT contends that it should have received the award since the agency's risk concerns were unreasonable, and it offered a lower price than the awardee. CMT also argues that the technical evaluation and subsequent award to AJT were tainted by a conflict of interest.

We deny the protest.

The TESS services are critical engineering support necessary to ensure scheduled space program launches and missions including Titan IV, Atlas II, Delta II and III, Trident D-5, and various commercial satellite programs. The procured services include phase-in tasks; project management; engineering design; emergency on-call engineering support; inspection services; and data compilation/recordkeeping. The RFP was issued on May 15, 1995 and contemplated the award of a 1-year contract with 4 option years based on an integrated assessment of technical and price factors, with price less important than technical merit. The RFP required each offeror to submit a technical/management proposal, which was to be evaluated under seven criteria of equal importance. The RFP further provided that risk analysis of each proposal would be performed and considered as part of the overall evaluation.

By the June 21 closing date, four offers were received, including offers from CMT and AJT. During the next 2 months, numerous "Clarification Requests/Deficiency Reports" (CR/DR) were issued to each of the four offerors. . . .

* * * * *

On September 7, after reviewing and concurring in the SSET's finding, the source selection authority (SSA) awarded the contract to AJT. Although CMT's price was lower than AJT's, the SSA determined that AJT's lower performance risk warranted paying an approximately 12-percent price premium. Specifically, the SSA noted that any interruption in the required TESS services--including delays in providing emergency on-call engineering services--could potentially cause launch delays that would cost the agency approximately $1 million per day. On September 26, after attending the agency's debriefing, CMT filed this protest.

DISCUSSION

Alleged Conflict of Interest

The record shows that AJT's proposed project manager was a contracting officer's technical representative (COTR) who served on the predecessor contract until he retired, 1 day after the current contract was awarded to AJT. CMT contends that AJT's proposed employment of the project manager constituted a personal conflict of

interest prohibited by the procurement integrity provisions of FAR subpart 3.104. Alternatively, CMT contends that AJT's proposed project manager must have used inside source selection information to assist the awardee in drafting the winning proposal; CMT also maintains that the project manager similarly must have assisted the agency in drafting the current RFP to favor AJT's capabilities, resulting in an improper organizational conflict prohibited by FAR subpart 9.5.

The Air Force acknowledges that AJT's proposed project manager served as the COTR for the predecessor contract; however, the agency asserts that contrary to the protester's contentions, no procurement integrity or organizational conflict of interest regulations were violated by AJT's proposed use of the COTR.

The Air Force reports that AJT approached the COTR on April 18, 1995 and offered him an employment position as project manager for the upcoming procurement. The COTR accepted the employment offer with an effective start date of October 1, but conditioned his acceptance of AJT's employment offer on the Air Force's determination that such employment would not constitute an improper conflict of interest. The COTR then reported the employment contact to the agency and, by memorandum dated May 8, formally requested an ethics advisory opinion regarding his potential post-government employment by AJT. The Air Force determined that employment with AJT was permissible since the COTR was not involved in any aspect of the current TESS procurement.

The interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and the Department of Justice. Our general interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee during the award selection process. Cleveland Telecommunications Corp., B-257294, Sep. 19, 1994, 94-2 CPD p 105; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD p 132.

Here, we find nothing improper in either the COTR's conditional acceptance of employment while still an Air Force employee, or in AJT's proposed use of the COTR in its proposal. Although procurement officials are prohibited from engaging in employment negotiations during the conduct of a procurement, FAR s 3.104-3(b), the COTR was not a procurement official as defined within these regulations: the COTR had no involvement with drafting, reviewing or approving the RFP specifications; evaluating proposals; selecting sources; conducting negotiations; or approving the award to AJT. FAR s 3.104-4(h). Further, while any government employee is prohibited from "participating personally and substantially" in any matter that would "affect the financial interests of any person with whom the employee is negotiating employment," FAR s 3.104-1(b)(2), there is no evidence that the COTR participated in any way in the procurement on behalf of the Air Force or AJT. See Cleveland Telecommunications Corp., supra. Nor did the COTR participate in the drafting or negotiation process for the predecessor solicitation, known as the Ground Systems Associate Contract (GSAC). In this regard, the Air Force reports that the GSAC requirements underwent substantial changes, rewriting, and restructuring before being issued as the instant TESS procurement.

Since the COTR was not involved in any aspect of the TESS procurement, and since the COTR was not employed by AJT, and did not otherwise assist AJT in the

drafting of its proposal for this procurement, the organizational conflict of interest restrictions set forth at FAR 9.5 are inapplicable. See *Abt Assocs., Inc.*, B-253220.2, Oct. 6, 1993, 93-2 CPD p 269.

Although the protester contends that AJT's proposed employment of a current Air Force employee must have influenced the SSET to favor the AJT proposal, the record simply does not support this contention. CMT has not furnished any evidence to support this allegation, and we will not attribute bias in the evaluation of proposals on the basis of inference or supposition. See *TLC Sys.*, B-243220, July 9, 1991, 91-2 CPD p 37. The protester's speculation notwithstanding, the record contains no evidence of bias in the evaluation of either CMT's or AJT's proposal; instead, the record contains a well-documented, detailed evaluation and source selection analysis, showing that the Air Force conducted its evaluation reasonably and in accordance with the evaluation criteria. Under these circumstances, CMT's allegations of possible impropriety, unaccompanied by supporting evidence, amount to nothing more than speculation, and as such, do not provide a basis for protest. *ITT Fed. Servs. Corp.*, B-253740.2, May 27, 1994, 94-2 CPD p 30.

The protest is denied.

Comptroller General of the United States

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ETHICS PROBLEM #1

Contractor has successfully completed performance of the contract, including several changes directed by you, the contracting officer. Submitting the invoice for final payment, with complete documentation, Contractor says, "I need a favor. The Government owes me $100,000 under the contract, as these documents show, and under your standard procedure I will be paid in 30 days. I need money urgently, though, unless I receive $75,000 within 10 days, I will probably lose my business. If you will arrange for me to be paid $75,000 in 10 days, I will accept that as full payment and waive my right to the other $25,000. I am desperate. Please help me." You can accomplish this if you want to. What ethical responsibilities (if any) do you see in this situation?

PROBLEM #2

The contracting officer assigned a technical representative to draft a statement of work for a contract, which was to be awarded soon, including a description of the work and the necessary personnel to perform the work. The COTR asked the contractor performing the current contract to write the descriptions, which later became the statement of work for the new contract. Of the 206 firms solicited, only 4 submitted proposals, and the only one that was technically acceptable, was the one submitted by the same contractor. Is there a problem? What did/should the contracting officer do? See Ressler Associates, B-244110, 91-2 CPD 230

PROBLEM #3

Company A agrees to provide systems engineering and technical direction to the Navy for the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). May Company A be permitted to supply any powerplant components? May Company A supply a component or components of the submarines which are not related to the powerplant (e.g., fire control navigation, etc.)?

PROBLEM #4

Company B is the systems engineering and technical direction contractor for the gizmo system. After some progress the Government terminates the contract for convenience. Subsequently, the blivet system is developed which is unlike the gizmo system but performs the same function. May Company B be awarded the production contract for the blivet system or any of the subcontracts for the system's components?

continued on next page

Problems *(continued)*

PROBLEM #5

The Nevada Military Air Show ended at 8:00 p.m. on Saturday. The civilian contracting officers from the air show's respective services, Amy from the Army, Arlene from the Air Force and Nancy from the Navy decided to "kick-back" and go out on the town and celebrate.

At the closing ceremonies, they were each given a silver plated, diamond-studded airplane from the participating contractors in recognition of their months of hard work in putting the show together. They each had done such a good job, that one contractor promised each of them a position if they quit their government job. Arlene did say she would consider giving each of them a resume.

After about three hours and three beers at a local fancy "cowboy" bar where they had been celebrating, the three unmarried contracting officers met Billy Boeing, Larry Lockheed and Johnny Rockefeller. Unbeknownst to the three contracting officers, Boeing, Lockheed, and Rockefeller are heirs and officers of companies that have government contracts administered by Amy, Arlene and Nancy. (It should be noted that no one in this situation used his or her last name.)

Billy, Larry and Johnny join the contracting officers and for another three hours they buy the contracting officers imported beer and share three bottles of champagne none of which costs less than $150 a bottle. After the third bottle of champagne, Billy, Larry and Johnny propose marriage to Amy, Arlene and Nancy respectively. Being in Nevada, they are able to get married that night.

They decided to use the drive-through wedding chapel, as a couple of them are unable to stand up and walk for significant periods of time. On their way to a hotel from the wedding chapel, due to their condition after three bottles of champagne, they were involved in a car crash. Driving at a speed of 70 m.p.h. (measurement of skid marks prove this!) in a parking lot, they hit a palm tree and a statue of Wayne Newton outside of the hotel. Billy Boeing is killed when the Wayne Newton statute crashes through rear window, striking him in the head.

As a result of the crash, Amy as Billy's wife inherited over 100,000 shares of Boeing stock. (Amy is a contracting officer on a range contract awarded to Boeing.)

Amy, Arlene, Nancy, Larry and Johnny all survive the crash but suffer serious injuries. As a result the survivors are initially unconscious in a Las Vegas hospital. Larry and Johnny's business assistants arrange to have the survivors flown to Minnesota for medical treatment paid for by Lockheed and Standard Oil.

1. Assume that the three contracting officers go back to work. Identify any and all potential ethical problems.
2. Please identify how the three CO's may avoid ethical problems posed by the fact situation.
3. Should the Government punish any of the CO's for their actions? Why or Why Not? Did the Cos do anything wrong? Did they violate any ethical rules?

CHAPTER TWO CASES

COLORADO CARPET INSTALLATION, INC v. PALERMO
668 P.2d 1384 (Colo. Sup. Ct. 1983)

QUINN, Justice.

Colorado Carpet is a Colorado corporation engaged in the business of selling and installing carpeting, tile and other flooring materials. In April 1980, Jack Duran, the president of Colorado Carpet, began negotiations with the Palermos for the sale and installation of carpeting, carpet padding, tile and vinyl floor covering in the downstairs and upstairs areas of their home. Colorado Carpet did not maintain an actual retail store or warehouse for these materials, but arranged to purchase them from other distributors. In the course of his negotiations with the Palermos, Duran delivered carpet samples to the Palermo home, measured the home, and assisted Mrs. Palermo in locating at local retail outlets the type and brand of flooring materials that she wanted. Further negotiations ensued, including a written proposal from Duran.

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Although the Palermos never made a written acceptance of Colorado Carpet's proposal, Duran testified that Mrs. Palermo orally accepted the proposal on or about April 25, 1980, shortly after he submitted it to her. Mrs. Palermo, in contrast, denied accepting the written proposal. It was her testimony that neither she nor her husband ever agreed to purchase any carpeting from Colorado Carpet and that she had contacted Duran only about a tiling job for the upstairs and downstairs bathrooms.

On April 30 and May 1, 1980, Colorado Carpet placed orders with Georgia and California manufacturers for the Seduction (downstairs) and the Amaretto (upstairs) carpeting. These orders called for both carpets to be cut into segments measuring 12 feet by 73 feet in order to permit effective installation in the upstairs and downstairs sections of the Palermo home. The orders were filled in due course, and the carpets were eventually delivered to a Denver warehouse. Colorado Carpet deferred ordering the carpet padding and kitchen carpet at this time because these were stock items and could be purchased immediately before the installation was to commence.

Colorado Carpet purchased and delivered the ceramic tile to the Palermo home for eventual installation in the upstairs and downstairs bathrooms. Mrs. Palermo, however, had a disagreement with Colorado Carpet's tile man over some repair work in connection with the tile installation and arranged with some other contractor to supply and install other tile.

Duran, on behalf of Colorado Carpet, attempted unsuccessfully to renegotiate with the Palermos but to no avail. Colorado Carpet removed its tile from the home, returned half of it to the supplier for a refund and sold the other half. It also shipped the Seduction carpeting back to the California manufacturer in exchange for some credit and was able to sell the Amaretto carpeting to a local purchaser.

[We] granted certiorari to consider whether the oral agreement in question constituted a contract for the sale of goods within the meaning of §4-2-201(1) of the Uniform Commercial Code, and, if so, whether it qualified for the "specially manufactured goods" exception of section 4-2-201(3)(a).

We first address the court of appeals' determination that the contract was one for the sale of goods, rather than for the performance of labor or services. We conclude that the agreement in question involved a contract for the sale of goods as contemplated by §4-2-201(1) of the Uniform Commercial Code (UCC).

This section prohibits the enforcement of contracts "for the sale of goods for the price of $500 or more ... unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought...."By its terms, the statute applies only to contracts for the sale of goods, and not to contracts for labor or services. The Uniform Commercial Code defines "goods" to mean "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities ... and things in action." §4-2-105(1). A "sale," by statutory definition, "consists in the passing of title from the seller to the buyer for a price," and a "contract for sale" includes a present sale of goods as well as a contract to sell goods at a future time. *Id*. 4-2-106(1).

In this case the subject of the contract involved "goods" because the carpeting and other materials were movable at the time that Colorado Carpet procured them for installation pursuant to the agreement. Since the agreement contemplated that title to the carpeting and other materials would pass to the Palermos, it constituted a "contract for sale." The scope of the contract, however, included not only the sale of goods but also the performance of labor or service.

Thus, we must determine whether such a mixed contract qualified as a contract for the sale of goods or, instead, constituted a contract for labor or service outside the scope of §4-2-201(1).

The performance of some labor or service frequently plays a role in sales transactions. "Goods," however, are not the less "goods" merely because labor or service may be essential to their ultimate use by the purchaser. The mere furnishing of some labor or service, in our view, should not determine the ultimate character of a contract for purposes of §4-2-201(1) of the Uniform Commercial Code. Rather, the controlling criterion should be the primary purpose of the contract--that is, whether the circumstances underlying the formation of the agreement and the performance reasonably expected of the parties demonstrates the primary purpose of the contract as the sale of goods or, in contrast, the sale of labor or service. We agree in this respect with the following statement in *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir.1974): "The test for inclusion or exclusion is not whether [goods and services] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g*., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g*., insulation of a water heater in a bathroom)."

This "primary purpose" test, we believe, is designed to promote one of the expressed statutory policies of the Uniform Commercial Code--"[t]o simplify, clarify, and modernize the law governing commercial transactions." §4-1-102(2)(a). Useful factors to consider in determining whether "goods" or "service" predominates include the following: the contractual language used by the parties, whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one hand and labor on the other, the

ratio that the cost of goods bears to the overall contract price, and the nature and reasonableness of the purchaser's contractual expectations of acquiring a property interest in goods (goods being defined as things that are movable at the time of identification to the contract, section 4-2-105(1).

Considering the contract under these guidelines, we are satisfied that, as a matter of law, its primary purpose was the sale of goods and not the sale of labor or service. The language in Colorado Carpet's proposal referred to the parties as "seller" and "customer." In addition, the agreement called for an overall contract price that included both the cost of goods and labor, and, as the trial evidence established, the charge for labor was slight in relation to the total contractual price. Finally, the carpeting and other materials were movable when Colorado Carpet procured them for the purpose of selling them to the Palermos. The fact that these materials might later be installed in the Palermo home and assume the character of fixtures does not undermine the primary purpose of the contract as one for a sale of goods. We therefore agree with the court of appeals that the agreement between Colorado Carpet and the Palermos constituted a contract for the sale of goods, with labor or service only incidentally involved, and thus within the statute of frauds provisions of the Uniform Commercial Code. The judgment of the court of appeals is affirmed.

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A.B. DICK COMPANY
ASBCA No. 32572, 89-2 BCA ¶21,731

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

A.B. Dick Company (Dick) appeals the default termination of a contract to provide document copier service at an air force base.

FINDINGS OF FACT

On 5 July 1985, the Government issued an Invitation for Bids (IFB) for the provision of document copier machines, supplies and service at 53 locations at MacDill Air Force Base, Florida, for the year beginning 1 October 1985 (FY 1986), with four option years thereafter.

The IFB at Section C, paragraph 3.d, required that the copiers: "Provide reproduced copies 8 1/2 inches wide X 11 inches long and 8 1/2 inches wide X 14 inches long without manually changing paper trays." The Government intended by paragraph 3.d to require "dual cassette" copiers. A dual cassette copier is a copier with two paper trays loaded in the copier simultaneously. The term "dual cassette," however, did not appear anywhere in the specification.

The IFB called for bids on a unit price per copy basis. Dick submitted a bid of $474,652.08 for the total five-year estimated quantity of copies. Dick's bid was the lowest of the three submitted. Dick based its bid on providing single cassette copiers with a manual by-pass feature which would permit manually feeding legal-size paper stock when the cassette was loaded with letter-size paper. Single cassette copiers with a manual by-pass feature were a common product in the copier industry in 1985 when the contract at issue was advertised and awarded. Dick's smallest dual cassette copier had a standard cost 25 to 30 percent higher than its single cassette copier.

There was nothing in the IFB that required mechanical feeding, or precluded manual feeding of the paper stock into the copier. There is no evidence that the single cassette machines which Dick intended to provide could not have met the specified monthly maximum copy requirements for each machine/location, even if the entire monthly quantity were manually fed through the by-pass.

After bids were opened on 5 August 1985, a competitor claimed to the Government that Dick's price was too low to provide dual cassette copiers. On 7 August 1985, a contract administrator telephoned Dick's branch manager and asked if Dick's machines "met the specs that required dual cassette machines." The branch manager responded that Dick's machines "met contract specs." By letter dated 9 August 1985, the contracting officer requested Dick to verify its bid and to certify, among other things, that: "... your bid is in compliance with Part I, Section C, paragraph 3.d which requires all copiers provided be dual cassette copies [sic],...." By letter dated 19 August 1985, Dick confirmed its bid and provided a certification which stated in relevant part: “1. We certify that our bid is in compliance with Part I, Section C, paragraph 3.d which states: ‘Provide reproduced copies of 8 1/2 inches wide X 11 inches long and 8 1/2 inches wide X 14 long without manually changing paper trays.’ The conversation with the contract administrator on 7 August 1985 and the foregoing exchange of letters were the only contacts by the parties regarding the type of copier to be provided between the opening of bids and award of the contract.

On 15 October 1985, Dick attempted to deliver and install the first 20 of the rebuilt copiers. However, the first copier, which Dick attempted to deliver, was rejected by the Government because it was not a dual cassette machine. Dick then returned the rebuilt copiers to its warehouse. Following rejection of Dick's first attempted delivery, the Government's contract administrator contacted three other suppliers of copier machines, and "all interpreted the specs as meaning dual cassette requirement". However, a trade publication describing the characteristics of copiers indicates that a manual by-pass allowing different size copies to be made on a single cassette machine without manually changing paper trays was a common feature on copiers available in 1985.

By letter dated 16 October 1985, the contracting officer gave Dick a cure notice stating in effect that unless dual cassette copiers were provided within ten days, the contract might be terminated for default. This was the only cure notice sent to Dick by the contracting officer on this contract, and it did not cite any alleged default other than the failure to provide dual cassette copiers.

An internal Government memorandum dated 18 October 1985 and signed by a contract administrator stated that it had been made clear to Dick prior to award that "even though not specified in specs, dual cassette or equal *without manually changing anything else* was the minimum requirement." [Emphasis added]

By letter to the contracting officer dated 25 October 1985, Dick noted that it had attempted twice to deliver copiers capable of reproducing letter-size and legal-size copies without manually changing paper trays, that the Government had refused to accept the machines, and that Dick considered the rejection to be a breach of contract.

On 27 November 1985, the Government terminated Dick's contract for default "for failure to comply with specifications."

DECISION

While the IFB specification could be met by dual cassette copiers, it did not require dual cassette copiers, nor did it require mechanical feeding of the paper stock. The IFB specification required only copiers that could produce two copy sizes "without manually changing paper trays." This was a performance specification, not a design specification, and the single cassette copier with manual by-pass, which Dick tendered, and the Government rejected met the specified performance requirement.

The reported response of the three copier suppliers to the contract administrator's request for their interpretation of the specification does not persuade us that there was any special trade language being used in the phrase "without manually changing paper trays," or that the phrase was ambiguous. A dual cassette copier might be the type of copier that would first come to mind, but the plain meaning of the words in the specification did not exclude other types of copiers that might also meet the performance requirement. The reported response of the three copier suppliers is particularly unpersuasive in light of the concurrent internal memorandum of the Government's contract administrator admitting that dual cassette copiers had not been "specified in specs."

The Government's oral and written requests to Dick for bid verification and certification after the opening of bids were, in effect, an attempt to change the terms of the IFB specification, making them more restrictive, without recompeting the

procurement in accordance with FAR 14.404-1. This attempt was in violation of FAR 14.101(d) which states: "Bids shall be evaluated without discussions," and FAR 14.101 (e) and 14.407-1(a) which state that award on sealed bids shall be made to that responsible bidder whose bid "conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation." Even if we were to consider the specification as ambiguous, a restrictive interpretation announced after the opening of bids is no different in substance from a change order eliminating all but one alternative from an unambiguous specification that permits several alternative methods of performance.

The Government argument that Dick is bound by its failure to object expressly to the Government's "interpretation" of the specification in the bid verification request is without merit. Dick limited its response to stating that it would comply with the specification, and its response carefully repeated the words of the specification without the added words of the Government interpretation. The Government could not have reasonably considered this response as an assent to its interpretation, and it did nothing thereafter prior to awarding the contract to secure Dick's unequivocal assent to that interpretation.

However, while Dick's response to the verification request carefully avoided acceptance of the Government's interpretation, it did not disclose Dick's intention not to provide the specific type of copiers which the Government in its verification had clearly indicated it wanted. In the absence of further communication from the Government on this subject, Dick could not have reasonably assumed from the award notice alone that the Government had retracted its restrictive reading of the specification.

The Government knew, or ought to have known, that the specification as advertised could be met by at least two different types of copier--dual cassette or single cassette with manual by-pass. In this regard, it should be remembered that the single cassette copier with manual by-pass was a common industry product when the contract was advertised, bid and awarded. Dick knew, from the Government's verification request after the opening of bids, that the Government wanted to restrict the specification to permit only the dual cassette copier. However, Dick's carefully worded reply to that request did not accept the Government's restrictive interpretation, and the Government knew or ought to have known from that response that its interpretation had not been accepted.

In these circumstances, we find an absence of manifestations by the parties of mutual assent to a fundamental term of the proposed contract. Where, as here, the parties attach materially different meanings to their manifestations and each party has reason to know the meaning attached by the other, there is no enforceable contract.

The appeal is sustained to the extent that, in the absence of an enforceable contract, there was no default by Dick but, for the same reason, there is also no entitlement to a convenience termination settlement.

DISSENTING OPINION BY ADMINISTRATIVE JUDGE GIERTZ

The termination for default should be upheld based on appellant's acquiescence in the Government's announced interpretation. The Government's 9 August 1985 letter makes clear that the Government wanted dual cassette copiers. Appellant knew this and knew that it intended to provide the manual feed type. Yet,

appellant's letter of 19 August is not calculated to bring this point home. Rather, appellant says only that it will comply with the contract requirements. This answer is meaningless at best since it says nothing other than that appellant will do what it is contractually obligated to do. At worse, appellant's response is deceptive. In the face of the clear conflict in interpretation, appellant remains silent while giving the illusion of agreement. Appellant needed to do more here. Under the total circumstances, the appellant's letter must be considered as tantamount to agreement with the Government's reasonable interpretation.

APPEALS OF JIM SENA CONSTRUCTION COMPANY, INC.
98-2 BCA 29,891; IBCA Nos. 3761-3765
Bureau of Land Management

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

These appeals involve a negotiated small business set-aside contract by the Bureau of Land Management (BLM) with Jim Sena Construction Company, Inc. (Sena or Appellant), entered into on February 17, 1995, for the construction of the Orilla Verde Ranger Station in Taos County, New Mexico (the project), for the fixed price sum of $745,952. The work was completed satisfactorily and on time.

After completion, claims for additional costs in connection with [various items, including] reimbursement of the New Mexico Gross Receipts Tax. were filed with, and finally denied by, a Contracting Officer (CO) who succeeded the original CO a year after the contract was signed.

The appeals were timely filed on March 26, 1997. On December 29, the Government moved to dismiss the largest claim, IBCA 3762, on the ground that the Appellant's reimbursement claim for the amount of the New Mexico Gross Receipts Tax was not cognizable as a matter of law. Appellant responded on January 30, 1998, and the motion was denied by the Board during a telephone conference call on March 10. An oral hearing in the matter was subsequently held on April 22 and 23, 1998, in Albuquerque, New Mexico.

IBCA 3762--New Mexico Gross Receipts Tax

The largest claim in these appeals is for reimbursement to the contractor of $47,131.59 that it was required to pay to the State of New Mexico pursuant to that State's gross receipts tax. We find the facts to be as follows:

The project involved an 8-A small business contract negotiated through SBA's set-aside program, under which SBA gave Sena's name to BLM, and BLM got in touch with Sena to request a contract proposal. BLM regarded Sena's first and second proposals, each of which expressly included the NMGRT, as too high. Sena then submitted its best and final offer in the amount of $792,114, again including a NMGRT of $47,033. BLM regarded this offer as acceptable except for the NMGRT, which the CO thought the Government would not incur.

The CO first raised the exemption issue at the time of Sena's second offer, but Sena believed that the tax would have to be paid and again specifically included it in its final proposal. It wrote a letter to the CO 3 weeks before the contract was signed, explaining proposed contract changes and maintaining that "[w]e are required by New Mexico State Law to charge and collect Gross Receipt [sic] Sales Taxes on the total contract amount."

At the meeting to consider Sena's best and final offer, the CO and Sena discussed the NMGRT, and the CO again insisted that the Government was exempt from the tax. It was agreed that the contract would be written for a price that excluded the tax but that BLM would obtain for Sena a nontax certificate or, if it could not get the exemption certificate, it would reimburse Sena for the amount of tax it actually paid. No other change was made in Sena's third proposal before the contract was signed.

The contract nevertheless incorporated by reference the standard Permits and Responsibilities clause (FAR 52.229-3), which provided that the contractor was responsible for all existing State and local taxes. Although Sena wrote to the CO as early as March 30, 1995 (before the work was begun), reminding him of the need for an exemption certificate and calling attention to its potential liability for penalties if the certificate was not in hand prior to the collection of funds -- and later wrote or telephoned the CO approximately 10 times more -- all Sena was ever told was that the CO was working on getting the exemption certificate. Apparently, however, no real effort had been made to obtain the certificate by the time the CO was relocated to a new job approximately a year later in March 1996.

At the hearing, both the Government and Appellant introduced the same exhibit, not included in the Appeal File, which was a February 3, 1995, E-mail message to the senior BLM New Mexico CO, who later succeeded the project CO after the former was reassigned, concerning the NMGRT in relation to the project. This early message stated:

I'm at an impasse with trying to award the Orilla Verde Ranger Station Contract.

The issue holding up the award is application of the NMGRT ($47,033). The contractor included it in his proposal, however, I feel the NMGRT does not apply based on the following: [The CO then quotes from FAR 52.229-10, a clause dealing with cost reimbursement contracts.]

My interpretation of the above information lead [sic] me to the conclusion that the NMGRT was not an allowable cost in the Contractor's proposal because the contractor WILL NOT be performing a cost-reimbursement contract. The contractor disagreed with my conclusion so I contacted the New Mexico Taxation and Revenue Department. I spoke with [an agent] concerning the NMGRT. He told me the NMGRT applied to <u>all</u> construction in the State of New Mexico whether being performed on Federal land or not. [Emphasis added; capitals in original.]

Thus, it appears that the original CO was on notice that the NMGRT would have to be paid even before entering into final negotiations on the proposed contract.

The successor CO apparently did not respond to the E-mail message in writing, but she was aware that the contract as signed contained the usual FAR clause, previously cited, making the contractor responsible for State taxes. The former CO did not discuss with his senior CO the fact or extent of his representations to Sena at the time the contract was entered into, that he would undertake responsibility for obtaining a State tax-exemption certificate; but when she personally became project CO, the successor CO took it upon herself to call the State tax office to obtain clarification of the tax liability of Federal contractors; and she subsequently asked the Department's field solicitor for assistance in the matter. Apparently, the Government's efforts to avoid the tax were unsuccessful.

Sena's last letter, dated March 20, 1996, which had prompted the successor CO's inquiry, demanded either a change order reimbursing it for the taxes it had to pay or else a letter from the State authorizing a refund. It received neither; and on January 3, 1997, the CO issued a final decision letter denying Sena's claim for the tax--as well as its other claims --basing her decision both on the agency's continued misunderstanding of FAR 52.229-10 dealing with cost contracts (which was inapplicable to this contract) and on the language of the Sena contract which imposed the responsibility for taxes on the contractor.

Positions of the Parties

The Government denies any arrangement by the first CO to reimburse the contractor if it ultimately had to pay the NMGRT. But the Government did not produce the first CO as a witness at the hearing, despite his apparently being readily available. Under such circumstances, the Board elects to rely on the testimony of the contractor as to the CO's oral promises, rather than on the Government's technical witness, who was not primarily concerned with the financial aspects of the contract.

The Government argues forcefully that boards of contract appeals have generally affirmed contractors' tax liability "when the contractor fails to include the amount of a sales or gross receipts tax in a contract price even when there is a misunderstanding between the CO and the contractor about the applicability of the tax,".

Appellant, on the other hand, points out that it carefully included the NMGRT amount in all three of its proposals despite the CO's insistence that the tax would not be imposed on a Government project. Sena maintains that it would never have entered into the contract for the same price if the Government had not assured it before signing that the NMGRT did not apply, and agreed to reimburse it for the tax if the Government did not provide it with the promised nontaxable transaction certificate. Appellant cites primarily Capitol Temptrol Corp., ASBCA 27859, 84-2 BCA 17,332, which, counsel argues, is almost identical with the case before us.

We agree with the Appellant. All of the Government's cases, except Turner, can easily be distinguished from this case because (1) Klinger involves a bidding situation where, as the low bidder, the contractor was asked to verify its bid, and did; and the Government had no reason to know that it had not included the necessary taxes; (2) Eller involved no allegation of Government misrepresentation: the Government simply did not mention the tax in its solicitation, and the Board said the contractor had the obligation to check into taxes; and Westland was a pre-Contract Disputes Act (CDA) bidding situation case in which (a) the Government's misrepresentation was not part of a negotiation, nor was the Board convinced that the contractor had relied on the misrepresentation; and (b) the Board had no authority to reform a contract even if the contractor had proved its case. Such is not the situation here or under the CDA. Capitol Temptrol, supra.

Turner, however, seems to hold that a contractor can rely only on facts, not opinions, even as expressed by a CO during contract negotiations, citing the classic cases of Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) and Office of Personnel Management v. Richmond, 96 U.S. 414 (1990). But if a prospective contractor cannot rely on the views expressed by the CO, upon whom can it rely? The primary purpose of a CO's warrant is to confer upon the recipient the authority to speak for the Government.

This brings us to the law concerning Government contract misrepresentation, which we consider to be crux of this matter. Where material Government misrepresentation, whether intentional or unintentional, is involved in a negotiated procurement, the courts and boards generally permit the contractor to reform or rescind its contract if it relied on the misrepresentation to its detriment.

Sena was assiduous in its efforts to communicate to the CO its firm belief that the NMGRT would be applied to the project, and equally diligent in communicating to the CO its intention to include the amount of the tax in its price. Sena agreed not to include the tax only on the condition that the Government would either exempt it from liability or else

reimburse it if the tax were imposed. But once the contract was signed, the Government did neither.

The General Accounting Office long ago took the lead in support of this proposition. See, e.g., Consolidated Diesel Electric Co., B-185655, Feb. 7, 1997, 77-1 CPD 93, (reformation denied), citing Rust Engineering Co., B-180071, Feb. 25, 1974, 74-1 CPD 101 (cited by Appellant), and cases cited therein. Accordingly, the Board in Capitol Temptrol, supra, found it unnecessary to cite any authority other than Rust (which itself, however, cites both Corbin and Williston on Contracts) for the proposition that reformation may be appropriate.

The courts not only take the same view with respect to a Government misrepresentation (e.g., Roseburg Lumber Co. v. Madigan, 978 F.2d 660 (Fed. Cir. 1992)), but they also permit the reformation of contracts where there is merely a mutual factual mistake that one party relies upon to its detriment, on the ground that a written document is intended to be nothing more than an integration in writing of terms already agreed upon. Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990); Southwest Welding & Manufacturing Co. v. United States, 179 Ct. Cl. 39, 51; 373 F.2d 982 (1967); Harrison Engineering & Construction Co., 107 Ct. Cl. 205 (1946).

Here, we find that both parties were mistaken at least about whether the Government could obtain a nontaxable certificate from the State of New Mexico. The contractor had never previously encountered a Government assertion of nontaxability on a New Mexico construction contract, so it had no reason to know whether BLM could obtain such a certificate or not. Thus, there was no reason for Sena not to agree to give BLM the alternative of either obtaining a tax-exemption certificate or else reimbursing it for any tax it might have to pay.

We hold that the contractor is entitled to have the contract reformed to recover the NMGRT. The CO may have been honestly mistaken both in his belief that the FAR permits the Government to include State taxes only when the contract is a cost-reimbursement contract and in his continued assertion to Sena that the Federal Government was exempt from the NMGRT. But even an innocent Government misrepresentation is no bar to an equitable reformation of the resulting contract where the contractor was misled by the misrepresentation into removing the tax from its best and final offer, and it thereafter suffers a substantial detriment in having to pay the tax.

Therefore, the contractor is entitled to reimbursement in the amount of $47,131.59, with interest under the CDA from March 21, 1996, the date the successor CO received his demand for reimbursement.

DECISION

Accordingly, ... IBCA 3762 [is] sustained in the [amount of $47,131.59], with interest ... in accordance with the CDA from the dates the CO received each claim.

SYSTEMS TECHNOLOGY ASSOCIATES, INC., v. UNITED STATES
699 F.2d 1383 (CAFC 1983)

This case presents a question of Federal Government contract law: whether a settlement agreement between a contractor and the Government should be set aside for duress or coercion in light of the contractor's precarious financial condition at the time the settlement agreement was reached. The contractor, Systems Technology Associates, Inc., appeals the February 19, 1981, decision of the Department of the Interior Board of Contract Appeals (board), dismissing the contractor's claim that the settlement agreement should be set aside. While we do not fully endorse the board's analysis, we do find that the settlement was not induced by coercion or duress. We, therefore, affirm the decision of the board.

I.

Systems Technology Associates (STA) entered into a contract with the Environmental Protection Agency (EPA) on August 15, 1974. STA agreed to supply computer equipment to EPA's Ann Arbor, Michigan, laboratory for the fixed price of $1,302,993. At the Government's behest, the contract was modified several times between May and December 1975. With no agreement on schedule and price adjustments, STA stopped work and, on March 8, 1976, EPA terminated the contract for default.

The contractor's appeal of the default termination was sustained by the board. In its January 19, 1978, decision, the board converted the default termination to a termination for convenience and required the Government to equitably adjust the contract. STA's constructive change order claims were denied without prejudice and remanded to the contracting officer.

On February 14, 1978, the parties met and STA suggested that the settlement be on a "total cost" basis. STA submitted a termination settlement proposal. In evaluating that proposal, a Government auditor requested and was denied access to STA's books on June 5, 1978. The parties met and discussed their disagreements over the use of the total cost basis methodology, favored by the Government, and over Government access to STA's books.

Subsequently, STA resubmitted its claim, protesting the Government's insistence on a total cost basis settlement and agreeing under protest to make cost records available to Government auditors. The auditors, however, insisted on using STA's job cost ledgers. STA again protested. The auditors finally concluded that, because of STA's failure to make the job cost ledgers available, the field audit office could not render an opinion on STA's settlement proposal.

This dispute over methodology and access to the job cost ledgers continued until October 4, 1978, when STA submitted under protest a settlement proposal prepared on a total cost basis and allowed the auditors access to its job cost ledgers. STA's total cost basis settlement proposal requested an additional payment of $2,718,448.

During the period of this dispute, STA was under financial pressure from its bank and a principal contractor, Xerox. The record is clear that the Government was at least aware of STA's precarious financial position.

The audit report was delivered to the Government in mid-January 1979. Following discussion of the Government's refusal to supply a copy of the audit report to STA, the

parties met on February 8, 1979, at which time the Government offered a total settlement payment of $798,952. The contractor rejected the offer claiming that the Government's strategy was to place STA under duress to force a reduced settlement. Another negotiation meeting was held February 22, 1979, but no progress was made. The Government eventually relented on the issue of making the audit report available; on March 7, 1979, STA received a copy of the audit report. The audit report questioned $2,235,056 of STA's $4,696,968 total cost basis settlement claim. Only $2,461,912 of contractor's claim was established by the auditors as verified costs.

It was against this background of financial pressure and disputes over settlement methodology and access to records that the parties met on March 16, 1979. Xerox had offered to waive interest on its claim against STA if full payment was made by that date. The Government was fully apprised of this offer.

Although STA requested a speedy settlement, almost 14 months had elapsed since the board ordered equitable adjustment of the contract. Much of this time was consumed by the disputes discussed above. STA was finally forced to accept the Government's position on both points in order to advance the negotiations. Unable to move the Government in the March 16 meeting, STA's president accepted a total settlement in the amount of $1,200,639, citing his inability to pursue the matter further due to the company's precarious financial condition.

On June 11, 1979, STA appealed to the board, asking that the March 16 settlement be set aside on the grounds that it was procured by duress, coercion, and such arbitrary action as to be tantamount to fraud. The board determined that duress was not established. STA's request for reconsideration of the board's February 19, 1981, decision was denied.

STA then appealed to this court, requesting reversal of the board's February 19, 1981, decision.

II.

The sole issue raised by this appeal is whether the board erred in determining that the settlement agreement should not be set aside for coercion or duress. In arguing that this court should set aside the settlement agreement, STA contends that the board erred in articulating the applicable legal standard and in applying that standard to the facts before it. The Government defends the board's decision as reasonable, thorough, and legally correct.

A. The essential elements of economic duress are summarized by Nash and Cibinic in *Federal Procurement Law* (1969 ed., p. 208) as: (1) A person compels another to assent to a transaction against his will; (2) such assent is induced by wrongfully threatening action the person has no legal right to take; and (3) the threatened action, if taken, will cause irreparable damage to the other person. * * *

Focusing on the second of Nash and Cibinic's elements, the board went on to state that duress requires a wrongful act or an act the Government is not legally empowered to take. While the board did not require that the act be illegal per se, it focused on "whether the actions were legally permissible actions under the contract and the applicable regulations." The findings that the Government had not acted illegally and had acted within its legal rights under the contract were considered by the board to be dispositive of the propriety of the Government's actions. In evaluating the board's

articulation of the standard of duress, we do not write upon a clean slate. The United States Court of Claims, one of the two predecessor courts to this court, has established standards for determining when duress will render an agreement void. In *Louisiana-Pacific Corp. v. United States*, the Court of Claims, denying both parties' motions for summary judgment, set forth the test for duress. The Government, seeking to secure a modification of a timber sales contract, threatened cancellation of the contract if the contractor did not accept the Government's proposed modification. The contractor signed the modification and subsequently sued to void it, alleging, *inter alia*, that it was a victim of Government duress.

The standard now looks more closely at the defeat of the will of the party coerced. An act the Government is empowered to take under law, regulation, or contract may nonetheless support a claim of duress if the act violates notions of fair dealing by virtue of its coercive effect.

B. STA's primary contention is that the Government deliberately delayed in order to benefit from STA's financial condition. STA, therefore, strongly contests the board's finding that STA was responsible for much of that delay. The key question with respect to delay is not the precise quantum of delay attributable to STA but, rather, whether delay that may be used in a coercive manner is attributable to the Government.

The board, in its February 19 opinion, addressed STA's allegations of Government delay in terms of the availability of the job cost ledgers and the audit report. On rehearing, the board identified the period of delay attributable to STA for STA's failure to make the job cost ledgers available to be 4 months. The board found that the only period of delay attributable to the Government was the 5- to 6-week period from late January 1979 until March 3, 1979, during which time the Government refused to provide STA with a copy of the audit report. The remainder of the 14-month negotiation period, the board determined, was not attributable to either party but, rather, was needed to perform the audit and was taken up by negotiations between the parties.

Only that delay attributable to the Government is relevant to disposition of the claim that the Government exerted duress through deliberate delay. We cannot say that the board's finding that the Government was responsible for only 5 to 6 weeks of delay was fraudulent, or arbitrary, or capricious, or so grossly erroneous as necessarily to imply bad faith, or was not supported by substantial evidence. That period of delay is not sufficient to establish duress in light of the circumstances surrounding the negotiation of the settlement agreement in this case.

Second, STA argues that the Government was aware of, had caused, and had used the contractor's precarious financial condition to coerce a settlement. STA's precarious financial condition is well documented in the record and was recognized by the Government.

STA, however, does no more than assert causation and the Government's coercive use of the circumstances to secure a settlement. The record is totally devoid of proof of either count. We agree with the board's assessment that the record does not support STA's second claim.

III.

In conclusion, the board's determination that the settlement agreement was not secured by coercion or duress on the part of the Government is affirmed. The contractor has failed to establish facts constituting duress under the applicable standards of duress. Additionally, the contractor has received in settlement and through progress payments amounts in excess of its verified costs under the contract.

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ENVIROCARE OF UTAH, INC. v. U.S
No. 99-76C.
44 Fed.Cl. 474 (1999)

Opinion and Order

WIESE, Judge.

This pre-award bid protest case, brought pursuant to 28 U.S.C. § 1491(b)(1), is before the court on defendant's motion to dismiss, in part, and the parties' cross-motions for judgment on the administrative record, following an on-the-record mini-trial.

On February 17, 1999, plaintiff filed a complaint for declaratory and injunctive relief and moved for a preliminary injunction. Plaintiff's complaint contains five counts: (1) the solicitation fails to utilize mandatory Federal Acquisition Regulations (FAR) procedures for the acquisition of commercial items; (2) the solicitation permits the award of an illusory contract; (3) the solicitation does not elicit the best value because it fails to consider transportation costs; (4) the solicitation contains defective specifications because it states that certain radioactive wastes are not subject to regulation under the Atomic Energy Act; and (5) the United States Army Corps of Engineers (Corps) lacks a valid delegation of authority to conduct this procurement.

After a February 18, 1999 hearing on plaintiff's motions for preliminary injunction and a temporary restraining order, defendant agreed to delay the contract award pending the court's decision in this case; however, the court permitted defendant to continue to conduct all pre-award evaluation activities.

On March 11, 1999, International Uranium (USA) Corporation (IUSA), an offeror on the solicitation, moved to intervene in this action. On March 25, 1999, the court denied IUSA's motion and permitted IUSA's participation in this action as amicus curiae.

On April 28, 1999, once the parties' motions were fully briefed, the court heard oral arguments. The court determined that a factual dispute existed regarding the allegations set forth in Count I of plaintiff's complaint and ordered a mini-trial to address these allegations. The mini-trial was held on May 13, 1999, in Washington, D.C.

Upon reviewing the administrative record (AR) and the parties' briefs, the court concludes that plaintiff's claims do not merit relief. Accordingly, for the reasons discussed below, defendant's motions to dismiss, in part, and for judgment on the administrative record, are granted. Plaintiff's motion for judgment on the administrative record is denied.

Facts

The relevant facts set forth below, which are taken from the AR, are not in dispute.

On December 21, 1998, the Corps issued Solicitation No. DACW41-99-R-0004 for up to ten indefinite-delivery/indefinite-quantity contracts for the removal of five different types of waste at sites within the Formerly Utilized Sites Remedial Action Program (FUSRAP). The five types of waste were: (1) low-activity radioactive waste; (2) naturally-occurring radioactive materials; (3) 11(e)(2) materials, generated prior to November 18, 1979; (4) hazardous mixed waste materials; and (5) Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6933 (RCRA) hazardous waste containing residual radioactivity. Each contract awarded was to deal with at least one, and a maximum of five, types of waste. Contracts for each type of waste would be awarded to a maximum of two bidders.

Section B of the solicitation estimated the total value of all contracts to be awarded at $400 million. Each contract was to have a five-year base period with a five-year option period. The guaranteed minimum for the base period of each contract was the lesser of: (1) two percent of the total acquisition value of the contract, or (2) $500,000. The solicitation stated that the award would be made "to the responsible offeror ... whose proposal conforms to the solicitation and is determined to be the Best Value to the Government ... The technical evaluation factors ... are approximately equal to price." [See] FAR s 2.101 ("Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.").

The solicitation required offerors to "provide all data necessary to fully support the prices in the proposal schedule, ... includ[ing] all labor rates, material costs, equipment costs, surcharges, disposal taxes, closure fund, overheads, and profit." However, offerors expressly were not to include transportation costs in their price proposal, other than costs of "incidental transfer of materials at or near the disposal facility."

Although the solicitation stated that the 11(e)(2) waste is not subject to regulation under the Atomic Energy Act (AEA), the solicitation required contractors to dispose of waste in accordance with "all applicable or relevant and appropriate Federal, State, and local regulations and permits." The solicitation required the contractor to obtain the applicable permits and/or licenses within twelve months of the contract award. The contractor agreed that, if it could not obtain the necessary permits, it waived the contract's guaranteed minimum and acceded to a no-cost termination of the contract for convenience.

***

Summary Judgment

Summary judgment is appropriate when the court finds both that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." … A material fact preventing summary judgment is one that is relevant and necessary to establishing or defending against the claim and that may affect the outcome of the decision; an issue is genuine if a reasonable finder of fact could decide the question in favor of the non-movant. … The fact that both parties have moved for summary judgment, however, does not relieve the court of its responsibility to determine the appropriateness of summary disposition.

***

Pre-Award Bid Protests

In pre-award bid protests brought under the Tucker Act, courts apply the standard of review for agency action established by the Administrative Procedure Act, 5 U.S.C. § 706 (1994). See 28 U.S.C. § 1491(b)(4). An agency procurement decision will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review is confined to the administrative record, i.e., to the record before the decision maker when the final award decision was made. Camp The court "may award any relief that [it] considers proper, including declaratory and injunctive relief[,] except that any monetary relief shall be limited to bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2).

Absent evidence of actual irregularity, the court presumes the regularity of government action.

In sum, a court may set aside an agency's action only when it has no rational basis,., when the decision is "totally lacking in reason." Keco Industries, Inc. v. United States, 203 Ct.Cl. 566, 492 F.2d 1200, 1206 (1974). If the agency's action is reasonable, the court will not disturb it. See, e.g., Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 995-96 (Fed.Cir.1996).

In addition, to receive injunctive relief, as plaintiff demands here, it must show, not only that the agency's action is unreasonable, but also: 1) that failure to enjoin the procurement will cause irreparable harm; 2) that such harm outweighs any potential harm to third parties; and 3) that injunctive relief is in the public interest. In sum, a protester must show, not only an error in the procurement process, but also that the error was "clear and prejudicial."

Illusory Contract

Plaintiff argues that the solicitation's provision that awardees "have 12 months from the date of contract award to acquire the applicable licenses and/or permits..." results in an illusory contract. Plaintiff points out that if an awardee fails to obtain the necessary licenses and/or permits, the awardee forfeits the contract's guaranteed minimum and agrees to a no-cost termination of the contract for convenience. Plaintiff asserts that this contract would be illusory because the awardee would not have to perform any work if it failed to obtain the necessary permits; in fact, plaintiff intimates that an awardee may not even attempt to acquire the permits. Plaintiff claims that this "unlimited right of exculpation" renders the contract illusory.

"[A] party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void." Torncello v. United States, 231 Ct.Cl. 20, 681 F.2d 756, 760 (1982). Thus, contracting parties "may not agree that one or both may walk away from all obligations without rendering the contract unenforceable." Id. at 764.

Nevertheless, courts must construe contracts so as to avoid rendering them illusory. One method of rehabilitating an otherwise illusory contract is to imply a requirement of good faith, due diligence, or reasonableness. Indeed, "it is an implied term of every contract that each party will act in good faith towards the other." Link v. Department of the Treasury, 51 F.3d 1577, 1582 (Fed.Cir.1995).

In this case, the awardee's obligation to obtain the required licenses or permits within one year contains an implied duty to act in good faith. In agreeing to act in good faith and use its best efforts to obtain the required licenses, the awardee promises to do positive acts, constituting a legal detriment. [FN6] This is sufficient consideration to support the government's return promise to hold the contract open. Moreover, the government itself tenders no performance until the appropriate licenses have been acquired. Therefore, the contract is not illusory.

The contract's guaranteed minimum supplies the requisite mutuality of obligation between the parties. Thus, the government commits to the contract by guaranteeing a minimum order. Conversely, the contractor relinquishes this minimum order if it fails to obtain the required licenses.

This type of conditional promise is analogous to sales of real estate contingent upon the buyer's ability to obtain a mortgage loan. The condition would render the promise illusory if the buyer were under no obligation to try to obtain a loan. However, courts hold that the buyer impliedly promises to use his best efforts to obtain the loan and that the contract is therefore not illusory.

Conclusion

Defendant's [motion] to dismiss, in part, … [is] granted.

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O'NEILL OIL SERVICES, INC.
DOTCAB No. 2464, 92-2 BCA ¶24,927

At the oral request of the Coast Guard, on October 1, 1986, O'Neill began oil deliveries to 94 Bailey Hill Road, Wyoming, Rhode Island, a facility being leased by the Coast Guard. These deliveries continued through December 11, 1986, without the issuance of a purchase order by the Coast Guard.

On December 5, 1986, the Coast Guard issued to O'Neill a purchase order, retroactive, to cover the period from October 1, 1986 through September 30, 1987. This order established a blanket purchase agreement for the delivery of fuel oil with automatic delivery service. This order also provided for payment in arrears for the past deliveries, after receipt of an original invoice.

Subsequent to September 30, 1987, the date on which the purchase order expired, O'Neill continued to deliver and the Coast Guard continued to accept oil for about four months, although a new purchase order had not been executed. On February 10, 1988, the Coast Guard once again issued a purchase order retroactive to October 1, 1987. This purchase order was effective through September 30, 1988. The Coast Guard lease on the property expired prior to October 1, 1988, and therefore the purchase order was not renewed. However, the Coast Guard did not notify O'Neill that it no longer occupied the premises, that the deliveries of oil should cease, or that the purchase order would not be renewed.

O'Neill made four oil deliveries subsequent to contract expiration. (October 1988, November 1988, December 1988, and January 1989). O'Neill had an automatic billing system that generated bills for these four months. However, the Coast Guard has no record of receiving these invoices. The invoices were sent to the leased property rather than to the address set forth in the contract.

On or about February 15, 1989, O'Neill contacted the Coast Guard regarding the unpaid bills and was informed that the purchase order had not been renewed. Other than the course of conduct set forth above, the Coast Guard made no written or oral representation to O'Neill to continue fuel deliveries.

Appellant than filed a request for payment of the four invoices totaling $430.11. The Coast Guard denied this request.

DECISION

O'Neill argues that it should be reimbursed for the four oil deliveries in question because, based on the Coast Guard precedent of back-dating purchase orders, O'Neill continued to perform past the expiration date of the contract with the good faith belief that a new purchase order would be issued. The Coast Guard contends that since the last purchase order expired on September 30, 1988, it is not responsible for oil deliveries made after that date. Respondent also argues that there was no meeting of the minds to support an implied-in-fact contract.

In order for appellant to prevail on its claim it must prove the existence of either an express or implied contract. It is clear that no express contract existed because the deliveries in question were made after the expiration date of the last purchase order. We must decide whether we can find the existence of an implied contract.

There are two types of implied contracts: implied-in-fact and implied-in-law. A contract implied-in-fact is founded upon express contract, is inferred, as a fact, from the

conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding. Such an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act, or sign.

An implied-in-fact contract requires the same elements, except for a written or oral agreement, as an express contract: *e.g*. a definite offer and acceptance, unambiguously communicated by parties having mutual intent to contract, which is clearly manifested by the parties' conduct. These elements need not be expressed but, rather, may be inferred from the parties' conduct. It is appellant's burden to prove that an implied-in-fact contract was made. In addition to these elements in order to find a contract implied-in-fact, we must also determine that the government either induced the contractor's performance or received a benefit from that performance. Further, even if the appellant was able to establish all of these contractual elements, the Government is only bound if its agents making the alleged agreement were authorized to do so.

On the other hand, a contract implied-in-law is a legal fiction whereby the law imposes a duty to make restitution in the absence of an intent to create a contract, in order to prevent the unjust enrichment of one of the parties. Such arrangements are treated as contracts only for the purpose of the remedy.

Under the Contract Disputes Act this Board has jurisdiction over implied-in-fact contracts, 41 U.S.C. §602. The Board has no jurisdiction over contracts implied-in-law.

Based on these legal principles, the Board must examine the conduct of the parties to determine whether there is any evidence of a "tacit understanding" between the parties by which O'Neill would continue delivering oil to 94 Bailey Hill Road after the purchase order expired along with evidence that the Coast Guard would continue to pay.

It is undisputed that the Coast Guard failed to issue a purchase order on or before October 1, 1986, or October 1, 1987, the starting date of each contract. On both occasions the Coast Guard accepted oil deliveries for months before it finally issued the respective purchase orders. Based on these facts, O'Neill believed that another purchase order would be forthcoming after October 1, 1988. Thus, it continued to deliver oil without a contract. However, the elements necessary to imply a contract are absent. There is no evidence in the record showing that the Coast Guard induced O'Neill to continue deliveries beyond the term of the contract. The Coast Guard's practice of back-dating purchase orders and making retroactive payments was not an inducement for O'Neill to continue delivering oil after the expiration date of the existing contract. Though the prior conduct established a pattern which appellant believed would continue, it did not furnish a legal basis for recovery. Additionally, there was no meeting of the minds or indication by the Coast Guard that it would reimburse appellant for deliveries beyond the expiration of the last purchase order. Further, this is not a case where we can find that there was an unjust enrichment. The Coast Guard had vacated the premises and gained no benefit from the four deliveries. While we do not condone the Coast Guard's loose method of contracting demonstrated in this case, appellant acted at its own risk. O'Neill was fortunate that on the first two occasions respondent issued a purchase order. The terms of the second purchase order are unambiguous. That order terminated on September 30, 1988.

CONCLUSION

There is no legal basis on which O'Neill can recover from the Coast Guard. The claim is denied. The appeal is dismissed with prejudice.

RELIABLE DISPOSAL COMPANY, INC.
ASBCA No. 40,100, 91-2 BCA ¶23,895

OPINION BY ADMINISTRATIVE JUDGE HARTY

Reliable Disposal Co., Inc. (Reliable) seeks additional compensation for garbage collection and removal services provided in connection with a port visit by the USS IOWA to New Orleans, Louisiana. The Government maintains the services were provided without proper authorization.

FINDINGS OF FACT

The United States Department of Agriculture (USDA), through the Animal and Plant Health Inspection Service (APHIS), regulates the disposal of garbage from vessels. APHIS determines which garbage requires treatment before landfilling. For this purpose, a distinction is drawn between wet and dry garbage.

Wet garbage means all waste material derived in whole or in part from fruits, vegetables, meats, or other plant or animal (including poultry) material, and other refuse associated in any way with such material. Dry garbage is trash other than wet garbage. Wet garbage must be disinfected. Special containers are used to steam the waste. As a general matter, USDA regulations require any vessel, which has been in a foreign port within the past two years to disinfect its entire accumulation of garbage. However, APHIS practice with respect to U.S. Naval vessels is to apply a so-called '24 hour rule.' If no foreign perishable food stores are found by APHIS and the vessel is returning to a U.S. port from a foreign port, then only the garbage aboard the vessel at the time of docking and all garbage generated during the first 24 hours must be handled as foreign origin. Even if the first 24 hours of garbage is mixed with some garbage discharged after the first 24 hours, only the garbage, which is mixed, is required to be disinfected. All other garbage subsequently segregated is not required to be disinfected. If, however, APHIS finds foreign stores aboard the vessel, then the entire garbage discharge for the duration of the stay must be considered APHIS regulated waste and must be treated.

On 2 December 1988, the IOWA asked the Naval Support Activity, New Orleans, to arrange for daily trash and garbage removal services while the ship was docked. This prompted the contracting officer, Ms. Ernise Polete, to telephone appellant's President, Mr. Emanual DeFraites, to obtain price quotations for both wet and dry garbage services so the information could be relayed to the IOWA. Reliable uses a four cubic foot covered container with steam coil in the bottom for collecting and processing wet garbage. A thirty five cubic yard roll-off container is used for collecting dry garbage. Both parties are in agreement that Reliable quoted a price of $400 per 'wet ' container and $190 per 'dry' container.

A number of exchanges with the ship led to a 23 January 1989 requisition from the IOWA. On the same day, the contracting officer translated the requisition into Purchase Order No. N00205-89-M-E-D56. The order was identified as a 'CONFIRMING ORDER.' Item No. 0001 specified the 'rental of 2 35-cubic yard roll-off containers to be delivered at 9 A.M., 89 February 6th, picked up by 9 A.M., 89 February 11. Containers to be dumped twice daily at 0900 and 1500 hours.' Both the unit price and total price were identified as $760, with the quantity being specified as '1 Job.' The

$760 price was based on '4 dumps X 190.00.' Item No. 0002 called for '(4) special containers for contamination. ' Item 0002 was similarly stated, with both the unit price and the total price listed as $1,600 for '1 Job.'

The record contains four previous purchase orders between Reliable and the Navy: the first dated 20 October 1987, covered a visit by the USS KOELSCH; the second dated 9 February 1988, covered the USS FORRESTAL; the third also dated 9 February 1988, covered the USS AUSTIN, which was apparently traveling with the FORRESTAL; and the fourth dated 23 January 1989, covered a visit by the USS INCHON. All of the purchase orders used the same pricing format of identifying one 'lot' or 'job' and specifying an identical unit price and total price. However, it has been the practice of the Navy only to pay for the service provided, that is, based on the number of containers used. Moreover, Mr. Emanuel DeFraites testified it is Reliable's practice to bill only for services provided, rather than what the purchase order called for. For example, in the case of the INCHON, Reliable billed $1,330 instead of the $2,090 specified on the confirming order. In the case of the FORRESTAL and the AUSTIN, Reliable billed $2,690 rather than the $7,620 total of the confirming orders. In every previous instance the amount billed for the services never exceeded the amount of the purchase order.

The DD1155 Purchase Order/Delivery Order form used for the IOWA order did not contain the General Provisions on the reverse side. Instead, an incorporation by reference sheet, listing all applicable contract clauses, was to be appended to the purchase order. Due to an oversight, the incorporation by reference sheet was not attached to the purchase order. The continuation sheet did incorporate the FAR 52-232.25 Prompt Payment (1988 Feb) clause, the DAR 7-1903.41(b) clause, the Service Contract Act of 1965 -- Contracts of $2,500 or Less (April 1964) clause and a Variation in Quantity clause.

The IOWA arrived at the Julia Street Wharf in New Orleans on 6 February 1989 at 1816 hours. This concluded a voyage that began on 20 January 1989 at Norfolk, VA and included a visit to Phillipsburg, St. Martin, Netherlands Antilles from 28 January to 1 February 1989. The IOWA took on perishable stores on 19 January 1989, and did not replenish its perishable food stores until after its arrival in New Orleans. No evidence was offered of foreign stores aboard the IOWA. The IOWA was, therefore, subject to the 24-hour rule.

On the afternoon of 6 February 1989, Reliable's Operations Manager, Mr. Robert DeFraites, went to the Julia Street Wharf in New Orleans in anticipation of the arrival of the IOWA. Mr. DeFraites testified that Reliable's driver initially brought the four 'wet' containers called for by the purchase order. The driver then was to return and to deliver the two 35-cubic yard 'dry' containers ordered. However, while at the wharf, Mr. Robert DeFraites initiated a conversation with the Naval Support Activity's operations officer, LTCDR Helen Ross, with whom he had dealt on prior occasions.

During a brief conversation, Mr. DeFraites questioned whether four 'wet' containers were enough considering the large number of personnel on the IOWA, particularly considering the common problem of ship personnel mixing wet and dry garbage. In response, LTCDR Ross advised him that only wet garbage discharged within the first 24 hours of arrival needed to be treated. Her information was based on a

previous conversation with Mr. William Spitzer, APHIS's Plant Protection and Quarantine Officer in Charge of the New Orleans office.

Neither Robert DeFraites nor Emanuel DeFraites, whom he immediately called for instructions, had heard of the 24-hour rule before. Mr. Emanuel DeFraites sought to confirm the rule with the USDA. However, when he called the USDA, he was unable to get useful information on the 24-hour rule. (The main office was closed and he was referred to the airport office. The unnamed individual he spoke with reportedly said he was unable to provide an answer, but said, “You're deputized just like me, use your own judgment.”) Mr. Emanuel DeFraites was left to use his own judgment. Accordingly, he advised Robert DeFraites to treat all garbage as wet.

Mr. Robert DeFraites testified that he explained his conversation with his office to LTCDR Ross who authorized Reliable to place additional wet containers. LTCDR Ross had no recall of authorizing additional containers in this case but did not deny it could have occurred. Her recollection was limited to the 24-hour rule. However, she did sign receipts for the eight 'wet' containers placed by Reliable on 6 February. On each of the receipts LTCDR Ross signed, her name and the contracting officer's name appear in a space entitled 'authorized by.' These were the only delivery receipts she did sign. We find Robert DeFraites testimony on this point credible. We also find that Reliable was advised by LTCDR Ross of the 24-hour rule prior to commencing performance and the authorization for the additional containers was subject to the 24-hour rule.

As operations officer, LTCDR Ross's responsibilities included coordinating all port services, including garbage removal, for visiting U.S. and foreign ships. If there was a problem with services, she was responsible for seeing it resolved. She had dealt with other contractors in the past. Every time a ship came in, she almost always arranged for the utility services (water, electricity, telephones). For other services, she has also had occasion to contact contractors for services. At the time of the hearing, she had arranged for the port visits of approximately thirty-five ships. In roughly, seven of those arrivals, she dealt directly with contractors. If a contractor were on site, she would deal directly with the contractor about any problems. If a contractor were not on the site, she would radio her secretary who would contact the contractor and relay the response back by radio. She was also in a position to contact other activity personnel to resolve problems. The contracting officer confirmed that LTCDR Ross worked with her in connection with vessels and that LTCDR Ross does communicate directly with contractors. Between June of 1988, when she assumed her responsibilities and 6 February 1989, LTCDR Ross confirmed that she had on other occasions contacted Reliable and placed orders for garbage services. She was unable to recall how many ships were involved. She did remember one ship by name, but could only recall that all of the ships were of foreign origin. LTCDR Ross did not have a contracting officer's warrant.

Based on the conversation with the operations officer, eight 'wet' containers were placed at dockside on 6 February 1989. The IOWA arrived late in the afternoon. However, on 7 February 1989, no containers were placed or removed since that day was Mardi Gras, a local holiday. On the morning of 8 February 1989, the eight containers left on 6 February 1989 were hauled away by Reliable and replaced with empty 'wet' containers. The eight containers hauled away had been overfilled by the Navy and some of the garbage had to be placed in another container at Reliable's shop.

On 8 February 1989, Emanuel DeFraites spoke briefly with APHIS's Mr. Spitzer, the same individual that LTCDR Ross had spoken with prior to the arrival of the IOWA. This conversation occurred after Reliable had already placed four additional 'wet' containers during the morning. In testimony, Mr. Spitzer confirmed the Navy's view of the 24-hour rule. He explained convincingly that Reliable is authorized to treat garbage under a compliance agreement with USDA. However, the agreement does not 'deputize' Reliable in the sense of authorizing it to act on behalf of APHIS for determining whether the 24-hour rule applies. However, Mr. DeFraites understood from the conversation with Mr. Spitzer that all of the garbage should be treated as 'wet.' This was based on his understanding that if garbage discharged within the first 24-hour period is mixed with garbage discharged after that time, all of the garbage should be treated.

On 9 February 1989, the eight filled containers left at dockside the previous day were picked up and replaced with eight empty containers. When the vessel left on 10 February 1989, Reliable picked up the eight containers placed on 9 February. The containers were again overfilled and the refuse was placed into two additional containers at Reliable's shop.

A total of thirty-one 'wet' containers were supplied to the IOWA between February 6 and February 9, 1989. (We have detailed only those, which are involved in the dispute.) No 35-cubic yard or 'dry' containers were ever supplied. Reliable subsequently billed the Navy $12,400 (thirty-one containers X $400) for its services. The Navy paid Reliable $2,400, although it maintains it meant to pay only $2,360, the maximum amount identified on the purchase order. Reliable sought recovery of the $10,000 difference.

Reliable's request was evaluated by the contracting officer, her superior, Mr. John Bockhorst, and his supervisor, LTCDR Rogia Williams, the supply officer of the Naval Support Activity, both of who had contracting officer warrants. On 9 March 1989, the Naval Support Activity's receipt control section noted that because of the discrepancy between the amount invoiced and the $2,360 identified on the purchase order, an additional $10,040 was required. An increase was requested. The contracting officer reviewed the matter some time thereafter. She prepared a draft message to be sent to the IOWA. Her draft sought additional funds 'as soon as possible' since Reliable was awaiting payment. She went to the IOWA because the ship was to be the source of the funds, rather than the Naval Support Activity. In her view, she had no choice but to get the IOWA's approval before paying. Her evaluation was based on the understanding that 'when a ship comes into port from a foreign country, certain trash containers are to be used.' She prepared the draft for use by her superior, Mr. John Bockhorst. However, if Reliable had not provided the service, she would not have supported the request for additional funds. Mr. Bockhorst also drafted a message seeking more funds. His draft was reviewed and approved for release by LTCDR Williams, the supply officer. He also supported the request and if the funding request had been approved, he would have completed the paperwork necessary for payment to be made. He also did not believe they had the authority to proceed without the IOWA's approval since the ship was 'basically paying' for the services.

By message dated 27 March 1989, the Naval Support Activity asked the IOWA for authority to increase the amount of the requisition by $10,040 to make payment

because delivery receipts show actual usage (31) disposals vice the estimated usage on the original purchase order. The IOWA replied on 14 April 1989 that its records did not agree with Reliable's delivery receipts and requested the contracting officer to investigate.

The IOWA's reply prompted a further review, including consultation with the Naval Regional Contracting Center, Charleston, South Carolina. The supply officer testified that no one was dissatisfied with Reliable's service. The services were 'generally good;' however, there remained a difference with Reliable over the application of the 24-hour rule. LTCDR Williams did not agree that all of the garbage needed to be disinfected, just the garbage subject to the 24-hour rule. Ultimately, however, Reliable's claim was denied by the supply officer in a letter dated 28 September 1989, on the ground that the services provided by Reliable at variance with the purchase order were unauthorized. This timely appeal followed.

DISCUSSION

At the outset, it must be emphasized that the 'confirming order' issued by the contracting officer was a unilateral purchase order, not a bilateral purchase order. We note in this regard appellant was not required to sign the purchase order. *C&M Machine Products, Inc.*, ASBCA No. 39635, 90-2 BCA ¶22,787. The purchase order was an offer to enter into a unilateral contract.

The order itself is confusing. There is no dispute between the parties that $400 was the agreed price for each 'wet' container, while $190 was the rate set for the 'dry' containers. Yet, the order lists identical prices for both the unit price and the total price and speaks in terms of 'l Job.' Moreover, the unit price and total cost of item 0001 was based on '4 Dumps x 190 = $760. 'This computation is in error if the containers were to be 'dumped twice daily at 0900 and 1500.' Four dumps would be required to meet just one full day's requirement. In this connection, we do not understand the 'twice daily' requirement to be contingent upon whether the containers were filled to capacity or not as the Government has suggested at one point in its brief. In any event, despite these uncertainties, it seems clear in light of prior practice, the parties have looked to the actual services rendered.

We do not place the same emphasis on the purchase order as the parties do. In our view, Reliable's representative, Mr. Robert DeFraites, made a counter-offer at the wharf. In response, the Navy's operations officer approved the placement of additional 'wet' containers, subject, however, to her understanding of the 24-hour rule. The question remains, however, whether her approval was authorized. Government counsel quite rightly emphasizes that under *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947), 'anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.' Moreover, the Government agent must have actual authority, as opposed to apparent authority, to bind the Government. The burden is on the one seeking to bind the Government to show the agent's authority. The policy reasons for this rule are clear. As the Federal Circuit recently observed '[t]he 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.'

Admittedly, the operations officer did not have a contracting officer's warrant. However, this does not end the inquiry. Although apparent authority will not bind the Government, it has been recognized that actual authority may be implied from the circumstances. In limited circumstances, authority has been implied when considered an integral part of the specific duties' assigned to the employee. The determination obviously depends on the particular facts surrounding each transaction.

Here, the Government's suggestion that Reliable should have turned to the contracting officer would, if followed, have resolved the matter one way or the other on the spot. However, the suggestion is not satisfying in light of the previous dealings between the parties and LTCDR Ross' responsibilities. Given her responsibilities for insuring that vessels received necessary services and her prior dealings with contractors, particularly Reliable, we believe a case might be made that she had implied authority to adjust the type and number of containers to meet the demands of the situation. Indeed, she would appear to need this type of flexibility to deal with the many potential problems associated with a vessel's arrival. In this context, it does not make sense to send Reliable to the contracting officer, as the Government would have us do. The operations officer, with her ability to communicate through hand-held radio, was generally in an ideal position to act as 'the eyes and ears' of the contracting officer.

Nevertheless, we need not resolve any doubts we may have about whether Reliable has met its burden of demonstrating implied actual authority because we conclude that in any event a responsible contracting official has ratified by implication the operations officer's authorization to Reliable. If the ratifying official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act, ratification will be found.

We note that all three officials with contracting officer warrants--the contracting officer, her superior, and the supply officer -- supported obtaining additional funds to pay Reliable. This is evident from the draft messages and the 27 March message ultimately sent to the IOWA. The Government urges in this regard that the contracting officer, her superior, and the supply officer 'were merely asking whether the customer (the USS IOWA) wished to pay for services for which the IOWA received no benefit.' Counsel also points out that the ratification procedures of FAR §1.602-3 were not followed by the contracting officials.

We are not persuaded that the failure to process Reliable's claim under the ratification procedures of FAR §1.602-3 rules out a determination that an unauthorized commitment has been ratified by implication. See *Parkin Company of America, Inc*. at 100,297-98. On the other hand, the procedures would certainly have provided an independent source of authority for addressing Reliable's claim.

Moreover, we think counsel's characterization of these contracting officials' actions is too modest. The contracting officials' request for additional funds from the IOWA and the ship's demur do not rule out a conclusion that the operations officer's actions were implicitly ratified. See *General Electric Co. v. United States*, 412 F.2d 1215, *reh'g denied* 416 F.2d 1320 (Ct.Cl. 1969), cited with approval in *Texas Instruments, Inc. v. United States*, 922 F.2d 810 (Fed. Cir. 1990). In *General Electric*, a contracting officer's concurrence on internal correspondence, not disclosed to the contractor, recommending funding be obtained to respond to a claim was effective to bind the Government even though the request for funds was denied by higher authority.

The desire of the higher authority to reserve control over all funding did not preclude the contracting officer from acting within the scope of his monetary authority. Under *General Electric* 'the law presumes that when [a contracting officer] acquainted with the underlying facts signs an internal document . . . [the officer] has decided to express a definite opinion on the merits of the claim in the absence of contrary testimony or evidence.' *Texas Instruments, supra,* at 814. Thus, if we did not have the benefit of testimony from the contracting officer and the supply officer, we could easily conclude from the draft messages and the message actually sent on 27 March that the officials intended to accede to Reliable's claim in its entirety.

However, in our view, the testimony of the supply officer is telling. He was the senior contracting official reviewing the transaction and the review was under his control. He acknowledged that Reliable's services were generally good. He simply did not agree that all of the garbage needed to be disinfected, only the garbage subject to the 24-hour rule. We treat this as an affirmation of the operations officer's authorization to Reliable.

We emphasize at this point that while we believe the operations officer approved the placement of additional 'wet' containers, her approval was subject to the 24-hour rule. A necessary implication of this approval was that 'dry ' containers would have sufficed thereafter. Reliable exceeded her authorization. It may be that Reliable's actions were based on a good faith, albeit erroneous, interpretation of the USDA's requirements. Nevertheless, it was incumbent on Reliable to seek further authorization from the Naval Support Activity before proceeding on 8 February 1989. By failing to do so, appellant acted on its own and the Navy is not required to pay for 'wet' containers when 'dry' containers would have been satisfactory.

DECISION

The appeal is sustained in part. Reliable is entitled to compensation for eight 'wet' containers at $400 per container, plus an appropriable sum based on the $190 rate for what should have been 'dry' containers from 8 February through the IOWA's departure. Reliable may also establish, on remand, the need for using an additional 'wet' container to treat the overfill from the eight containers, as well as appropriate compensation. The matter is remanded to the parties to determine quantum, including interest in accordance with the Contract Disputes Act.

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CHAPTER THREE CASES

OFFICE OF PERSONNEL MANAGEMENT v. RICHMOND
496 U.S. 414 (1990)

Justice KENNEDY delivered the opinion of the Court.

This case presents the question whether erroneous oral and written advice given by a Government employee to a benefits claimant may give rise to estoppel against the Government and so entitle the claimant to a monetary payment not otherwise permitted by law.

I

Not wishing to exceed a statutory limit on earnings that would disqualify him from a disability annuity, respondent Charles Richmond sought advice from a federal employee and received erroneous information. As a result he earned more than permitted by the eligibility requirements of the relevant statute and lost six months of benefits. Respondent now claims that the erroneous and unauthorized advice should give rise to equitable estoppel against the Government, and that we should order payment of the benefits contrary to the statutory terms.

Respondent was a welder at the Navy Public Works Center in San Diego, California. He left this position in 1981 after petitioner, the Office of Personnel Management (OPM), approved his application for a disability retirement. OPM determined that respondent's impaired eyesight prevented him from performing his job and made him eligible for a disability annuity under 5 U.S.C. §8337(a). Section 8337(a) provides this benefit for disabled federal employees who have completed five years of service. The statute directs, however, that the entitlement to disability payments will end if the retired employee is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement."

The statutory rules for restoration of earning capacity are central to this case. Prior to 1982, an individual was deemed restored to earning capacity, and so rendered ineligible for a disability annuity, if "in each of two succeeding calendar years the income of the annuitant from wages or self-employment ... equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." The provision was amended in 1982 to change the measuring period for restoration of earning capacity from two years to one: "Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement."

After taking disability retirement for his vision impairment, respondent undertook part-time employment as a school bus driver. From 1982 to 1985, respondent earned an average of $12,494 in this job, leaving him under the 80% limit for entitlement to continued annuity payments. In 1986, however, he had an opportunity to earn extra money by working overtime. Respondent asked an employee relations specialist at the Navy Public Works Center's Civilian Personnel Department for information about how much he could earn without exceeding the 80% eligibility limit. Relying upon the terms of the repealed pre-1982 statute, under which respondent could retain the annuity

unless his income exceeded the 80% limit in two consecutive years, the specialist gave respondent incorrect advice. The specialist also gave respondent a copy of Attachment 4 to Federal Personnel Manual Letter 831-64, published by OPM, which also stated the former 2-year eligibility rule. The OPM form was correct when written in 1981; but when given to respondent, the form was out of date and therefore inaccurate. Respondent returned to the Navy in January 1987 and again was advised in error that eligibility would be determined under the old 2-year rule.

After receiving the erroneous information, respondent concluded that he could take on the extra work as a school bus driver in 1986 while still receiving full disability benefits for impaired vision so long as he kept his income for the previous and following years below the statutory level. He earned $19,936 during 1986, exceeding the statutory eligibility limit. OPM discontinued respondent's disability annuity on June 30, 1987. The annuity was restored on January 1, 1988, since respondent did not earn more than allowed by the statute in 1987. Respondent thus lost his disability payments for a 6-month period, for a total amount of $3,993.

Respondent appealed the denial of benefits to the Merit Systems Protection Board (MSPB). He argued that the erroneous advice given him by the Navy personnel should estop OPM and bar its finding him ineligible for benefits under the statute. The MSPB rejected this argument, noting that the officials who misinformed respondent were from the Navy, not OPM. The MSPB observed that, "[h]ad [respondent] directed his request for information to the OPM, presumably, he would have learned of the change in the law." The MSPB held that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." The MSPB denied respondent's petition for review, and respondent appealed to the Court of Appeals for the Federal Circuit.

A divided panel of the Court of Appeals reversed, accepting respondent's contention that the misinformation from Navy personnel estopped the Government, and that the estoppel required payment of disability benefits despite the statutory provision to the contrary. The Court of Appeals acknowledged the long-standing rule that "ordinarily the government may not be estopped because of erroneous or unauthorized statements of government employees when the asserted estoppel would nullify a requirement prescribed by Congress." Nonetheless, the Court of Appeals focused on this Court's statement in an earlier case that "we are hesitant ... to say that there are no cases" where the Government might be estopped. *Heckler v. Community Health Services of Crawford County, Inc*., 467 U.S. 51 (1984). The Court of Appeals then discussed other Court of Appeals and District Court opinions that had applied estoppel against the Government.

The Court of Appeals majority decided that "[b]ased on the Supreme Court's acknowledgment that the estoppel against the government is not foreclosed and based on court of appeals rulings applying estoppel against the government, our view is that estoppel is properly applied against the government in the present case." The Court reasoned that the provision of the out-of-date OPM form was "affirmative misconduct" that should estop the Government from denying respondent benefits in accordance with the statute. The facts of this case, it held, are "sufficiently unusual and extreme that no concern is warranted about exposing the public treasury to estoppel in broad or numerous categories of cases."

II

From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants. In *Lee v. Munroe & Thornton*, 7 Cranch 366 (1813), we held that the Government could not be bound by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority. In *The Floyd Acceptances*, 7 Wall. 666 (1869), we held that the Government could not be compelled to honor bills of exchange issued by the Secretary of War where there was no statutory authority for the issuance of the bills. In *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), we dismissed the argument that unauthorized representations by agents of the Government estopped the United States to prevent erection of power houses and transmission lines across a public forest in violation of a statute: "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

The principles of these and many other cases were reiterated in *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380 (1947), the leading case in our modern line of estoppel decisions. We recognized that "not even the temptations of a hard case" will provide a basis for ordering recovery contrary to the terms of the regulation, for to do so would disregard "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."

Despite the clarity of these earlier decisions, *dicta* in our more recent cases have suggested the possibility that there might be some situation in which estoppel against the Government could be appropriate. The genesis of this idea appears to be an observation found at the end of our opinion in *Montana v. Kennedy*, 366 U.S. 308 (1961). In that case, petitioner brought a declaratory judgment action seeking to establish his American citizenship. After discussing petitioner's two statutory claims at length, we rejected the final argument that a consular official's erroneous advice to petitioner's mother that she could not return to the United States while pregnant prevented petitioner from having been born in the United States and thus deprived him of United States citizenship. Our discussion was limited to the observation that in light of the fact that no legal obstacle prevented petitioner's mother from returning to the United States, "what may have been only the consular official's well-meant advice--'I am sorry, Mrs., you cannot [return to the United States] in that condition'--falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth. In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials."

* * * * *

The Solicitor General proposes to remedy the present confusion in this area of the law with a sweeping rule. As it has in the past, the Government asks us to adopt "a flat rule that estoppel may not in any circumstances run against the Government." The Government bases its broad rule first upon the doctrine of sovereign immunity. Noting that the "United States, as sovereign, is immune from suit save as it consents to be sued," petitioner asserts that the courts are without jurisdiction to entertain a suit to compel the Government to act contrary to a statute, no matter what the context or

circumstances. Petitioner advances as a second basis for this rule the doctrine of separation of powers. Petitioner contends that to recognize estoppel based on the misrepresentations of Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved to Congress. This rationale, too, supports the petitioner's contention that estoppel may never justify an order requiring executive action contrary to a relevant statute, no matter what statute or what facts are involved.

We have recognized before that the "arguments the Government advances for the rule are substantial." And we agree that this case should be decided under a clearer form of analysis than "we will know an estoppel when we see one." But it remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government. A narrower ground of decision is sufficient to address the type of suit presented here, a claim for payment of money from the Public Treasury contrary to a statutory appropriation.

III

The Appropriations Clause of the Constitution, Art. I, §9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute. All parties here agree that the award respondent seeks would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest, 5 U.S.C. §8337. The point is made clearer when the appropriation supporting the benefits sought by respondent is examined. In the same subchapter of the United States Code as the eligibility requirements, Congress established the Civil Service Retirement and Disability Fund. §8348(a)(1)(A). That section states in pertinent part: "The Fund ... is appropriated for the payment of ... benefits as provided by this subchapter...." The benefits respondent claims were not "provided by" the relevant provision of the subchapter; rather, they were specifically denied. It follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money "be drawn from the Treasury" to pay them.

Our cases underscore the straightforward and explicit command of the Appropriations Clause. "It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937).

The command of the Clause is not limited to the relief available in a judicial proceeding seeking payment of public funds. Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury. We have held, for example, that while the President's pardon power may remove all disabilities from one convicted of treason, that power does not extend to an order to repay from the Treasury the proceeds derived from the sale of the convict's forfeited property... Just as the pardon power cannot override the command of the Appropriations Clause, so too judicial use of

the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.

Our decision is consistent with both the holdings and the rationale expressed in our estoppel precedents. Even our recent cases evince a most strict approach to estoppel claims involving public funds. The course of our jurisprudence shows why: Opinions have differed on whether this Court has ever accepted an estoppel claim in other contexts, but not a single case has upheld an estoppel claim against the Government for the payment of money. And our cases denying estoppel are animated by the same concerns that prompted the Framers to include the Appropriations Clause in the Constitution. As Justice Story described the Clause: "The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation...." 2 *Commentaries on the Constitution of the United States* §1348 (3d ed. 1858).

The obvious practical consideration cited by Justice Story for adherence to the requirement of the Clause is the necessity, existing now as much as at the time the Constitution was ratified, of preventing fraud and corruption. We have long ago accepted this ground as a reason that claims for estoppel cannot be entertained where public money is at stake, refusing to "introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself." But the Clause has a more fundamental and comprehensive purpose, of direct relevance to the case before us. It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.

Extended to its logical conclusion, operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity. If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive. If, for example, the President or Executive Branch officials were displeased with a new restriction on benefits imposed by Congress to ease burdens on the fisc (such as the restriction imposed by the statutory change in this case) and sought to evade them, agency officials could advise citizens that the restrictions were inapplicable. Estoppel would give this advice the practical force of law, in violation of the Constitution.

It may be argued that a rule against estoppel could have the opposite result, that the Executive might frustrate congressional intent to appropriate benefits by instructing its agents to give claimants erroneous advice that would deprive them of the benefits. But Congress may always exercise its power to expand recoveries for those who rely on

mistaken advice should it choose to do so. In numerous other contexts where Congress has been concerned at the possibility of significant detrimental reliance on the erroneous advice of Government agents, it has provided appropriate legislative relief.

One example is of particular relevance. In *Schweiker v. Hansen*, 450 U.S. 785 (1981), we rejected an estoppel claim made by a Social Security claimant who failed to file a timely written application for benefits as required by the relevant statute. Congress then addressed such situations in the Budget Reconciliation Act of 1989 by providing that for claims to old age, survivors, and disability insurance, and for supplemental security income: "In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of [the date on which the misinformation was given or the date upon which the applicant became eligible for benefits apart from the application requirement]." Pub.L. 101-239, §10302. The equities are the same whether executive officials' erroneous advice has the effect of frustrating congressional intent to withhold funds or to pay them. In the absence of estoppel for money claims, Congress has ready means to see that payments are made to those who rely on erroneous Government advice. Judicial adoption of estoppel based on agency misinformation would, on the other hand, vest authority in these agents that Congress would be powerless to constrain.

* * * * *

Indeed, it would be most anomalous for a judicial order to require a Government official, such as the officers of OPM, to make an extrastatutory payment of federal funds. It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress. If an executive officer on his own initiative had decided that, in fairness, respondent should receive benefits despite the statutory bar, the official would risk prosecution. That respondent now seeks a court order to effect the same result serves to highlight the weakness and novelty of his claim.

* * * * *

Respondent would have us ignore these obstacles on the ground that estoppel against the Government would have beneficial effects. But we are unwilling to "tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." And respondent's attempts to justify estoppel on grounds of public policy are suspect on their own terms. Even short of collusion by individual officers or improper executive attempts to frustrate legislative policy, acceptance of estoppel claims for Government funds could have pernicious effects. It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

Also questionable is the suggestion that if the Government is not bound by its agents' statements, then citizens will not trust them and will instead seek private advice from lawyers, accountants, and others, creating wasteful expenses. Although mistakes occur, we may assume with confidence that Government agents attempt conscientious performance of their duties and in most cases provide free and valuable information to those who seek advice about Government programs. A rule of estoppel might create not more reliable advice, but less advice. The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice. The inevitable fact of occasional individual hardship cannot undermine the interest of the citizenry as a whole in the ready availability of Government information. The rationale of the Appropriations Clause is that if individual hardships are to be remedied by payment of Government funds, it must be at the instance of Congress.

Respondent points to no authority in precedent or history for the type of claim he advances today. Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution.

The judgment of the Court of Appeals is Reversed.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

Respondent, a recipient of a federal disability annuity, was unsure whether he could accept limited overtime work without forfeiting his right to disability payments. He went to his former Government employer seeking an answer, asked the right questions, received an answer in the form of both oral advice and an official Government publication, and relied on that answer. Unfortunately, the publication the Government gave Richmond was years out of date, and the oral information was similarly erroneous. In this case, we must decide who should bear the burden of the Government's error.

The majority hints that it is unsympathetic to Richmond's claim that he was treated unfairly, but it does not rule on that basis. Rather, the majority resolves the issue by holding as a general rule that a litigant may not succeed on a claim for payment of money from the Treasury in the absence of a statutory appropriation. Although the Constitution generally forbids payments from the Treasury without a congressional appropriation, that proposition does not resolve this case. Most fundamentally, Richmond's collection of disability benefits would be fully consistent with the relevant appropriation. And even if the majority is correct that the statute cannot be construed to appropriate funds for claimants in Richmond's position, petitioner may nonetheless be estopped, on the basis of its prelitigation conduct, from arguing that the Appropriations Clause bars his recovery. Both the statutory construction and the estoppel arguments turn on the equities, and the equities favor Richmond. I therefore dissent.

As the majority notes, the Appropriations Clause generally bars recovery from the Treasury unless the money sought " 'has been appropriated by an act of Congress.'" Section 8337(d) provides that a disability annuity terminates when the annuitant's earning capacity is restored and that such capacity is "deemed restored" if in any calendar year the annuitant makes more than 80% of the current rate of pay of the position he left. The majority contends on the basis of this provision that paying benefits to an annuitant who has exceeded the 80% limit would violate the Appropriations Clause because such benefits are not "provided by" the statute.

The Court need not read the statute so inflexibly, however. When Congress passes a law to provide a benefit to a class of people, it intends and assumes that the Executive will fairly implement that law. Where necessary to effectuate Congress' intent that its statutory schemes be fully implemented, this Court therefore often interprets the apparently plain words of a statute to allow a claimant to obtain relief where the statute on its face would bar recovery.

Where strict adherence to the literal language of the statute would produce results that Congress would not have desired, this Court has interpreted other statutes to authorize equitable exceptions though the plain language of the statute suggested a contrary result. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), for example, we held that a statute requiring that a plaintiff file a suit under Title VII of the Civil Rights Act of 1964 (Title VII) within 90 days of the alleged unlawful employment practice was "subject to waiver, estoppel, and equitable tolling." ...

Respect for Congress' purposes in creating the federal disability annuity system and principles of elementary fairness require that we read the statute in this case as not barring Richmond's claim. Perhaps "[t]he equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." But the equities surely do weigh in favor of reading the disability annuity statute to authorize payment of the claim of an annuitant rendered ineligible for benefits by his reliance on misinformation from the responsible federal authorities.

II

Even if the majority is correct that the statute does not itself require an exception where the Executive has misled a claimant, Richmond should still prevail. Although petitioner has an Appropriations Clause argument against any claim for money not authorized by a statutory appropriation, a court is not invariably required to entertain that argument.

The grounds on which a court may refuse to entertain an argument are many, but most have an equitable dimension. The courts' general refusal to consider arguments not raised by the parties, for example, is founded in part on the need to ensure that each party has fair notice of the arguments to which he must respond. Thus, the Appropriations Clause's bar against litigants' collection of money from the Treasury where payment is not authorized by statute may not be enforced in a particular case if a court determines that the equities counsel against entertaining the Government's Appropriations Clause argument.

The question here is thus similar to ones that we have posed and answered in any number of recent cases, should petitioner in this case be barred from invoking the statutory eligibility requirement (and through it, the Appropriations Clause) because

Richmond's ineligibility for benefits was due entirely to the Government's own error? The majority refuses to answer this question. The Court of Appeals addressed it directly, concluding that the facts in this case were so "unusual and extreme" that the Government should be estopped from applying the statutory restrictions to bar Richmond's recovery. I agree with the Court of Appeals' ruling.

III

The majority argues that policy concerns justify its general refusal to apply estoppel against petitioner in cases in which a claimant seeks unappropriated funds from the Treasury. Such a rule is necessary, says the majority, to protect against "fraud and corruption" by Executive Branch officials. If such officials are "displeased" with a statute, the argument goes, they may misinform the public as to the statute's meaning, thereby binding the Government to the officials' representations. The majority's concern with such dangers is undercut, however, by its observation that "Government agents attempt conscientious performance of their duties." The majority also contends that even if most claims of equitable estoppel are rejected in the end, "open[ing] the door" to such claims would impose "an unpredictable drain on the public fisc." The door has been open for almost 30 years, with an apparently unnoticeable drain on the public fisc. This reality is persuasive evidence that the majority's fears are overblown.

Significant policy concerns would of course be implicated by an indiscriminate use of estoppel against the Government. But estoppel is an equitable doctrine. As such, it can be tailored to the circumstances of particular cases, ensuring that fundamental injustices are avoided without seriously endangering the smooth operation of statutory schemes. In this case, the Federal Circuit undertook a thorough examination of the circumstances and concluded that denying Richmond his pension simply because he followed the Government's advice would be fundamentally unjust.

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STARFLIGHT BOATS, Plaintiff,
v.
The UNITED STATES, Defendant.
48 Fed. Cl. 581 (2001)

Contractor filed complaint alleging damages resulting from delays arising under the subject contract and caused by the government. On defendant's motion and to dismiss, or in the alternative, for summary judgment, the Court of Federal Claims, held that the contractor who alleged that it entered into implied-in-fact contract with the government failed to meet its burden of showing that agency official who entered into alleged contract had actual authority to do so.

ORDER

This government contract case is before the court, on defendant's dismiss, or in the alternative, for summary judgment. Plaintiff filed a complaint alleging damages resulting from delays incurred by plaintiff arising under the subject contract and caused by the government. Plaintiff alleged that contract performance was delayed because he was cooperating with the government's criminal investigation of the Contracting Officer's Representative. For the reasons set forth below, defendant's motions for summary judgment is hereby *ALLOWED.*

BACKGROUND

On September 21, 1992, Contract No. F08637-92-C-080 (hereinafter the "contract") was awarded to Starflight Boats (hereinafter "Starflight" or "Plaintiff") by the Department of the Air Force, Air Education and Training Command, 325th Contracting Squadron at Tyndall Air Force Base, Florida (hereinafter "Air Force" or "government"). The contract price for the manufacture and purchase of 47 airfield runway edge marker systems was a total firm fixed price of $864, 348.00. During the contract performance, the parties executed eight bilateral modifications, which raised the contract price to $949,794.00, and extended the schedule to cover the extension period of the contract.

Shortly after plaintiff began performing the contract, Kenney, the Government COR, attempted to induce Mr. Brown, the owner and president of Starflight, to conspire with him to defraud the government. Under Kenney's plan, Mr. Brown would substitute inferior products for those that were specified in the contract, without reducing the price that Mr. Brown charged the government. Kenney and Mr. Brown would then divide the money that the government overpaid. Although Ronnie Kenney persisted in soliciting Mr. Brown's participation, Mr. Brown did not acquiesce. Mr. Brown did, however, inform Sue Harris (the Government contract specialist and administrator)), and she referred Mr. Brown to Doug Brian, Deputy of Contracting for the Air Force.

At a meeting in early 1993, Mr. Brown informed Brian of Kenney's conduct. Mr. Brown alleges that he and Brian reached a secret, oral agreement whereby Mr. Brown would help the government investigate Kenney. Mr. Brown further alleges that Brian instructed him to comply with the unlawful demands of Mr. Kenney, and Doug Brian, in return, promised he would honor Mr. Brown's claims for the costs associated therewith upon the conclusion of the investigation and conviction of Kenney.

The Air Force Office of Special Investigation began investigating Kenney on May 17, 1993 and closed the investigation on November 18, 1996. As a result of this investigation and subsequent criminal trial, Kenney was convicted on August 29, 1997 for soliciting a gratuity as a public official.

On October 30, 1995, Mr. Brown filed a claim for damages with the Department of the Air Force for $224,390.00. Mr. Brown's claim alleged that the contract's performance was delayed because he was cooperating with the criminal investigation of Kenney. The Department of the Air Force rejected Mr. Brown's claim on August 28, 1998 via letter that Mr. Brown received in early September 1998. Plaintiff filed the instant action on August 24, 1999.

Plaintiff brings this action asserting that it is entitled to the additional $224,390.00 for damages resulting from delays encountered by the contractor due to interference by the COR who was investigated, indicted, and convicted from soliciting bribes from Starflight.

DISCUSSION

Plaintiff argues that an implied-in-fact contract existed between Mr. Brown and the government. Plaintiff contends that, under the agreement, Mr. Brown promised to assist the government in its criminal investigation of Kenney, and in exchange for Mr. Brown's help, the government promised to reimburse Mr. Brown for his costs associated with assisting the government. It is under this alleged implied-in-fact contract that Mr. Brown now seeks damages.

An implied-in-fact contract is one " 'founded upon a meeting of 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.' " The requirements for an implied-in-fact contract include findings of: (1) mutuality of intent to contract, including offer and acceptance; (2) consideration; and, (3) lack of ambiguity in offer and acceptance. An additional requirement is added when the United States is a party; the government representative 'whose conduct is relied upon must have actual authority to bind the government in contract.' This requirement arises from the concept "that the Government, unlike private parties, cannot be bound by the apparent authority of its agents." "A finding of lack of authority would render the purported contract at issue unenforceable."

Plaintiff's claim that it entered into an implied-in-fact contract with the government fails. The government representative, Mr. Brian, did not have actual authority to bind the government in contract.

Plaintiff argues that it meets the requirements of an implied-in-fact contract with the government. Plaintiff contends that it was asked to assist in the criminal investigation of the COR and in return it would be compensated for any costs related to plaintiff's assistance. Plaintiff maintains that Mr. Doug Brian, the Deputy Chief of Procurement, extended to Mr. Brown an express oral contract offer. Plaintiff asserts that Mr. Brown accepted the government's offer expressly as well as through his conduct. Plaintiff argues that its oral acceptance of the government's offer forms the basis of an implied-in-fact contract founded upon a meeting of the minds which, although is not embodied in an express contract, is inferred from the conduct of the parties demonstrating their tacit understanding. . Plaintiff further contends that the consideration was given in the form of his assistance in the investigation and

prosecution of Mr. Kenney in return for repayment of costs incurred by Mr. Brown.

Plaintiff argues that the government may also ratify a parol contract through accepting the benefits received from a contractor's actions. This court and the Supreme Court have adhered to the rule that a parol contract fully executed by the contractor upon his part, wherein the United States receives all the benefits for the undertaking, imposes a liability upon the latter as upon an implied contract."

Plaintiff, however, must also show that Mr. Brian, the government representative who entered into the alleged contract with plaintiff, had actual authority to authorize Mr. Brown's assistance. Actual authority can either be express or implied-in-fact. Government employees hold express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants them such authority in unambiguous terms. Starflight has not presented any evidence demonstrating that Brian had actual authority to enter into a contract. Plaintiff solely offers its bare assertion that Brian was within the scope of his authority and does not offer any statutes or regulations as the source of Brian's authority. Plaintiff fails to present any provisions which suggest that Brian, or anyone else with whom Mr. Brown purported to contract, had authority to orally bind the government and hence alter the terms of the original contract or its written modifications.

Plaintiff contends that by the very nature of Brian's position as Deputy Chief of Procurement, he had actual authority to authorize Mr. Brown's assistance. Plaintiff argues that Brian, as an officer authorized to contract for the United States, has the implied authority to modify provisions of a contract specifically where it is clear that it is in the best interest of the government to do so. Actual authority may be implied when such authority is an "integral part of the duties assigned to a [g]overnment employee." Although Brian was involved in the administration of this contract, a person with no actual authority cannot acquire actual authority "through the court-made rule of implied actual authority."

The contract contained Federal Acquisition (hereinafter "FAR") §52.243-1, Changes--Fixed Price, which states in part that "[t]he contracting officer may at any time, by *written* order, ... make changes within the general scope of this contract..." 48 C.F.R. § 52.243-1 (emphasis added). Plaintiff has not offered any evidence that Mr. Brian acquired approval from any official with adequate authority to contravene the requirement that all contract changes is in writing.

The Federal Circuit has addressed the issues of implied-in-fact contracts and the requisite authority of government employees to bind the government. The court explained that:

> It is well established that the government is not bound by the acts of its agents beyond the scope of their actual authority. Contractors dealing with the United States must inform themselves of a representative's authority and the limits of that authority. Moreover, anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority.

In the case at bar, even if plaintiff believed that Brian had authority to bind the government in contract, plaintiff bore the burden of confirming through the government the exact reach of Brian's authority. Therefore, plaintiff cannot meet the elements of an implied-in-fact contract with the government, specifically due to Brian's lack of actual authority to bind the government.

In his affidavit, Mr. Brown recalls a meeting between himself and Brian, who was the government employee that solicited Mr. Brown's help investigating Kenney. In his sworn affidavit Mr. Brown states:

> "[d]uring the conference I expressed my need for time extensions and contract payments. The contract did not permit sufficient progress payments. I told Mr. Brian that I would run out of funds before the contract would be performed under the present circumstances. That this would be especially true if I cooperated in the investigation relating to Mr. Kenney's illegal activities."

It is clear that Mr. Brown knew even before meeting with Brian, in connection with the Kenney investigation, that his company needed funds and was having difficulty meeting the contract's schedule. Plaintiff alleges that Brian, in response to Mr. Brown's concerns, assured him that if he cooperated with the government, Mr. Brown would not run out of money or lose the contract. Mr. Brian then contacted Contract Specialist Sue Harris, and she amended the express contract by issuing bilateral Amendment/Modification number P00002 (hereinafter "P00002"). Pursuant to P00002, the government: (i) changed specifications in the contract that increased the contract's total value by $85,446.00, (ii) agreed to allow plaintiff twenty- five extra days to complete a testing procedure that was required by the express contract, (iii) changed the FOB from "Origin to Destination," and (iv) permitted plaintiff to invoice twice a month. Mr. Brown signed P00002 as the authorized agent for plaintiff, and Larry Edwards signed as the authorized agent for defendant. Shortly thereafter, Harris helped Mr. Brown secure progress payments, easing plaintiff's cash problems. The four items to which P00002 relates are all covered under the subject matter of the express contract, therefore, they cannot also be the subject matter of an implied-in-fact contract.

In the case at bar, when Mr. Brown met with Brian to discuss his assistance in the government's investigation of Kenney, they altered the terms of the express contract. Moreover, the government and Mr. Brown agreed to six more time extensions during the contract's performance, all during the period that the government was investigating Kenney. Through these amendments, they agreed to change the contract's specifications, plaintiff's shipping liability, deadline extensions, invoicing requirements, and progress payment schedule. All of these terms are part of the subject matter covered by the express contract. Therefore, they were not unrelated to the express contract.

The record before the court is sufficient to determine that any oral implied- in-fact contract between plaintiff and the government is inextricably connected to the subject matter of the express contract between the parties. Therefore, as a matter of law, the court finds that there is no implied-in-fact contract.

CONCLUSION

For the reasons set forth above, defendant's motions in limine and for summary judgment are hereby *ALLOWED.* The defendant's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(4), is deemed hereby *MOOT.* The Clerk of the court is directed to enter judgment accordingly.

IT IS SO ORDERED.

TOWN OF FLOYD v. UNITED STATES
34 Fed.Cl. 170 (1995)

HODGES, Judge.

Defendant moved to dismiss plaintiff's contract claim because it did not state the elements of an implied-in-fact contract. We grant defendant's motion to dismiss.

Discussion

The Town of Floyd is a municipal corporation located near Griffiss Air Force Base in New York. While investigating the effects of de-icing chemicals used at the base, representatives of the Air Force and residents of the town discovered contamination in drinking water wells adjacent to the base. Until clean up of the site could be accomplished, the Air Force provided a grant of $500,000 to cover the design costs of extending existing water lines from the neighboring City of Rome to provide safe drinking water to the affected residents of the town. The Air Force also offered to pay its share of installing the alternative water system.

Plaintiff commissioned engineering designs and plans and solicited bids for the construction work, including the Charles Road and Davis Road areas now in dispute (Area B). Department of Air Force personnel reviewed and approved the designs, plans, and bid specifications. Meanwhile, the Air Force continued testing and analysis to determine the nature and extent of the contamination. Eventually, it set up a buffer zone of coverage, drawing boundaries beyond which the Air Force would not be responsible for water line construction. Consequently, the Air Force divided the Town of Floyd into four parcels--Areas A, B, C, and D--and limited funding for the water line installation costs to those portions of the town in which groundwater had been contaminated by the Air Force. The Air Force determined that it had not contaminated Area B.

The Air Force entered into a contract with the City of Rome to extend that city's water system to the contaminated areas of the Town of Floyd. Area B was not included in the contract. Despite defendant's refusal to pay for Area B, plaintiff financed construction of the entire project. The town seeks reimbursement of $310,000 for construction of the municipal water system allocable to Area B.

Plaintiff contends that Mr. Gary Vest, then the Air Force Deputy Assistant Secretary for Environment, Safety and Occupational Health, bound the Air Force to provide service to Area B and that the Air Force's failure to include Area B in its contract with the City of Rome constitutes breach of an implied-in-fact contract.

Implied-in-Fact Contract

An implied-in-fact government contract requires findings of mutual intent to contract, consideration, and unambiguous offer and acceptance. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed.Cir.1990), *cert. denied*, 501 U.S. 1230 (1991). Moreover, plaintiff must show that an authorized official bound the United States.

A. Mutual Intent to Contract

Plaintiff must demonstrate that "the parties intended to bind each other and expressed those intentions clearly." *Hubbs v. United States*, 20 Cl.Ct. 423, 426 (1990). The Town of Floyd may have intended to enter into a binding contract regarding Area B,

but it proffers no evidence that Mr. Vest intended to contract on behalf of the Air Force to extend water lines to Area B. Plaintiff alleges facts showing negotiations between Mr. Vest and the town, but "[e]xtensive negotiations in which the parties demonstrate hope and intent to reach an agreement are not sufficient in themselves to establish a contract implied-in- fact." *Pacific Gas & Electric Co. v. United States*, 3 Cl.Ct. 329, 339 (1983).

Plaintiff argues that Mr. Vest's deposition testimony supports intent to bind the Air Force:

> [A]t the time we made the offer of the [$]500,000 [for planning and design] we also indicated that the Air Force would pay its appropriate or fair share of actually putting in an alternative water system.
>
> Q. Okay. And when you offered these sums, did you consider yourself to have bound the Air Force to coming forth with those sums if whatever conditions you imposed for their receipt were met?
>
> A. On the basis of my responsibilities in the consultation, coordination that went into the development of the offer, I certainly believed that, and I think it is true that it was a genuine offer and that barring something unbeknownst to me or someone else, that if the offer were accepted, that indeed the Air Force would have taken the--would take the actions to implement that offer.

This testimony may indicate that Mr. Vest intended to bind the Air Force to its "fair share" of the installation costs, but it does not show that Mr. Vest bound the Air Force to pay for installation to Area B. When Mr. Vest said that the Air Force would pay its fair share, the Air Force had not determined the extent of the contamination; its fair share had not been calculated.

The Town Supervisor asked Mr. Vest at a meeting with town officials whether his offer included Area B. Mr. Vest responded, "I won't quibble over a road or two." Plaintiff argues that Mr. Vest included Area B in his offer by so responding. Pressed further, Mr. Vest finally said, "Yes." This exchange does not demonstrate an unequivocal, definite, mutual intent to bind the Air Force. Mr. Vest thought that the Air Force would pay its fair share of the contamination problem. He did not make a binding promise to correct the problem in Area B.

***

D. Authority

"A government official who allegedly binds the Government to a contract implied-in-fact must have had the actual authority to do so." *Goolsby v. U.S.*, 21 Cl.Ct. 629, 631 (1990). A party entering into a contract with a government official "takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

Plaintiff's complaint does not allege that Mr. Vest had actual authority to bind the Government. Plaintiff states: "Mr. Vest represented that he had authority to commit defendant to pay for remedial action and, on information and belief, Mr. Vest had that authority." Plaintiff asserts that Mr. Vest "had no doubt of his discretion to make 'offers' or commitments on behalf of the Air Force," and that Mr. Vest consistently represented himself to town officials as having that authority. The appearance of authority is not dispositive. An official must have actual delegated authority to enter into or amend an

agreement. Mr. Vest's understanding of his own authority is not conclusive.

Mr. Vest did not claim authority to bind the Government to extend service to Area B. The town admits that contracting was not Mr. Vest's function and that he did not have a warrant to contract for a municipal water system. According to plaintiff, Mr. Vest had authority to approve the use of Defense Environmental Restoration Program (DERP) funds for remedying contamination and wide discretion to conduct environment cleanup. If Mr. Vest could delegate funds to remedy environmental damage, plaintiff has not shown that he had authority to determine the extent of damage. Mr. Vest stated in his deposition:

> The fair share is--well, in this particular case would be to provide water to those areas where the water was in fact--or determined by appropriate authority to have been contaminated or to have a high--reasonable probability, really, whatever, to have been contaminated by some action or activity of the Air Force and that would be the extent of fair share.

For Mr. Vest to have exercised the authority that plaintiff submits he possessed, the "appropriate authority" must have established contamination. Plaintiff has not alleged facts sufficient to demonstrate that Mr. Vest had actual authority to bind the Air Force to pay for damage to an area that had not yet been determined to be damaged by the Air Force.

Contract Arising Out of The Defense Environmental Restoration Program

The Town of Floyd argues that its claim arises out of a federal program providing for funding or services. In support of this theory, plaintiff cites *Commonwealth of Kentucky ex rel. Cabinet for Human Resources v. United States*, 16 Cl.Ct. 755 (1989) and *City of Wheeling, W.Va. v. United States*, 20 Cl.Ct. 659 (1990). These cases are distinguishable from the present situation.

***

The Defense Environmental Restoration Program [DERP] is not a federal grant program like the program in *Commonwealth of Kentucky*. Federal grant programs direct the Secretary "to pay money to the state, not as compensation for a past wrong, but to subsidize future state expenditures." The Defense Environmental Restoration Program seeks, among other goals, to identify, investigate, research, develop, and clean up contamination at facilities under the jurisdiction of the Secretary of Defense. It is a program of environmental restoration that compensates for past injuries or wrongs. It does not mandate payment of money but makes funds available for remedial projects.

The statute in *City of Wheeling* authorized the Environmental Protection Agency to make grants to any municipality for the construction of publicly owned waste treatment works. After an applicant submits plans and estimates and the EPA approves, the approval "shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." As in *Commonwealth of Kentucky*, the statute in *City of Wheeling* contains language creating a contractual obligation. The Defense Environmental Restoration Program contains no such language and does not create a contractual obligation to pay money.

… Mr. Vest's authority under [the DERP] statute would not allow him to bind the Government in this case. Mr. Vest could carry out certain functions of the Secretary of

Defense assigned by DERP. However, the statute provides only that:

> The Secretary [of Defense] may enter into agreements on a reimbursable basis with any other Federal agency, and on a reimbursable or other basis with any State or local government agency, to obtain the services of that agency to assist the Secretary in carrying out any of the Secretary's responsibilities under this section. Services which may be obtained under this subsection include the identification, investigation, and cleanup of any off-site contamination possibly resulting from the release of a hazardous substance or waste at a facility under the Secretary's jurisdiction.

Therefore, if Mr. Vest had the same authority as the Secretary, he could reimburse only those expenses of remedying environmental damage that the Secretary has responsibility to remedy. For example, this section may confer authority to contract with the City of Rome to extend its existing water system to the contaminated areas in the Town of Floyd. However, Area B in the Town of Floyd was deemed to be an area not damaged by the Air Force. Mr. Vest had no authority to contract in that area. We do not address the issues of whether Area B was contaminated and whether the Air Force abused its discretion in refusing to fund the construction of the system to Area B.

Conclusion

Plaintiff has not established a claim arising out of a federal program providing for funding or services nor an implied-in-fact contract. Defendant's Motion to Dismiss is GRANTED. No costs.

AUTHORITY PROBLEM #1

You advertise an antique desk for sale in the local newspaper. A well-dressed gentleman appears at your door two days later and advises you that he wishes to make an irrevocable offer of $1500 for the desk. What steps do you need to take in order to be assured that the offer will remain irrevocable?

PROBLEM #2

The agency solicitation requested quotes for the design, manufacture and installation of workstations "in accordance with procedures established for systems furniture." The RFQ, issued to contractors on the schedule, advised offerors that award would be made on the basis of the low, total weighted offer. Five quotes were received in response to the RFQ by the September 20 closing date. Based upon an evaluation of the quoted prices and the application of the two evaluation factors, the agency determined that Haworth's quote was "low." After three of the quoters, including Westinghouse, protested the ensuing September 28 award to Haworth, the Forest Service reexamined its evaluation and determined that it had misapplied the RFQ evaluation formula. Upon reevaluation, the Forest Service determined that Westinghouse had submitted the low quote. When the agency then terminated its contract with Haworth and made award to Westinghouse, on December 10, Haworth filed a protest with the contracting officer. Haworth contends that Westinghouse's September 20 quote, which did not specify an acceptance period, had expired and therefore could not be accepted by the agency for award on December 10. Haworth argues that although the RFQ did not establish an acceptance period, a reasonable period should be implied; with respect to what constitutes a reasonable period, Haworth cites the standard Federal Acquisition Regulation (FAR) clause at FAR §52.214-15, "Period for Acceptance of Bids," which sets 60 calendar days as the bid acceptance period unless the bidder indicates otherwise. Decide.

PROBLEM #3

Byers submitted a sealed bid. The solicitation stated: "Offers providing less than 60 calendar days for (GSA) acceptance after the date offers are due will not be considered and will be rejected." There is no indication that Byers limited the acceptance period of his offer. GSA accepted Byers' offer on August 24, the 56th day after the closing date, by mailing him the award document, by certified mail, "return receipt requested." Byers executed the return receipt form attached to the package. However, according to the postmaster, when Byers discovered it was from GSA, he returned it to the postal clerk. On August 26 Byers advised GSA by letter (received August 27) that the specifications were defective in that the specified pavers had the wrong dimensions and would not perform satisfactorily. Byers also advised GSA in the same letter that an adversarial relationship had developed in the pre-award contract discussions and that he did not wish to proceed with the contract. On August 31, the contracting officer advised Byers that he had been awarded the contract on August 24. Byers responded to this letter on September 10, requesting the return of his bid bond. The contract was terminated for default on October 8. Byers appealed. The Government argues that Byers' original bid was an offer for acceptance by GSA, and that GSA accepted Byers' offer when it put the award package in the mail on August 24. Further, the act of mailing was an acceptance by the Government of Byers' bid, and a contract came into being when the acceptance was put into the mail. Byers argues that no contract ever came into existence, on the theory that he withdrew his offer in his letter of August 26; therefore there was nothing for the Government to accept. Byers also argues that his offer was too defective to be accepted because the bid bond did not contain either his name or a penal sum, and it was not valid for a bid date after April 20 (the original date for the submission of offers and later changed), thus no contract came into being. Decide.

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Problems *(continued)*

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PROBLEM #4

Buyer purchased a personal computer from Computerwerx for $2200. Buyer made a down payment of $200, and agreed to make monthly installment payments of $125 per month for the next three years. Computerwerx used its standard sales agreement which specified all the terms of the agreement, including charges for credit, insurance, taxes, and the rate of interest and the amount of interest buyer would be paying over the three-year term. Dissatisfied with the computer after six months, buyer now seeks to avoid making any further payments. What arguments, if any, can buyer make in an effort to avoid making further payments. Evaluate these arguments.

PROBLEM #5

You enter into an agreement with Prime Painting, Inc., to have your barn and other specified buildings painted at a cost of $6700. After Prime has begun the work, its foreman advises you that the job will be more expensive than Prime had originally believed. The foreman tells you that she will instruct her painters to stop work immediately unless you agree to pay an additional $2500 for the completed work. You agree to pay the added sum, and Prime completes the job. What argument or arguments could you make to support the position that you are not liable to pay the additional $2500?

PROBLEM #6

Seller agrees to sell 100 widgets to buyer at a per unit price of $50. Buyer agrees to pay $1000 at the present time, with the balance in cash upon delivery, but no delivery date is specified. Do the parties have an enforceable contract, and, if so, what are the terms of that contract?

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Problems *(continued)*

PROBLEM #7

DPS is in the business of custom computer programming. Smith sells petroleum products. Smith and DPS entered into an oral agreement under which DPS was to develop computer software for Smith's IBM System-32 computer. Later, DPS was engaged to develop and implement a data processing system for Smith's new IBM System-34 computer. DPS was to develop an accounting system to meet Smith's specific needs. After having paid several billings submitted by DPS, Smith refused to pay DPS's billing of $7,166.25. The basis for the refusal is that the agreement between the parties is oral, and that the UCC requires all sales above $500 to be in writing. Decide.

PROBLEM #8

Prior to award of a firm fixed-price contract for widgets, the contracting officer and the contractor agreed not to incorporate the Termination for Convenience clause. Following award, the government determined it no longer needed the widgets and advised the contractor it was terminating the contract for convenience. Contractor objected, claiming the contract provided no such authority. Discuss.

PROBLEM #9

The Army issued an IFB to supply 25,000 yards of white duck cloth for summer uniforms. The specifications indicated the cloth was to be 29-30 inches in width, would have a certain thread count and weight, and would be four-ply. P submitted a sample with its bid, indicating "Bidding on enclosed sample 35/36." The contracting officer had no laboratory facilities to test whether the sample complied with the specification, but P had provided complying cloth under prior contracts and the cloth appeared to comply. As a result, the contracting officer awarded the contract to P, the low bidder. Following award, the contracting officer learned that the cloth submitted with the bid did not in fact comply. Discuss the contracting officer's options.

PROBLEM #10

An Air Force inspector ordered the contractor to add a larger quantity of epoxy than the specifications required in preparing a certain composite material. Due to the nature of the mixture, the epoxy had to be poured within a short period of time. Without conferring with the contracting officer, the contractor complied with the inspector's direction. The mixture did not cure properly, and the contractor had to dispose of it. Contractor now seeks an equitable adjustment for its costs. What argument would the contractor make in support of its request and what would be the government's responding argument? Discuss.

PROBLEM #11

The contracting officer sent contractor a letter specifically setting forth a procedure for processing change orders through the project officer. The letter further specified that any questions as to whether work was within the contract requirements were to be submitted in writing to the contracting officer. Later contract modifications requiring additional work indicated that such work was to be "as directed by the project officer" and "as approved by the project officer." Contractor now submits a request for an equitable adjustment based upon instructions from the project officer. The government argues that the project officer has been specifically denied the authority to make changes in the contract, as evidenced by the letter initially provided to the contractor. Decide.

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Problems *(continued)*

PROBLEM #11

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PROBLEM #12

Contractor was to install a runway lighting system requiring a double circuit underground conduit. At the direction of the government's "technical personnel," contractor changed the system to a single circuit that required the digging of several additional trenches along the taxiway. After about a month of digging the government directed the contractor to abandon the single conduit system. Contractor claimed the added costs of digging the several trenches and the government defends claiming that its "technical personnel" had no authority to direct the change. Decide.

PROBLEM #13

ABC Corp. required the use of an asphalt plant to complete a road construction project elsewhere. It approached Major Russell, the civil engineering officer at Verysmall AFB, and offered to seal-coat ten miles of the base's roads in return for the use of the base asphalt plant. Major Russell agreed, but said he had to forward the purported agreement for higher headquarters approval. In the meantime, based on Major Russell's assurance that approval would probably be forthcoming, ABC Corp. seal-coated the agreed upon roads. Higher headquarters refused to allow ABC Corp. the use of the asphalt plant. ABC Corp. now sues the Air Force, claiming breach of contract. What possible theory of recovery exists to provide ABC Corp. a remedy? Discuss. Williams v. U.S., 127 F.Supp. 617 (Ct.Cl. 1955)

PROBLEM #14

An Air Force IFB provided that a prompt payment discount permitting 20 days in which to pay will be considered in determining the low bidder. Fink submitted a bid offering a 10-day prompt payment discount, which if considered would make Fink the low bidder. Air Force failed to note discrepancy and advised Fink that it was the apparent low bidder. Ten days later Fink's president had a pre-award meeting with the contracting officer in which he was advised that "(T)hings seem to be in order," and was provided the contract number. Fink's president further advised that a truck was being purchased to perform the contract work, and the contracting officer provided his name and telephone number, indicating that if there was any difficulty in getting the truck, the contracting officer could be contacted. The following day, the discrepancy in Fink's bid was detected and the contract was awarded to the otherwise low bidder. What remedy, if any, does Fink have? Explain. Fink Sanitary Service, Inc., 53 C.G. 502 (1974)

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Problems *(continued)*

PROBLEM #15

Kozak contracted with the government to perform audits of federal payments for transportation services. While Kozak was to be paid based on a percentage of moneys collected from these audits, the government had the discretion as to how many bills to forward for audit. The government was admittedly prescreening bills, which affected adversely Kozak's income. Prior to award of a second contract for the same services, Kozak complained about the government's practice and was assured the practice would discontinue. In fact, under the second contract, the practice continued. What type of argument might Kozak make to justify an equitable adjustment under the second contract? Discuss.

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CHAPTER FOUR CASES

United States Court of Appeals for the Federal Circuit
01-1628
Thomas E. White, SECRETARY OF THE ARMY,
Appellant,
v.
EDSALL CONSTRUCTION COMPANY, INC.,
Appellee
DECIDED: July 2, 2002

RADER, Circuit Judge.
Thomas E. White, Secretary of the Army, appeals the decision of the Armed Services Board of Contract Appeals (Board) holding that a disclaimer on a design drawing did not shift the risk of a design defect to Edsall Construction Company, Inc. Edsall Construction Co., ASBCA No. 51787 (May 21, 2001) (Edsall). Because the Board correctly held that the general disclaimer did not shift the risk to Edsall, this court affirms.

In May 1996, the U.S. Army awarded Edsall a fixed-price contract for the construction of a facility to house the Montana National Guard's helicopters. The facility specification included two hangars designed for the Army by Schlenker and McKittrick Architects (SMA) and Design 3 Engineering, Inc. The specification and drawings called for "tilt-up canopy door[s]" weighing about 21,000 pounds each. The design used a complex system of motors, cables, pulleys, and counterweights to open the doors. As illustrated in the drawings, the cables attach to the doors at points called "pick points." The cables run from the pick points, up over a main truss, over one set of pulleys to another set of pulleys above the counterweights, and then down to the counterweights. The drawings also show the weight of each canopy door as distributed equally between three pick points.

Mr. William Oakey, a Design 3 structural engineer, designed the three-pick-point canopy door. Mr. Oakey placed a disclaimer on one of the drawings, drawing S13, stating:

> CANOPY DOOR DETAILS, ARRANGEMENTS, LOADS, ATTACHMENTS, SUPPORTS, BRACKETS, HARDWARE ETC MUST BE VERIFIED BY THE CONTRACTOR PRIOR TO BIDDING. ANY CONDITIONS THAT WILL REQUIRE CHANGES FROM THE PLANS MUST BE COMMUNICATED TO THE ARCHITECT FOR HIS APPROVAL PRIOR TO BIDDING AND ALL COST OF THOSE CHANGES MUST BE INCLUDED IN THE BID PRICE.

Mr. Oakey testified that he added the disclaimer as an "informational flag" to bidders that they should verify the three-pick-point design. He further annotated the drawing with dotted lines or "v" (for "verify") to indicate some schematic details. Several annotations asked the contractor to verify the door weight and the weight per pick point.

Edsall subcontracted the canopy door construction to Uni-Systems, Inc. (USI). USI has substantial experience in designing and building hangar doors. USI's owner,

Mr. Cyril J. Silberman, testified that he read the disclaimer on drawing S13 as a "heads up that there may be problems with the drawings." Mr. Silberman also testified that when he looked at the drawings, he saw nothing "obviously wrong," and the drawings appeared "pretty well-engineered."

After the contract award, USI discovered that the three-pick-point design would not work. In October 1996, USI sent Edsall a sketch of a four-pick-point design and a letter explaining that the three-pick-point design was unworkable. Edsall then informed the contracting officer (CO) that USI proposed a four-pick-point design. The CO understood that the four-pick-point setup was a new design, but anticipated no additional cost to the Government. By February 1997, Edsall had informed the contracting officer representative that the three-pick-point design was unworkable.

In March 1997, USI submitted a structural drawing for the four-pick-point design, which the CO approved in April 1997. By the time the Government approved the new design, the steel trusses already had been fabricated by a different Edsall subcontractor and delivered to the site, thereby requiring USI to make additional modifications to the trusses to accommodate the new design with four pick points. In July 1997, Edsall informed the Army of its potential claim for additional costs incurred as a result of the new design. In June 1998, Edsall submitted USI's claim for an additional $70,000 based on the new design. The Army rejected the claim in July 1998 because USI had not requested the design change before bidding, as allegedly required by the disclaimer, and because USI's submittal for the new design did not state that it would increase construction costs. Edsall appealed to the Board on behalf of USI.

The Board found that the specifications incorporated defective design characteristics. The Board further held that Edsall's pre-bid review of the specifications was reasonable and that the disclaimer on drawing S13 did not shift any risk for design inadequacies to Edsall. Accordingly the Board awarded Edsall its additional costs.

II.

When the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects. United States v. Spearin, 248 U.S. 132, 136 (1918); see also Essex Electro Eng'rs, Inc. v. Danzig, 224 F.3d 1283, 1289 (Fed. Cir. 2000); USA Petroleum Corp. v. United States, 821 F.2d 622, 624 (Fed. Cir. 1987). This implied warranty attaches only to design specifications detailing the actual method of performance. It does not accompany performance specifications that merely set forth an objective without specifying the method of obtaining the objective. Because the implied warranty protects contractors who fully comply with the design specifications, the contractors are not responsible for the consequences of defects in the specified design. Spearin, 248 U.S. at 136.

Moreover, general disclaimers requiring the contractor to check plans and determine project requirements do not overcome the implied warranty, and thus do not shift the risk of design flaws to contractors who follow the specifications. Id. at 137; see also Al Johnson Constr. Co. v. United States, 854 F.2d 467, 468 (Fed. Cir. 1988) ("The implied warranty is not overcome by the customary self-protective clauses the government inserts in its contracts..."). Only express and specific disclaimers suffice to overcome the implied warranty that accompanies design specifications. Absent such

disclaimers, the contractor is entitled to any additional costs reasonably incurred to produce a satisfactory result.

The implied warranty, however, does not eliminate the contractor's duty to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognized or should have recognized an error in the specifications or drawings. Blount Bros. Constr. Co. v. United States, 346 F.2d 962, 972-73 (Ct. Cl. 1965). This duty requires contractors to clarify patent ambiguities, but does not require them to ferret out hidden or subtle errors in the specifications. Id. at 973. As this court's predecessor, the Court of Claims, stated:

> [Contractors] are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents, and they are protected if they innocently construe in their own favor an ambiguity equally susceptible to another construction. . [because] ambiguities in contracts drawn by the Government are construed against the drafter.

In the present case, the Army authored the specifications through its architects. The drawings, which form a part of the specifications, depict a canopy door with three pick points. The Board found that the canopy door shown in the drawings incorporated significant design characteristics. Specifically, the Board concluded that the number of pick points and the distribution of the load at three points on the truss above the door constituted "design features that a bidder was expected to follow." The Board also found that the three-pick-point door design was defective and would not have worked even if modified. On appeal, the Army does not contest that the three-pick-point design was defective.

The record also provides substantial support for the Board's finding that the three-pick-point door design constituted a design requirement rather than merely a performance specification. Because the disclaimer on drawing S13 required the contractor to seek clearance for "any condition that will require changes from the plans," Edsall could not alter the design without approval of the Army's architect. If the three-pick-point design had been merely a performance specification (i.e., it did not specify an actual method of performance), Edsall could have chosen any method of building a workable tilt-up canopy door, including a four-pick-point design. Because the Army made the three-pick-point door design, including the weight distribution to points on the truss, a design requirement, it warranted the adequacy of the design. The Army is thus responsible for the consequences of design defects absent an express and specific disclaimer shifting the design risk to Edsall. Spearin, 248 U.S. at 136 (government responsible for design defects in specification that specified characteristics, dimensions, and location for a sewer).

On appeal, the Army contends that the disclaimer on drawing S13 clearly and plainly required Edsall to "verify" the three-pick-point design before bidding. Further, the Army argues that the Board's holding reads the disclaimer and drawing annotations out of the contract. While agreeing that contractors should not be required to uncover hidden errors, the Army argues that Edsall had a duty to verify the design in this case.

Although the disclaimer at issue requires the contractor to verify supports, attachments, and loads, it does not clearly alert the contractor that the design may contain substantive flaws requiring correction and approval before bidding. While suggesting the possibility of minor problems in the drawings, the disclaimer did not shift

the risk of design flaws to Edsall. Like the disclaimer in Spearin, the disclaimer in this case is only a general disclaimer. It required Edsall to verify general details, such as door weight and dimensions, but did not alert Edsall to the prospect that the Army's design might not work for its intended purpose.

This Spearin rule governs this case as well. The Army gave Edsall specifications for a design with three pick points. The contract bound Edsall to build according to the specified design, which was defective. Because the general disclaimer did not obligate Edsall to determine whether the Government's design would work for its intended purpose, Edsall is not responsible for the consequences of design defects. Further, the mere fact that USI discovered the defects shortly after beginning a post-bid structural review does not transform an otherwise general disclaimer into a disclaimer sufficient to overcome the implied warranty.

In sum, the disclaimer places the responsibility of verifying physical details, such as door size or the number of brackets needed, on Edsall, but it does not obligate Edsall to analyze the Government's design to determine whether it will work for its intended purpose. The Board correctly held that the disclaimer on drawing S13 did not shift the risk of a design flaw in the canopy doors to Edsall. Edsall is entitled to recover any additional costs reasonably incurred to produce a workable tilt-up canopy door.

CONCLUSION

Because the Board correctly held that the general disclaimer on drawing S13 did not shift the risk of a design flaw in the canopy doors to Edsall, this court affirms.

COSTS

Each party shall bear its own costs.

AFFIRMED

Instrument Control Service, Inc.; Science & Management Resources, Inc.
File: B-289660; B-289660.2
Date: April 15, 2002

Protests that solicitation requirement that items be calibrated within 5 workdays is unnecessary and unattainable are denied where the agency has reasonably explained its need for the requirement and why it is not unattainable, and the protesters have not shown the requirement is unnecessary or unattainable.

DECISION

Instrument Control Service, Inc. (ICS) and Science & Management Resources, Inc. (SMR) protest the terms of request for proposals (RFP) No. F09650-01-R-0256, issued by the Department of the Air Force, for calibration and repair services of test, measurement, and diagnostic equipment (TMDE) at the Precision measurement Equipment Laboratory (PMEL), Warner Robins Air Logistics Center (WR-ALC), Robins Air Force Base, Georgia. ICS contends that the solicitation is defective in that it does not include conformed wage determinations available from the previous contract. ICS and SMR both contend that the solicitation is defective in that the 5-workday turnaround time for each TMDE item serviced is an unnecessary and unattainable requirement.

WR-ALC performs inspections and depot maintenance for certain types of Air Force aircraft. The WR-ALC PMEL calibrates, repairs, and certifies the TMDE used by the agency to accomplish these aircraft maintenance and inspection functions. On December 7, 2001, the agency issued a solicitation for the requirement to operate the WR-ALC PMEL and to service all assigned TMDE equipment.

The RFP contemplates the award of a fixed-price contract for a 2-year base period, with two 1-year options and two 1-year incentive options. The solicitation provides offerors with the agency's best estimated quantity (BEQ) of 160 TMDE items input each workday for the base period.1 RFP attach. 2, Workload Estimates. The basic contract prices are based upon this BEQ plus 15 TMDE items; the RFP provides for separate pricing for TMDE items input each workday "over and above" the agency's BEQ plus 15 TMDE items. RFP § B.

The RFP's performance work statement establishes turnaround times for the TMDE items input to the contractor, based on an item's priority as determined by the agency. For routine items, the required turnaround time is 5 workdays. For TMDE items designated by the Air Force as priority and emergency, the turnaround times are 2 workdays and 8 hours, respectively. The RFP also contains a penalty provision for delinquent performance by the successful contractor beyond the required turnaround times, using a payment deduction formula set forth in the RFP, in which a percentage of the line item price, as submitted by the contractor in its proposal, is to be deducted for each day an TMDE item is delinquent.

Prior to the amended RFP's closing date for receipt of proposals, ICS and SMR each protested various aspects of the solicitation.

ICS and SMR protested the RFP requirement establishing a 5-workday turnaround time for each routine TMDE item serviced. The protesters contend that the agency has no need for the 5-workday turnaround requirement, noting that the Air Force

lacks a uniform turnaround time standard and that other contractor-operated PMELs have less stringent requirements. The protesters also contend that the 5-workday turnaround time requirement is unattainable and unrealistic, particularly given other solicitation requirements. 6 The protesters argue that the penalties resulting from delinquent performance “pose formidable and unnecessary risks” for the successful contractor.

In response, the Air Force maintains that the 5-workday turnaround requirement here is reasonable. The agency argues that in order for WR-ALC to perform programmed maintenance schedules in support of airlift missions; it is necessary that its mechanics have properly calibrated tools and equipment on hand. The Air Force explains that WR-ALC has “sized” its inventory of tools and equipment that require calibration based on a 5-workday turnaround time for these services, and that its customers rely upon this short turnaround time to fulfill their missions. The agency also contends that the requirement here is not unattainable, arguing that historical performance data shows its feasibility. In addition, the agency maintains that past contractors have not utilized the PMEL’s total available capacity, which may have contributed to any difficulties they had in meeting this requirement. The Air Force also notes that the RFP generally allows offerors to separately price the additional costs that would be incurred as a result of TMDE items input “over and above” the daily BEQ amount, which mitigates the price risk of the contractor.

The responsibility for drafting proper specifications that reflect the government’s needs is the contracting agency's. Our Office will not sustain a protest challenging an agency’s judgment in a situation such as this unless the protester presents clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. A protester’s mere disagreement with an agency’s judgment concerning the agency’s needs and how to accommodate them does not demonstrate that specifications are unduly restrictive or defective.

Here, while the protesters have offered evidence that the Air Force employs different turnaround times at other PMEL locations, they have not shown that the 5-workday turnaround requirement does not represent the agency’s minimum needs, given the agency’s detailed explanation. It is well established that each procurement stands on its own; the fact that the Air Force’s judgment as to the required turnaround time may have been different under the circumstances of other procurements does not invalidate an otherwise reasonable requirement.

Nor have ICS and SMR shown the turnaround time for servicing TMDEs is unrealistic or unattainable. In this regard, we note that ICS’s average turnaround time for the previous contract was less than the 5-workday turnaround requirement. Moreover, as the WR-ALC PMEL facility is generally available for use at all times of the day, a contractor can employ additional shifts and/or overtime in order to meet the turnaround time requirement. While this may prove more costly, it is not impossible, and an offeror can account for the increased performance costs, as well as for quantities in excess of the designated daily BEQ, in its price proposal. Even though a contractor may not achieve the 5-working day turnaround time for every piece of equipment serviced, we find that the failure to do so does not make the requirement an unattainable one.

Regarding the protesters' contentions that the penalties associated with delinquent performance impose formidable and unnecessary levels of risk on the contractor, the mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. It is within the ambit of administrative discretion for an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. Moreover, the provision that ICS and SMR are protesting affect all potential offerors equally, and, in our view, the fact that offerors may respond differently in calculating their prices is a matter of business judgment that does not preclude a fair competition.
The protests are denied.

Anthony H. Gamboa
General Counsel

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New Shawmut Timber Company, B-286881
February 26, 2001
B-286881, 2001 CPD¶ 42

Forest Service rejected bid for timber sale as nonresponsive where protester failed to include a price for one of the several line items being sold; in the absence of a price for the item, the agency concluded that there was doubt regarding whether the protester had offered to perform that aspect of the requirement.

DECISION

New Shawmut Timber Company protests the rejection of its bid as nonresponsive for the FR165 Re-Entry timber sale in the Allegheny National Forest, conducted by the Forest Service, Department of Agriculture. New Shawmut contends that its omission of a price for one of the line items did not provide a proper basis for rejecting its bid.

The prospectus for the sale called for the submission of sealed bids to purchase seven species of timber and included an estimated quantity and minimum acceptable price for each species. As pertinent here, one of the seven species was listed as "hardwood--other," with a minimum acceptable bid price of $1.90 per hundred cubic feet. The agency received five bids; New Shawmut's was the apparent high bid but, after reviewing it, the agency determined that the bid was nonresponsive, and rejected it, because it did not include a price for the "hardwood--other" line item.

New Shawmut maintains that the agency's rejection of its bid was improper because, in effect, it bid zero for the "hardwood--other" line item. According to New Shawmut, although this price was below the stated minimum, its bid nonetheless was responsive. The protester directs our attention to several prior decisions of our Office where we found that the Forest Service had improperly rejected a bid as nonresponsive where a line item price was below the minimum acceptable price by only a negligible amount.

New Shawmut's argument mischaracterizes the issue here. To be responsive, a bid must constitute an unequivocal offer to perform the exact thing called for under the solicitation, such that acceptance of the bid will bind the contractor to perform in accordance with the material terms of the solicitation. Doug Jones Sawmill, B-239996, Sept. 19, 1990, 90-2 CPD ¶ 233 at 2. The failure to include a price for a line item evidences a bidder's intent not to be bound or obligated to perform that element of the requirement, and thus generally renders the bid nonresponsive.

New Shawmut's failure to price the "hardwood--other" line item was not equivalent to a bid of zero for the item; rather, leaving its bid for that item blank rendered the bid equivocal regarding whether New Shawmut intended to obligate itself to perform that element of the requirement. The bid therefore properly was rejected as nonresponsive for this reason. [1] In contrast, in the cases cited by the protester, since the bids included prices for all line items, the bidders--unlike New Shawmut--obligated themselves to perform the requirements of the line items. This left as the only issue the question whether the bid price was materially below the stated minimum; it was this issue that our decisions addressed.

New Shawmut maintains that its bid falls into an exception under which a bidder may be permitted to correct a mistake where a bid on its face reflects a consistent pattern of pricing that both establishes the nature of the error and the intended bid. Doug Jones Sawmill, supra. New Shawmut contends that its bid evidences a consistent pattern of pricing because, for five of the six remaining line items, it rounded its price upward to the nearest dollar above the minimum acceptable bid price; thus, the protester concludes, since the "hardwood--other" line item had a minimum acceptable price of $1.90 per hundred cubic feet, its "mistake" of leaving it blank should be corrected to a price of $2 per hundred cubic feet.

We disagree. First, there is nothing on the face of the bid that shows New Shawmut's failure to price the line item was a mistake rather than a business judgment. In any case, there was no clear pattern of pricing, since, as noted, New Shawmut did not round its price upward to the nearest dollar above the minimum acceptable bid price for all of the other line items. For the "black cherry" line item, the minimum acceptable price was $1,717.51 per hundred cubic feet, and New Shawmut bid $2,384. There thus is no consistent pricing that can serve as a basis for inferring the price New Shawmut might have intended to bid for the "hardwood--other" line item.

Finally, New Shawmut maintains that its bid was responsive because it evidenced its intention to be bound by all terms of the solicitation elsewhere in its bid documents. Specifically, the protester notes that the bid form (the terms of which it acknowledged by signing its bid) provides that the bidder agrees to cut and remove all the "included timber or forest product" by the date specified. (The protester also references a provision of the sample contract that was included with its bid materials.) This argument, too, is without merit. Even if the provisions referenced by the protester indicated its willingness to perform in accordance with the contract terms generally, its failure to price the "hardwood--other" line item rendered the bid at best ambiguous as to New Shawmut's intent regarding that item; there is no way to determine from the bid whether the failure to price the line item or the commitment made elsewhere in the bid reflects New Shawmut's intent. Where, as here, a bid is susceptible of more than one reasonable interpretation, under one of which it would be nonresponsive, it must be rejected.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

Priority One Services, Inc.,
B-288836, December 17, 2001

Agency's communications after submission of final proposal revisions with one offeror constituted discussions where the agency required the offeror to replace unacceptable personnel, and solicited other proposal revisions from that offeror, which entailed an increase in its proposed costs; thus, the agency was required to conduct discussions with all offerors whose proposals had been determined to be in the competitive range.

DECISION

Priority One Services, Inc. protests the award of a contract to SoBran. Incorporated under request for proposals (RFP) No. NIAID-DIR-01-56, a small business set-aside, issued by the National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health, Department of Health & Human Services, for the care, use, and humane treatment of laboratory animals, and technical skills related to the scientific study and manipulation of animals and animal products. Priority One contends, among other things, that NIAID conducted improper discussions with SoBran.

We sustain the protest.

The solicited services are to be provided under a cost-plus-fixed-fee contract for a base year with four 12-month option periods. Award was to be made to the offeror whose proposal provided the "best overall value to the Government," considering the following evaluation factors: past performance (worth 800 points), technical approach and general understanding of requirements (worth 700 points), corporate resources (worth 350 points), small disadvantaged business (SDB) participation (not scored), and cost (not scored). Although past performance was said to be "of paramount consideration," cost and SDB participation were "also important" to the award decision. All evaluation factors other than cost, when combined, were significantly more important than cost. Under the past performance factor, the RFP listed 12 variously weighted subfactors, including whether proposed "personnel have necessary knowledge, skills and abilities to successfully complete" the contract (worth 100 points) and "adequate past performance of [s]ubcontractors" (worth 50 points). One of the seven subfactors of the technical approach and general understanding of requirements factor was "work force recruitment/retention plan" (worth 100 points).

Four proposals were received by the closing date. Only Priority One's and SoBran's proposals were included in the competitive range. A four-member technical evaluation panel evaluated and point-scored the technical proposals. The proposals underwent a technical and cost evaluation. Following written discussions, the final revised offers were received and evaluated as follows:

	SoBran	Prioirty One
Score:	1,606.25	1,394.25
Cost:	$33,927,775	$36,092,283

Based on this evaluation, the technical evaluators "acknowledged" that the award should be made to SoBran, but requested "further clarification/information from SoBran prior to completing the written recommendation for award." After receiving SoBran's response, the agency made award to that firm. This protest followed. Priority One protests that the communications with SoBran after that firm's tentative selection constituted discussions, requiring discussions with all competitive range offerors. Priority One alleges that it could have improved its technical proposal in several material respects if it had been provided further discussions.

The communications in question were made by telephone on July 12 and the source selection document characterizes them as follows:

Clarification was requested about SoBran's intent with regard to some key personnel proposed in the FRO [final revised offer]. A couple of people had become unavailable since the FRO submission and a couple of those proposed were unacceptable. Further clarification was also requested with regard to the proposed salaries for the Q/A [quality assurance] Trainer, the Veterinarian and the Administrative Managers as well as how the overtime proposed was calculated. It was unclear whether these positions would be compensated at a level equivalent to that of the current contract or better, given the key role that these personnel are to hold in the new contract.

In response to these communications, SoBran revised its technical and cost proposal by July 20. This proposal revision identified various new personnel (including replacements for personnel found unacceptable by the agency), raised the salaries of some positions to help ensure employee retention as suggested by the agency, responded to the agency's various other questions (relating to such matters as quality assurance implementation, the relationship with its proposed subcontractor, and the strategy to attract incumbent employees), and increased its proposed costs by $156,992.

Discussions occur when the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal. In contrast, clarifications are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal and do not give an offeror the opportunity to revise or modify its proposal. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range, whereas clarifications may be requested from just one offeror. See FAR §§ 15.306(a), (d); Global Associates Ltd., B-271693, B-271693.2, Aug. 2, 1996, 96‑ 2 CPD ¶ 100 at 4. It is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. The acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal, Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 at 11.

Here, the communications in question clearly constituted discussions. The agency found that certain proposed personnel were "unacceptable" and required SoBran to replace these personnel. In addition, the agency found that SoBran may not be able to retain personnel in certain "key positions" at the proposed salaries and requested SoBran to address this concern, which SoBran did by raising the salary

levels of these positions. A variety of other concerns about the technical and cost proposal were raised and SoBran amended its technical and cost proposal to address these concerns, including raising its proposed cost by $156,992.

The protest is sustained.

We recommend that consistent with this decision the agency reopen discussions with the competitive range offerors, request revised offers, reevaluate proposals, including performing a proper cost-realism analysis, and make a new best-value determination. We also recommend that Priority One be reimbursed the cost of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel

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MATTER OF: AMERICAN MATERIAL HANDLING, INC.
B-281556; 99-1 CPD ¶ 46

DECISION

American Material Handling, Inc. protests the award of a contract to R&R Limited under request for quotations (RFQ) No. F04684-98-Q-S178, issued by the Department of the Air Force for a 40-foot articulating boom lift. The procurement was solicited under simplified acquisition procedures through the Federal Acquisition Computer Network (FACNET).

The Air Force issued the RFQ through the FACNET on August 27, 1998. Soliciting through FACNET requires electronically transmitting the solicitation from a computer terminal to a government gateway, which is a computer/communications system performing a variety of data management functions. After processing by the gateway, the information is transmitted through a network entry point to Value-Added-Networks (VAN), which are private sector entities that provide the electronic procurement information to businesses that have registered to contract with the government through the FACNET. Any electronic commerce, such as the submission of a quote, requires these businesses to access the same process in reverse order.

Here, the RFQ was transmitted from Vandenburg Air Force Base (AFB) through the government gateway at Hill AFB with a stated due date for quotes of September 4.

American asserts that it transmitted a quote priced at $51,731 for the boom lift in response to the RFQ on September 4. In support of this assertion, American has submitted a copy of the quote it claims to have submitted with a September 4 date on it. American explains that the copy of the quote was returned by its VAN, and that the date was automatically recorded on the copied quote when it was transmitted through the FACNET.

According to the Air Force, their computer system at Vandenburg AFB reserved for the receipt of quotes malfunctioned on September 4, and they were unable to retrieve any quotes that may have been submitted on that date. In view of this problem, the Air Force retransmitted the RFQ on September 17, with a revised due date for quotes of September 21. The agency also intended to transmit with the reissued RFQ a note stating as follows: "Our computer system crashed and all bid offers were lost. Please submit your bid no later than 21 September 98." However, during the course of this protest it was discovered by the agency that the note erroneously "stayed within the Government computer system," and was not transmitted over the FACNET.

The protester explains that it did not submit a second quote upon seeing only the retransmission of the RFQ because the protester assumed that its quote was properly submitted, and was unaware from the retransmission itself that its quote had been lost due to a malfunction in the Air Force's computer system.

On September 21, the Air Force received a quote in response to the retransmitted RFQ from R&R at a price of $52,040. No other quotes were received, and a purchase order was issued to R&R on September 29.

American asserts that it is being unfairly "penalized for [the agency's] computer failure," and argues that it should have received the purchase order.

When using simplified acquisition procedures, agencies must promote competition "to the maximum extent practicable." 10 U.S.C. § 2304(g)(3) (1994). In meeting this requirement, agencies must make reasonable efforts, consistent with efficiency and

economy, to afford all eligible and interested vendors an opportunity to compete. S.D.M. Supply, Inc., supra, at 4. Agencies have a fundamental obligation to have procedures in place not only to receive quotations, but also to reasonably safeguard quotations received and to give them fair consideration. Id. However, as a practical matter, even with appropriate procedures in place, an agency may lose or misplace a bid or quotation, and the occasional loss of a bid or quotation--even if through the negligence of the agency--generally does not entitle the bidder or vendor to relief. Id.; Interstate Diesel Service, Inc., B-244842.2, Sept. 27, 1991, 91-2 CPD ¶ 304 at 2.

Our Office has recognized a limited exception to the general rule that the negligent loss of a quote or bid in and of itself does not entitle a bidder to relief. This exception applies where the record demonstrates that the loss was not an isolated incident, but rather, was part of a systemic failure on behalf of the agency such that the procedures in place to receive and safeguard quotes cannot be considered reasonable. For example, in East West Research Inc., B-239565, B-239566, Aug. 21, 1990, 90-2 CPD ¶ 147, aff'd, Defense Logistics Agency--Recon., B-239565.2, B-239566.2, Mar. 19, 1991, 91-1 CPD ¶ 298, our Office concluded that the contracting agency breached its statutory duty to promote competition to the maximum extent practicable where during a period of less than 1 week the contracting agency received, and then lost, two quotations submitted by the same vendor is response to two different RFQs. Similarly, our Office found in S.D.M. Supply, Inc., supra, that the agency's procedures for receiving and safeguarding quotes transmitted through the FACNET could not be found reasonable where the record evidenced that in addition to losing the protester's quote, the agency had previously lost the quotes of other vendors submitted in response to a number of other RFQs.

The Air Force reports that the problems encountered, that is, the loss of any quotes received when the system malfunctioned on September 4 and the failure of the note informing vendors of the malfunction to accompany the retransmitted RFQ, were isolated events. Because the record here does not evidence that the loss of American's quote resulted from any deliberate effort on the agency's part or that it was part of a systemic failure by the agency to receive and safeguard quotes, the loss of American's quote, while unfortunate, provides no basis to provide it relief.

The protest is denied.

Comptroller General of the United States

RAMCO EQUIPMENT CORPORATION
B-254979, 94-1 CPD P 67,
February 2, 1994

DECISION

Ramco Equipment Corporation protests that the requirement to provide a cleaning chemical in invitation for bids (IFB) No. DAAC79-93-B-0078, issued by the Department of the Army for an agitated tank washer degreasing machine, is restrictive of competition.

The degreasing machines are used for removing dirt, grease, sludge, and other foreign materials from engine and vehicle parts and miscellaneous ordnance items made from various metals. The machines clean the parts by immersing and agitating them in recirculated, hot water or a water/detergent solution. As relevant to this protest, section 3.5 of the IFB purchase description provides: "[t]he machine shall strip 98 percent of all grease, oil, and common soils, inside and outside, from items in 30 minutes or less. This shall be accomplished without any precleaning or pretreatment...." Section 3.7.3 provides:

> "Machine manufacturer shall recommend a generic type chemical compound suited to the types of materials (aluminum, brass, copper, magnesium, steel) being washed and soils to be removed. The chemical shall not leave any residue or cause any discoloration of the materials being cleaned. Machine shall perform as specified when charged with 8 ounces (or less) by weight of recommended generic chemical compound per gallon of water in the reservoir. Contractor shall furnish initial chemical charge with the machine for start- up and sufficient chemical to operate the machine for 90 working days."

Ramco states that it is not aware of any generic chemical compound that will clean all of the potential soils from all the different metal compositions without leaving a residue or causing discoloration. Ramco explains that aluminum, brass, copper, and magnesium are sensitive metals that can be damaged by even mild detergents and that in fact heat of the water can tarnish brass and copper. To support this position, Ramco has submitted letters from two chemical specialist companies. One states that it is impractical to assume that any one detergent could perform without first testing a sample of contaminated parts in the manufacturer's laboratory. The second states that it does not offer a generic-type, commercially-available, cleaning solution and does not believe one exists that will meet the requirements of the solicitation because a cleaning solution that must remove 98 percent of all the listed soils would have to be used at varying concentrations and varying temperatures depending on the composition of the soils. The second specialist also states that without the employment of a rinse cycle, all aqueous detergents will leave a residue on the parts consisting of detergent and emulsified and soluble soils.

The contracting agency has the responsibility for drafting proper specifications that reflect the government's needs. In developing those specifications, agencies are required to use "market research in a manner designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired." Federal Acquisition Regulation (FAR) § 10.002(a)(2). In addition, the specifications must reflect the minimum needs of the agency and the market available to satisfy those

needs. FAR § 10.002(a)(4). Our Office will not substitute its judgment for the contracting agency's judgment of its needs unless there is clear and convincing evidence that the specifications are impossible to meet or otherwise unduly restrict competition. *California Inflatables Co., Inc.*, B-249348, Nov. 9, 1992, 92-2 CPD p 331.

In the report it submitted in response to the protest, the Army did not respond to Ramco's argument that the specification for the chemical was impossible to meet. In additional comments requested by our Office, the Army stated that it recently used the same specification to procure a degreasing machine and received three responsive bids and that it awarded a contract under that specification. We then asked the Army if the chemical that is being supplied under that contract is meeting the specification, that is, if it is cleaning all the various metals, without discoloring any of the parts and without leaving a residue despite the fact that there is no rinse cycle. The Army responded that the awardee, Graymill Corporation, provided Aquatene GM330 cleaning solution concentrate and that the cleaning solution has lasted longer than required. As to whether the chemical is meeting the specifications, the Army simply replied that the machine is used to remove grease and oils "with subsequent cleaning of parts by other means if required."[1]

Ramco argues that the Army's explanation does not indicate whether the chemical has cleaned aluminum, brass, copper, magnesium, and steel without leaving any residue on the metals and without discoloring them, as required by the solicitation. Ramco restates its position that the specification cannot be met and now specifically argues that the Aquatene chemical does not meet it.

As provided above, the specification in issue requires the machine manufacturer to provide a chemical that will clean aluminum, brass, copper, magnesium, and steel without causing any discoloration and without leaving a residue even though there is no rinse cycle. We have specifically asked the Army to address the protester's argument that no such chemical exists. The Army's only response to this question was to state that it awarded a contract using the same specification last year. When we then asked the Army if the chemical that is being provided by that contractor is meeting the requirements of the specification, the Army simply told us that the chemical is lasting longer than required under the solicitation. The Army, however, in spite of our request, has not addressed whether the chemical is cleaning all the various metals listed in the specification without discoloring them and without leaving a residue. Nor has the Army indicated that it has conducted any market research, as required by FAR § 10.002, to determine if the chemical it has specified is in fact available.

The protester, on the other hand, has provided information from two chemical specialists who assert, and explain why, a generic chemical does not exist that will in fact meet the performance requirements. Given that the record is entirely devoid of any information, such as market research, to contradict these statements that a chemical does not exist that will meet the requirements of the solicitation, it appears that the protester is correct that the specification cannot be met.

Moreover, it appears that the Army is tacitly acknowledging that what it is now using (the machine and chemical delivered under the previous contract) is not or may not be working as required by the RFP since the Army now states that the machine is used to remove grease and oils "with subsequent cleaning of parts by other means if required." The solicitation makes no provision for the possibility of cleaning the parts by

other methods. Rather, both the current and earlier specification provide that the "machine shall strip 98 percent of all grease, oil and common soils, inside and outside, from items in 15 minutes or less. This shall be accomplished without any precleaning or pretreatment such as vapor degreasing, scraping, solvent soaking, etc., to loosen or remove the soils...." Thus, it appears that the specification is in fact overstating the Army's minimum needs because the Army is willing to accept a machine and cleaning agent that do less than required by the specification. Since procuring agencies are only permitted to include requirements that meet their minimum needs, the solicitation is also defective for this reason *Pipeliner Systems, Inc.*, B-254481, December 21,1993,93-2CPD.

We recommend that the Army determine what its minimum needs are and provide specifications that reflect those needs only, amending the solicitation or issuing a new one as appropriate. In addition, we find that Ramco is entitled to reimbursement of its costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f), Ramco's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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MATTER OF: HOECHST MARION ROUSSEL, INC.
B-279073; 98-1 CPD ¶ 127
May 4, 1998

DECISION

Hoechst Marion Roussel, Inc. (HMR) protests the terms of request for proposals (RFP) No. M5-Q1-98, issued by the Department of Veterans Affairs (VA) for sustained action (administered once daily) Diltiazem, a calcium channel blocker used primarily in the treatment of hypertension [high blood pressure]. HMR argues that the RFP improperly permits VA to make a post-award sole-source modification of the resulting contract to include dosage strengths and package sizes not subject to evaluation during the acquisition. HMR also maintains that the RFP fails to provide for consideration of the competing products' relative efficacy in connection with the agency's technical evaluation, and improperly calls for the winning vendor to bear the cost of recalibrating VA's automatic drug dispensing equipment.

We sustain the protest.

The RFP contemplates the award of a single requirements-type contract for VA's entire requirement for Diltiazem for a base year and four 1-year options. This drug is currently available under multiple-award Federal Supply Schedule (FSS) contracts (the three potential competitors each have an FSS contract for Diltiazem). VA currently dispenses some 23 million doses of Diltiazem per year in varying strengths and, depending on the vendor, the product is commercially available in 120, 180, 240, 300 and 360 milligram (mg) dosages. Pursuant to VA's national formulary program, the agency seeks to establish, through the current procurement, a single, nationwide supplier of Diltiazem to ensure the availability and consistency of the drug, and to take advantage of volume-based pricing.

For evaluation and award purposes, the RFP provides that price and past performance will be considered, with price more important. The contract line items are divided among several dosage strengths and package sizes (for example, 120 mg dosages available in 30, 90 and either 1,000 or 5,000 dose packages), and the RFP provides that an aggregate price for each offer will be arrived at by adding the cumulative total of the proposed prices for all contract line items. The RFP further provides that some, but not all, of the commercially available dosage strengths will be evaluated for award purposes, specifically, that only 120, 180 and 240 mg. dosages will be evaluated. As for other available strengths, the RFP provides: "If additional strengths are available, they should be included in the offer, however they will not be made part of the evaluation process. Any additional strength may be added after award by mutual agreement through negotiation between the contractor and Government. Furthermore, any commercially offered packaging sizes should be made available to the Government after award."

VA states that it has a known requirement for higher dosages (specifically 300 mg. and 360 mg. dosages), and will meet that requirement either through a single, large pill under the terms of the above provision (if the contractor manufactures larger pills), or with a combination of lower dosage pills (if the contractor manufactures only the three lower dosages). VA explains that it has limited the RFP to only the lower dosage strengths because these are common to all three of the prospective vendors, and maintains that this will foster broader competition, since only one firm manufactures the full range of dosage strengths (i.e., up to 360 mg.).

DOSAGE REQUIREMENTS

HMR alleges that the solicitation does not accurately reflect the agency's needs and that any modification under the provision quoted above will constitute an improper sole-source award to the successful contractor for dosage strengths that were not evaluated. For example, HMR has a 300 mg dosage available, and the intervenor in this protest, Forest Pharmaceuticals, has 300 and 360 mg. dosages available. HMR maintains that, since the agency has a clearly-defined need for these larger dosages, it must state its requirement in the RFP and procure them competitively, rather than on a sole-source basis by means of the modification provision.

When issuing a solicitation for a requirements-type contract, agencies are required to include realistic estimates of the total quantities of goods or services being procured. Federal Acquisition Regulation § 16.503 (a)(1). Where a solicitation lacks realistic estimates, firms cannot prepare bids or offers that reflect the agency's actual, anticipated needs, and the agency cannot determine whether award to one firm versus another will result in the lowest possible cost to the government. Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, 97-2 CPD ¶ 131 at 7.

Here, the record shows that VA has a known requirement for approximately 1.7 million 300 mg strength dosages, and 33,000 dosages at the 360 mg strength. These estimates are based on historical data showing the dosages prescribed during the preceding year for outpatient use, and VA does not contest that this represents a realistic estimate of its requirement for these higher strengths. Rather than include estimates for these dosage requirements and allow offerors alternatives to meeting the requirements (e.g., offer combinations of 120 mg. and 180 mg. dosages to meet the 300 mg. requirement, or offer a 300 mg. dosage if available), the agency increased the estimated quantity for 180 mg. dosages by 3.4 million dosages to cover needed 300 mg. dosages. Moreover, by accounting for the requirement for 300 mg. dosages in terms of 180 mg. dosages, the RFP's quantity estimates overstate the agency's actual requirement for 180 mg. dosages by approximately 566,000 dosages. Because of this unrealistic estimate, offerors will be proposing to supply dosages that the agency may not order.

The agency argues that its approach maximizes competition and will ensure that VA obtains the lowest prices. The record, however, does not support the agency's position. Under the Competition in Contracting Act, solicitations shall "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." 41 U.S.C. § 253a(a)(2) (1994). Rather than increasing competition, the agency's approach of allowing offerors to propose only smaller dosage pills constitutes a restrictive provision that appears to lack any basis in the agency's needs. The solicitation precludes firms such as the protester from proposing larger dosage pills to satisfy the need, whose existence the agency concedes, for larger dosages.

Moreover, there is no basis to believe that this restriction will ensure that VA obtains the lowest prices. Indeed, VA concedes that prescribing single 300 and 360 mg. dosage pills might be more cost effective than prescribing smaller dosage pills in combination. For example, the protester's FSS price for its large dosage pill is lower than the price for a combination of its smaller dosage pills. Allowing offerors to propose only small dosage pills may mean that manufacturers of the larger dosage pills, such as the protester, are precluded from offering their lowest possible price in the course of the competition, and the contract thus may be awarded at other than the lowest possible cost to the government.

Including the larger dosages in the evaluation would not prevent any firm from competing--indeed, competition could be increased, if firms are allowed to offer either a single pill or a combination of pills to meet the larger dosages--and including the larger dosage pills in the evaluation may result in a cost saving to the agency. Since the reasons offered by the agency for not allowing offerors to propose larger dosage pills do not demonstrate that this restriction is necessary to satisfy the needs of the agency, we conclude that the restriction is improper.

Our conclusion in this regard is reinforced by the RFP provision allowing for a post-award contract modification in the event that the awardee manufactures higher strength dosages. This provision demonstrates that the agency already anticipates a need for the larger dosage pills, and thus lacks any basis for precluding offerors from proposing prices for those pills. The agency's recognition of the need for the larger pills establishes another defect in the agency's procurement strategy, as set out in the solicitation: the agency apparently intends to modify the contract after award to add items (the larger dosage pills) that were not subject to the competition originally obtained. An agency may not properly competitively award a contract with the intention of materially modifying it after award; such a modification would be tantamount to an improper sole-source award. Falcon Carriers, Inc., B-232562.2, Jan. 30, 1989, 89-1 CPD ¶ 96 at 4.

In sum, we conclude that the dosage requirements provisions of the RFP do not realistically state the agency's requirements, impose a restriction not necessary to satisfy the agency's needs, and reflect the intent to modify the contract on a sole-source basis after award.

DIFFERENCES IN EFFICACY

HMR contends that the RFP's evaluation scheme fails to provide for an assessment of the differences in the efficacy among the three prospective offerors' products. According to the protester, the three drugs have important medical differences arising from the fact that each firm formulates its product differently. HMR contends, for example, that there are differences in the absorption rate of the three products, and that there is a so-called "food effect" that changes the absorption rate of one of the products. HMR argues that the evaluation scheme should take these clinical differences into account, and that the agency has not produced a medical study or other adequate medical evidence to show that its conclusion regarding the therapeutic equivalence of the three drugs is reasonable. In support of its position, HMR has submitted a forthcoming study that it maintains shows that there are potential clinical differences in the offerors' products.

Where an agency has deliberated and reached a considered judgment concerning a medical policy, we do not believe that policy or judgment is appropriate for review under our bid protest function. Pfizer, Inc., B-277733, Oct. 27, 1997, 97-2 CPD ¶ 119 at 2-3. This includes the need for, and accuracy of, evidence supporting the agency's medical judgments. Id. at 3 n.3. The record shows that VA's Pharmacy Benefits Management and Medical Advisory Panel (MAP) reviewed the three drugs in question to determine whether any one of the three manufacturers could be selected as VA's primary formulary for Diltiazem. The MAP concluded that the sustained action Diltiazem products available were therapeutically equivalent for contracting purposes. The record also contains affidavits executed by two doctors who participated in the MAP review. The first agrees with the MAP's conclusion that any one of the three available drugs could be placed on the national

formulary, and that the difference between them lies solely in the release mechanism employed. The second doctor states that the differences between the three drugs are not clinically significant, and will not induce important side effects. The record thus shows that VA considered the therapeutic comparability of the three drugs, concluded that any one of the three would be satisfactory for the agency's purposes and found that, while there were differences in the three products, none was significant for the agency's purposes. While the protester disagrees with the agency's conclusion, we will not review the agency's considered medical judgment. *****

RECOMMENDATION

In view of the foregoing, we recommend that the agency amend the RFP to state VA's estimated requirements for all dosages, rather than permitting offerors to propose only the three smaller dosages. As indicated above, the agency may, if consistent with its needs, allow offerors to satisfy the requirements for larger dosages by offering either single large dosage pills or multiple small dosage ones. We also recommend that HMR be reimbursed the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit to the agency its certified claim for those costs, detailing the time spent and the expenses incurred, within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

MATTER OF: SMELKINSON SYSCO FOOD SERVICES
B-281631; 99-1 CPD ¶ 57

DECISION

Smelkinson Sysco Food Services protests the terms of request for proposals (RFP) No. SPO300-99-R-D008, issued by the Defense Supply Center Philadelphia (DSCP), Defense Logistics Agency, for full service food distribution support for a number of federal installations in the Washington D.C. area. Smelkinson protests the RFP requirement that offerors disclose, among other things, profit associated with interorganizational transfers of food items.

We sustain the protest.

The RFP, issued on October 23, 1998, contemplates the award of a fixed-price contract with weekly economic price adjustments, for a base year and 4 option years, for full line food distribution, where the "prime vendor" contractor serves as the customer's primary source for food items. The procurement is being conducted pursuant to the commercial-item acquisition procedures of Part 12 of the Federal Acquisition Regulation (FAR). The RFP's pricing schedule lists commercial food items to be supplied, with their estimated quantities, for offerors to price. Offerors are to provide the following prices by item: delivered price per unit, distribution price per unit, total unit price, and total extended price. The RFP's "price changes" clause, included in the solicitation as an addendum to FAR § 52.212-4, provides the following definitions of the relevant pricing terms: the "unit price" is the "total price charged to DSCP per unit for a product delivered to the Government consisting of two components: 'delivered price' and 'distribution price'"; the "delivered price" is the "actual invoice price . . . of the product paid to the manufacturer/supplier, delivered to the Prime Vendor's facility"; and the "distribution price" is the "firm fixed price, offered as a dollar amount, which represents all the elements of the contract price other than the delivered price . . . [such as] projected general and administrative costs, overhead, profit, packaging costs, transportation costs . . . and any other expenses." This clause allows for changes in the "delivered price" on a weekly basis, to reflect fluctuation of item prices in the commercial market; the contractor's distribution price, however, remains fixed.

The RFP's "interorganizational transfers" clause, the subject of this protest, provides further pricing requirements for the determination of "delivered price" related to transfers among contractor affiliates or divisions. This clause provides as follows: “For purposes of determining the delivered price of an item delivered under this contract, allowances for materials, supplies and services that are sold or transferred between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of the cost incurred by the transferring organization. When materials or supplies are purchased specifically for the contract, only the actual purchase cost of these materials or supplies should be charged to the contract . . .. If the contractor has an established centralized procurement function, all actual costs associated with the operation of this function may be added to the invoice price when the product is transferred to the affiliated organization. Notwithstanding the above, allowances may be at price when it is an established practice of the offeror/contractor to transfer product to its

affiliated organizations at other than actual cost, by use of a catalogue, competition or some other standard pricing mechanism, that transfer price can be used as the invoice price of the item as long as all affiliated organizations were charged the same price for that item. If the catalogue or standard price at which the item is being transferred includes profit to the transferring organization, that profit must be disclosed to the Contracting Officer. The Contracting Officer and the offeror/contractor will agree to a procedure for this disclosure. If no disclosure is made, then profit may not be included in the price charged to the Government for the item."

The same RFP clause addresses freight (or transportation) costs as follows: "The following requirements must be met before freight costs can be charged to the Government as part of the delivered price of the product: 1. Only actual costs paid by the contractor or any of its affiliated organizations may be included as part of the delivered price . . . . .. 4. If the offeror/contractor deviates from the above, full disclosure must be made to the Contracting Officer who will determine if an exemption from these requirements will be granted. Exemptions will only be granted when the Contracting Officer determines that the exemption is in the best interest of the Government."

Smelkinson contends that the requirements for disclosure of profit and freight costs in excess of actual costs related to interorganizational transfers among affiliates are contrary to customary practice in the food distribution industry.

Smelkinson asserts that it is customary in the food service industry for large food distributors, or consortiums of smaller food service companies, to operate through a central purchasing and distribution center that can purchase from suppliers at high volume, resulting in lower prices that may be passed to consortium members or affiliates. Smelkinson explains that certain mark-ups may then be added to these prices, for instance, in light of numerous "value-added services" performed by the central purchasing and distribution center for its members. Smelkinson further states that where the distributor, or central purchasing and distribution center, operates its own transportation network, customary commercial practice is for transportation of the item transferred to be charged at price, rather than cost, which may include profit or other elements.

Smelkinson contends that, although different food service distributors may price their products and product transfers in different ways, it is not customary practice to require, as the RFP does here, disclosure of profit, or freight costs in excess of actual costs, in otherwise competitive prices offered by the distributors. Smelkinson adds that its large commercial food distribution operation does not include an accounting system that identifies the "profit" element per interorganizational transfer required to be disclosed by the RFP. Smelkinson therefore contends that, since the challenged disclosure terms are inconsistent with customary commercial practice, and, since the agency has failed to request and obtain the waiver necessary to include the challenged terms, the RFP is defective.

FAR § 12.301(a), implementing the Federal Acquisition Streamlining Act (FASA) of 1994, 10 U.S.C. § 2377 (1994), regarding the preference for the acquisition of commercial items that meet an agency's needs, provides that 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; or (2) Determined to be consistent with customary practice.

FAR § 12.301(b)(3) provides for the inclusion of the clause at FAR § 52.212-4 in solicitations and contracts for commercial item acquisitions, which clause "includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices." FAR § 12.301(b)(3) further provides that the "contracting officer may tailor" the terms of FAR § 52.212-4 in accordance with FAR § 12.302. In pertinent part, FAR § 12.302(a), provides that: because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at . . . [FAR] 52.212-4, Contract Terms and Conditions--Commercial Items, to adapt to the market conditions for each acquisition.

FAR § 12.302(c), regarding the tailoring of clauses for conditions inconsistent with customary practice, provides: The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

In response to the protest here, the agency asserts that the interorganizational transfers clause included in the RFP, as an addendum to FAR § 52.212-4, is not inconsistent with customary commercial practice in the food distribution industry, and therefore no waiver is required to tailor the clause. The agency states that it has conducted market research that supports its position; in particular, the agency lists several conferences held in the food distribution industry in which the agency discussed its prime vendor program. Some of the solicitations recently issued pursuant to this program include the currently protested terms. The agency reports that no other firm has objected to the terms of the interorganizational transfers clause at these conferences. Consequently, the agency asserts that, since no single pricing method is utilized in the food services distribution industry, and no firm has objected to the clause's terms (even though they were included in other recent prime vendor solicitations), the clause is not inconsistent with customary commercial practice. The agency does not assert, however, nor does the record otherwise show, that the specific terms challenged by Smelkinson were ever researched or discussed by the agency with industry representatives at these conferences or elsewhere.

The FAR, at Part 10, provides general guidance to an agency regarding the scope and proper methods for conducting required market research. The specific techniques listed and factors to be considered, see FAR § 10.002(b)(1), reflect the purpose of market research--to generate a meaningful exchange of information between the agency and industry. Here, we think that the agency has failed to meet its obligation to conduct appropriate market research to show that the challenged terms are consistent with customary commercial practice.

As stated above, there is no showing in the record that the specific disclosure requirements, particularly regarding profit, were ever researched, discussed with, or

commented upon by, industry representatives. While the agency relies on the fact that the clause at issue was not objected to by industry representatives, such silence alone is not an acceptable substitute for the agency's obligation to conduct market research to confirm customary industry practice in the use of these terms, particularly in view of the protester's assertion that there is no industry practice requiring disclosure of profit or other cost data for interorganizational transfers. In fact, the agency itself acknowledges that there is no customary commercial practice requiring such disclosure

Since the clause at FAR § 52.212-4, presenting standard terms and conditions for use in commercial item acquisitions, does not include the disclosure requirements challenged by Smelkinson, it is clear that the agency has "tailored" the provision in the RFP. Given the lack of any meaningful market research showing that the challenged terms are consistent with customary commercial practice, we conclude that the agency violated the requirement in FAR § 12.302(a) to conduct appropriate market research prior to tailoring the regulatory provision. In the alternative, given the agency's apparent concession that there is no customary commercial practice calling for the type of disclosure required by the RFP clause, we conclude that the agency improperly tailored the standard clause at FAR § 52.212-4 without obtaining the requisite waiver to do so under FAR § 12.302(c). Accordingly, we sustain the protest.

We recommend that the agency amend the RFP to remove the challenged disclosure provisions, and then request new proposals. In the alternative, if the agency continues to believe that the provisions are needed, the agency should either confirm through appropriate market research that the provisions are consistent with customary commercial practice or obtain a waiver, pursuant to FAR § 12.302(c). We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

MATTER OF: INTERNATIONAL BUSINESS SYSTEMS, INC.
B-275554, 97-1 CPD ¶ 114
March 3, 1997

DECISION

International Business Systems, Inc. (IBSI) protests the award of a contract to Dulles Networking Associates Inc. (DNA) by the Department of Veterans Affairs (VA) pursuant to request for proposals (RFP) No. 101-05-96, issued to purchase a replacement telephone system for the VA Medical Center, Wilkes-Barre, Pennsylvania. IBSI argues that the agency's evaluation of past performance was unreasonable * * * * *

We sustain the protest.

BACKGROUND

The solicitation for the replacement telephone system here was issued on April 24, 1996, via the VA Bulletin Board System and the Internet, and envisioned a competition limited to participants in the Small Business Administration's (SBA) section 8(a) small disadvantaged business program, pursuant to 15 U.S.C. s 637(a) (1994). The RFP anticipated award of a fixed-price contract to the offeror whose proposal was determined most advantageous to the government. The evaluation scheme incorporated a two-step review. First, technical proposals were to be evaluated on a pass/fail basis. In this regard, the solicitation advised that:

> "Technical proposals must meet all mandatory requirements stated in Section B, Part 1 of this solicitation. Proposals which fail to meet all of the mandatory requirements will not be eligible for award."

RFP, Amendment No. 4, Chapter E, Part 3, p. E-35. Next, the RFP anticipated review of the price and past performance of technically acceptable offerors. The RFP advised that merit ratings would be assigned to the past performance portion of the proposal, and that price and past performance would be approximately equal in weight. Id.

Six proposals were received by the closing date of July 31. Initially, three of the proposals - including the proposal submitted by IBSI - were evaluated as technically compliant with the specifications, and three of the proposals - including the proposal submitted by DNA - were viewed as noncompliant. Prior to making a final decision, however, the agency determined that the DNA proposal was, in fact, compliant, and clarification questions were asked of DNA - as they had been asked of the other three offerors whose proposals were considered compliant.

For the evaluation of past performance, the agency reviewed the references provided by each offeror and assigned adjectival ratings to each proposal. The specifics of the initial past performance review are not relevant here as the agency scrapped its initial review and reevaluated past performance while preparing the agency report in response to this protest. The reevaluation of past performance is discussed below.

To make its final selection decision, the agency compared the price and past performance rating of each of the four technically acceptable offerors. In this review, the contracting officer rejected one of the four proposals for reasons unrelated to this protest. Thus, the agency compared the following results:

OFFEROR	PRICE	PAST PERFORMANCE RATING
DNA	$ 2,448,361	Excellent
IBSI	$ 2,903,742	Good
Offeror A	$ 5,558,131	Excellent

Based on this assessment, the agency concluded that DNA's proposal with its lowest price and excellent past performance rating offered the greatest value to the government. Thus, award was made to DNA, and this protest followed.

Re-evaluation of Past Performance

One of IBSI's challenges in its initial protest was that DNA's excellent past performance rating was unreasonable given that DNA did not have direct experience as a prime contractor furnishing and installing telephone systems. In response to this assertion, the contracting officer (CO) decided, "to take corrective action" by reevaluating the past performance of DNA and IBSI. CO's Statement, December 20, 1996, at 39. In essence, the CO opted to cull from her past performance review any reference involving a contract for other than furnishing and installing telephone systems, and any reference for which the offeror was not the prime contractor.

In reevaluating DNA's proposal, the contracting officer decided that none of DNA's references was directly applicable to furnishing and installing telephone systems. Under the terms of the RFP, offerors were advised that if they lacked past experience relating to this requirement, the proposal would "not be evaluated favorably or unfavorably on these factors." RFP, Amendment No. 4, Chapter E, Part 3, p. E-36. Thus, the CO awarded DNA's proposal a "neutral" rating under the past performance factor.

In reevaluating IBSI's proposal, the contracting officer identified two references directly applicable to this solicitation - both involving installation of telephone systems at VA hospitals. However, the CO based her review on only one of the references. The CO explained that the second reference - involving the installation of a similar telephone system at the VA Medical Center in Brockton/West Roxbury, Massachusetts - was not considered because the individual within the agency responsible for completing the form did not do so.[1] Using the one completed relevant reference, the CO concluded that IBSI's past performance should be rated "good."

In comparing the neutral rating of DNA and the good rating of IBSI, the CO concluded that the two offerors were essentially equal in the area of past performance. Thus, the agency report explains that DNA would continue to be the awardee given its lower price.

ANALYSIS

IBSI argues that the agency unreasonably evaluated past performance and wrongly concluded that DNA's proposal was compliant with the mandatory requirements of the specifications. With respect to past performance, IBSI argues that the agency was required to consider its installation of a telephone system for the Brockton/West Roxbury VA Medical Center, and that had it done so, it could not reasonably conclude that IBSI and DNA were equal in past performance.

* * * * *

Past Performance

IBSI's challenge to the past performance evaluation is that the agency could not reasonably ignore IBSI's past performance on the Brockton/West Roxbury contract when that contract involved the same agency, the same CO, and virtually the same services as here. IBSI further argues that this result is untenable when other evidence - i.e., the CO's letter to the SBA - demonstrates the CO's first-hand knowledge of IBSI's past performance of this work. Thus, IBSI argues that the inclusion of the Brockton/West Roxbury experience would have enhanced its standing in the area of

past performance, and would have made less likely a finding that the two offerors were equal in this area. We agree.

We start our review with the evaluation approach outlined in the agency report. As described above, the conclusion that IBSI and DNA were essentially equal under the past performance factor, leading to a selection decision based on price, was based on an evaluation of one relevant reference for IBSI and no relevant references for DNA. Thus, the contracting officer compared a rating of "good" with a rating of "neutral" to reach her conclusion that the offerors were essentially equal. In the abstract, we have no basis to disagree with this conclusion.

Where an RFP identifies past performance and price as the evaluation factors and indicates that an offeror with a better past performance record than that of another offeror can expect a higher past performance rating, proposals must be evaluated on that basis. The selection official, however, has the discretion to decide the appropriate trade-off between past performance and price in determining which proposal represents the best value to the government. *Excalibur System, Inc.*, B-272017, July 12, 1996, 96-2 CPD p 13 at 3. Such a trade-off is not precluded under an evaluation scheme specifying a "neutral" rating for vendors with no past performance record. *Engineering and Computation, Inc.*, B-275180.2, Jan. 29, 1997, 97-1 CPD p 47 at 4-5; *Excalibur Sys., Inc.*, supra.

Our disagreement with the agency springs from its overly mechanical application of its procedures for evaluating past performance. While the VA is correct in its view that there is no legal requirement that all past performance references be included in a valid review of past performance, *Dragon Service, Inc.*, B-255354, Feb. 25, 1994, 94-1 CPD p 151 at 8; *Questech, Inc.*, B-236028, Nov. 1, 1989, 89-2 CPD p 407 at 3, some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information. See *G. Marine Diesel*, 68 Comptroller General 577 (1989), 89-2 CPD p 101 at 5-6; *New Hampshire-Vermont Health Service* 57 Comptroller General 347 (1978), 78-1 CPD p 202 at 12-13; *Continental Maritime of San Diego, Inc.*, B-249858.2; B-249858.3, Feb. 11, 1993, 93-1 CPD p 230 at 6-8; *G. Marine Diesel; Phillyship*, B-232619; B-232619.2, Jan. 27, 1989, 89-1 CPD p 90 at 4-5; *Inlingua Schools of Languages*, B-229784, Apr. 5, 1988, 88-1 CPD p 340 at 5.

Here, the record shows that IBSI's proposal clearly identified a recent contract involving the same agency, the same services, and the same contracting officer, and asked that its performance of this contract be considered as part of its evaluation, as the solicitation anticipated and required. The record also shows that the contracting officer was aware of IBSI's performance of this contract and had termed it "exemplary" in a letter to the SBA written barely 4 months before the award decision here. Under these circumstances, we conclude that the agency unreasonably failed to consider IBSI's performance on its earlier contract simply because an individual in the agency did not complete the assessment required. See *G. Marine Diesel; Phillyship*, supra (protest sustained where Navy elected not to consider unsatisfactory past performance of awardee involving similar services and the same command because awardee did not include the controversial contract on its list of references for the past performance review).

Finally, even though we consider the agency's evaluation of IBSI's past performance to be unreasonable, we note that competitive prejudice is an essential element of a viable protest. *Lithos Restoration Ltd.*, 71 Comptroller General 367 (1992), 92-1 CPD ¶ 379. Where no prejudice is shown, or is otherwise evident, our Office will

not disturb an award, even if some technical deficiency in the award process arguably may have occurred. *Merrick Eng'g, Inc.*, B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130, recon. denied, B-238706.4, Dec. 3, 1990, 90-2 CPD p 444.

We conclude that IBSI was likely prejudiced by the agency's failure to evaluate its past experience on the Brockton/West Roxbury VA Medical Center contract. In the agency's reevaluation of past performance, it compared IBSI's "good" past performance rating with DNA's "neutral" rating, concluded that the two proposals were essentially equal under this factor, and selected DNA's lower-priced proposal. Although the CO did not consider IBSI's performance of the Brockton/West Roxbury contract, the record shows that the CO has described IBSI's performance there as "exemplary." While we recognize that this one-word description of IBSI's performance may not translate directly to a superlative review under the more nuanced assessment of past performance the agency is using in this evaluation, it does suggest likelihood that IBSI will receive at least a rating of "good." If so, there is no way to conclude with certainty that the agency would have made the same best value trade-off when faced with two "good" ratings on identical contracts compared with DNA's "neutral" rating. See *Engineering and Computation, Inc.*, supra, at 4-5 (". . . a determination to award to a higher-cost offeror with a good past performance record over a lower-cost offeror with a neutral past performance rating is not precluded since such a determination is consistent with making a cost/technical tradeoff to determine if one proposal's technical superiority is worth the higher cost associated with that proposal."). In addition, if IBSI's rating is higher than "good," the outcome of the tradeoff decision is even less certain.

* * * * *

RECOMMENDATION

For the reasons stated above, we conclude that the agency's failure to evaluate IBSI's past performance on a recently completed contract involving the same agency, the same services, and the same contracting officer, was unreasonable. We recommend that the agency evaluate IBSI's performance of the Brockton/West Roxbury VA Medical Center contract, and include IBSI's performance of this contract in its past performance review and best value determination. If, at the conclusion of the agency's reevaluation, the revised best value determination shows that IBSI's proposal, and not DNA's, represents the best value to the government, the agency should terminate the contract awarded to DNA - performance of which has been suspended pending the resolution of this protest - and award to IBSI. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest including attorneys' fees. Bid Protest Regulations, s 21.8(d), 61 Fed. Reg. supra (to be codified at 4 C.F.R. s 21.8(d). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. Bid Protest Regulations, s 21.8(f)(1), 61 Fed. Reg. supra (to be codified at 4 C.F.R. s 21.8(f)(1)).

The protest is sustained.

MATTER OF: CYBER DIGITAL, INC.
B-270107; 96-1 CPD ¶ 20

DECISION

Cyber Digital, Inc. protests the award of a contract to GTE Government Systems Corporation under request for proposals (RFP) No. SP4700-95-R-0006, issued by the Defense Logistics Agency (DLA) for the installation and maintenance of a telephone system to serve four Defense Contract Management Offices located in the states of Florida, Georgia, and Alabama. Cyber Digital contends that DLA improperly rejected its best and final offer (BAFO) as late, and that the agency misevaluated its initial price proposal. …

We deny the protest in part and dismiss it in part.

The RFP was issued on March 27, 1995, and contemplated the award of a 9-year, fixed-price, indefinite quantity/indefinite delivery contract to the offeror whose technically acceptable offer represented the "best value" to the government, using the evaluation factors of past performance and price. In addition to technical proposals, offerors were required to submit the RFP's fixed pricing schedule as well as the RFP's "Pricing Questionnaire," which required "simple" or "compounded" escalation rates for each of the required services associated with this contract. Offerors were also required to submit a "Performance Proposal" providing references for all contracts awarded within the last 5 years, and detailing similar past experience, which the agency would use in evaluating each offeror's past performance. The RFP also provided that a life-cycle evaluation of each offeror's proposed prices would be performed.

By the May 11 closing date, three offers were received, from The American Telephone Company, Cyber Digital, and GTE. For the next several months, numerous technical and pricing clarification requests were issued by the agency to each offeror. On September 11, based on the offerors' responses to the clarification requests, the contracting officer established a competitive range, which included all three offers.

On September 14, oral discussions were conducted with each offeror. …

By amendment dated September 18, the agency requested that each offeror submit its BAFO by 4 p.m. on September 21. The RFP authorized the submission of facsimile BAFOs.

On September 21, at 3:30 p.m., Cyber Digital contacted the contracting officer and requested a BAFO extension, which was denied. The Cyber Digital representative advised the contracting officer that it "would try" to meet the 4 p.m. deadline. At 3:50 p.m., DLA's facsimile machine began receiving Cyber Digital's BAFO; during this process, a Cyber Digital representative telephoned a contract specialist who was monitoring the agency's facsimile machine site to verify that Cyber Digital's facsimile was being received. The contract specialist advised Cyber Digital that the transmission was proceeding, but warned Cyber Digital that it did not appear that the entire document would be received by the 4 p.m. deadline.

By 4 p.m., DLA had received the first eight pages of Cyber Digital's facsimile transmission which consisted solely of pricing schedule pages; the contract specialist and five other agency officials signed the cover page of the facsimile BAFO transmission in witness of the partial, 8-page receipt. The remaining 11 pages of Cyber Digital's BAFO--including 6 pricing schedule pages, and a 4-page response to DLA's past performance

questions--were received late. The last facsimile page of Cyber Digital's BAFO was received at 4:12 p.m.

Because the entire BAFO was not timely received by the 4 p.m. deadline, the contracting officer rejected the BAFO as late, in accordance with Federal Acquisition Regulation § 15.412(c). By letter dated September 25, the contracting officer notified Cyber Digital that its BAFO was being rejected as late and that only Cyber Digital's initial proposal would be considered in the award evaluation process; on September 30, the contracting officer awarded the contract to GTE as the best value offer. On October 6, Cyber Digital filed this protest at our Office.

Rejection of Cyber Digital's BAFO

Under FAR §§ 15.412 and 52.215-10 (which was incorporated in the RFP), a BAFO received at the designated agency location after the exact specified closing time may not be considered unless the late receipt is due solely to mishandling by the government after receipt at the government installation. In this case, Cyber Digital argues that government mishandling prevented its facsimile from arriving by the 4 p.m. deadline; alternatively, Cyber Digital maintains that the agency was required to accept and consider the eight BAFO pricing schedule pages which were timely submitted by the 4 p.m. closing deadline.

In support of its contention that government mishandling caused its late BAFO submission, Cyber Digital argues that DLA improperly failed to advise it that there were four facsimile machines available for transmission of BAFO documents. We find this argument without merit.

The RFP listed two of the four available facsimile machine numbers. According to an affidavit provided by a DLA cost analyst who was monitoring the four facsimile machines, Cyber Digital submitted its BAFO on a third facsimile machine whose telephone number was provided by the agency to all three offerors during clarifications. The cost analyst also reports that to the best of her recollection, "neither of [the two] machines [identified in the RFP was] in use" when Cyber Digital was submitting its BAFO on the third facsimile machine. Thus, the record shows that Cyber Digital had access to three of the four facsimile machines located at the closing site.

The agency was under no obligation to provide all four facsimile machine numbers to the protester. The FAR requires agencies to have adequate procedures in place to ensure the timely receipt and delivery of all proposal documents--including facsimile submissions when such submissions are authorized. FAR §§ 15.411(a) and 14.202-7(a)(5); Butt Construction Co., Inc., B- 258507, Jan. 30, 1995, 74 Comptroller General ----, 95-1 CPD ¶ 45. At the same time, however, FAR s 15.412(b) places the burden on offerors to see that offers and any modifications to them reach the designated office on time. As noted above, the agency provided the offerors with three facsimile numbers (two listed in the RFP and one provided during clarifications) for transmitting proposal documents; since nothing requires an agency to have more than one facsimile machine and since the offeror generally bears the risk of non-receipt of facsimile transmissions, we have no basis for finding any inadequacy in the agency's process for receiving facsimile documents.

We also have no basis to otherwise find government mishandling. Where an offeror delayed transmitting a lengthy facsimile BAFO until 10 minutes prior to the BAFO closing deadline, and the agency otherwise had reasonable facsimile submission procedures in place, we held that receipt by the agency after the BAFO closing time was solely the fault of the contractor. See Brookfield Dev., Inc., Fuller and Co., and Colorado Nat'l Bank, B-255944, Apr. 21, 1994, 94-1 CPD ¶ 273. Similarly here, the late receipt of Cyber Digital's BAFO was simply the result of the protester's failure to allow a reasonable time for the facsimile transmission of its BAFO, not government mishandling. See Phoenix Research Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514.

While Cyber Digital argues that the agency should have considered the eight pages that were received prior to the 4 p.m. deadline, we see no basis to conclude that the agency was required to do so. On the contrary, even if the timely received pages had been substituted for the corresponding pages in Cyber Digital's initial proposal, the agency still would have been left with an incomplete offer; we do not think the agency could reasonably assume that Cyber Digital's BAFO committed it to every CLIN in the RFP's pricing schedule-- or that Cyber Digital had addressed the agency's concerns about the protester's negative past performance record--without receiving a complete BAFO by the designated 4 p.m. deadline. See Inland Service Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266; Phoenix Research Group, Inc., supra. …

The protest is denied in part and dismissed in part.

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MATTER OF: NICK CHORAK MOWING
B-280011.2; 98-2 CPD ¶ 82

DECISION

Nick Chorak Mowing protests the issuance of a purchase order to Bill Christopher Enterprises under request for quotations (RFQ) No. RT-98-00295, issued by the Environmental Protection Agency (EPA) for certain full-service landscape maintenance and management services. Chorak complains that the agency exhibited bias and conducted a "price auction."

We deny the protest.

The RFQ, issued under simplified acquisition procedures on March 26, 1998, sought quotes to provide full-service landscape maintenance and management at two locations of the National Health and Environmental Effects Laboratory complex in Corvallis, Oregon. The types of groundskeeping activities included in the statement of work (SOW) were lawnmowing and thatch removal; tree and shrub pruning; debris removal; application of bark dust in landscaped areas; weed and insect pest control in lawn and landscaped areas; application of fertilizers and pesticides by a state of Oregon licensed pesticide applicator; and parking lot and sidewalk sweeping. The RFQ contemplated the issuance of a 1-year, fixed-price purchase order to the vendor whose quotation represented the best value to the government, and indicated that the quotations would be evaluated on the basis of past performance, adequacy and completeness of proposed work plan, and price.

The EPA received quotations from Nick Chorak Mowing and Bill Christopher Enterprises in response to the RFQ. The proposed prices were $23,988 and $31,069.08, respectively. The project officer evaluated each vendor's work plan, past performance references, and price. The agency engaged in discussions during which each firm was notified of specific deficiencies in its work plan and was provided an opportunity to provide a compliant revised work plan.

During discussions, the contracting officer sent a facsimile to Christopher, which identified deficiencies in its quote and concluded with the following postscript: "P.S. Your quote is more than what we had in mind for this effort. I'd like to discuss your offer." Christopher responded to the identified deficiencies that same day by facsimile. In that response Christopher reduced its original quote by $1,000, offering a revised quote of $30,069.12, and stated that it could provide an additional unspecified price reduction if the agency would reduce the fertilizer requirements to twice per year, instead of three times per year, and allow lawn clippings to be left on the lawn rather than bagged. On April 23, the contracting officer notified Chorak and Christopher by facsimile that the agency had reduced the number of required fertilizer applications from three to two per year, and invited each firm to submit a revised quotation in response to the reduced requirements.

Christopher submitted a very slightly reduced quote of $29,916 in response, which remained substantially higher than Chorak's quote of $23,988. [FN2] The contracting officer concluded after reviewing Chorak's past performance references that there would be "significant risks" that Chorak's performance would be unsatisfactory. The agency also determined that three deficiencies remained in Chorak's revised work plan. Christopher received an overall past performance rating of "acceptable." The agency also determined that Christopher's revised work plan conformed to the SOW

requirements. Accordingly, the contracting officer determined that Christopher's higher quote represented the best value to the government and issued a purchase order to Christopher on April 30. This protest followed.

Chorak argues that the agency improperly engaged in a "price auction." Chorak acknowledges that the agency did not reveal its price during discussion with Christopher, but argues that "the fact that Christopher was given the opportunity to choose what portion of the Solicitation to change . . . coupled with the fact that Christopher was told that his proposal was too high, should be considered price auctioning."

Solicitations issued after January 1, 1998, such as this one, are governed by the Federal Acquisition Regulation (FAR) as amended by the Federal Acquisition Circular (FAC) No. 97-02, which includes the Part 15 rewrite. While the predecessor Part 15 included constraints on the government's use of "auction techniques," FAR § 15.610(e) (June 1997), the rewrite does not contain such a provision. Section 15.306(e) now sets forth specific limitations on exchanges with offerors by Government personnel involved in an acquisition. Section 15.306(e)(3) proscribes the revealing by government personnel of an offeror's price without that offeror's permission, but explicitly provides that, "the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion."

Here the record establishes that the agency conducted discussions consistent with the legal requirements outlined above. The contracting officer did not reveal either offeror's quote to the other. Instead the contracting officer notified Christopher that she considered its price too high, which is permissible under the revised regulation.

During the course of discussions with Christopher, the agency considered Christopher's suggestion that it reduce the number of fertilizer applications and allow the grass clippings to remain on the lawn, and while the agency rejected Christopher's grass clippings suggestion, it concluded that it was appropriate to reduce the number of fertilizer applications in the SOW. The protester has not asserted, and the record does not suggest, that this revised requirement fails to reflect the agency's actual needs. Where, as here, an agency discovers that a solicitation overstates its needs, the proper remedy generally is revision of the solicitation to reflect the agency's actual needs, and affording offerors an opportunity to respond to the revision. Brisk Waterproofing Co., Inc., B-256138.3, June 30, 1994, 94-1 CPD ¶ 394 at 3-4. Accordingly, we see no basis to object to the agency's reduction of the SOW fertilizer requirement, on which each offeror was provided with an opportunity to submit a revised quote.

The protester inaccurately asserts that Christopher was "permitted to make changes in the SOW." In fact, the agency evaluated Christopher's suggestions during discussions, and then decided what best would satisfy its needs, adopting one recommendation which had only a minimal price impact. The agency's adoption of that suggestion is unobjectionable; government procurement officials, who are familiar with the conditions under which supplies, equipment, or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the government's actual needs, and therefore, are best able to prepare appropriate specifications. See AGEMA Infrared Sys., B-257168, Aug. 10, 1994, 94-2 CPD ¶ 68 at 4.

Finally, the protester argues that the contracting officials were biased in favor of Christopher and against Chorak. This allegation is not supported by the record. Chorak has provided nothing more than speculative comments that the agency may have acted

in bad faith. The specification change which Chorak sees as evidencing this bias was unobjectionable, as discussed above, and had a negligible impact on Christopher's price. This simply does not provide a sufficient basis to find bad faith or improper conduct on the part of the agency. HBD Indus., Inc., B-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400 at 4-5.

The protest is denied.

Comptroller General of the United States

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WIDNALL et al. v. B3H CORPORATION et al.
75 F.3d 1577 (CAFC 1996)

CLEVENGER, Circuit Judge.

The Secretary of the Air Force (Air Force) and Logistics Techniques, Inc. (LOGTEC) appeal the July 8, 1994 decision of the General Services Administration Board of Contract Appeals (GSBCA or Board), B3H Corp. v. Department of Air Force, GSBCA No. 12813-P, 94-3 B.C.A. (CCH) P 27,068, 1994 WL 372020 (1994), granting the protest of B3H Corporation (B3H) in a best value procurement. B3H cross-appeals the GSBCA's dismissal of B3H's protest based on alleged improprieties involving Air Force personnel and LOGTEC. We reverse the Board's granting of B3H's protest on the best value issue and affirm the Board's denial of B3H's protest on the procurement impropriety issue.

I

On June 8, 1992 the Air Force solicited a contract on an indefinite delivery/indefinite quantity basis to provide technical support for the Air Force Material Command at Wright-Patterson Air Force Base. The solicitation stated that evaluation of the offerors would be based on technical, managerial, and cost factors in descending order of importance. At issue in this case are the portions of that solicitation reserved for small businesses. Section M-991 of the solicitation provided, in pertinent part, that "[t]he Government will award a contract resulting from this solicitation to the responsible offeror whose offer, conforming to the solicitation, will provide the best value to the Government....The Government reserves the right to award to other than the lowest offeror."

The Source Selection Evaluation Board (SSEB) evaluated, among other companies, the proposals of LOGTEC, Aries Systems International, Inc. (Aries), and B3H. The SSEB determined that while the estimated cost of the LOGTEC offer was higher than B3H and Aries, LOGTEC and Aries were higher rated in the technical area. LOGTEC was also higher rated than Aries and B3H in the management area. After a working group performed a price/technical tradeoff analysis, on February 18, 1994 the Source Selection Authority (SSA) awarded the contracts at issue to LOGTEC and Aries determining that these offerors provided the best value to the Government.

B3H filed a protest in response to the SSA's findings on April 15, 1994. In relevant part, B3H alleged that the awards were improper because: (1) the Air Force failed to select the company offering the best value; and (2) the procurement was improperly tainted by frequent pre-award golf matches between Jerry George, the Air Force Program Manager, and LOGTEC personnel. The GSBCA dismissed the impropriety issue on May 18, 1994 as untimely filed. On May 19, 1994, B3H moved for reconsideration of the impropriety issue.

On July 28, 1994, the GSBCA denied B3H's motion to reconsider the impropriety issue because B3H failed to plead necessary information as to why its protest was timely. Nonetheless, the GSBCA granted B3H's protest on the best value issue. The GSBCA held that the SSA did not adequately justify the higher cost of LOGTEC and Aries, even after the price/technical tradeoff analysis had been considered. Nor, in the Board's opinion, did the record as a whole demonstrate that the added value of the LOGTEC and Aries proposals were worth their higher price. Having granted B3H's best value protest, the GSBCA allowed the Air Force to continue its contracts with LOGTEC and Aries, but

prohibited the Air Force from renewing the options on the contracts unless the awards were affirmed in a new source selection.

II

The scope of our review of a decision by an agency board of contract appeals is set forth in 41 U.S.C. s 609(b) (1988): [T]he decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

This case involves determining the Board's proper method of review when examining a best value agency procurement decision, a question of law that we address de novo. Cecile Indus., Inc. v. Cheney, 995 F.2d 1052, 1054 (Fed.Cir.1993).

III

At issue in this case is a best value procurement authorized by 48 C.F.R. s 15.605(c) (1994) ("[I]n certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors."). Because this contract involves the procurement of automatic data processing equipment, GSBCA review of the agency's decision is governed by the Competition in Contracting Act of 1984 (CICA), as amended, 40 U.S.C. s 759(f)(5)(B) (1988): If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

This case must be viewed in light of the many previous cases under CICA in which the Board has reviewed an agency's best value choice. Precedent dictates that the Board's task on review is to determine if an agency's procurement decision is grounded in reason. Once the Board determines that the agency's selection is so grounded, it then defers to the agency's decision even if the Board itself might have chosen a different proposal. See Oakcreek Funding Corp., GSBCA No. 11244-P, 91-3 B.C.A. (CCH) P 24,200, at 121,041, 1991 WL 133389 (1991).

In an early post-CICA decision, DALFI, Inc., GSBCA No. 8755-P, 87-1 B.C.A. (CCH) P 19,552, 1986 WL 20777 (1986) (DALFI I), the Board upheld a protest of DALFI for a contract selection by the Naval Aviation Logistics Center (NALC). The NALC had chosen the lower rated $17 million proposal of SDI over the higher rated $20 million DALFI proposal. The GSBCA held that the NALC erred in part by taking SDI's assertion of a lower cost to the Government at face value and not conducting a price realism analysis that would assess the proposal's true cost. The Board stated that the procurement had been "converted ... from one for the highest technically rated proposal representing the best buy to the Government into one for the lowest price for a technically acceptable proposal." DALFI I, at 98,809. Nevertheless, the Board later accepted the agency's choice after the agency quantified the proposal's technical differences and determined that the technical superiority of DALFI was not worth its higher cost. DALFI, Inc., GSBCA No. 8975-P-R, 87-3 B.C.A. (CCH) P 20,070, at 101,628, 1987 WL 41150 (1987) (DALFI II); cf. Pyramid Technology Corp., GSBCA No. 8743-P, 87-1 B.C.A.

(CCH) P 19,580, at 99,022-23, 1987 WL 46607 (1987) (contracting officer properly relied on lower price when the technical merits of the offerors were similar).

Once an agency has independently rated each proposal to determine its fulfillment of the requirements of the contract's solicitation, the agency typically performs a tradeoff analysis singling out and evaluating the differences between each of the qualifying proposals. These differences, often termed discriminators, may be either quantified or non-quantified for the Board does not require that each difference in a proposal be assigned an exact dollar value representing its worth to the Government. See TRW Inc., GSBCA No. 11309-P, 92-1 B.C.A. (CCH) P 24,389, at 121,789, 1991 WL 175673 (1991).

Even if the GSBCA disagrees with the reasonableness of a portion of an agency's justification, it will accept agency procurement decisions if the remaining agency analysis can stand on its own. In Computer Sciences Corp., GSBCA No. 11497-P, 92-1 B.C.A. (CCH) P 24,703, 1991 WL 286233 (1991), the agency awarded a contract to Boeing rather than accepting the less expensive proposal of CSC. The decision process consisted of starting with the proposed costs of each offer and adding additional charges quantifying estimates as to how much each proposal would actually cost the agency during the life of the contract. For example, the agency determined that CSC's cheaper, technically inferior proposal would actually cost the agency over $350 million for necessary future upgrades and maintenance. The SSA chose Boeing based on this analysis because Boeing's true cost was only 1% greater than CSC's. Computer Sciences Corp., at 123,289-92. On review of CSC's protest, the GSBCA found that the agency's determinations regarding paper consumption and future maintenance costs did not have a rational basis. Nevertheless, after factoring out these items from the analysis, Boeing's technically superior proposal was only 5.33% more expensive than CSC in true costs. Thus, the Board upheld the decision of the SSA since the SSA had made a reasonable best value decision given the small increase in price the Government would have to pay for Boeing's technically superior proposal. Computer Sciences Corp., at 123,297-98; cf. Andersen Consulting v. United States, 959 F.2d 929, 935 (Fed.Cir.1992) (noting that de minimus errors by agency are insufficient to sustain protest).

In contrast, when an agency's decision has no basis in reason, the GSBCA will overturn the agency's decision. In Network Solutions, Inc. v. Department of Air Force, GSBCA Nos. 11498-P, 11532-P, 92-3 B.C.A. (CCH) P 25,083, 1992 WL 107863 (1992), vacated on other grounds sub nom. Electronic Data Sys. Corp. v. Rice, 988 F.2d 128 (Fed.Cir.1992), the SSA awarded a contract to the more expensive offeror, EDS, in part because of a cost/technical tradeoff analysis. The solicitation included a request to each offeror to estimate the amount of time necessary for its system to complete a hypothetical computer task. Network Solutions, at 125,028-29. After the losing offeror filed a protest, the GSBCA rejected the SSA's conclusion that EDS' offer was more efficient. The Board noted that the SSA had failed to document a reasoned cost/technical tradeoff and found that EDS' claim that its system would perform a hypothetical sample task faster than other proposals was insufficient to justify EDS' higher price. Network Solutions, at 125,043-44.

Recently, this court has reviewed two cases in which the Board initially refused to accept an agency's procurement decision based on the lack of a reasoned explanation for the selection. In both cases the Board and this court later upheld the agency selection after the agency reevaluated its decision and proffered reasonable explanations as to why its initial choice was correct. In International Business Machs. Corp. & Lockheed

Missiles & Space Co., GSBCA Nos. 11359-P, 11362-P, 94-2 B.C.A. (CCH) P 26,782, 1991 WL 542336 (1991) (Lockheed I), the Board granted IBM's and Lockheed's protests, rejecting the IRS' acceptance of AT & T's proposal to build its automation system. The IRS could not justify the increased cost of $500-700 million for the project simply by stating that AT & T's winning proposal was technically superior to the lower offers. Furthermore, AT & T's offer was only 15% more technically superior than the other proposals. The Board directed the IRS to justify its award to AT & T or initiate a new procurement for the contract. Lockheed I, at 133,201-03.

The IRS formed a working group to re-analyze the procurement, which performed a price/technical tradeoff analysis by identifying quantifiable and non- quantifiable discriminators between the various proposals. The group assigned dollar values to four quantifiable discriminators (price risk, software integration, system performance and training) in an attempt to determine the true cost to the Government of each proposal. The group also designated negative, positive or neutral ratings for ten non-quantifiable discriminators. Based on this analysis, the IRS concluded that the technical superiority of the AT & T proposal made it the best value to the Government despite its higher price. Lockheed Missiles & Space Co. v. Department of Treasury, GSBCA Nos. 11776-P, 11777-P, 93-1 B.C.A. (CCH) P 25,401, at 126,499-501, 1992 WL 512122 (1992) (Lockheed II), aff'd, 4 F.3d 955 (Fed.Cir.1993). Lockheed and IBM again filed protests, which the Board denied, stating: All the agency was required to do was present a reasoned analysis showing that the Government expects to receive benefits commensurate with the price premium it will have to pay....[W]e do not lose sight of the basic principle that, in making its analysis, the agency is essentially exercising its business judgment, albeit one involving taxpayers' money, and not conducting a definitive or all-inclusive study. Lockheed II, at 126,508.

Although the GSBCA disagreed with the IRS' consideration of training as a quantified discriminator in its analysis, the Board held that the IRS had not abused its discretion. Lockheed II, at 126,507-09. Affirming the judgment of the Board on appeal, Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955 (Fed.Cir.1993) (Lockheed III), this court stated: "[A] proposal which is one point better than another but costs millions of dollars more may be selected if the agency can demonstrate within a reasonable certainty that the added value of the proposal is worth the higher price." Lockheed III, at 960 (emphasis deleted).

In Grumman Data Sys. Corp. v. Department of the Air Force, No. 11635- P, 94-2 B.C.A. (CCH) P 26,821, 1994 WL 102044 (1992) (Grumman I), the Board sustained Grumman's protest of the Air Force's decision to award a computer networking contract to Contel. The SSA had concluded that the technical enhancements in Contel's proposal warranted the $33.9 million (58.8%) higher price. The Board found that the SSA had failed to explain via quantification or reasoned analysis why the increased value of Contel was worth the price. Simply adhering to the solicitation's ranking of technical merit over cost was insufficient. Grumman I, at 133,401-03. The Board directed the Air Force to justify its award to Contel or initiate a new procurement for the contract. Grumman I, at 133,406.

In an effort to comply with the GSBCA's directive, the Air Force confirmed its initial selection by preparing a comprehensive cost/technical tradeoff analysis, which delineated quantifiable and nonquantifiable discriminators between the two proposals. Quantifiable

factors included user friendliness, systems administration and technical support. Each factor was broken down into subfactors, and each subfactor was assigned a dollar value depicting how much Contel's superior technical expertise in that subfactor was worth to the Air Force. This analysis revealed that the technical superiority of the Contel proposal made it worth $42.25 million more to the Air Force than the Grumman proposal. The Air Force also considered various non-quantifiable factors in its evaluation. Grumman Data Sys. Corp. v. Department of the Air Force, No. 11939-P, 94-2 B.C.A. (CCH) P 26,822, at 133,419, 1992 WL 571025 (1992) (Grumman II), aff'd, 15 F.3d 1044 (Fed.Cir.1994). Grumman again filed a protest. After considering this renewed analysis, the Board upheld the Air Force's award. The Board agreed with the Air Force that Grumman's proposal would require more maintenance and training and that its system would be less capable of handling multiple tasks. Grumman II, at 133,435-36. Additionally, the Air Force properly considered the increased time for training on the Grumman system, the increased productivity associated with Contel's more powerful processors, the more extensive support team, the increased user friendliness, and the lower system administration time. Grumman II, at 133,439. On appeal, this court affirmed the decision of the Board. Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044 (Fed.Cir.1994) (Grumman III).

Post-Grumman III decisions of the GSBCA accepting higher cost proposals as the best value to the Government continue to enforce the grounded in reason standard for review of the agency's choice. For example, the Board upheld the agency's rejection of a proposal because the novelty of the offeror's technology posed a danger of intolerable system failure. ATLIS Federal Servs., Inc. v. Department of Health and Human Servs., GSBCA No. 12959-P, 95-1 B.C.A. P 27,486, at 136,970-71, 1994 WL 750293 (1994). Similarly, the Board upheld the agency's determination to reject a proposal because the offeror's proposed solution relied on subcontractors who used unproven software development tools and had a high rate of employee turnover. Titan Corp. v. Department of Commerce, GSBCA No. 13103-P, 95-2 B.C.A. (CCH) P 27,779, at 138,539, 1995 WL 386851 (1995).

IV

This case involves a solicitation which stated that technical, managerial and cost factors would be evaluated in that order of precedence. The offers of LOGTEC and Aries were judged to be superior in the technical area. While LOGTEC was rated higher than Aries and B3H in the management area, total cost evaluations revealed that LOGTEC and Aries were respectively 15% and 8.8% more expensive than B3H's offer. The Air Force created a price/ technical tradeoff working group (P/TTO Group) to further analyze the proposals. The P/TTO Group identified one quantified discriminator quantifying the estimated risk that an offeror would need to expend additional funds to provide trained personnel than the offeror originally calculated. This dollar value was added to the total evaluated cost of each offer to obtain a value adjusted cost. Although B3H's price risk was approximately four times higher than LOGTEC's and Aries', the value adjusted costs of LOGTEC and Aries were still respectively 16% and 4% higher than B3H.

The P/TTO Group also identified six non-quantified discriminators: (1) experience with the relevant Air Force software; (2) hardware maintenance experience; (3) hardware sizing experience; (4) data management experience; (5) whether the offeror already had offices near the Air Logistics Centers (ALC co-location); and (6) the offeror's

subcontractor control plan. Each offeror was assigned a positive, neutral or negative evaluation for all six discriminators. The P/TTO Group gave LOGTEC a positive rating for the subcontractor control plan discriminator and assigned Aries and B3H neutral ratings for that category. While LOGTEC and Aries received a negative rating and B3H a neutral one for the hardware maintenance experience discriminator, the ratings of LOGTEC and Aries were superior to B3H's for all other non- quantified discriminators. With respect to those superior ratings, the P/TTO Group predicted that the proposal of B3H would result in completing the task order in a longer period of time and with a lower level of quality.

Relying upon the analysis of the P/TTO Group, the SSA in his written determination that LOGTEC's superior proposal was worth its extra cost stated: "I assess that the relative superiority of the [LOGTEC] proposal as indicated in the [excellent] rating in the Management Area will result in improved quality and cost control that represents value to the Government which mitigates the ... difference in cost." As to the award to Aries, the SSA similarly wrote: "B3H had more negative and fewer positive non-quantified discriminators than [Aries]....The technical superiority of [Aries] represents the Best Value to the Government considering the [small] difference in cost...."

At the B3H protest hearing, the SSA elaborated at length on the rationale for choosing LOGTEC and Aries. When B3H asked the SSA to explain in specific detail the basis for his decision, the SSA's response took up forty-three pages of testimony and covered all seven discriminators explaining how he considered them, evaluated their import, and why he did what he did. He had earlier given twenty-two pages of testimony on the same subject. In general, the SSA's testimony was that prior experience in the areas of the various non- quantifiable discriminators resulted in shorter start up times, quicker execution, a better quality product, shorter learning curves, and less staffing time, all of which would produce economic benefits to the Air Force. With respect to the issue of what justifies the higher estimated costs of the awards, the SSA testified:

> If specifically you mean what do we expect would occur through the execution of the contract with Aries and Logtec that would justify the increased price ... we can go back through the discriminators if you like and we can go back through the superior technical management proposal for characteristics. But in summary, what we would expect is that we would get a ... substantially higher quality product. We would expect that we would be in a better position to control and understand the cost that would be expended in the conduct of the individual task. That is that the costs that are identified in the initial response to the statement of work, would in fact be much closer to the cost that would be expected to be incurred through the conduct of that cost.

In essence, the SSA determined that the inferior management and lower non- quantified discriminator ratings of B3H meant that there was a likelihood that B3H's offer would produce unnecessary cost overruns and actually cost more than an estimated value adjusted cost, which was designed to factor in that risk. Thus, the SSA concluded the superior management and technical evaluations of LOGTEC and Aries justified incurring the increased value adjusted cost.

V

On appeal, the Air Force contends that the Board committed legal error by reading into the words "reasonable certainty" in Lockheed III a requirement that a measure of

proof, beyond that found in precedent, is necessary in order to satisfy the grounded in reason test. As a result, the Air Force argues that acceptance of the Board's reasoning would improperly shift the burden of proof to the agency during a protest proceeding and would allow the Board to substitute its own judgment for that of an agency making a procurement decision. We agree with the Air Force.

Nothing in Lockheed III suggests the application of a different standard than what was applied before that decision, or that the quantum of proof in Lockheed III materially exceeded that found in earlier precedent. Indeed, neither the language nor the facts of the case show anything other than that Lockheed III is consistent with the principle that the Board's task upon review of a best value agency procurement is limited to independently determining if the agency's decision was grounded in reason. If this court wishes to alter such a longstanding principle, it will do so explicitly with supporting rationale.

Fulfilling its statutory duty under 41 U.S.C. s 607(e) (1988), the Board in this case reviewed the Air Force's procurement decision. The Board found that one non-quantified discriminator, the ALC co-location, did not have a rational basis. Except for this finding, the Board found no fault with the methodology of the SSA's decision. Just as in Computer Sciences Corp., the Board here did not reject the procurement on the basis of one suspect discriminator, but continued its analysis with the offending discriminator factored out of its inquiry.

Although the SSA gave a reasoned explanation as to why he chose LOGTEC and Aries, the GSBCA did not defer to his reasonable decision. For example, the Board found fault with the SSA's emphasis on LOGTEC's and Aries' superiority over B3H in the software experience and data management experience non-quantified discriminators. The Board held that the record does not support the SSA's decision to emphasize these two discriminators over the others. Yet, weighing which non-quantified discriminator to emphasize in an analysis is exactly the type of decision the SSA is entrusted to make. As the Board does not require that every discriminator be assigned an exact dollar value, TRW, it necessarily must rely on an agency's judgment in giving disparate weight to the various non-quantified discriminators in a best value determination.

The Board should have followed its clear line of precedent and deferred to the reasonable decision of the SSA in this case. The Air Force's P/TTO Group developed seven discriminators and assessed how each of the offeror's proposals fared under those chosen criteria. Using his independent judgment and consistent with the solicitation's stipulation that cost was the least important factor for this contract, the SSA relied on this analysis and reasonably determined that the technical and managerial superiority of LOGTEC's and Aries' proposals were worth the 15% and 8.8% higher cost. This case is no different from the many previous cases in which the GSBCA deferred to reasonable best value decisions made using substantially similar forms of analysis. Indeed, the SSA's concern that B3H's proposal might lead to excessive cost overruns seems no different from such recent explanations accepted by the Board in ATLIS (fear of cost overruns due to new technology) and Titan (fear of cost overruns due to subcontractor problems.) In reversing the GSBCA's grant of B3H's protest on the best value issue, we emphasize that the settled law remains settled. ...

For the reasons stated above, we reverse the GSBCA's grant of B3H's protest on the best value issue. …

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ELDYNE, INC.
B-250158.4, 93-1 CPD ¶422

DECISION

The Department of the Navy requests reconsideration of our decision in *Eldyne, Inc*., B-250158 *et al*., Jan. 14, 1993, 93-1 CPD ¶430, in which we sustained Eldyne's protest of the award of a contract by the agency to McLaughlin Research Corporation under request for proposals (RFP) No. N66604-92-R-0060. We sustained the protest because the agency failed to conduct meaningful discussions with Eldyne, the incumbent contractor of the technical support services required by the RFP. In that decision, we found that the Navy failed to discuss serious weaknesses in the firm's proposal which had a significant adverse affect on the proposal's technical evaluation score, especially in light of the agency's reliance on the point scores received by the two offerors' proposals in making the award determination. The record showed that the agency limited its technical discussions to one question concerning one of Eldyne's proposed personnel and did not raise any concerns regarding lack of detail in Eldyne's technical and management approaches which had resulted in its offer being scored at the low end of the acceptable point score range.

We deny the request for reconsideration because it provides no basis for reconsidering our prior decision.

In its request for reconsideration, the Navy essentially contends that the Federal Acquisition Regulation (FAR), at §15.610, requires the agency to discuss only matters that make a proposal unacceptable ("deficiencies") with offerors whose proposals are included in the competitive range. Since Eldyne's lack of detail in its technical proposal was considered a "weakness," but was not labeled as a "deficiency" failing to meet the agency's technical requirements, the Navy contends there was no requirement for the agency to discuss the evaluators' concerns with the firm. The agency also asserts that it was not required to discuss with Eldyne those portions of its proposal found to be lacking in detail because they reflected the firm's lack of competence, diligence and inventiveness in preparing its proposal. The Navy argues that it was not required to inform the offeror how to improve its proposal's technical approach to the level of the awardee's detailed technical proposal so that no discriminating factors between the merit of the proposals would remain.

The Navy's contention that contracting officers are never required to discuss aspects of a proposal that do not make it unacceptable is simply wrong. As we stated in our decision sustaining Eldyne's protest, discussions conducted with offerors in the competitive range must be meaningful. FAR §15.610; *Jaycor*, B-240029.2 *et al*, 90-2 CPD ¶354. The FAR explicitly recognizes that, in conducting meaningful discussions, a contracting officer must use his or her judgment based on the facts of each acquisition (except that deficiencies and other matters listed in FAR §15.610(c) must always be discussed). Substitution of the mechanical approach suggested by the Navy for this exercise of judgment can, as it did in this case, frustrate the fundamental requirement of the Competition in Contracting Act of 1984 (CICA), for meaningful discussions. As reflected in FAR §15.610, CICA effectively requires agencies to point out weaknesses, deficiencies or excesses in proposals necessary for an offeror to have a reasonable chance of being selected for award, which is, after all, the basis for including a proposal

in the competitive range in the first place. See FAR §15.609(a); *Price Waterhouse*, B-222562, 86-2 CPD ¶190.

The exercise of the contracting officer's judgment in this respect requires weighing several competing interests. For example, agencies are admonished by the FAR to protect the integrity of the procurement process by balancing the need for meaningful discussions against actions that result in technical leveling (FAR §15.610(d)), technical transfusion (FAR §15.610(e)(1)), or auctions (FAR §15.610(e)(2)). See generally *Mine Safety Appliances Co*., B-242379.5, 92-2 CPD ¶76. The FAR defines technical leveling as helping an offeror "bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal." FAR §15.610(d). Also, while agencies generally must lead offerors into the areas of their proposals that require amplification or correction for them to have a reasonable chance of award, there is no obligation to afford all-encompassing discussions or to discuss every element of a technically acceptable competitive range proposal. *Jaycor, supra*.

Since the number and type of proposal deficiencies will vary among proposals, contracting officers necessarily must have considerable discretion in determining what will be discussed with each offeror, and in striking the appropriate balance between meaningful discussions and technical leveling. See *CBIS Fed. Inc*., 71 Comp.General 319 (1992), 92-1 CPD ¶308; *E-Systems, Inc*., B-191346, 79-1 CPD ¶192. For example, in a case where it might have been preferable for an agency to have informed an offeror in the request for BAFOs of continuing concerns about a weakness identified during discussions, we found that there was nothing improper about not doing so, given the agency's reasonable concerns about technical leveling. *E-Systems, Inc., supra*. Our Office will sustain a protest, however, if an agency, attempting to strike the balance between holding meaningful discussions and avoiding technical leveling, acts unreasonably. See *Price Waterhouse, supra* (protest sustained where agency provided offerors with identical discussion questions because of concerns that questions tailored to the individual proposals would violate the FAR's restrictions against technical leveling and technical transfusion).

Here, Eldyne was not advised during discussions of any concerns about its technical proposal except in regard to its initial proposal of an individual who subsequently became unavailable for employment. Yet, each evaluator supported his individual determination to significantly downgrade Eldyne's technical evaluation score (primarily for technical approach, but also for management approach) on the basis of the proposal's lack of detail. Our review of the record showed that this lack of detail raised concerns regarding Eldyne's level of understanding and ability to address certain technical problems and, in at least one management area, whether or not Eldyne's "vague" approach met the requirements.

Regardless of the agency's description of its concerns with Eldyne's proposal as constituting a weakness rather than a deficiency, the record shows that Eldyne's proposal was significantly downgraded in these areas of its proposal. We believe the agency was required to discuss the matter with Eldyne; the firm should have been allowed the opportunity to amplify its approach to confirm its understanding of the RFP's requirements and satisfy the agency's serious concerns. (Although the Navy disputes our interpretation of the above described concerns regarding the proposal as "serious," we believe the

substantial number of evaluation points lost solely due to the perceived lack of detail show the evaluators believed that those concerns were serious.)

Further, although the agency criticizes our decision sustaining the protest for focusing primarily on the findings of one evaluator, rather than the consensus of the technical evaluation results prepared by the technical evaluation panel chairman, the consensus determination was also supported by the same concerns.

As stated in our decision on the protest, the agency's award determination documentation shows that the comparison of the two firms' point scores (which was the final basis of the agency's finding of technical equivalency between the proposals) weighed heavily in the ultimate award determination. By failing to advise Eldyne during discussions of the agency's actual serious concerns about its initial technical and management proposal which resulted in the substantial downgrading of the proposal, and instead limiting its questions regarding the technical proposal to one unrelated question, we believe the agency effectively deprived the firm of the opportunity to meaningfully compete for the contract award since the firm was given no notice of the manner in which it needed to respond to address the agency's actual concerns.

Further, in our view, the agency's limited technical discussions were not justified by concerns as to technical transfusion or technical leveling. The record did not show that technical transfusion, that is, the government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal, was an issue for the agency in the conduct of discussions here. We do not see how discussion questions to elicit more detail and explanation from Eldyne concerning its own technical and management approach involves technical transfusion. Also, technical leveling was not an apparent concern since it only arises as an issue where, as a result of successive rounds of discussions, the agency helped an offeror to bring its proposal up to the level of the other proposals. Successive rounds of discussions were not contemplated nor conducted here. Moreover, the weaknesses in Eldyne's proposal were not inherent in Eldyne's approach nor would they have required extensive revision to resolve. See *Ford Aerospace & Communications Corp*., B-200672, 80-2 CPD ¶439. It is clear that the agency's failure to discuss the weaknesses which represented a significant loss of points unreasonably deprived the firm, which had been placed in the competitive range, of any further opportunity to obtain the contract.

The agency in essence repeats arguments it made previously and expresses disagreement with our decision. Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. §21.12(a) (1993). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. *R.E. Scherrer*, Inc. Recon., B-231101.3, 88-2 CPD ¶274.

The request for reconsideration is denied.

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RAYTHEON COMPANY
B-261959.3, 96-1 CPD ¶37

DECISION

Raytheon Electronic Systems Division, through its parent, Raytheon Company, protests the award of a contract to Hughes Missile Systems Company under request for proposals (RFP) No. N00024-95-R-5400, issued by the Naval Sea Systems Command, Department of the Navy. The RFP was issued to procure engineering and manufacturing development of the Evolved Seasparrow Missile. Raytheon argues that the Navy's selection of Hughes for award of this contract was unreasonable and results from an improper deviation from applicable procurement laws and regulations.

We sustain the protest.

BACKGROUND

This procurement--seeking design, development, fabrication (of test articles) and testing of a modified warhead, new rocket motor, and new tail control section for the existing Seasparrow missile system--was conducted pursuant to a Memorandum of Understanding (MOU) among members of the North Atlantic Treaty Organization (NATO). The MOU, for the Cooperative Support of the Seasparrow Surface Missile System, provides for the establishment of a steering committee comprised of a representative of each of the 13 nations participating in the MOU. An addendum to the MOU assigns the contracting responsibility for the missile upgrade to the Department of the Navy within the U.S. Department of Defense (DOD) (and provides that the procurement be conducted in accordance with U.S. contracting laws, regulations and procedures), but requires unanimous approval by the Steering Committee of any source selection advisory council (SSAC) recommendation for award prior to a final selection decision by the source selection authority (SSA).

Pursuant to the authority in 10 U.S.C. §2304(c)(1) (1994), the Navy limited the competition here to Raytheon and Hughes, the only two qualified Seasparrow missile producers, and issued the RFP on December 16, 1994. As mentioned above, the procurement seeks a modified guidance section and fuze, along with a new rocket motor and new tail control system, resulting in a faster and more maneuverable missile. These increases in speed, maneuverability, and warhead/fuze effectiveness are required to meet both U.S. and international threat scenarios. Despite the international cooperative nature of this endeavor, however, the U.S. threat scenario included in the RFP is more challenging-*i.e.*, more difficult to counter-is classified and is not releasable to the non-U.S. participants in the program. As a result, these requirements were included in a classified attachment to the RFP marked "NOFORN," barring dissemination of the information to foreign nationals. Section L of the RFP advised offerors that any information covered by the NOFORN restriction should be clearly labeled and segregated in a separate proposal annex.

Section M of the RFP advised the two offerors that proposals would be evaluated under each of seven technical/management evaluation factors, listed below in descending order of importance: (1) performance/design; (2) schedule, planning and control; (3) work share; (4) organization/resources; (5) test and evaluation; (6) support engineering; and (7) production readiness. Section M also advised that offers must be

evaluated as technically acceptable under each of the above factors to be eligible for award. In addition, section M explained that the agency was seeking the greatest value for the government and reserved the right to pay a premium of up to 25 percent to obtain the services of an offeror whose proposal received a higher technical score than the lowest cost technically acceptable proposal. The RFP also warned that the agency intended to award a contract without discussions.

After receipt of initial proposals from both Raytheon and Hughes on March 7, 1995, the source selection evaluation board (SSEB) and the cost evaluation panel (CEP) evaluated the proposals and prepared reports to the SSAC.

* * * * *

The SSA for this procurement states that he attended several days of the deliberations of the SSAC and concluded that award should be made to Hughes. The SSA explains that he advised civilian leadership of the Navy of his decision in late May 1995. On a date after June 16 but before June 19, the SSA-who also served as chairman of the Steering Committee formed pursuant to the MOU-received the unanimous vote of the Steering Committee to accept the SSAC recommendation, which included his vote as chairman. The SSA explains that on June 19, he formally determined that award should be made to Hughes, based on the recommendation of the SSAC and the Steering Committee vote. On that date, the contracting officer awarded the contract to Hughes and this protest followed.

PROTESTER'S CONTENTIONS

Raytheon's protest raises two broad challenges to this procurement: (1) that the structure of the source selection process foreclosed any independent selection decision by the SSA; and (2) that the evaluation was unreasonable. In the first broad area, Raytheon contends that by permitting representatives of foreign governments to serve on the SSAC, the Navy improperly relinquished control over the selection decision for reasons discussed more fully below. In the second broad area, Raytheon claims that the Navy improperly held discussions only with Hughes and not with Raytheon; that the technical evaluation of both proposals was unreasonable; that the Navy improperly awarded on the basis of initial proposals when discussions were required; and that the Navy's evaluation of Hughes's proposed costs was unreasonable.

DISCUSSIONS

Raytheon contends that the Navy improperly held discussions only with Hughes, and wrongly permitted Hughes to revise its proposal, while not giving Raytheon a similar opportunity. Raytheon argues that once the Navy held discussions with Hughes, it was required to do so with Raytheon, and it was required to permit both offerors to submit best and final offers (BAFO). The Navy does not deny that if discussions are held, they must be held with all offerors or that upon the conclusion of discussions, all offerors must be permitted to submit BAFOs; rather, the Navy argues that no discussions occurred here, and that what transpired between the Navy and Hughes was merely clarification of Hughes's proposal.

At issue here is Hughes's proposed conveyance of data rights to the government for certain elements of the Seasparrow missile. Specifically, Hughes's proposal [DELETED].

GPLR permit the government to use technical data to conduct follow-on competitive procurements, but limit use of the data for other commercial purposes. Defense Federal Acquisition Regulation Supplement (DFARS) 227.401(14). GPLR may only be claimed by an offeror for a limited time; offerors are required to identify the time period for which they claim GPLR, and after expiration of the claimed time the government is entitled to unlimited rights to the data. DFARS 227.402-72(a)(2); 252.227-7013(b)(2).

In reviewing Hughes's proposal, the Navy explains that its evaluators wanted confirmation that the above-quoted Hughes statement was intended to mean that, [DELETED]. This led to the following written question to Hughes: [DELETED]

Hughes responded: [DELETED]

The Navy concluded that Hughes's response meant that the proposal was offering [DELETED]. In its recommendation to the SSA that award be made to Hughes, the SSAC included Hughes's offer [DELETED] proposal over Raytheon's. According to Raytheon, regardless of whether the Navy intended to seek clarification or to conduct discussions, Hughes took the opportunity to revise its proposal, and this exchange constituted discussions. Thus, Raytheon claims that it, too, should be given an opportunity to revise its proposal.

Federal Acquisition Regulation (FAR) 15.610(a) permits contracting agencies to make award on the basis of initial proposals without discussions, where the solicitation, as here, announces this possibility. Where discussions are held with one offeror, however, the agency is required to conduct discussions with all other offerors whose proposals are in the competitive range, which is composed of those proposals that, as submitted, either are acceptable or are susceptible of being made acceptable through negotiations. FAR 15.610(b); *HFS, Inc*., B-248204.2, 92-2 CPD ¶188; *Microlog Corp*., B-237486, 90-1 CPD ¶227; *Kinetic Concepts, Inc*., B-232118, 88-2 CPD ¶428. Discussions are material communications related to an offeror's proposal and distinguishable from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. *Microlog Corp., supra.*

The difference between clarifications and discussions is described in FAR 15.601: " 'Clarification' ... means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal.... Unlike discussion ..., clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision." " 'Discussion' ... means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification) whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

See also *New Hampshire-Vermont Health Service*, 57 Comptroller General 347 (1978), 78-1 CPD ¶202 (if the communications provide an offeror with an opportunity to make a substantive change in its proposal, the communications are discussions, not clarifications); *The Human Resources Co*., B-187153, 76-2 CPD ¶459 (same). If discussions are conducted, the agency must request BAFOs from those offerors whose proposals are still in the competitive range, even where the discussions do not directly

affect the offerors' relative standing. FAR 15.611(a); *HFS, Inc., supra; Microlog Corp., supra; Kinetic Concepts, Inc., supra.*

It is the actions of the parties that determine whether discussions have been held, and not merely the characterization of the communications by the agency. *ABT Assocs*., B-196365, 80-1 CPD ¶362; *The Human Resources Co., supra*. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. 51 Comptroller General 479 (1972); *New Hampshire-Vermont Health Service, supra*; *The Human Resources Co., supra.*

The key issue here is whether Hughes's response changed its proposal in a meaningful way. We conclude that it did, and thus that the exchange constituted discussions, not clarifications.

The Navy explains that the Seasparrow missile program has existed since 1968, and that during that time improvements to the missile have been modest. With this procurement, the Navy (and NATO) seek engineering and manufacturing design changes to significantly enhance the capabilities of this missile system. After the design changes procured here are incorporated into the Seasparrow missile, the Navy (and NATO) seek to competitively purchase production quantities of these missiles for years to come. In this environment, the willingness of the offerors to provide relatively unfettered access to as much of the technical data as possible will have a significant impact on the government's ability to conduct future competitions for the enhanced missile. [DELETED].

[DELETED]

[DELETED] other conclusion about the meaning of Hughes's response is not supported by the language of the response.

Since Hughes's response to the Navy's question about [DELETED] effect of revising the company's proposal, this exchange met the requirements of the test set forth at FAR 15.601 for determining whether discussions were held. *4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc*., B-251936; B-251936.2, 93-1 CPD ¶420. Accordingly, we sustain the protest.

RECOMMENDATION

We recommend that the Navy conduct discussions with both offerors, request best and final offers, and proceed with the source selection process. In view of our recommendation, we need not consider Raytheon's numerous challenges to the evaluation, since most of these matters can be resolved, if necessary, during discussions.

If, after the selection process has concluded, Raytheon's offer is determined to be more advantageous than the offer submitted by Hughes, the Navy should terminate Hughes's contract and award to Raytheon. We also find that the protester is entitled to recover the reasonable cost of filing and pursuing this protest, including attorney's fees. 4 C.F.R. §21.6(d)(1) (1995). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receipt of this decision. 4 C.F.R. §21.6(f)(1).

The protest is sustained.

APPEAL OF: COYLE'S PEST CONTROL, INC.
HUDBCA No. 96-A-121-C10; 97-1 BCA ¶ 28,717

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Statement of the Case

By letter dated March 19, 1996, Coyle's Pest Control, Inc. ("Appellant") filed a notice of appeal of a contracting officer's final decision, dated March 4, 1996, denying Appellant's certified claim for $1,525,170.74 under Contract No. H06C94050400000 with the Small Business Administration ("SBA") and the U.S. Department of Housing and Urban Development ("HUD," "Government," or "Department"). During a telephonic prehearing conference held on June 5, 1996, the parties and the Board agreed that this case was appropriate for summary judgment on the issue of entitlement. The parties filed their cross motions for summary judgment on or about July 31, 1996, and their reply briefs on or about September 23, 1996.

Summary judgment will be granted only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The parties, and this Board, agree that there are no genuine issues of material fact in dispute. The issue is one of contract interpretation, which is appropriate for summary judgment.

Positions of the Parties

First, Appellant argues that if this Board interprets the contract as an indefinite quantity contract, the Board should deem 240 properties, the maximum amount that the contract permits the Government to assign per month to Appellant, as the minimum quantity also, in the absence of a minimum quantity provision in the contract. Furthermore, since the Government did not assign Appellant 240 properties per month, and the Government did not partially terminate the unordered quantities of the contract for convenience, Appellant contends that it is entitled to breach damages under Maxima Corp. v. United States, 847 F.2d 1549 (Fed.Cir.1988).

In the alternative, Appellant argues in its motion for summary judgment that this contract is a requirements contract, mandating that the Government purchase all of its termite inspection and treatment services from Appellant. Appellant further argues that the Government breached the requirements contract by allowing the buyers of HUD homes to separately contract for termite inspections and treatments which would be reimbursed by HUD at closing. In support of its theory that the contract must be interpreted as a requirements contract, Appellant notes that the contract does not contain the standard indefinite quantity clauses or a minimum quantity provision, essential elements of an indefinite quantity contract. In support of this theory, Appellant relies on a non-binding U.S. Court of Federal Claims case for the proposition that if a contract is subject to interpretation as either an indefinite quantity contract or a requirements contract, it must be interpreted as a requirements contract. Crown Laundry and Dry Cleaners, Inc. v. United States, 29 Fed.Cl. 506 (1993).

The Government argues that the contract is an indefinite quantity contract, and that the Government is not obligated to purchase all of its requirements from Appellant. In support of its position, the Government states that the contract was intended to be an

indefinite quantity contract, and labeled it as such. The Government further argues that although the contract did not contain a minimum quantity term, the contract is still valid because the Government ordered more than a nominal amount of services from Appellant. Ralph Construction, Inc. v. United States, 4 Cl.Ct. 727 (1984).

Undisputed Facts

1. Appellant was awarded Contract No. H06C94050400000 for termite inspection and subterranean treatment of HUD-owned properties in 34 Texas counties. Specifically, clause B.1 of the contract required Appellant:

"[T]o furnish all labor, service, equipment, transportation, materials and supplies to provide subterranean termite control and related services on assigned properties owned by the U.S. Department of Housing and Urban Development (HUD). These services are to be performed in the geographic locations stated in this solicitation, in accordance with all terms, conditions and specifications contained in this solicitation <u>required to meet the needs</u> of the Houston HUD office, Property Disposition Division Branch." [Emphasis supplied]

The effective date of the contract was December 20, 1993. The contract was for a period of one year plus two one-year options to extend performance under the contract. The estimated value of the contract, including the two additional option years, was $1,930,000.

2. Under Section B.2 of the contract, Appellant was to receive a fixed price per assigned property for termite inspection and subterranean treatment. Under the terms of the contract, Appellant would be assigned between zero and 240 properties per month. If the two option years were exercised, Appellant would receive a modest price increase. The Government later exercised its option to extend the contract for one year through December 19, 1995.

3. Section L.14 of the contract stated that the Government intended the contract to be a fixed unit rate-indefinite quantity contract. However, the contract did not contain a minimum number of properties to be assigned to Appellant, and did not incorporate by reference the Indefinite Quantity clause found at Federal Acquisition Regulation ("FAR") 52.216-22, which is required for all indefinite quantity contracts by FAR 16.506(e). Throughout the course of the contract, HUD maintained that the contract was an indefinite quantity contract.

4. The contract did not contain a clause requiring the Government to order all of its subterranean termite inspections and treatments from Appellant, and did not incorporate by reference the Requirements clause found at FAR 52.216-21, which is required for all requirements contracts by FAR 16.506(d). The contract specifically stated that it only applied to services on assigned properties, meaning properties assigned by HUD to Appellant for termite-related services.

5. Beginning in June, 1995, HUD determined that the contract was too expensive and was written to the advantage of Appellant because the contract allowed Appellant, not HUD, to decide when subterranean treatment was necessary. HUD decided that it was in its best interest to only order preventative subterranean termite treatment if an inspection showed active termite infestation. HUD requested that Appellant sign a proposed contract modification to reflect this change. Appellant refused to sign the proposed modification because Appellant believed that the contract, as modified, would no longer be cost effective for Appellant. As a result of Appellant's objection, HUD cancelled the proposed

modification. During this time period, HUD delayed in assigning any properties under the contract.

6. In July 1995, HUD decided to alter its national policy regarding termite inspections and treatment. HUD would no longer contract for termite inspection and treatment services. Buyers of HUD-owned properties would order their own termite inspections from any licensed contractor prior to closing, and the cost of the inspection and any necessary treatment would be reimbursed to the buyer by HUD at closing. HUD placed an advertisement stating its new policy in a local newspaper, the Houston Chronical, on July 14, 1995. The record in this appeal does not indicate how many buyers, if any, responded to the advertisement and were reimbursed by HUD for termite inspections and treatments. By letter dated July 18, 1995, the contracting officer informed the SBA of this change in policy, and that Appellant would be assigned a "substantially lesser amount" of properties under the contract. The contracting officer also suggested a no-cost termination settlement.

7. As of July 12, 1995, HUD temporarily discontinued ordering termite inspection and treatment services while it negotiated a contract modification with Appellant. After negotiations between Appellant, the Small Business Administration, and HUD, the contract was modified, effective September 25, 1995. Section C.2 of the contract was modified to: (1) limit the use of detection methods in performing inspections; (2) provide that subterranean treatment of termites would be ordered in writing by HUD if HUD determined it was needed; and (3) exclude treatment other than subterranean treatment from the contract. Section B.2 of the contract was also modified to reflect an increase in the contract price for both inspections and treatments.

8. By letter dated November 28, 1995, the contracting officer informed Appellant that it would no longer receive assignments as of December 20, 1995, when the option year would end. The term of the contract was later slightly extended through January 19, 1996.

9. On December 7, 1995, Appellant submitted a certified claim to the contracting officer for $1,525,170.74, the difference between the estimated value of the contract ($1,930,000) and the amount paid to Appellant for services performed during the base year of the contract ($404,829.26). Appellant treated the contract value estimate of $1,930,000 as applying only to the base year, but it is clear from the documents in the Appeal File that this estimate included the base year and the two additional option years. Appellant claimed that the contract was a firm fixed price contract, and therefore, it was entitled to the full estimated value of the contract. Appellant also stated that if HUD chose to characterize the contract as a requirements contract, HUD improperly diverted performance from Appellant, constituting a breach of contract.

10. On March 4, 1996, the contracting officer issued a final decision denying Appellant's December 7, 1995 certified claim as a request for unallowable anticipatory profits on an indefinite quantity contract.

11. As of March 6, 1996, Appellant was paid a total of $694,228.04, which covered all work actually performed under the contract.

Discussion

There are generally three types of procurement contracts: definite quantity contracts, indefinite quantity contracts, and requirements contracts. Mason v. United

States, 615 F.2d 1343 (Ct.Cl.1980). Neither party now suggests that this is a definite quantity contract, although Appellant had originally made that claim to the contracting officer.

This contract also cannot be construed as an indefinite quantity contract. Although the contract states that it is an indefinite quantity contract, this Board is not bound by that label. Torncello v. United States, 681 F.2d 756 (Ct.Cl.1982). An indefinite quantity contract is defined as a contract which:

[P]rovides for an indefinite quantity, within stated limits, of supplies and services to be furnished during a fixed period, with deliveries or performance to be scheduled by placing orders with the contractor.

(1) The contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities not to exceed a stated maximum....

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.... FAR 16.504(a).

The contract at issue did not contain a stated minimum quantity other than zero. A guaranteed minimum quantity term is essential to the enforceability of the contract. Without such a term, the contract lacks mutuality of obligation, and contains an unenforceable illusory promise on the part of the Government. Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923); Mason v. United States, 615 F.2d 1343 (Ct.Cl.1980). A minimum quantity term assures prospective bidders on a contract that the Government will purchase some supplies and services, allowing the bidders to recover bid expenses as well as making a profit. Mason, supra. By stating a "minimum quantity" of zero, the contract lacks consideration because the Government does not promise to buy even a small amount of services. Ralph Construction, supra. The contract at issue does not meet the criteria required of an indefinite quantity contract.

This contract also fails to meet the elements of a requirements contract. A requirements contract "requires that the contractor have the exclusive right and legal obligation to fill all of the government's needs for work of the kind described in the contract and that the government will purchase those needs from no one other than the contractor." Ralph Construction, supra; Modern Systems Technology Corp. v. United States, 979 F.2d 200 (Fed.Cir.1992); FAR 16.503. An essential element of a requirements contract is a promise by the Government to purchase its required services or supplies exclusively from the contractor. Modern Systems, supra. In the present case, the contract does not contain a provision requiring the Government to purchase all of its termite inspection and treatment needs exclusively from Appellant.

Appellant argues that if the contract is susceptible to interpretation as either a requirements contract or an indefinite quantity contract, it must be interpreted as a requirements contract, citing only Crown Laundry, supra, and that the Government breached the contract by allowing home buyers to separately contract for reimbursable termite inspection and treatment services.

The U.S. Court of Federal Claims held in Crown Laundry that a contract for laundry and dry cleaning services could not be an indefinite quantity contract because it did not contain a minimum quantity provision. We fully agree with that conclusion. However, the court also determined that the contract in Crown Laundry was a requirements contract,

even though the contract failed to incorporate required clauses for requirements contracts or state that the Government was required to purchase all of its laundry services from the Appellant, because the intent of the parties was to form a requirements contract. We are unaware of any decision of a federal agency board of contract appeals, which has adopted the Crown Laundry approach, nor has the U.S. Court of Federal Claims applied it in subsequent cases. Crown Laundry appears limited to its peculiar facts of mutual mistake and common intent. In the present case, we cannot find that the parties intended to form a requirements contract. The documents in the appeal file indicate that the Government clearly intended to form an indefinite quantity contract, and believed that it had done so. We find the application of the holding in Crown Laundry under the circumstances presented in this case to be inappropriate.

We believe that the interpretation of an analogous contract by the United States Claims Court in Ralph Construction, supra, offers more appropriate guidance. In Ralph Construction, a contract, denominated a requirements contract, did not contain a minimum quantity term necessary for an enforceable indefinite quantity contract, and also did not contain a provision requiring the Government to purchase all of its needs from the contractor, a necessary term for an enforceable requirements contract. The Claims Court held that the contract was unenforceable for lack of consideration. It further held that the contractor could recover the contract price for work performed, but was not entitled to any other costs.

The contract at issue in this appeal also does not contain the necessary elements of an enforceable indefinite quantity contract, nor an enforceable requirements contract. The enforcement of such a contract would fail for lack of consideration in the absence of a clause stating a minimum quantity or a clause requiring the Government to purchase all of its requirements from Appellant. Because the contract is not enforceable for lack of consideration, Appellant is entitled to payment only for the services ordered by the Government and performed by Appellant. It is undisputed that Appellant has been paid for all services performed. Consequently, we must conclude that Appellant's claim for an additional payment of $1,525,170.74 fails as a matter of law.

Conclusion

For the foregoing reasons, Appellant's Motion for Summary Judgment is denied, and the Government's Motion for Summary Judgment is granted, but for reasons other than those cited in support of the Government's motion. The appeal of Coyle's Pest Control, Inc. for an additional payment of $1,525,170.74 is DENIED.

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MATTER OF: SATELLITE SERVICES, INC.
B-280945.2; B-280945.3, 98-2 CPD ¶ 125

DECISION

Satellite Services, Inc. (SSI) protests the terms of request for proposals (RFP) No. DAHA23-98-R-0002, for construction work at various National Guard installations. Satellite asserts that the RFP is flawed because the agency is commiting itself neither to order a stated minimum quantity of services nor to order all of its requirements from a successful offeror, rendering illusory the consideration necessary for an enforceable contract.

We sustain the protest.

On August 5, 1998, the United States Property and Fiscal Officer for Missouri issued the RFP for a "multiple-award, multiple-year task order contract" for maintenance, repair, and construction work at Rosecrans Memorial Airport in St. Joseph, Missouri, Jefferson Barracks and Lambert Field in St. Louis, and Canon Range at Fort Leonard Wood for 1 year, with four 1-year options. The solicitation allows potential offerors to specify at which of the four locations, and in which dollar ranges, [FN1] they would like to compete for task orders if they are selected for award of a task order contract. The RFP provides for no guaranteed minimum per contractor; a contractor can receive a maximum of $20 million over the 5-year term of the contract. A contractor may request release from the contract at any time after the base year.

Section C of the RFP contains a statement of work and an explanation of how the contract would be administered. Each contractor promises to maintain an office within 100 miles of the project locations and to attend, within 24 hours of notice, preproposal site visits. The agency will issue an oral or electronic (facsimile or e-mail) "Notice of Proposed Task Order Project Request for Proposal," with a brief synopsis of the project including required performance period, details of the preproposal conference, and "best value requirements"--that is, whether award will be based on price or a price/technical tradeoff. RFP § C.5.a. Based on competitive proposals received "exclusively" from task order contractors, the agency will select one of those contractors, to which it will issue the task order. RFP § C.1.c. Pursuant to RFP § C.7.a the contractors will be given "a fair opportunity to compete for each . . . proposed project" at the locations and in the price ranges included in their contracts.

While the RFP states that the agency will offer all construction acquisition projects from $2,000 to $3 million in value at the installations covered, for competition among the contractors, the RFP also allows the government to exclude projects "unique" in nature. The RFP also provides that the contracting officer will not have to provide the contractors with the opportunity to compete where there is an urgent need; where he determines that only one contractor can provide the services because of their unique or highly specialized nature; where a project is a "logical follow-on to an order already issued under the contract"; or "when otherwise determined to be in the best interest of the Government." Further, the government reserves the right to contract for work outside the task order contract if the contracting officer determines that the price obtained through competition among the contractors is not fair and reasonable. SSI essentially contends that the RFP is ambiguous and raises a number of questions relating to interpretation both of the RFP and

any resultant contract. The protester argues that, although it is unclear what kind of contractual vehicle the agency intends, that contract will lack the consideration required by the Federal Acquisition Regulation (FAR) and applicable legal principles to result in an enforceable contract.

In response to the protest, the agency contends that an award under the solicitation will give rise to a valid requirements contract based on the agency's promise, under section C.1.b of the RFP, to allow all task order contractors to participate in a limited competition for all of its future requirements for construction services, between $2,000 and $3 million at the four installations covered. We disagree.

A requirements contract provides for filling all actual purchase requirements of designated government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. FAR § 16.503(a). The promise by the buyer to purchase the subject matter of the contract exclusively from the seller is an essential element of a requirements contract. Modern Sys. Tech. Corp. v. United States, 979 F.2d 200, 205 (Fed. Cir. 1992). A solicitation will not result in the award of an enforceable requirements contract where a solicitation provision disclaims the government's obligation to order its requirements from the contractor and therefore renders illusory the consideration necessary to enforce the contract. See Sea-Land Service, Inc., B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49 at 5.

As pointed out by the protester, the agency's position essentially relies upon the concept that the individual contracts with the task order contractors, as a group constitutes the "contract" under which the agency agrees to satisfy its requirements. With regard to any individual contractor, however, there is no obligation to procure all of the agency's needs from that contractor, or to procure all of its needs within a designated price range or at a designated location from that contractor, or even to order any work at all from the contractor. Further, the agency's obligations to the contractors as a whole are limited by the RFP provisions allowing the contracting officer to exclude "unique" projects--and, more important, allowing the contracting officer to deny the task order contractors the right to compete--the very right that the agency argues they have bargained for--"when otherwise determined to be in the best interest of the Government." A party may not by such means reserve to itself a method of unlimited exculpation without rendering the promises illusory and the contract void. Torncello v. United States, 681 F.2d 756, 760 (Ct. Cl. 1982). As the court stated in Torncello, it is specious to argue that the agency's power to avoid its obligations is limited by requiring that it can only do so in the best interest of the government or in the exercise of its discretion. Id. at 770 ("it seems hardly sufficient for the government to promise not to do anything that would be against its own interest. This merely is promising only to do whatever suits it.").

In other words, an obligation that is avoidable in the government's discretion, or whenever it is in the government's interest, is no limit on the agency's actions. Where the agency has such discretion, it is impossible to ascertain any definite amount of work to which a contractor is entitled, no guidance for a court or board to determine if and when a breach has occurred, and no means of enforcing the contract against the government. See Modern Sys. Tech. Corp. v. United States, supra, at 206.

Further, the essence of a requirements contract is not only that the government agrees to satisfy all its requirements from one contractor, but that the contractor agrees to fill all those requirements. Media Press, Inc., 215 Ct. Cl. 985, 986 (1977); Sea-Land

Service, Inc., supra. The contract contemplated here lacks this element as well. As originally issued, the RFP § B.1.c required the contractors to submit proposals for task orders on all the locations and in all the dollar ranges specified in their offers. By amendment No. 0003, however, the agency deleted that requirement. [FN2] In sum, both parties to the contract here would retain the right to avoid performing; neither will have agreed to be bound in any meaningful way. The absence of valid mutual promises renders the contract unenforceable. Sea-Land Service, Inc., supra.

In responding to other issues raised by the protester, the agency suggests that the contract may be regarded not as a requirements contract, but as an indefinite-quantity contract. [FN3] Assuming this is an alternative argument by the agency, the contract nevertheless does not qualify as an indefinite- quantity contract. Specifically, FAR § 16.504 expressly states that an indefinite-quantity contract shall require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. FAR § 16.504(a)(1). To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity. FAR § 16.504(a)(2). The FAR reflects the rule that, without an obligatory minimum quantity, the government-buyer under an indefinite-quantity contract would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Rice Lake Contracting, Inc. v. United States, 33 Fed.Cl. 144, 153 (1995); Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6. Since the RFP here contains no stated minimum, it does not meet the test for formation of a valid indefinite-quantity contract.

Given our finding that, however interpreted, award under the solicitation would not give rise to an enforceable contract, we sustain the protest. We recommend that the agency cancel the RFP and reissue it in a legally sufficient form. We also recommend that SSI recover its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R.s 21.8(d)(1) (1998). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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THE HONORABLE DAVID PRYOR, CHMN, FEDERAL SERVICES. POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE
Comp. Gen. Dec. B-237356, December 29, 1989

Dear Mr. Chairman:

This responds to your letter dated September 29, 1989, requesting our opinion on whether the Department of Energy (DOE) and the Environmental Protection Agency (EPA) are using contractors to perform inherently governmental functions. You have provided our Office with three instances of work performed by contractors for these two federal agencies: a DOE contract for hearing examiners to review the granting or denial of security clearances, a DOE contract for the preparation of testimony and other materials for congressional hearings, and an EPA contract run a "Superfund Hotline" to respond to telephone inquiries. In connection with our review, we requested and received comments from DOE, EPA, and the Office of Management and Budget (OMB) on these contracts.

For the reasons set forth below, we conclude that the contracts by DOE for hearing examiners and for the preparation of testimony involve inherently governmental function, which should be performed by federal employees. We recommend that the agencies modify or terminate these contracts to ensure that these inherently governmental functions are not performed by contractors. In addition, we conclude that, to the extent the EPA contractor interprets agency regulations in responding to Superfund Hotline inquiries, such actions are also inherently governmental functions. We recommend that EPA review this contract and its performance, and if necessary modify the contract, to assure that the contractor does not interpret agency regulations.

BACKGROUND

The federal policy for the contracting out of commercial activities by federal agencies and for the use of advisory and assistance (consultant) services by federal agencies is set forth in Office of Management and Budget Circulars No. A-76, August 4, 1983, and No. A-120, Jan. 4, 1988. Circular A-76 provides that certain functions are governmental in nature and, therefore, shall be performed by federal employees. Such a governmental function is defined in Circular A-76 as: "... a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government..."

Circular No. A-120 provides guidelines for the use of "advisory and assistance" (consulting) services. This Circular identifies functions for which advisory and assistance services may not be utilized, including "work of a policy, decision-making or managerial nature which is the direct responsibility of agency officials."

In several decisions, our Office has expressed the view that, in the context of OMB Circulars No. A-76 and A-120, certain functions are so related to the agency's mission that it would be inappropriate to contract out such functions. For example, we held in B-198137, June 3, 1982, that certain legally required auditing tasks could not be contracted out because they involved making discretionary decisions regarding the disposition of disputed monetary claims against the government. However, we identified certain auditing activities, which were proper for contracting since they were restricted to

examining vouchers, verifying invoice amounts and identifying billing errors. B-198137, *supra*. Similarly, we held in B-192518, Aug. 9, 1979, that the decision to accept or reject a particular candidate for a Young Adult Conservation Corps (YACC) program, and thus confer or deny a valuable federal benefit, should not be contracted out. We had no objection, however, to contracting for all other aspects of administering the YACC program which did not involve the exercise of discretion or making judgments for the government.

DISCUSSION

In the context of OMB policy and our decisions concerning inherently governmental functions, as summarized above, we will now analyze the three contracts presented in this case.

DOE Hearing Officer

The DOE contracted with the Maxima Corporation to provide Hearing Officers who conduct administrative hearings and Personnel Security Review Examiners who review findings concerning the eligibility of individuals for DOE security clearances.

Under 10 C.F.R. §710.20-710.39, procedures are established for administrative review of questions concerning eligibility for a DOE security clearance. The manager of a DOE operations office appoints a Hearing Officer who considers evidence at a hearing, makes specific findings of fact concerning an individual, and recommends to the DOE manager the granting, denial, or revocation of the individual's security clearance. Among other responsibilities, the Hearing Officer (1) determines whether evidence, oral or written, is material and admissible at the hearing, (2) considers the credibility of witnesses, and (3) rules on the admissibility of documentary evidence. 10 C.F.R. §§710.26-710.30. The determination of the Hearing Officer may be reviewed by three DOE Personnel Security Review Examiners as provided in 10 C.F.R. §§710.30 and 710.31. As noted above, these Examiners are also contract personnel.

The question presented is whether these functions of the Hearing Officer and the Personnel Security Review Examiner are inherently governmental functions that should only be performed by federal employees. The report to us from DOE, which focuses on the Hearing Officer position, states that the functions of the Hearing Officer are not inherently governmental since that individual provides only an advisory recommendation to the Assistant Secretary for Defense Programs, who makes the final determination whether to grant or deny the security clearance. The DOE contends that the contractor is providing a "support service" in the form of advisory recommendations, and that the use of independent parties as Hearing Officers "enhances the integrity of the administrative review process and fosters greater due process for the individuals concerned."

The report to us from OMB states that the Hearing Officer functions should be performed by government personnel. The OMB points out that the Hearing Officer "considers and rules on evidence in a disputed matter, makes specific findings as to the truth of the information provided, and determines whether the access should be granted, denied, or revoked." OMB concludes that the contractor is exercising discretion in applying government authority, which is contrary to OMB Circular No. A-76.

We agree with OMB's analysis of the contract. In our opinion, the Hearing Officer and the Personnel Security Review Examiner provide quasi-judicial services which are

inherently governmental functions that should not be procured by contract. Circular No. A-76 specifically includes "judicial functions" as an example of an act of governing that should not be contracted out. Furthermore, the Hearing Officer exercises broad discretionary authority and makes individual value judgments for the government in virtually every aspect of the hearing process. Clearly, the Hearing Officer's exercise of discretion is an integral part of the hearing process.

DOE argues that this work is not inherently governmental since it is advisory in nature and the ultimate decision-maker is a government official. However, the policies established by the OMB Circulars and decisions of this Office do not focus solely on the outcome of a decision-making process or on the ultimate decision-maker. Rather, our decisions and the policy established by OMB Circulars are based on the degree of discretion and value judgment exercised in the process of making a decision for the government.

That the final determination whether to grant or deny an individual's security clearance is made by the Assistant Secretary for Defense Programs does not obviate the need for personal deliberation, individual decision and considered value judgment on the part of the Hearing Officer in arriving at a recommendation. It is precisely that process which is the focus of any analysis of whether a function is an inherently governmental one that should not be contracted out.

DOE Preparation of Testimony

The DOE contracted with Systematic Management Services for support services for the Office of the Assistant Secretary for Defense Programs. Based on statements of prior work, it appears that the contractor provided briefing materials to DOE officials testifying before Congress; prepared answers to congressional inquiries resulting from confirmation hearings for the Secretary of Energy; prepared testimony, talking points, briefing books, materials and viewgraphs for the Secretary for congressional hearings; and prepared a draft statement for the Secretary's use in appearances before congressional committees.

Under DOE regulations, a contractor may not initiate or originate draft testimony or present, as a representative of the government, testimony before a congressional committee or regulatory body. [DOE indicates that a contractor employee has provided comments on proposed draft testimony and on at least one occasion has written a full draft of testimony. The agency admits that there has been a failure to comply with the DOE order in this case.

Apart from the violation of the DOE order, we believe that these contractor activities represent inherent governmental functions. In our opinion, a contractor who drafts testimony exercises discretion, makes value judgments for the government, and is in a position to establish policy for the agency. Therefore, we believe these services are inappropriately procured by contract. The OMB comments agree that the functions of testimony writer, as summarized in the task descriptions, are inherently governmental functions that should only be performed by government employees.

The DOE comments state that agency personnel review all drafts of proposed testimony before adopting and presenting them as the official statement of the agency before Congress. However, we cannot agree with DOE that editing and reviewing contractor-generated materials effectively removes the inherently governmental aspects

of the position of testimony writer. On the other hand, we would not object to a contract, which provides for writer-editor services in the preparation of statements or congressional testimony where the government's policy or position on a particular topic has been established and the contractor is responsible only for preparing a draft to reflect that agency policy or position.

EPA Superfund Hotline

Since 1980, EPA has contracted with GEO/Resource Consultants, Inc. (GRC) to operate a "Superfund Hotline" to answer telephone questions from government agencies, industry, and the public related to certain environmental laws. According to the EPA, GRC provides and maintains its own facility in Washington, DC, including its own research library. The Hotline staff consists of Information Specialists and Team Leaders trained to answer the telephones and to respond to inquiries concerning the agency's regulatory programs.

The EPA states that the Hotline staff answers approximately 80 percent of questions received while the caller remains on the telephone line and that generally these are routine questions involving a recitation of the regulations and policies previously developed and furnished by EPA. Questions that cannot be answered immediately are researched by GRC staff who then contacts the caller with the response.

In the event the GRC staff cannot confidently answer the initial question or cannot find a clear answer in the regulations or other research materials, the GRC staff will contact EPA. Approximately 60 calls per month are referred to EPA staff. The determination of whether to refer a question to EPA for resolution is made by the GRC staff.

The EPA contends that the Superfund Hotline contract does not fall within any of the examples of inherently governmental functions enumerated in OMB Circular No. A-76. According to EPA, contractor employees do not exercise discretion in applying government authority or use value judgments in making decisions for the government. The agency argues that the contractor is merely a conduit for information.

OMB comments that the operation of a hotline would normally be considered a commercial activity but that if the contractor is interpreting agency regulations, as opposed to providing responses based on prior government interpretations, that function should be performed by government employees.

We believe that aspects of the EPA contract raise questions concerning the amount of discretion and value judgment exercised by the contractor. For example, while 80 percent of the questions received by the contractor are routine in nature, requiring mere recitation of the "plain meaning of regulations" and policies or interpretations developed by EPA, 20 percent require additional research and some of these questions are referred to EPA personnel for resolution. The agency states that in determining whether to refer an issue to EPA, the contractor applies a "reasonable doubt" standard.

It is conceivable that a "plain meaning" may be derived from the highly technical and complex regulations controlling hazardous waste, but it is also possible that there is substantial room for the exercise of discretion and value judgment in researching and responding to these questions. Additionally, it is contractor staff who using their value judgment, ultimately determine whether to refer questions to agency personnel. Finally, it

appears that callers to the Hotline are not informed that a contractor employee is responding to the question.

We agree with OMB that the interpretation of agency regulations should be performed by federal employees. Accordingly, we recommend that EPA review the contract and, if necessary, modify it to assure that the contractor does not provide original interpretations of EPA's regulations. We further recommend that the contractor be required to identify to all callers that the Hotline is staffed by contractor personnel and that interpretations of EPA regulations must be handled by EPA personnel.

Sincerely yours,

Milton J. Socolar

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PROBLEM #1

The Navy sought a firm-fixed-price contract for copier services, specifying that the copiers provided under the contract had to use a dry toner, as opposed to a liquid toner. The reason for the toner requirement was that the unit that would use these copiers deployed frequently and had to ship its office equipment with it. In the past the unit had experienced spillage in shipment from copiers using a liquid toner. Datacorp, Inc., would like to bid, but only has available copiers which use a liquid toner. Identify those arguments Datacorp may use in an effort to compete.

PROBLEM #2

The Air Force is seeking radar detection devices for its security police vehicles. It learns that Detecto Corp, which appears to be the only supplier of devices of a type necessary to meet the Air Force requirement, has been supplying radar detection devices to the police in several states for a number of years. Can the Air Force use the procedures in FAR Part 12 to procure these devices?

PROBLEM #3

An agency announced in the Commerce Business Daily that the IFB would be posted on its Internet site, but that offerors who lacked Internet capabilities could request a hard (paper) copy of the IFB. When its bid was unsuccessful, AA&T discovered that the hard copy it had received was materially different from the IFB posted on the Internet; actually, it was an earlier draft, which the agency sent by accident. AA&T has protested to the GAO. Was the protest successful? Why, or why not? *American Analytical & Technical Services, Inc.*, B-282277.3 (1999).

PROBLEM #4

About 30 minutes prior to bid opening the bid opening officer (BOO) synchronized her watch with Naval Observatory time. The clock on the wall of the bid opening room, which other persons in the contracting office had synchronized with a local radio station, was four minutes slower. When her wristwatch registered 2:00 PM, the advertised bid opening time, the BOO announced that the bid opening time had arrived, and she began to open and read the bids. Two minutes later, representatives of Unicorn, Inc, entered the room and attempted to give the BOO Unicorn's bid. The BOO refused to accept the bid since it was late. The Unicorn representatives, noting the time on the wall clock, objected, claiming their bid was timely. What should the BOO do with the bid? Discuss whether or not the bid is timely.

PROBLEM #5

The Forestry Service's Request for Sealed Bids advised bidders their hand carried bids could be dropped off at a particular street address in Seattle. However, bids submitted by mail were to be sent to the same street address, but in Renton, a city adjacent to Seattle. Bid opening was announced as being conducted at the Renton address. Tek gave its bid to a United Parcel Service representative the day prior to bid opening. The courier arrived at the Seattle address prior to the bid opening time, only to discover that the Forestry Service had erred in including the Seattle address that hand-carried bids were supposed to be taken to the Renton address. Several hours later the courier arrived at the Renton address and delivered Tek's sealed bid. The Tek bid is low. Can it be considered for award?

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Problems *(continued)*

PROBLEM #6

The Army's Request for Sealed Bids permitted bidders to revise their bids by FAX prior to bid opening. Five minutes prior to bid opening, Wunderbar, Inc, submitted a FAX transmission that stated, "We wish to change our bid in the following particulars:" The rest of the message was not transmitted. The contracting office called Wunderbar immediately and advised that the balance of the transmission had not arrived. A half an hour later the balance of the FAX arrived. Wunderbar's bid as opened is low. The changes it made lowered the bid. What should the contracting office do in this situation?

PROBLEM #7

The Air Force estimates the cost of constructing a minimum-security correctional facility will be $5 million. It receives three bids in the following amounts: $5,327,000; $4,950,000; and $3,990,000. The Air Force awards to the low bidder. Two months after receiving the notice to proceed, the contractor claims it erred in preparing its bid, that it really intended to bid $4,990,000, and that it refuses to continue performance under the contract. What options are available to the contracting officer?

PROBLEM #8

The Environmental Protection Agency issued an IFB for laboratory services. It contemplated the award of 19 one-year contracts, each with 2 one-year options, and with no more than 3 contracts to be awarded to any one bidder. After bid opening, each bidder had to qualify by analyzing a sample provided by EPA. The bidders who scored 75% on that test were invited to submit a related data package, and contracts were awarded on the basis of price to offerors who scored above average on this second test. Was this an allowable application of the two-step process? Why or why not? *American Analytical & Technical Services, Inc.*, B-282277.3 (1999).

PROBLEM #9

Prospective offerors were advised by the RFP that past performance would be assessed by reviewing information in proposals, information available from past and current customers, and from other agencies, and that "offerors would be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response, or lack thereof, would be taken into consideration." R-D Corp was rated acceptable in all categories and received the contract award. WG Co. submitted a lower cost proposal but was only rated marginally acceptable on past performance. WG Co. protested. Pending resolution of the protest, the contracting agency discovered that R-D should have been downgraded on past performance because, in the agency's view, it was delinquent in making deliveries under seven of nine prior contracts, and these delays were inexcusable. It therefore decided that award to R-D resulted in greater risk to the Government, terminated R-D's contract, and awarded it to WG Co. Discuss R-D's recourse.

continued on next page

Problems *(continued)*

PROBLEM #10

The Defense Commissary Agency requests proposals for a contract for commissary services contract on the basis of "best value" to the Government. Five technical evaluation factors are equally important: (1) past performance, (2) staffing - shelf stocking, (3) staffing – custodial function, (4) staffing – receiving and storage function, and (5) project manager/supervisory man-hours. The RFP said that price would not be scored, but would be evaluated for realism, to assess the offeror's understanding of the work, and to determine an offer's acceptability and establish the competitive range. The RFP specifically reserved the right to "accept other than the lowest offer." The contract was awarded to Ace Services, and TSSI protested award was made on the basis of the "lowest-priced, technically acceptable offer." DCA concedes that "the solicitation inadvertently omitted the language that award would be made to the lowest technically acceptable offeror," but says it used a legitimate form of best value determination and there is no problem. Is DCA correct? If there is a problem, what is it? See *Matter of: Technical Support Services, Inc.*, B-279665.2 (July 8, 1998).

PROBLEM #11

An RFP for management, administrative and technical assistance listed qualifications as an evaluation factor. It further required offerors to submit resumes of proposed key personnel, and, if not currently employed by the offeror, a signed letter of intent to accept employment if the offeror was awarded the contract. The RFP further required the contractor to have a conference room able to seat 50 people and be a minimum of 400 square feet. Although rated fully qualified on qualifications, MRI's proposal failed to show employment status of two proposed key personnel and failed to show the size of the conference room. The contracting agency requested and received clarification on these matters from MRI and then awarded to MRI based upon initial proposals. SAI, whose technical proposal was rated superior to that of MRI, protested, claiming it had not been permitted to engage in meaningful discussions. Decide.

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CHAPTER FIVE CASES

Matter of: Vantex Service Corporation
August 8, 2002

Protest against agency's bundling of portable latrine rental services with waste removal services, each of which is classified under a different North American Industrial Classification System code and is generally performed by a different set of contractors, is sustained, where the agency has not shown that bundling the services is necessary to meet its needs.

DECISION

Vantex Service Corporation protests the terms of invitation for bids (IFB) No. DAKF40-02-B-0001, issued by the Department of the Army, Fort Bragg, North Carolina, for rental and servicing portable latrines at Fort Bragg, Fort Drum (New York), and Fort Campbell (Kentucky), and certain waste removal services at Fort Campbell. Vantex contends that the bundling of portable latrine rental and servicing with the other waste removal services at Fort Campbell unduly restricts competition.

We sustain the protest.

The IFB, issued as a total small business set-aside on March 29, 2002, contemplated the award of one or more fixed-price contracts for a base period with four 1-year options. The bidding schedule segregated the work for each facility under three separate schedules (I, II, III), and a fourth schedule (IV) that combined the work for all three facilities. The IFB permitted bidders to bid on a single schedule, a combination of schedules, or schedule IV (that is, all three locations), and provided for "most advantageous to the government" award(s), based on either the lowest bids from each schedule or the aggregate total of all schedules under schedule IV. Schedule III (for Fort Campbell) included waste removal services in addition to portable latrine rental services; schedules I and II included only portable latrine rental services. The additional services under schedule III included pumping and cleaning grease traps; pumping and cleaning permanent concrete pit latrines; removing, cleaning and reinstalling sewer sump pumps; pumping and cleaning septic tanks; and pumping and cleaning sewer lift stations. It is the inclusion of these other services under schedule III that is the issue in this protest.

Vantex, which provides portable latrine services, filed a timely agency-level protest alleging that combining the portable latrine services with the waste removal services at Fort Campbell improperly bundled requirements in violation of the Competition in Contracting Act of 1984 (CICA). The Army denied Vantex's agency-level protest, and this protest on the same grounds was filed shortly before bid opening.

In response to the IFB, the Army received seven bids. Two bids were received in response to schedule III: one from the incumbent, Kennedy Septic Tank Service, Inc. at $2,244,888 and the other from Tarheel Specialties at $1,623,000. Only Kennedy submitted a bid for the Army's total requirements for all three facilities under schedule IV.

CICA generally requires that solicitations include specifications, which permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. See 10 U.S.C. § 2305(a)(1)(B) (2000). Because procurements conducted on a bundled or total package basis can restrict competition, we will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's needs. Better Serv., B- 265751.2, Jan. 18, 1996, 96-1 CPD ¶ 90 at 2.

Vantex argues that there is no valid reason to bundle the waste removal services and portable latrine rental services under schedule III. In this regard, Vantex notes that the two types of services combined at Fort Campbell fall under separate North American Industrial Classification System (NAICS) codes, and alleges that generally the bidders on solicitations covered by the NAICS code covering portable latrine services would not compete for the waste disposal services covered by the other NAICS code, and vice versa. Vantex states that it is aware of no other military installation that bundles these services. Vantex further asserts that there has been very little competition (no more than two bids for the last several procurements) for these services since they have been combined. For example, in the prior solicitation for these services, there were only two bidders, itself and the incumbent, and Vantex found that it could not effectively compete because its expertise and equipment were only suited for the portable latrine requirement. Vantex asserts that bundling the requirements put Vantex and other potential bidders (both portable latrine service providers and waste removal service providers), who could not provide all of the services, at such a competitive disadvantage that only the incumbent (which provides both types of services) would be competitive.

The Army's stated reason for combining portable latrine services with waste removal services at Fort Campbell is as follows:

In the early 1980's, Fort Campbell obtained grease trap cleaning services via purchase orders. Cleaning services for Government owned portable latrines was also contracted out. This method of acquiring services was costly, inefficient, and an administrative burden. In the mid-1980's, Fort Campbell, therefore, sought to have one contractor perform all the liquid waste removal services, as it was natural to combine like type contracts. This method of acquiring services was cost efficient and reduced our administrative burden. We were able to avoid multiple solicitations and multiple contracts with multiple contractors. As a result Fort Campbell could obtain needed similar services utilizing one contracting officer, one contract specialist, and one contracting officer's representative.

In addition, the agency states that the types of equipment and employees that would be used for the two types of services are very similar and that no particular expertise or certification is required for the waste removal services.

On the record before us, we find that the Army has not adequately demonstrated that combining its requirements for portable latrine and waste removal services was necessary to satisfy the agency's needs. The agency has not adequately explained why it chose to bundle the two kinds of work at Fort Campbell, yet did not bundle two kinds of work at either of the other two locations, and in fact structured the solicitation so that services for the three locations can be obtained by separate or combined awards, thus facilitating competition while not excluding the possibility of a combined contract.

The agency's justification, quoted above, essentially amounts to reliance on administrative convenience as the basis for the bundling. However, the fact that the agency may find that combining the requirements is more convenient administratively, in that it has found dealing with one contract and contractor less burdensome, is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition. CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition, whenever concerns of economy or efficiency are being weighed against ensuring full and open competition. See Better Service, supra; National Customer Eng'g, B- 251135, March 11, 93-1 CPD ¶ 225 at 6. Although the Army also claims that combining the services was more cost efficient, other than its own statement, it has not produced any evidence showing that these cost savings were significant, nor has it explained why these savings went beyond no longer having to administer more than one contract. Restricting competition is presumed to raise, not lower, the cost that the government will pay, and the desire to reduce administrative costs is generally neither a permissible nor a logical basis to restrict competition. See National Customer Eng'g, supra, at 6-7 (where an agency concludes that having separate contractors may lead to additional costs, the proper course is not to restrict competition, but rather to structure the procurement to take all costs into account).

Here, the record does not evidence that the agency has received the benefit of competition or a lower price by combining the services. The Army's reported receipt of at least two bids under each procurement since the services have been combined, and the recent experience in the last two procurements reveal that the Army has only received minimal competition. The Army mistakenly argues that receipt of at least two bids constitutes adequate competition citing FAR § 19.502-2. That section, however, establishes only the criteria upon which the agency may base a decision to set aside a procurement exclusively for small businesses. On the other hand, FAR § 14.408-1(b) states:

[I]f less than three bids have been received, the contracting officer shall examine the situation to ascertain the reasons for the small number of responses. Award shall be made notwithstanding the limited number of bids. However, the contracting officer shall initiate, if appropriate, corrective action to increase competition in future solicitations for the same or similar items, and include a notation of such action in the records of the invitation for bids.

Even though no more than two bids were apparently received on prior procurements for the combined services, there is no evidence that the contracting officer undertook any investigation to determine whether combining the requirements was inhibiting competition.

Moreover, the Army's own market survey confirmed that there were "numerous" businesses capable of competing (and apparently willing to compete) for the waste removal services, but chose not to compete primarily because of the way in which the agency combined portable latrine services with these other services that represented only approximately 25 percent of the contract. As pointed out by the protester, this survey did not include portable latrine companies in the area; Vantex's own survey revealed at least 31 companies in the area who provide portable latrine services, at least one of which had previously expressed interest in bidding but did or could not

because the services were combined with waste disposal services at Fort Campbell. That is, the record before us indicates that different sets of contractors perform the two types of work and that bundling the two types of work appears to discourage competition. Given the lack of competition, and evidence that other companies likely would have bid had the agency not bundled the services, we believe that there is a reasonable basis for concern that the bundling of services here may be causing the agency to pay unnecessarily high prices.

The protest is sustained.

We recommend that the Army resolicit its requirements for Fort Campbell without bundling portable latrine services with the other waste removal services. The agency could accomplish this by amending the solicitation to provide for the possibility of separate awards for the two types of services at Fort Campbell, as it did with regard to the possibility of separate awards for the work at the three installations. We also recommend that the protester be reimbursed the cost of filing and pursuing its protests, including attorney's fees. The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel

Matter of: J. L. Malone & Associates

B-290282, July 2, 2002

Protest against agency's acceptance of late hand-carried bid is denied where the bid was received at the government installation and was effectively under the government's control prior to the scheduled bid opening, notwithstanding the role played by a contractor in receiving and controlling the bid.

DECISION

J. L. Malone & Associates protests the decision by the National Aeronautics and Space Administration to accept the apparent low bid submitted by Garnet Electric Company, Inc. under invitation for bids (IFB) No. MSFC0-02-05, issued for the construction of an electrical substation at the Marshall Space Flight Center (MSFC) in Huntsville, Alabama. Malone, the second low bidder, argues that the Garnet bid should have been rejected as late because the bid was not received in the designated bid opening room until after the time scheduled for bid opening, and the circumstances did not meet the regulatory standard for acceptance of a late bid.

We deny the protest.

The IFB required bids to be submitted by 1:30 p.m. on April 9, 2002 in room 36 of MSFC's Building 4250; the designated place for bid opening was Room 38 in Building 4250. As amended, the IFB incorporated by reference the Federal Acquisition Regulation (FAR) § 52.214-7 provision entitled "Late Submissions, Modifications, and Withdrawal of Bids," governing the treatment of late bids. As relevant here, the current regulatory language of FAR § 52.214-7(b)(1) states: Any bid, modification, or withdrawal received at the Government office designated in the IFB after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid would not unduly delay the acquisition; and-- (ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

FAR § 52.214-7(c) provides: Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

The propriety of the agency's acceptance of Garnet's bid is the central issue in this protest; the protester alleges it should have been rejected as late. Our Office conducted a hearing, recorded by videotape, to ascertain the facts and to assess the credibility of the respective parties' witnesses concerning the circumstances of the bid delivery. Testimony was obtained from the contracting officer, who served as the bid opening official; the Project Manager for R.W. Beck, Inc.-- the MSFC's construction management and inspection services contractor; the Beck construction manager; and the Garnet representative.

The contracting officer states that, on April 9, the day of bid opening, because bidders might have difficulty gaining access to the base, he asked the Beck project manager to send an employee to Gate 9 of Redstone Arsenal to escort bidders through security to the bid opening room. The Beck project manager designated the Beck construction manager, who had conducted the pre-bid site visits for this project, to serve as the point of contact at Gate 9. The contracting officer testified that he met with the Beck construction manager and instructed him "to be at the gate at 1:00 and stay until 1:30 and receive any bids [and] to act as a courier only for those bids." The Beck construction manager was further advised that when the time set for bid opening had arrived, the contracting officer would contact him and instruct him to return to the bid opening room with any bids in his possession.

The record shows that the Garnet representative arrived at Gate 9 of Redstone Arsenal to deliver Garnet's bid on April 9 and was logged in by security personnel on the visitors' roster at 12:59 p.m. Upon learning from security personnel that he needed an escort, the Garnet representative called the Beck construction manager on his cellular telephone since the Beck construction manager had been the point of contact on Garnet's previous site visit. When the Beck construction manager arrived at Gate 9, he informed the Garnet representative that the contracting officer had directed him to collect bids and deliver them to the bid opening room. The Beck construction manager then telephoned the contracting officer at his office at 1:07 p.m. to inform him that Garnet's representative was there with a bid, and the contracting officer reports that he made a contemporaneous notation on his desk calendar for April 9, which reads "1:08 pm from Garnet." At the hearing, the Beck construction manager explained that in collecting Garnet's bid package, he gave the Garnet representative his business card on which he wrote "1:08 p.m. 4/9/02," took the bid package to his vehicle where he "locked it up." The Beck construction manager did not escort the Garnet representative onto the base since the contracting officer had instructed him to remain there until 1:30 p.m. Garnet's representative gained access to the base without an escort and arrived in Room 38 of MSFC's Building 4250 at approximately 1:40 p.m.

Meanwhile, the record indicates that the contracting officer entered the bid opening room between 1:15 p.m. and 1:20 p.m. where several bidders' representatives, including Malone's, were present. The contracting officer reports that he accepted bid packages from these bidders' representatives and, although he did not use a time/date stamp, he sequentially numbered each sealed package he accepted. At approximately 1:28 p.m., the Beck project manager, who was in the bid opening room, telephoned the Beck construction manager to inform him that the time set for opening bids had arrived and instructed the Beck construction manager to return to the bid opening room with any bids already in his possession. While bids were being opened, the Beck construction manager arrived in the bid opening room and delivered Garnet's bid package to the contracting officer at 1:38 p.m. The contracting officer accepted the Garnet bid because he believed the bid was timely delivered when the Beck construction manager took possession of it at Gate 9 at 1:08 p.m., some 22 minutes before the scheduled opening. The contracting officer also believed that the responsibility for the late delivery to the bid opening room was due to his instructions to the Beck construction manager to remain at Gate 9 until the time set for bid opening.

The contracting officer therefore opened Garnet's bid and it was determined to be the apparent low bid, of the eight bids received.

Malone protests that Garnet's bid was late and cannot be considered by the agency because of Garnet's alleged failure to allow sufficient time to ensure delivery of its bid to the designated opening room before bid opening. Specifically, given the security procedures in effect, the protester alleges that 31 minutes was not a reasonable amount of time to gain access to Redstone Arsenal, complete the MSFC visitor badging process, and arrive at the scheduled place for bid opening. In its post-hearing comments, Malone alleges that the information relied on by the contracting officer to establish the time of receipt of Garnet's bid at Redstone Arsenal and that the bid was under the control of the government prior to bid opening was not acceptable evidence as contemplated by the FAR.

Bidders generally are responsible for delivering their bids to the proper place at the proper time, and late delivery of a bid generally requires its rejection. As the clause quoted above explains, however, a late hand-carried bid can be considered for award if it was at the government installation designated for receipt of bids, and under the control of the agency, prior to the time set for receipt of bids. FAR § 52.214-7(b)(1)(ii). Under the governing language in the FAR, it is the contracting officer, in the first instance, who should make the determination whether a late bid should be accepted, FAR § 52.214-7(b)(1), and our Office will not substitute its judgment in this regard, but will review the reasonableness of the agency's determination. States Roofing Corp., B-286052, Nov. 8, 2000, 2000 CPD ¶ 182 at 4. We find reasonable the decision made here by the agency to accept Garnet's bid.

The Garnet bid was clearly late, since it was not received at the office designated in the IFB until after the designated time. The question thus becomes whether the contracting officer reasonably concluded that the circumstances here met the criteria for acceptance of a late bid under FAR § 52.214-7(b)(1). Some of those criteria are not at issue: the protester does not claim that the Garnet bid was received after award was made or that its acceptance would unduly delay the acquisition. The dispute, rather, arises from the contracting officer's findings in two key areas: whether the Garnet bid was received at the government installation prior to the time set for receipt of bids (that is, 1:30 p.m.), and whether the bid then remained under the government's control until 1:30 p.m.

There is no doubt that the bid was at the government installation, that is, Redstone Arsenal, by 1:30 p.m. The protester does not contend otherwise. Instead, the protester's concern is about whether the bid was "received" at Redstone prior to 1:30 p.m., since the person who took custody of the bid from the Garnet representative was a contractor, not a government employee. We see no basis to find that a contracting officer cannot have a contractor employee fulfill the ministerial task of taking custody of bids, at least in these circumstances, where doing so in no way cast doubt on the integrity of the process. Accordingly, we conclude that the contracting officer reasonably found that the Garnet bid had been received at the government installation prior to the time set for receipt of bids.

Our conclusion is the same regarding whether the bid remained under the government's control between its receipt at Redstone Arsenal and the 1:30 p.m. bid opening time. We see no basis to question the reasonableness of the contracting

officer's determination that the Garnet bid was effectively under the government's control between its receipt at 1:08 p.m. and the bid opening time. There is no evidence that the Beck construction manager acted other than in a purely ministerial capacity, and at the direction of the contracting officer. Consistent with the contracting officer's instructions, the Beck construction manager could not relinquish control of the bids collected without the contracting officer's authorization, and, in any event, it is undisputed that the Beck construction manager maintained custody of the bid package until he handed it to the contracting officer. In these circumstances, we find reasonable the contracting officer's finding that the Garnet bid was effectively under the government's control from 1:08 p.m.

We recognize that circumstances may exist where a contracting officer might reasonably find that concerns about the integrity of the process meant that control by a contractor employee did not meet the regulatory standard. In the facts of this case, though, we think it was reasonable for the contracting officer to find that consideration of the Garnet bid did not compromise the integrity of the competitive process.

In sum, we conclude that the contracting officer reasonably found that the Garnet bid was received at Redstone Arsenal prior to the time set for receipt of bids and then remained under the control of the government until the time of bid opening, and we thus have no basis to question the contracting officer's decision to accept Garnet's late bid.

The protest is denied.

Anthony H. Gamboa
General Counsel

Matter of: Pike Creek Computer Company, Inc.
B- 290,329, 2002 CPD P 106
June 21, 2002

Protest that agency improperly canceled research topic under solicitation issued in connection with the Small Business Technology Transfer program is denied where record shows that, after consideration by numerous component activities of the Department of Defense, the agency determined that it did not have a requirement for the research.

DECISION

Pike Creek Computer Company, Inc. protests the cancellation of topic No. N02-T019 under program solicitation No. 2002, issued by the Department of Defense (DOD) in support of the Small Business Technology Transfer (STTR) program. Pike Creek argues that the agency improperly canceled the topic prior to the deadline for submitting offers.

We deny the protest.

DOD issues a single STTR program solicitation once a year, and that solicitation includes research topics identified by various military activities. The solicitation here was issued on January 2, 2002, and included topic No. N02-T019 (a topic identified by the Navy), seeking proposals for research and development activities in the area of active cooling of high heat electronic components. Proposals were due by April 17. On April 12, DOD deleted the subject topic from the STTR solicitation. Pike Creek maintains that it was improper for the agency to delete the topic only a few days prior to the deadline for submitting proposals, noting that, by the time of the cancellation, it had expended substantial time and resources in preparation of its proposal. The protester requests either that it be awarded a contract for the topic, or that the agency be required to reopen the topic and receive and evaluate proposals for the requirement. Pike Creek also requests reimbursement of its proposal preparation and protest costs.

In a negotiated acquisition such as this one, agencies have broad discretion in deciding whether to cancel a solicitation and need only advance a reasonable basis for the cancellation. Encore Mgmt., Inc., B-278903.2, February 12, 1999, 99-1 CPD ¶ 33 at 3. Cancellation is proper where award under the solicitation would not meet the government's actual needs, and the agency properly may cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the cancellation occurs after proposals have been submitted.

We have no basis to object to the agency's cancellation of the topic. The agency reports that the selection of research topics for inclusion in the STTR solicitation involves an interactive process among several elements of DOD. Specifically, each service element (in this case, the Navy) submits proposed topics to the Office of the Secretary of Defense, Small and Disadvantaged Business Utilization Office (OSD/SADBU), which then forwards the proposed topics to the Director of Defense for Research and Engineering (DDR&E) for substantive review. After that

substantive review, DDR&E either accepts a topic or rejects it based on a determination that the topic does not meet one or more topic selection criteria. Where a topic is rejected, the service element is advised. At that point, the service element may abandon the topic, rewrite the topic or appeal its rejection. The rewritten/appealed topic is again forwarded to DDR&E, which once again reviews the topic for inclusion in the solicitation. If the topic is again rejected by DDR&E, it is automatically forwarded to an Integrated Review Team (IRT) for review. The IRT then forwards its assessment to the director of OSD/SADBU, which consults with the director of DDR&E in making a final determination of whether to include a topic in the solicitation.

Here, when the Navy initially submitted the subject topic, it was rejected by DDR&E. The topic was then rewritten and resubmitted to DDR&E, which again disapproved the topic, and then forwarded it to the IRT. The IRT, in turn, also disapproved the topic, and sent its recommendation to OSD/SADBU. In the meantime, the Navy's program manager rewrote the topic again and forwarded it, along with numerous other Navy topics, to the STTR program manager. According to the Navy's program manager, he found nothing in DOD's internal guidance that prohibited his forwarding the disapproved topic to the STTR program manager; he concluded that the director of OSD/SADBU would make the final determination as to whether the topic would be included in the solicitation.

After receiving the Navy's list of topics, OSD/SADBU included the subject topic in the solicitation. After approximately 2 1/2 months had elapsed, the STTR program manager contacted the Navy program manager to ask why the subject topic (along with several other unapproved topics) had been included in the solicitation. The Navy's program manager states that he provided the same explanation outlined above, namely, that he was relying on the director of OSD/SADBU to make a final determination based on the IRT's recommendation and his rewritten topics. Thereafter, various discussions and meetings were held among the DOD component organizations regarding resolution of the question of whether to include the disapproved topics. At the conclusion of these deliberations, the STTR program manager decided to cancel the disapproved topics, and notified prospective offerors using the agency's website.

The agency's explanation provides a reasonable basis for the agency's decision to cancel the protested topic. Through its deliberative process, DOD decided that the topic was not a part of its actual STTR research needs. In the final analysis, the process for selecting topics involves consideration by numerous DOD component activities, and the protester has not identified any basis for our Office to conclude that DOD, as the acquiring activity, improperly or inaccurately determined that its actual needs did not include the subject topic. While it is unfortunate that this deliberative process took the amount of time ultimately required, this delay does not provide a basis for finding the cancellation improper. See PAI Corp., et al., B-244287 et al., Nov. 29, 1991, 91-2 CPD ¶ 508 at 4-5 (cancellation proper no matter when the information precipitating the cancellation is known or should have been known, even if solicitation is not canceled until after proposals are submitted and protesters have incurred costs in pursuing the award).

As for the protester's request for proposal preparation and protest costs, reimbursement of such costs is predicated on a finding by our Office that an agency's actions violated a procurement statute or regulation. 4 C.F.R. § 21.8(d) (2002). Since, as discussed above, we find nothing objectionable in DOD's decision to cancel the protested topic, we have no basis to recommend that the protester be reimbursed these costs.

The protest is denied.

Anthony H. Gamboa
General Counsel

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MATTER OF: ATD-AMERICAN CO. - RECONSIDERATION
B-275926.2, 97-1 CPD ¶ 188

DECISION

ATD-American Company (ATD) requests reconsideration of our January 31, 1997, dismissal of its protest of the award of a contract to BTB Trading, Inc. under request for proposals (RFP) No. 1PI-R-0606-96, issued by the Department of Justice Federal Prison Industries (UNICOR) for the purchase of various sizes of bleached white sheeting material for the manufacture of sheets, pillowcases and napkins.

The RFP sought proposals for a fixed-price indefinite delivery/indefinite quantity contract for a base year with two 1-year options, and provided that proposals would be evaluated on the basis of past performance, technical, and price factors. Award was to be made to the offeror whose proposal was most advantageous to the government.

Nine offerors responded to the RFP. Based on the evaluation, BTB's proposal was ranked first overall and ATD's proposal was ranked fifth. After award was made to BTB, ATD protested to our Office asserting that the agency incorrectly evaluated past performance, and improperly evaluated price by considering the total prices for the base and option years. ATD also argued that BTB's offer should have been rejected because BTB lacked the financial capacity to perform and could not meet the solicitation requirement to provide domestic goods.

We dismissed the protest because it failed to establish a valid basis for challenging the agency's action. ATD's allegations concerning the agency's evaluation of past performance and price were both based on ATD's misreading of the evaluation criteria. With respect to ATD's allegations that BTB lacked the financial capacity to perform and that BTB had submitted a below-cost offer which indicated an intent to provide non-conforming, non-domestic sheeting material, there is no prohibition on submitting a below-cost offer, and our Office does not review an agency's affirmative determination of responsibility, i.e., that an offeror can perform a contract at the offered price, absent circumstances not present here. *JWK Int'l Corp.*, B-237527, Feb. 21, 1990, 90-1 CPD p 198 at 4.

On reconsideration, ATD argues only that its objection to the agency's failure to consider BTB's financial capability should not have been treated as a responsibility issue. The protester points out that the RFP provided that offeror financial capability to acquire material, equipment and personnel to perform and complete the requirement would be considered under the technical evaluation factor. The protester maintains that BTB is an undercapitalized entity whose financial capability was not appropriately evaluated by the agency.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (1994), as amended by Pub. L. No. 104-106, §§ 4321(d), 5501, 5603, 110 Stat. 186, 674, 698, 700 (1996), only an "interested party" may protest a federal procurement. That is, a protester must be 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 the contract. Determining whether a party is sufficiently “interested” involves consideration of a party's status in relation to a procurement. Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester to be too remote to establish interest within the meaning of our Bid Protest Regulations. A protester is not interested if it would not be in

line for award if its protest were sustained. *Abre Enters., Inc.*, B-251569.2, Mar. 16, 1993, 93-1 CPD p 239 at 4.

Here, ATD's proposal was ranked fifth overall. ATD's allegation pertains only to the evaluation of BTB's financial capacity; the protester has not provided any basis to challenge the evaluation of the intervening offerors' proposals. Accordingly, even if our Office found that the agency's evaluation of BTB's proposal was improper, because there are three intervening offerors ATD would not be next in line for award of a contract. Under these circumstances, ATD is not an interested party to protest the award decision.

The request for reconsideration is denied.

MSI
B-243974, B-243974.2, B-243974.3, 91-2 CPD ¶ 254

DECISION

MSI, a Division of the Bionetics Corporation, protests the award of a cost reimbursement contract to DynCorp under request for proposals (RFP) No. 0000-930102(CS), issued by the Department of State, for operational and maintenance support for the agency's Bureau of International Narcotics Matters (INM) air wing mission to combat narcotics growing and trafficking. MSI objects to the Department of State's cost realism analysis, conduct of discussions, and selection of DynCorp's $16 million higher cost proposal.

We sustain the protests.

INM has principal responsibility for the international narcotics control assistance program established by the Foreign Assistance Act of 1961. 22 U.S.C. §2291 (1988). An integral part of this assistance program is the INM air wing, which consists of more than 50 fixed-wing and rotary aircraft that are used in narcotics eradication and interdiction. The RFP contemplated the award of a cost-plus-award-fee contract for a base and 4 option years for operational and maintenance services to support the INM air wing in various countries in South America, Central America and Asia. The RFP provided detailed information concerning the number and type of aircraft; the anticipated flying hours, crew factors and missions per aircraft per country; and a monthly deployment schedule per country. The contractor was required to provide personnel and material sufficient to support the RFP requirements. The RFP also provided detailed instructions for the preparation of technical and cost proposals.

Offerors were informed that award would be made to the responsible offeror, whose proposal, conforming to the RFP requirements, was evaluated as most advantageous to the government, price and other factors considered. Technical, management, and cost were the stated evaluation factors, with the technical and management factors to be of equal weight and the cost factor of less importance. Subfactors, and sub-elements for each sub-factor, were stated for the technical and management evaluation factors. Offerors were informed that the technical and management factors would be evaluated under the following assessment criteria, which were stated to be of equal weight: (1) understanding of and compliance with RFP statement of work, (2) technical approach, and (3) past performance. In addition, each technical and management factor and sub-factor would be assessed for risk.

The cost evaluation was to consider the degree to which costs tracked the technical/management evaluation factors, whether the costs were rationally supported, cost realism, and overall cost. Offerors were informed that the government would evaluate offers for award purposes by adding the total cost for all options to the total cost for the basic requirement.

The agency received nine offers, of which only three offers, including those of MSI and DynCorp, were found to be within the competitive range. Written deficiency reports (DR), clarification requests (CR), and cost questions were issued to each of the competitive range offerors, and the written discussions formed the basis of oral, face-to-face discussions with each offeror.

During the first round of discussions, the agency issued amendment No. 6 to the RFP, which requested technical and cost proposals for an option for operational and maintenance support of an additional 49 rotary aircraft. Offerors were requested to provide their estimated costs for the base year for each additional aircraft up to a stated maximum for each of four designated countries and to provide escalation rates to be applied to the base year costs to calculate the option year costs. Offerors were required to provide detailed supporting cost documentation for their estimated costs and to price a summary table (Table B(1)) that would reflect the offerors' estimated base year monthly charges for operating and maintaining varying quantities of aircraft for each country.

At the conclusion of discussions, revised proposals, which included the offerors' responses to amendment No. 6, were requested and received. The agency evaluated the offerors' responses to the DRs, CRs, and cost questions, and the proposals for the additional rotary aircraft. The agency also evaluated the revised cost proposals for the degree to which they were realistic with respect to the technical/management proposals and statement of work. The Defense Contract Audit Agency (DCAA) then audited the offerors' cost proposals.

The agency conducted a second round of discussions, including further DRs, CRs, cost questions, and face-to-face discussions, and requested best and final offers (BAFO). The final evaluation results were as follows:

	Technical Management	Ratings/Risk	Cost
DynCorp	Blue/Low	Blue/Low	$108,247,833
Offeror A	Green/Low	Green/Low	$108,114,744
MSI	Green/Low	Green/Moderate	$92,134,314

DynCorp's overall superior rating reflected the agency's determination that DynCorp had provided a detailed documented proposal that exceeded the RFP evaluation standards under many of the evaluation subfactors. The technical evaluators concluded that DynCorp had extensive experience, a complete understanding of the RFP work and had detailed its technical ability to perform the contract work in an exceptional manner.

MSI's overall acceptable rating reflected the agency's determination that MSI had submitted an acceptable proposal that generally satisfied the RFP evaluation standards. While MSI's proposal was rated acceptable overall, significant weaknesses were noted under several evaluation subfactors. The technical evaluators' overall impression of MSI's proposal was that the firm's proposal, while acceptable, lacked detail on its approach to meeting the contract requirements and represented a moderate risk.

The source selection authority (SSA) determined that while all the proposals in the competitive range were acceptable, DynCorp's proposal "was rated exceptional and substantially higher than the other two offerors in the technical and management areas, and competitive in the cost area." Although MSI's proposed costs were approximately $16 million lower than DynCorp's, the SSA concluded that under the RFP evaluation factors--that provided that technical and management factors were more important than cost--DynCorp's proposal was the most advantageous to the government. The SSA further noted that the cost realism of MSI's cost proposal was questionable in several

important areas, *i.e.*, insurance and spare/repair parts, and that this discounted the apparent cost savings offered by MSI.

Award was made to DynCorp on May 1, 1991, and this protest followed on May 10. Contract performance was not suspended based upon the agency's written determination that urgent and compelling circumstances significantly affecting the interests of the government would not permit awaiting our decision in this matter. See 31 U.S.C. §3553(3)(d)(1) (1988). As a preliminary matter, DynCorp argues that MSI is not an interested party to protest the award because the firm would not be in line for award even if its protest were sustained. See 4 C.F.R. §21.1(a) (1991). We disagree. It is true that another offeror was rated higher technically than MSI, and that MSI does not challenge that offeror's eligibility for award. The protester, however, has a significantly lower cost than either of the other competitive range offerors and its protest challenges the agency's cost/technical tradeoff, cost realism analysis, and source selection decision. If, as MSI argues, the agency's cost evaluation is flawed and would have resulted in an even greater cost advantage for MSI, a revised cost/technical tradeoff could result in MSI being in line for award. Accordingly, MSI is an interested party under our Bid Protest Regulations. See *Kinton, Inc.*, 67 Comp. Gen. 226, 88-1 CPD ¶112.

MSI essentially protests the rationality of the agency's source selection of DynCorp's $16 million higher cost proposal where, the protester alleges, the agency's cost realism analysis of DynCorp's proposal was arbitrary and unreasonable. Among other things, MSI specifically contends that DynCorp's cost proposal for the additional aircraft added by amendment No. 6 is incomplete in that the awardee failed to price required spare/repair parts.

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated cost of contract performance and proposed fees are not considered controlling since an offeror's estimated costs may not provide valid indications of final actual costs that the government is required, within certain limits, to pay. Federal Acquisition Regulation (FAR) 15.605(d); *Amtec Corp.*, B-240647, 90-2 CPD ¶482. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. *CACI, Inc.-Federal*, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶542. Because the contracting agency is in the best position to make this cost realism determination, our review is limited to determining whether the agency's cost realism analysis is reasonably based and not arbitrary. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111, 76-1 CPD ¶325.

The agency does not contest MSI's contention that DynCorp failed to price the spare/repair parts required for the aircraft added by amendment No. 6, but argues that the agency "accepted" 98 percent of DynCorp's proposed costs while questioning 17 percent of MSI's proposed costs. The agency contends that DynCorp's cost documentation "[l]eft no doubt as to what DynCorp's proposed costs for the option to add aircraft were."

DynCorp, in its revised proposal offered to provide the required spare/repair parts for the optional aircraft added by amendment No. 6 for the base year at an estimated cost several times higher than MSI's estimated cost of $1 million. During discussions, the agency informed DynCorp that "spare and repair parts for optional aircraft will be

provided by [the government] for the first year. Adjust [DynCorp's subcontractor's] proposal to price only for 4 years." DynCorp in its BAFO proposed $0 for spare/repair parts for the base year, with the same escalation rates for the option years as it offered in its revised proposal, which resulted in DynCorp proposing $0 for spare/repair parts for the 4 option years as well.

In the evaluation of BAFO cost proposals, the agency recognized that DynCorp had failed to propose any costs for the spare/repair parts required to support the amendment No. 6 additional aircraft for the option years, even though these parts were not to be provided by the government and the RFP requested costs for these parts. Nevertheless, the agency made no determination of DynCorp's probable costs for the spare/repair parts for the option years. Instead, the agency accepted DynCorp's estimate of $0 for these parts and requested that DCAA conduct a post-award audit for the purpose of determining DynCorp's probable cost for providing these parts for the option years, recognizing that considerable costs could be anticipated for the parts for the option years. We find that this resulted in an irrational cost realism analysis of DynCorp's proposal since the RFP reasonably contemplated that the offerors supply and price these parts.

The agency and DynCorp contend that, because amendment No. 6 only requested pricing for the base year and escalation factors for the option years, the government was not required to evaluate the costs, or cost realism, of the option years of the amendment No. 6 aircraft. However, amendment No. 6 specifically provides that offerors' estimated costs for the additional aircraft would be evaluated by adding the total price for all options to the total price for the base requirement, and the agency has provided no reasonable basis for not considering these costs.

This problem was compounded by the agency's failure to conduct equal discussions with MSI and DynCorp and to inform MSI of the change in the RFP requirements, *i.e*., that spare/repair parts would be furnished for the base year at government expense. In negotiated procurements, procuring agencies are generally required to conduct meaningful discussions with all competitive range offerors; this obligation is not satisfied by misleading or prejudicially unequal discussions. See *Pan Am World Servs., Inc., et al*., B-231840 *et al*., 88-2 CPD ¶446. In its revised proposal for the spare/repair parts required for the additional aircraft, MSI estimated costs in excess of $1 million for the base year. The agency did not inform MSI, as it had DynCorp, that spare/repair parts for the additional aircraft would be provided by the government for the base year but questioned MSI's rationale and methodology for its estimated costs for the parts. In its BAFO, MSI slightly increased its estimated costs for the parts for the base year, with the same escalation rates as it proposed in the revised proposal. Since only the awardee was informed that spare/repair parts for the optional, additional aircraft would be furnished at government expense for the base year, MSI proposed costs in excess of a $1 million for the parts for the base year while DynCorp reduced its proposed costs for the parts to $0 for the base year. These were the costs used in making the source selection decision.

Moreover, since amendment No. 6 required offerors to propose their costs for providing spare/repair parts for the additional aircraft for the base year and escalation rates for the option years, the provision of spare/repair parts for the optional aircraft by the government during the base year was a change in the RFP requirements. It is a

fundamental principle of government procurements that competition 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. *Cylink Corp.*, B-242304, 91-1 CPD ¶384. Thus, when either before or after the receipt of proposals, the government changes or relaxes its requirements, it must issue a written amendment notifying all offerors of the changed requirements. See FAR 15.606(a). Thus, when the agency determined that the parts would be provided by the government for the base year, and so informed DynCorp, it was incumbent upon the agency to likewise notify the other competitive range offerors of the changed RFP requirements so that all offerors were competing on an equal basis. See *Joint Action in Community Serv., Inc.*, B-214564, 84-2 CPD ¶228.

The agency's failure to conduct a proper cost realism analysis of DynCorp's offer under amendment No. 6 and to conduct equal discussions--informing offerors of the changed RFP requirements--resulted in a significant distortion of DynCorp's and MSI's relative costs of performance. We think that if the agency considered DynCorp's probable costs for the spare/repair parts for the option years for the amendment No. 6 aircraft, DynCorp's evaluated costs would be substantially higher than its offered $108 million. MSI's evaluated cost, on the other hand, may well have been lower than its offered $92 million if it had been informed that parts for the amendment No. 6 aircraft would be furnished by the government for the base year.

Thus, we find unreasonable the agency's source selection decision and underlying cost/technical tradeoff, which were based upon erroneous cost information. The record shows that the SSA was not informed of DynCorp's failure to price spare/repair parts for the amendment No. 6 additional aircraft for the option years. He was also not informed that the cost evaluation did not reflect the fact that MSI, but not DynCorp, priced the first year's spare parts for the additional aircraft. Under the circumstances, MSI's cost advantage would appear to be substantially greater than $16 million, a fact of which the SSA was not aware, and could have resulted in a different cost/technical tradeoff judgment and selection decision.

We sustain the protests.

We recommend that the Department of the State reopen negotiations with the three offerors in the competitive range, informing them of the agency's requirements, and request revised proposals. If, as a result of the revised proposals and a proper cost evaluation, an offeror other than DynCorp is found to be entitled to award, DynCorp's contract should be terminated for the convenience of the government and award made to that firm, if otherwise eligible. In addition, MSI is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. §21.6(d)(1). MSI should submit its certified claim for its protest costs directly to the agency within 60 working days of receipt of this decision. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. §21.6(f)(1)).

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MATTER OF: PEACOCK, MYERS & ADAMS
B-279327, 98-1 CPD ¶ 94
March 24, 1998

DECISION

Peacock, Myers & Adams protests the Department of Energy's (DOE) evaluation of the firm's proposal, and the award of multiple contracts to other offerors, under request for proposals (RFP) No. DE-RP02-97CH10887, for patent preparation and prosecution services.

We dismiss the protest as untimely filed.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier; however, a protest, such as here, challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, must be filed not later than 10 days after the date on which the debriefing is held in order to be timely. 4 C.F.R. § 21.2(a)(2) (1997); *Professional Rehabilitation Consultants, Inc.*, B-275871, Feb. 28, 1997, 97-1 CPD p 94 at 2.

The DOE conducted a debriefing with Peacock on February 11, 1998, during which Peacock was apprised of the information underlying its protest grounds. Peacock contends that it then timely filed its protest with our Office on February 23, the tenth day after the debriefing, at approximately 5:28 p.m. Eastern Standard Time (EST) by facsimile (fax) transmission. However, the DOE argues that the protest was untimely, since our records show that the protest was time/date stamped as received on February 24 at 7:17 a.m., the eleventh day after the debriefing. The DOE further notes that the faxed protest was marked by Peacock's own fax machine with the notation "02/23/98 15:31" on the last (signature) page of the protest; according to the DOE, this indicates receipt of the last page by our Office on February 23 at 3:31 p.m. Mountain Standard Time (MST), or 5:31 p.m. EST. The DOE maintains that because the last page of the protest was received by our Office after our 5:30 p.m. EST closing time, it was properly time/date stamped as received on February 24.

The protester responds that its fax machine time/date mark should not be considered accurate evidence of receipt of the protest because the fax clock was checked on March 4 against the Department of Commerce's Boulder Laboratories atomic time internet site (http://www.bdlrdoc.gov/doc- tour/atomicclock.html) and found to be approximately 3 minutes fast. Thus, according to the protester, its fax time/date mark "which indicated that the last page [of the protest] was received at 3:31 p.m. should have actually stated 3:28 p.m. [MST]," thus indicating timely receipt before close of business in our Office at 5:30 EST p.m. on February 23. Further, the protester asserts that we should consider evidence of the wristwatch time of contemporaneous witnesses (employees of the protester) who either transmitted the protest or observed the fax transmission, which indicates that the "transmission [was] completed prior to 5:30 p.m. [EST]." In this regard, the protester has submitted three employee affidavits

stating that the fax transmission of the protest was completed at "3:27 p.m. [MST]," "minutes prior to 3:30 p.m. [MST]," and "before the half-hour (3:30 p.m.) [MST]."

A protest is considered "filed" on a particular day under our rules when it is received by our Office by 5:30 p.m. EST on that day. 4 C.F.R. § 21.0(g). We require that the entire text of a protest be received prior to this deadline in order for the protest to be timely. See *Computer One, Inc. - Recon.*, B-249352.7, Sept. 27, 1993, 93-2 CPD p 185 at 2-3 n. 1. Generally, to determine when a protest was filed in our Office we rely on our time/date stamp, unless there is other evidence to show actual earlier receipt. *Balimoy Mfg. Co., Inc. - Recon.*, B-250672.2, Mar. 10, 1993, 93-1 CPD p 220 at 4.

There is no viable evidence showing timely receipt. Peacock's assertion that its fax time clock was 3 minutes fast and that transmission was completed minutes before 5:30 p.m. EST on February 23 based on its employees' wristwatch times constitutes evidence within the protester's control. Since such evidence may be developed or altered to support a protester's contentions, we do not consider such evidence sufficient to establish the time of transmission. See *Southern CAD/CAM*, 71 Comp. Gen. 78, 80 (1991), 91-2 CPD p 453 at 3-4. (Moreover, even if the evidence otherwise were accorded some weight, the time of completion of the fax transmission from the protester's fax machine does not equate with the time of receipt of the protest at our Office, since the fax transmission necessarily took some time. See *Mead Data Cent.*, 70 Comp. Gen. 371, 373-74 (1991), 91-1 CPD p 330 at 3.)

In the absence of independent corroborating evidence, we must rely on our time/date stamp, which, as discussed above, shows receipt of the protest in our Office after 5:30 p.m. on February 23, the tenth day after the debriefing. We also have examined other evidence available, our fax activity report, which confirms that the protest was not timely filed. Specifically, the protest was 12 pages long and the attachments to the protest were 33 pages long. Our fax activity report shows two transmissions from Peacock near the close of business on February 23. The first transmission, starting at 5:06 p.m., was 33 pages long, took 16 minutes 53 seconds to transmit, and has a document number that matches the document number marked by our fax machine on the attachments to the protest. The second transmission, starting at 5:26 p.m., was 12 pages long, took 7 minutes 45 seconds to transmit, and has a document number that matches the document number marked by our fax machine on the protest. Thus, the fax activity report of this second transmission indicates that the transmission of the protest to our fax machine was not completed until February 23 at 5:33 p.m., that is, after the 5:30 p.m. deadline. We conclude that the protest was not timely received in our Office. See *Balimoy Mfg. Co., Inc. - Recon.*, supra, at 4.

The protester asserts that, because problems were encountered in communicating with our fax machine, any questions as to the timeliness of its protest should be resolved in its favor. However, when a protester opts to file its protest at the last minute by fax, the protester assumes the risk that the protest will not be received at our Office in a timely manner. *Danville-Findorff, Inc. - Recon.*, B-242934.2, Mar. 21, 1991, 91-1 CPD p 313 at 2. A protester's inability to successfully send a fax to our Office shortly before closing does not provide a basis for waiving our timeliness rules. See *Computer One, Inc. - Recon.*, supra, at 5. While our timeliness rules may seem harsh in some cases, they reflect the dual requirements of giving all parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting

or delaying the procurement process. *Mead Data Cent.*, supra. Application of the timeliness requirement here establishes a readily discernible rule, which results in fair and equal treatment of all protesters.

Peacock asserts that we should consider this case under our significant issue exception to our timeliness requirements. 4 C.F.R. § 21.2(c). However, we will not consider the merits of an untimely protest by invoking the significant issue exception unless the protest raises an issue of first impression or one that would be of widespread interest to the procurement community. The crux of Peacock's protest is its disagreement with the evaluation of its proposal regarding a proximity evaluation factor. This issue, relating to this specific procurement, does not present a significant issue of widespread interest to the procurement community.

The protest is dismissed.

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MATTER OF: NATIONAL AEROSPACE GROUP, INC.
B-282843, August 30, 1999

DECISION

National Aerospace Group, Inc. protests its exclusion from competition under request for proposals (RFP) No. SPO740-99-R-3210, issued by the Defense Supply Center Columbus (DSCC), Defense Logistics Agency, for a quantity of metallic tubing identified as an approved product, listing its original manufacturer's part number and national stock number (NSN). National contends that the agency's failure to allow the firm to have its own alternate item evaluated deprived National of a reasonable opportunity to compete under the solicitation.

We sustain the protest.

In October 1998, National submitted its own technical data and drawing for this tubing to DSCC and requested its approval as an alternate, in anticipation of future requirements for the product. On December 18, National resubmitted its drawing to DSCC's technical staff and again requested approval. On March 29, 1999, DSCC announced its intention in the Commerce Business Daily (CBD) to procure the item on a sole-source basis from the original equipment manufacturer (OEM), Specialized Metals, as the only approved source. In the notice, DSCC invoked 10 U.S.C. § 2304(c)(1) (1994), which permits the use of other than competitive procedures when the property or services needed by the agency are available from only one responsible source, and no other property or services will satisfy the agency's needs. On April 1, DSCC issued request for quotations (RFQ) No. SPO740-99-Z- 4044 for 219 feet of the tubing. As a result of an increase in the amount of material required, the contracting officer later canceled the RFQ and, on May 4, again announced the agency's intention in the CBD to solicit and contract "with only approved sources," stating that "specifications, plans or drawings are not available," now citing 10 U.S.C. § 2304(c)(2). Under this authority, an agency may use other than competitive procedures to procure property or services where the agency's requirements are of such an unusual and compelling urgency that the government would be seriously injured if the agency was not permitted to limit the number of sources from which it seeks bids or proposals. On May 5, DSCC issued the RFP at issue here, SPO740-99-R-3210, which, as amended, calls for 541 feet of the tubing. The RFP required that offers be submitted by May 11.

A purchase item description (PID) associated with the NSN 014250937 states that the metal tubes are 12-inch pieces of round, seamless tubing, 1- inch in diameter, made of cobalt alloy L-605, with walls that are .049 inches thick. There is no physical description in the solicitation of the tubing, nor does the RFP describe the use to which the tubes will be put. During conference calls conducted by our Office among the protester's counsel, DSCC counsel, and DSCC technical personnel, agency counsel described the tubes' purpose as "use in a variety of welding projects," and DSCC technical personnel stated that the four military services that currently require the tubes use them for "certifying welders," adding that "they may also be used for other purposes," but admitting that DSCC staff did not know what those uses might be. Specialized Metals, which filed comments as an intervenor in the protest, states only that the tubing is "used by the military services for a variety of purposes."

The solicitation at section B, "Part Number," advised offerors as follows: “This requirement is in accordance with manufacturer's part number and the part number(s) listed in Section B - Item Description are the only approved items as of the date of this solicitation. THERE ARE NO DRAWINGS AVAILABLE AT THIS CENTER FOR THIS REQUIREMENT.”

The RFP included DLA's "products offered" clause, which requires offerors to specify whether they are offering an "exact product" as listed in the item description, or an "alternate product." Regarding the submission of alternate products, the clause instructs offerors to submit legible copies of all drawings, specifications or other data necessary to describe clearly the characteristics and features of the product being offered, as well as drawings and other data covering the design, materials, etc., of the exact product, to enable the government to determine whether the offeror's product is equal to the product cited in the PID. The clause states that firms may offer alternate products that are either "identical to or physically, mechanically, electronically and functionally interchangeable with" the named product, and cautions offerors that the failure to furnish the complete data necessary to establish acceptability of the product offered might preclude consideration of the offer.

On May 4, the contracting officer executed a justification and approval (J&A) for the acquisition of 416 feet of the tubing on a sole-source basis. The J&A consists of a pre-printed form on which the contracting officer checked various boxes to indicate that the statutory authority for the sole-source procurement is "10 U.S.C. 2304(c)(2) - Urgency"; that the use of the authority cited is based on "[n]o technical data on item and data cannot be obtained economically"; that "[e]fforts to ensure that offers are solicited from as many sources as practicable" consisted of "[t]he acquisition will be synopsized"; and, in a section for "[a]dditional facts supporting other than full and open competition," a box is checked stating: “As stated in the attached certification by the requiring activity, the Military Services will be seriously injured if contract award is delayed. The extent and nature of harm are detailed in the attached certification.”

The final paragraph of the form states: “In addition to the specific actions being taken by Technical Support Personnel to overcome barriers to competition before any subsequent acquisitions or recertification of class determination are made, this item is subject to the following methods of locating additional sources: [X] The solicitation contains the provision entitled Conditions for Evaluation and Acceptance of Offers for Part Numbered Items [the products offered clause].”

No additional information was included in the J&A, nor was any certification attached to the J&A.

On May 10, the agency prepared a written summary of its technical evaluation of National's alternate part, rejecting it as unacceptable. The technician notes on the form that the agency does not have OEM specifications against which it could evaluate alternate offers; that National has not provided "documentation to show and prove the methodology used to come up with their offered part," and that without such documentation to substantiate that the proposed National part is equal to or better than the OEM part, the review of the alternate offer cannot proceed. The technician also criticizes National's drawing for showing "a part that is 12 inches to 180 inches in length which is non-definitive. The drawing must reflect the length of the part being offered."

Also on May 10, National filed a protest against the RFP with the agency, alleging that it had submitted its technical drawing in December 1998 and that despite its repeated inquiries about the status of its request for approval, had not received any response.

By the May 11 date for submission of offers, the agency received offers only from Specialized Metals, offering the exact item listed, and from National, offering to supply its own part at a lower price. On May 20, the contracting officer denied National's agency-level protest, stating that the protester had failed to submit sufficient data for the agency to perform a thorough evaluation of its alternate item, and that DSCC does not possess the specifications that the agency would need in order to evaluate an alternate. On May 27, the contracting officer awarded the contract to Specialized Metals. National filed its protest in our Office on May 28, arguing essentially that DSCC's failure to consider National's request for approval for its alternate part improperly excluded the firm from competing for the award, and that the sole-source procurement was improper. National's protest was filed within 10 days of the award; however, DSCC executed a determination and findings (D&F) to authorize performance of the contract notwithstanding the protest on the basis that it had an urgent need for the item.

While the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in seven specified circumstances. 10 U.S.C. § 2304(c). When an agency uses noncompetitive procedures such as 10 U.S.C. § 2304(c)(1) or (c)(2), cited here by DSCC, it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. See 10 U.S.C. § 2304(f)(1)(A), (B); Federal Acquisition Regulation (FAR) §§ 6.302-1(d)(1), 6.302-2(c), 6.303, 6.304. Our review of the agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. …However, noncompetitive procedures may not properly be used where the agency created the urgent need through a lack of advance planning. 10 U.S.C. § 2304(f)(5)(A); …As explained below, here the agency failed to reasonably justify its urgency determination and also failed to provide National a reasonable opportunity to obtain approval of its proposed alternate product.

After reviewing the record, we conclude that the J&A here, invoking 10 U.S.C. § 2304(c)(2), does not reasonably establish such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. The DSCC J&A is completely inadequate, consisting only of check marks entered on statements on a pre-existing form. There is no explanation or justification to support the check marks entered. The J&A does not even include the certification of the requiring activity on which the J&A purports to rely to establish serious injury that would result from contract award delay and the extent and the nature of the harm. Although the agency report alludes to purchase orders that were placed and then canceled because of a vendor's substitution of a nonapproved part and cites its current lack of inventory as the basis for its determination that the requirement is urgent, DSCC never specifically demonstrates how such lack of inventory for this item adversely affects the requiring agency. Rather than factually establishing the adverse impact and, thus, the critical need, DSCC merely relies on minimal conclusory statements.

The agency also suggests in its conflicting statements regarding the usage of the item that no advance planning was undertaken. The protester's attempts to gain approval of its alternate part are also important in the context of advance procurement planning. An agency's failure to allow alternate sources to have their products evaluated and approved perpetuates the circumstance in which a sole-source procurement is necessary and amounts to a failure to engage in advance planning. …

Even more troubling is the agency's repeated reliance (in the CBD notices, the J&A, the agency report and in conference calls conducted in connection with the protest) on the absence of technical data and drawings proprietary to Specialized Metals as a basis to justify the sole-source acquisition. The agency's assertion that it does not possess the technical data is unrebutted. However, we question why this data is necessary, since the record does not show why DSCC needs this particular product, and DSCC technical personnel, when questioned directly, admitted that they did not know the product's exact use or characteristics. DSCC is essentially accepting at face value the requiring activities' assertion that this particular product is the only one that will meet their needs, and there also appears to be unquestioning acceptance--by DSCC, the requiring activities, or both--of the OEM's apparent insistence that its product is unique in ways that are essential to its function but cannot be revealed.

There is no evidence in the record that the contracting officer ever questioned why this exact item was needed, or what information was necessary that could only be obtained from the OEM. On this record, DSCC cannot explain how the tubing is used, or what specific needs are met by this part. In conference calls held in connection with the protest, DSCC counsel explained that military services have used the tubing in the past and therefore know that it satisfies their need, but have neither specified what that need is or how it can be satisfied by only this part, nor can they describe the performance characteristics of this part. [FN4] Thus, without any knowledge of how the part functions, DSCC is requiring absolute adherence to unknown parameters which may or may not be necessary to satisfy the government's actual need. It has not shown, for example, that the part must be interchangeable with other parts or must function in conjunction with other components in a larger system; in those circumstances, the assertion that the agency needed a particular part but could not state with precision how that part was configured could be reasonable. Cf. Navistar Marine Instrument Corp., B-262221, Nov. 20, 1995, 95-2 CPD ¶ 232 at 2- 3 (sole source procurement of part is reasonable where it performs critical function in testing aircraft engines and must fit into pre-existing opening on instrument panel); TSI Microelectronics Corp., B-243889, Aug. 20, 1991, 91-2 CPD P 172 at 5 (agency's lack of technical data and agency's compatibility concerns regarding critical microcircuit replacement part reasonably supported sole-source acquisition). DSCC has offered no explanation at all of its need here, beyond vague references to "a variety of uses" and stating without elaboration that the tubing is used "to certify welders."

Accordingly, on this record, DSCC has not reasonably justified its use of noncompetitive procedures, and we also question whether National was afforded a reasonable opportunity to have its alternate product evaluated for approval. Even had the agency appropriately justified its decision to solicit the product on a sole-source basis, it would still have been required to provide the protester that opportunity. CICA, with certain limited exceptions, requires contracting officers to "promote and provide for full and open competition in soliciting offers and awarding contracts." FAR § 6.101(a). When an agency

restricts a procurement to approved products, 10 U.S.C. § 2319(b) requires the agency to give offerors proposing alternate products a reasonable opportunity to demonstrate that their products can qualify.

We do not think the agency's actions were reasonable here. In response to National's assertion in its agency-level protest that DSCC had failed to comply with the requirements of 10 U.S.C. § 2319 and FAR § 9.206, the contracting officer asserted that "there is no qualification requirement for this item. As such, the statute and implementing regulation you reference is inapplicable to this acquisition." In that the solicitation specifies an approved product, the contracting officer is incorrect in the view that 10 U.S.C. § 2319(c)(3) is inapplicable. The contracting officer also disregarded the solicitation requirement that nonapproved sources would be given a reasonable opportunity to gain approval for their alternate items.

In response to the protester's submissions of its technical drawing in October and December 1998, the agency did not prepare a written evaluation of the submission until May 1999. When it did respond, its evaluation did not specifically respond to National's submission but relied instead on the agency's conclusion that an alternate part can only be approved if its offeror provides the technical data that is proprietary to the OEM. At no time did DSCC inform National of the specific information that its submission is lacking, beyond its insistence that only the OEM's technical data will do.

DSCC has not rebutted the protester's assertion that the unique feature of the tubing is the alloy from which it is made and that the chemical composition and properties of the alloy are in the public domain. Although the agency cites the requirement in the products offered clause that an alternate item must be "physically, mechanically, electrically and functionally interchangeable with the product cited in PID," it does not rebut the protester's assertion that the tubing has neither moving parts nor electrical features, and that its physical or chemical properties are set forth in the specifications for the cobalt alloy. As the protester points out, the agency has failed to identify a single functional characteristic that National's part does not satisfy. As discussed above, and by the agency's own admission, it has not done so because it does not know either the functional characteristics of the Specialized Metals part or the functional requirements that must be met.

Contracting officials have a duty to promote and provide for competition and to obtain the most advantageous contract for the government. In other words, contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a docile approach and remain in a sole-source situation when they could reasonably take steps to enhance competition. In the circumstances presented here, where the agency does not have technical data describing an item and does not know the actual needs upon which the requirement for the item is based, the agency cannot blindly rely on its ignorance to justify a blanket rejection of any alternate part submitted without the OEM's technical data. We think that, at a minimum, the contracting officials were required to consider whether the OEM's data was reasonably necessary for a thorough evaluation. … This would, of course, require the agency to analyze the government's actual needs.

Under these circumstances, the Agency's sole reliance on OEM data for approval of alternate products was unreasonable. National was not afforded a reasonable opportunity to demonstrate that its product could qualify.

RECOMMENDATION

We recommend that the agency determine whether its need for the tubing is, in fact, urgent; if so, it should execute a properly reasoned justification and approval document for the minimum quantity required. While performance of the contract has begun and it does not appear to be practicable to terminate Specialized Metal's contract, we recommend, because this item is procured on a recurring basis, that the agency reassess its actual need and determine whether this exact item is the only one that can meet that need; if not, the agency should take appropriate action to obtain competition for future acquisitions. If the agency determines that the sole-source is necessary to meet its needs, the agency should execute a properly reasoned justification and approval for limiting competition, and provide the protester a reasonable opportunity to qualify its alternate product.

We recommend that the protester be reimbursed for the expenses it incurred in filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1999). In accordance with section 21.8(f)(1) of our Regulations, National's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General of the United States

MATTER OF: OPTI-LITE OPTICAL
B-281693; 99-1 CPD ¶ 61

DECISION

Opti-Lite Optical protests the award of a contract to Classic Optical Laboratories, Inc. under request for quotations (RFQ) No. 663-56-98, issued by the Department of Veterans Affairs (VA) for commercial item prescription eyeglasses and services for VA beneficiaries. Opti-Lite principally contends that its offer was improperly evaluated and that the agency's selection decision was unreasonable.

We sustain the protest.

The solicitation, issued September 9, 1998, contemplated the award of an indefinite-delivery, indefinite-quantity requirements contract to supply prescription eyeglasses on an as-needed basis to listed participating VA facilities. The solicitation listed 85 specific items or services for which offerors were required to provide a unit price. The solicitation provided for award to the responsible offeror whose conforming offer was most advantageous to the government. The stated technical evaluation criteria consisted of methodology of approach, personnel qualifications and past performance. Under past performance, the solicitation required offerors to submit a minimum of four references with evidence of their organization's qualification, experience and achievements with relevant ongoing contracts, or contracts that have been completed within the past 3 years. The solicitation further provided that technical and past performance combined were approximately equal in weight to price. Additionally, offerors were encouraged to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the solicitation requirements, and were cautioned that the agency reserved the right to award on the basis of initial offers without holding discussions.

Six offerors responded to the solicitation. Opti-Lite submitted two separate price proposals; in both of them for many items, it entered "0." On October 20, the contracting officer contacted Opti-Lite to clarify whether entries of "0" in Opti-Lite's price proposal meant no bid or no additional charge. Opti-Lite faxed a clarification letter stating that all items marked with a "0" would be "supplied when ordered at no additional charge." As a result of the technical evaluation, Classic's offer received 92 out of 100 points for technical merit and was ranked first, and the protester's offer received a technical score of 70 and was ranked third. Because the protester's evaluated price of $624,380 was the lowest, it was awarded the top score of 100 for price. Classic's second low evaluated price of $706,854.23 received a score of 88. The contracting officer then added the technical and price scores to determine the highest-ranking offer. Classic's offer received the highest total point score of 180 and the protester's was second with a total score of 170.

Classic's pricing was compared to current contract prices and was found to represent a savings of 8 percent. The protester's prices were approximately 18 percent lower than current contract prices and were 12 percent lower than Classic's. However, the contracting officer was concerned that the protester's "unrealistic" price proposal might jeopardize performance. The contracting officer concluded that, based on the protester's pricing scheme, it was possible to order complete sets of glasses at no charge. The contracting officer's award memorandum concludes that award to Classic was warranted based on Classic's highest combined total score. The protester was notified of the award by letter dated November 20, and was provided a debriefing by letter dated November 25. The debriefing letter advised the protester of deficiencies pertaining to its methodology and

approach, its support for the professional qualifications of its personnel, and its failure to identify the subcontractors it intended to use in the course of performance.

Opti-Lite protested to the agency by letter dated December 2, alleging, among other things, that the agency's decision not to allow alternate pricing proposals was a major change requiring the agency to request best and final offers, that the agency erred in failing to check its past performance references, made at least six mathematical evaluation errors, improperly penalized Opti-Lite for failure to include subcontractor information in the past performance section when no subcontractors were used or requested, and failed to give any weight to Opti-Lite's claim that it is over 1,000 miles and 2 shipping days closer to the locations of contract performance than the awardee.

The contracting officer reviewed Opti-Lite's allegations and discovered that some irregularities had occurred in the evaluation of the protester's proposal. Errors had been made in evaluating Opti-Lite's past performance in the technical evaluation and in computing estimated quantities for the price evaluation. The contracting officer prepared a revised award memorandum dated December 7, in which Opti-Lite's proposal was given the maximum score for past performance, thus adding three points to its technical score, which still placed Opti-Lite's offer in the third position for technical merit, 19 points below that of the awardee. Since Opti-Lite had received the maximum number of points for its price proposal, that score remained unchanged. In the final ranking, Opti-Lite's total point score remained second, nine points below that of the awardee.

The contracting officer denied Opti-Lite's protest by letter dated December 8 and advised Opti-Lite that he used option No. 2 in the evaluation as directed by Opti-Lite in its letter dated October 20. Opti-Lite had previously been advised award to Classic was appropriate based on Classic's high "total score for technical and price." This protest to our Office followed.

Opti-Lite challenges the agency's evaluation of its technical proposal and maintains that it was wrongly denied an award because it was a highly technically qualified offeror under a solicitation for which it proposed the lowest price and contends that the agency's concerns about its performance risk are due to a lack of understanding of Opti-Lite's pricing methodology.

While this is a commercial items purchase, it was conducted using negotiation procedures. See FAR § 12.203. In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the solicitation specifies that price will be the determinative factor. ... Here, the solicitation provided that award would be made to the offeror whose proposal was most advantageous to the government considering price and other factors. Consequently, the contracting officer had the discretion to determine whether the technical advantage associated with Classic's proposal was worth its higher price. This discretion exists notwithstanding the fact that price and technical factors were of equal weight. However, the propriety of such a price/technical tradeoff decision turns not on the difference in the technical scores or ratings per se, but on whether the selection official's judgment concerning the significance of the difference was reasonable and adequately justified in light of the solicitation evaluation scheme. Cygnus Corp., B-275181, Jan. 29, 1997, 97-1 CPD ¶ 63 at 11.

In order for our Office to perform a meaningful review of an agency's selection determination, an agency is required to have adequate documentation to support its evaluation of proposals and its selection decision. Biospherics Inc., B-278508.4 et al., Oct.

6, 1998, 98-2 CPD ¶ 96 at 4; Arco Management of Washington, D.C., Inc., B-248653, Sept. 11, 1992, 92-2 CPD ¶ 173 at 3. While adjectival ratings and point scores are useful as guides to decision-making, they generally are not controlling, but rather, must be supported by documentation of the relative differences between proposals, their strengths, weaknesses and risks, and the basis and reasons for the selection decision. Century Envtl. Hygiene, Inc., B-279378, June 5, 1998, 98-1 CPD ¶ 164 at 4; Arco Management of Washington, D.C., Inc., supra, at 3.

Here, it is clear from the record that the source selection decision was based on a purely mechanical application of the numerical scores for the technical factors and price. The contemporaneous documentation of the agency's evaluation process in the report to our Office consists of copies of the technical evaluation completed by the evaluation team members, the price evaluation conducted by the contracting officer and the original and revised award memorandum completed by the contracting officer. The technical evaluation sheets completed by the evaluators contain numerical scores for each factor and subfactor, total point scores, and some narrative responses to certain aspects of the vendors' proposed solution.

The contracting officer's original and revised award memorandum and his statement submitted in response to this protest provide only the total technical and price scores for the proposals evaluated and in each instance state that the total score for technical and price would determine the final ranking of vendors and award. The contracting officer's award memorandum contains no hint as to the basis for the scoring of the proposals and provides no assessment of the strengths and weaknesses in the various proposals. While, in response to the protest, the contracting officer makes references to certain identified deficiencies in the protester's proposal, the contracting officer does not provide any explanation of how, based on these deficiencies in the protester's low priced proposal, or based on strengths in Classic's proposal, Classic's proposal was determined to be the more advantageous; rather he maintains his position that the total point scores per se justified the award to Classic.

Where a price/technical tradeoff is made, the source selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, including the benefits associated with additional costs. Federal Acquisition Regulation § 15.308 (FAC 97-02). It is improper to rely, as the agency did here, on a purely mathematical price/technical tradeoff methodology. See Teltara, Inc., B-280922, Dec. 4, 1998, 98-2 CPD ¶ at 4; General Offshore Corp.-Riedel Co., a Joint Venture, B-271144.2, B-271144.3, July 2, 1996, 96-2 CPD ¶ 42 at 8. In this case the tradeoff is inadequate because, beyond the mechanical comparison of the total point scores, the contracting officer made no qualitative assessment of the technical differences between the offers from Classic and Opti-Lite to determine whether Classic's technical superiority justified the cost premium involved.

In its submissions in response to the protest, the VA now maintains that Opti- Lite's below-cost proposal for various line items creates a risk of poor performance, and, in this manner, attempts to create a tradeoff rationale. However, the contemporaneous analysis of the contracting officer was in terms of financial capability to perform the contract at Opti-Lite's low price: "Opti-Lite price proposal is unrealistic. Opti-Lite proposed that 71 out of 85 line items are offered at no cost to the government. It is very unlikely that a contractor could perform this service without compensation for all the line items offered at no cost."

The contemporaneous concern about Opti-Lite's price reasonableness, therefore, was in reality a concern about its responsibility. See Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295 at 5-6. To the extent that the agency found Opti-Lite nonresponsible, it should have referred the matter to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures, because Opti- Lite is a small business. 15 U.S.C. § 637(b)(7) (1994); FAR § 19.602-1(a).

Since we find that the agency failed to document the reasonableness of its tradeoff decision, we recommend that the agency perform and document a proper tradeoff analysis. If the agency believes that Opti-Lite is nonresponsible, the matter should be referred to the SBA for COC consideration. If a different award determination results, the agency should terminate Classic's contract for the convenience of the government. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General of the United States

MATTER OF: POSSEHN CONSULTING
B-278579; 98-1 CPD ¶ 10

DECISION

Possehn Consulting protests the award of two contracts--one to Steve Holmes Forestry and one to Shasta Land Management Consultants--by the Forest Service, Department of Agriculture, pursuant to request for proposals (RFP) No. R5-06- 97-33, issued for the location and installation of permanent forest inventory plots in the Lassen, Plumas, and Tahoe National Forests. Possehn argues that the agency improperly rejected its proposal on the basis that its prices were too low, and unreasonably rated the proposal slightly below those of the two awardees in the area of technical merit.

We sustain the protest.

BACKGROUND

The Forest Service issued the RFP here on August 22, 1997, seeking fixed-price proposals for approximately 300 forest health inventory plots. The plots were aggregated into nine groups and offerors were to include a unit price for the plots in each group. The RFP anticipated award to the offeror whose proposal offered the best value to the government, based on the evaluation of price and technical factors, which were equally important. While the RFP included no criteria for the evaluation of price, it identified four technical criteria in descending order of importance: (1) experience establishing permanent forest and/or vegetation inventory plots; (2) past performance on similar contracts during the previous 3 years; (3) experience of key management personnel; and (4) qualifications of offered field personnel. The RFP also anticipated the possibility that the agency might make multiple awards. After receiving 13 proposals, the agency evaluated each offer using a scale of A, B, or C, with A being the highest ranking. The agency also used pluses and minuses in some cases to indicate greater or lesser merit. The following table shows the ratings given to the proposals submitted by Possehn and the two awardees for each of the four technical evaluation factors:

Management

OFFEROR	Firm Experience	Past Performance	Experience	Field Personnel
Steve Holmes	B+	B	A	A
Shasta	B+	B	A	A
Possehn	B	B	B+	A

The contracting officer also performed a price analysis by comparing the proposed prices of each offeror with a government estimate. Using this approach, the contracting officer rejected the proposals submitted by Possehn and one other offeror on the basis that the prices were unrealistically low. Contracting Officer's Statement, Nov. 25, 1997, at 8.

After excluding the two lowest priced proposals (including Possehn's), the contracting officer decided that the two proposals with the next lowest prices the proposals of Shasta Land Management for items 1 through 3, and Steve Holmes Forestry for items 4 through 9 presented the best value to the government. Although there were other higher-rated offerors with higher prices, the award decision stated that "[n]o

significant advantages could be gained by paying a higher price." Contracting Officer's Award Statement, Oct. 14, 1997. Awards were made on October 16.

After Possehn received notice of the award decision, it filed an agency-level protest, which was denied, and received a debriefing. During this process, Possehn learned that its price was lower than the award price for every item but one. The table below shows Possehn's price and the award price (in bold) for each item:

	Possehn	**Steve Holmes**	**Shasta Land**
Item Number	Consulting	Forestry	Management
1	$97.50/plot		$180/plot
2	$135.20/plot		$180/plot
3	$89.50/plot		$180/plot
4	$183.60/plot	$103.71/plot	
5	$144.33/plot	$169/plot	
6	$150.00/plot	$179/plot	
7	$144.33/plot	$179/plot	
8	$125.67/plot	$169/plot	
9	$103.71/plot	$169/plot	

Within 10 days of its debriefing, Possehn filed a protest with our Office and requested consideration of its protest under the express option procedures in our Bid Protest Regulations, 4 C.F.R. s 21.10 (1997). We granted Possehn's request.

DECISION

Possehn first argues that the agency could not properly reject its proposal on the basis that its prices were too low. We agree.

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 successfully perform the contract at its offered price. Cromartie Constr. Co., B-271788, July 30, 1996, 96-2 CPD P 48 at 5; Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD P 295 at 5; Ball Technical Products Group, B-224394, Oct. 17, 1986, 86-2 CPD P 465 at 2. As part of the technical evaluation, an agency may assess the reasonableness of a low price to evaluate an offeror's understanding of the solicitation requirements, so long as the RFP provides for evaluation of offeror understanding as part of the technical evaluation. Cromartie Constr. Co., supra; Envirosol, Inc., supra.

In this case, however, there was no technical evaluation criterion or proposal requirement addressing an offeror's understanding of requirements. Instead, the RFP examined only experience, past performance, and personnel qualifications. This being so, the agency's concern about the reasonableness of Possehn's low prices could not be considered other than as a responsibility matter. Cromartie Constr. Co., supra; Envirosol, supra, at 6. Since Possehn is a small business, the agency was required to refer any finding of nonresponsibility to the Small Business Administration (SBA) for review. 15 U.S.C. s 637(b)(7) (1994); Federal Acquisition Regulation s 19.602-1(a); Cromartie Constr. Co., supra; Envirosol, supra. Accordingly, we sustain Possehn's challenge in this area.

Possehn also argues that the agency's evaluation of its proposal lacked a rational basis. For example, Possehn argues that the agency could not reasonably give its proposal a rating of B under the most important technical evaluation criteria--experience establishing permanent forest and/or vegetation plots--while awarding a B+ to the proposals submitted by Shasta and Steve Holmes. In this regard, Possehn complains that it has the same experience as Shasta, although it concedes that it was possible Shasta's description of its experience in the proposal was more detailed than Possehn's description.

In this procurement, the Forest Service was required to distinguish among 13 proposals, all of which--including the proposal submitted by Possehn--appeared to have significant merit. Our review of an evaluation conclusion like the one here is to ensure that it is reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., 66 Comp. Gen. 404, 410 (1987), 87-1 CPD P 450 at 7. Based on our review of the proposals submitted by Possehn and the two awardees, we see no basis for concluding that the evaluation was unreasonable.

Specifically, the Shasta proposal does, in fact, offer more detail on past projects of that firm than does Possehn's proposal. While Possehn may be correct when it claims there is little actual difference in the experience of the two firms, the agency was required to make its judgments about the relative merits of the two proposals (in this case, the relatively small distinction between a B+ and a B) based on the descriptive material in the proposals themselves. In our view, there was nothing unreasonable in the agency's reliance on the written proposals for this information, and there was nothing unreasonable about the distinctions that were made. See De La Rue Giori, SA-- Recon., B-225447.3, June 15, 1987, 87-1 CPD P 594 at 3 (regardless of how capable an offeror may be, technical evaluations are based on the information included in its written proposal, which, if less comprehensive than other proposals, may not be selected for award).

In addition, the RFP expressly advised offerors that experience with permanent forest inventories would be ranked higher than experience with non-permanent forest inventories; and that forest inventory experience would be ranked higher than timber cruising experience. RFP s M-1. Since two of Possehn's previous projects were expressly described as timber cruising--the lowest-valued past experience according to the solicitation's evaluation scheme--and the other two involved forest inventory--but were unclear on whether the inventories were permanent or non-permanent--it appears that the slight distinction made in favor of the Shasta proposal clearly follows the evaluation scheme in the RFP, given the greater level of detail regarding past forest inventory efforts in that proposal.

As a second example, Possehn complains that certain details were omitted from the narrative description of its field personnel qualifications. Despite any omissions, however, the evaluation materials show that both it and the awardees received a rating of A in this area. Thus, our review shows that Possehn was not harmed by any such omission. Also, the ratings appear to have been consistently awarded since the proposals of the two awardees received an A rating for offering field personnel with qualifications similar to the qualifications of the personnel proposed by Possehn. In summary, our review shows nothing unreasonable about the evaluation of the relative strengths and weaknesses of these proposals.

RECOMMENDATION

Since the contracting officer's rejection of Possehn's proposal on the basis of its low price is a matter concerning an offeror's responsibility, and since the SBA has conclusive authority to determine the responsibility of small business concerns, we recommend that the agency refer the matter to the SBA for a final determination under the certificate of competency (COC) procedures. Alternatively, the contracting officer could, based on review of this decision, decide on his own to reverse the decision to reject Possehn's proposal based on its low price, which would obviate the need for a referral to the SBA. If the SBA issues a COC (or if the contracting officer on his own reverses the decision to reject Possehn's proposal), the agency should reinstate the proposal to the competition and perform a new cost/technical tradeoff, based on the RFP evaluation criteria, among the offerors. At the end of that process, if the contracting officer determines that Possehn's proposal offers the best value to the government, we recommend that the agency terminate the current awards and make award to Possehn.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys fees, if any. 4 C.F.R. s 21.8(d)(1) (1997). In accordance with 4 C.F.R. s 21.8(f)(1). Possehn's certified claim for such costs detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General of the United States

STAT-A-MATRIX, INC., et al.
B-234141.5, B-234141.4, B-234141.2, 89-1 CPD ¶ 472

DECISION

Stat-a-Matrix, Inc.; National Graduate University; Stat-a-Matrix Institute; and International Management Systems, Inc., protest the Office of Personnel Management's (OPM's) rejection of their proposals under request for proposals (RFP) No. 88-2795. We deny the protests.

The RFP solicited consulting and training services for the purpose of assisting federal agencies in implementing total quality management (TQM), which is a management approach that relies on principles of quality assurance and makes managers and employees alike responsible for providing quality products and services. The statement of work (SOW) in the solicitation established the following overall goals for the implementation of TQM: (1) create an organizational culture that emphasizes excellence in service delivery; (2) meet customer requirements and increase customer satisfaction; (3) achieve continuous improvement in the quality of products and services and the processes used to produce them; (4) increase productivity; and (5) achieve participative involvement of employees in improvement efforts. The solicitation required the implementation and achievement of these goals by all levels within an agency, including the senior management, middle management, and work force, and specifically called for a description of the approach and strategies that would be used to enable federal agencies and their employees to understand TQM, make a long-term commitment to the improvement process, build and improve the necessary management structure, acquire the skill of systematic problem solving, and function effectively in quality improvement teams.

The solicitation contemplated the award of multiple fixed-price Federal Supply Schedule contracts against which agencies deciding to implement TQM would place delivery orders. It provided for award to be made to those responsible offerors whose offers conform to the solicitation and are most advantageous to the government, with technical quality more important than price. The RFP stated that technical proposals would be evaluated on the basis of the following evaluation criteria, listed in descending order of importance: (1) implementation strategy and relevant materials and/or services proposed; (2) relevant experience and demonstrated capability; (3) professional staff capabilities; and (4) organizational capability.

The agency received 80 proposals by the October 11, 1988 closing date. In the initial technical evaluation, the technical evaluation panel, composed of 3 members, rated 25 proposals as acceptable or capable of being made acceptable and 55 proposals as unacceptable and not reasonably susceptible of being made acceptable. The proposals of all of the protesters here were determined technically unacceptable, principally for failure to provide a TQM implementation strategy and clearly establish prior TQM experience. OPM rejected the proposals as having no reasonable chance for award. We address each of the protests separately below.

NATIONAL GRADUATE UNIVERSITY

The University's proposal was found technically unacceptable on the basis that it did not present an overall strategy for implementing TQM; the agency determined that

the proposal focused primarily on providing training courses, included little discussion of providing consulting services, and did not adequately explain its strategy for the implementation of TQM principles learned in the classroom. In addition, the agency found that the proposal did not show any experience in the implementation of TQM.

The University first questions the composition of the evaluation panel. The panel consisted of: (1) the Chief of the Productivity Management Branch, Office of Management and Budget, (2) the Chief of the Resources Management Division, Internal Revenue Service (IRS), and (3) the Deputy Associate Director for Training and Investigations, OPM, who was the agency's senior career executive in charge of all OPM training programs. The University believes the panel should have included a representative from either the Federal Quality Institute, the federal office charged with introducing TQM to federal agencies, or the several quality assurance offices within the Department of Defense.

The composition of technical evaluation panels is within the discretion of the contracting agency and, as such, will not be reviewed by our Office absent a showing of possible bad faith, fraud, conflict of interest, or actual bias on the part of evaluators. *New Mexico State University*, B-230669.2, 88-1 CPD ¶523. None of these factors is shown or even alleged here. Moreover, it is our view that the important and responsible positions held by the agency evaluators here constituted *prima facie* evidence that they were qualified to evaluate proposals. *Communications and Data Systems Assocs*., B-223988, 86-2 CPD ¶491.

The University next complains that the evaluation panel's written assessment of its proposal did not comply with the agency's internal guidelines for conducting the evaluation, which required a specific and detailed explanation for a proposal's unacceptability. We will not consider the matter. An agency's internal instructions and procedures do not have the force and effect of law, so that the alleged failure to comply with them in a particular instance involves a matter for consideration within the agency itself, rather than through the bid protest process. *Holsman Services Corp*., B-230248, 88-1 CPD ¶484; *Spectron Caribe, Inc*., B-224251, 86-2 CPD ¶609.

The University also challenge the evaluation, complaining that the agency had an inadequate understanding of the content of its proposed training, which it maintains constituted a strategy for implementing TQM, and that the agency overlooked the achievements of its faculty, which included authoring both a text on TQM and the University's proposed TQM source materials. In this regard, the protester contends that disparities in the scoring of its proposal including findings of technical unacceptability based scores of 0 and 10 out of 100 available points, and a finding of technical acceptability with a score of 95 points, demonstrate the agency's inadequate understanding of its TQM implementation strategy, as well as an insufficient review of the University's experience.

The determination of the relative merits of proposals is primarily the responsibility of the contracting agency, which must bear the burden of any difficulties resulting from a defective evaluation. *Pitney Bowes*, B-233100, 68 Comp. Gen. 249, 89-2 CPD ¶157. Accordingly, in reviewing complaints about the evaluation of a technical proposal and the resulting determination of whether the proposal is within the competitive range, we will not reevaluate the proposal and independently judge its merits; we will only consider whether the evaluation was reasonable and otherwise consistent with procurement laws

and regulations. *Educational Computer Corp*., B-227285.3, 87-2 CPD ¶274. Although the competitive range of offerors to be included in discussions must include all proposals that have a "reasonable chance of being selected for award," and any doubt as to whether a proposal is in the competitive range should be resolved by inclusion, Federal Acquisition Regulation (FAR) 5.609(a), our Office will not disturb an agency's decision to exclude a firm from the competitive range where its technical proposal is reasonably considered so deficient that it would require major revisions to be acceptable. *Vista Videocassette Services, Inc*., B-230699, 88-2 CPD ¶55.

We find no basis to question the determination of technical unacceptability. The University's proposal does not explain how the "off-the shelf" training it offers in the form of various courses would provide for TQM implementation, the most important technical criterion in the RFP. The RFP specifically required a description of the approach that would be used in TQM implementation and we think the agency reasonably concluded that course offerings by themselves, without explanation, do not meet this requirement. For example, the proposal states that the University's approach "will provide senior management with a framework within which TQM policies, goals and management systems can be articulated" and "will also explore government-unique issues affecting TQM." We agree with OPM that merely proposing to articulate and explore TQM does not constitute a specific, total strategy for implementing TQM.

Further, the University's proposal does not indicate previous specific organizational experience in TQM implementation. The RFP stated that it was "imperative that offerors demonstrate experience and capabilities directly related to the proposed instructional approaches and implementation strategies," and requested detailed descriptions, as well as references, for prior, relevant TQM efforts that would substantiate a claimed capability to perform the contract work. The University's proposal only indicated experience in providing courses primarily on statistical process control and federal procurement, not experience in TQM implementation; the fact that its faculty has written on the subject of TQM does not by itself show experience in actual TQM implementation. Although the University's professional staff appears to have some TQM implementation experience, such experience is limited; for the most part their experience is in other areas such as federal procurement.

As for the scoring disparities, we have long recognized that it is not unusual for individual evaluators to reach disparate conclusions when judging competing proposals, since both objective and subjective judgments are involved, *Digital Radio Corp*., B-216441, 85-1 CPD ¶526; thus the mere fact that an individual evaluator gives a perfect score or that the scores of certain evaluators are extreme or inconsistent does not, by itself, render the scores invalid. *Panuzio/Rees Assocs*., B-197516, 80-2 CPD ¶395. In any case, here, the record indicates that the panel member who originally scored the University's proposal acceptable with 95 points subsequently reconsidered the evaluation and found the proposal unacceptable after concluding that the University's references in its proposal to TQM experts did not indicate that these experts were proposed employees or that the University itself had specific implementation experience. We find no indication in the record that the scoring by the technical evaluation panel reflects other than their reasoned judgment as to the University's proposal. Thus, the variance in the initial scoring by itself does not give us reason to

question the scoring, particularly when all the evaluators finally concluded that the University's proposal was unacceptable.

We conclude that it was not unreasonable for the agency to determine that the proposal would require major revisions to be made acceptable, and that the University thus had no reasonable chance for award.

STAT-A-MATRIX INSTITUTE

The Institute first argues that it was not promptly notified of an extension to the closing date for submission of proposals. While an amendment extending the original October 3, 1988, closing date to October 11 was issued on September 23, the protester states it did not learn of the extension until an October 3 telephone conversation with OPM officials and did not receive a copy of the amendment until October 4. The protester complains that it thus was not given the same length of time as other offerors to prepare a revised proposal.

Our Bid Protest Regulations provide that where alleged improprieties do not exist in the initial solicitation, but are subsequently incorporated into the solicitation, the alleged improprieties must be protested no later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. §21.2(a)(1) (1988). Here, although the Institute knew or should have known of its basis for protest no later than October 4, when it received the amendment, it did not file its protest until January 13, 1989, after notification of the rejection of its proposal. Thus, its protest in this regard is untimely and will not be considered. See *Joseph H. Carter*, B- 227094.2, 87-2 CPD ¶463.

The Institute also questions the evaluation of its proposal. The proposal, which consisted of offered courses leading to a master of science degree in quality management, as well as non-degree courses and training material, was rejected on the basis that it did not present a total strategy for implementing TQM throughout an organization, and did not show specific TQM experience or staff capability. OPM determined that federal agencies could utilize the Institute's offerings, consisting of such courses a quality engineering, quality improvement, and statistics and process control, only after devising their own strategies for TQM implementation.

The Institute contends that its course offerings constituted its strategy, that is, to educate a cadre of individuals within the organization on the concepts and benefits of TQM, so that they then could apply TQM principles to the workplace. Further, the protester maintains that its proposal in fact described previous TQM assistance it had provided to several large organizations.

We agree with the agency that the Institute proposal does not explain in detail the steps by which the principles of TQM will be implemented throughout the agencies. While course offerings may be a component of a TQM implementation strategy, we agree with OPM that courses, by themselves without some broader framework or explanation, do not constitute a clearly defined, overall strategy for implementation. Regarding prior experience, as already noted the RFP specifically required a detailed description of past experience in providing assistance, including a statement of the objectives, methodology, achievements, innovations, date and time span, and cost of the assistance, and the submission of references. While the Institute's proposal briefly described a program to introduce Food and Drug Administration personnel to TQM concepts and also stated that the Institute had assisted corporate quality institutes in

becoming familiar with TQM, our review of the proposal indicates that the specific and detailed description of past experience required by the RFP was not provided, and the fact that, as noted by the protester, the Institute has been accredited to grant a master of science degree in quality management does not by itself demonstrate the existence of experience in actually implementing TQM.

An offeror must demonstrate affirmatively the merits of its proposal, and it runs the risk of rejection if it fails to do so. *Vista Videocassette Service, Inc*., B-230699, *supra*; *Computer Brokers*, B-226103.2, 87-2 CPD ¶526. Here, the Institute simply did not document relevant TQM experience as required and did not provide for satisfying all the solicitation requirements. Its proposal, therefore, reasonably was found to be not susceptible of being made acceptable without major revisions, and elimination of the proposal from the competitive range was unobjectionable.

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PROTEST PROBLEM

A government solicitation called for the submission of proposals on March 15, 19XX. On February 15, 19XX, COMPANY's President met with the contracting officer and asked him if the time for submission of proposals would be extended. The contracting officer indicated that the date would be extended to April 15, 19XX. On March 1st, COMPANY's President, not having heard anything further about the extension, called the contracting officer and reconfirmed with him that the due date for submission of proposals would be extended to April 15th. Having received this assurance, the President then told his proposal team to slow down their preparation efforts and undertake a complete review of their proposal in an effort to substantially improve it. The solicitation was issued for a project that had received very high level interest within the Department of Defense. During the initial solicitation development, the contracting officer was provided with daily higher headquarters-directed changes to the scope of work. These changes continued after the solicitation was issued. The contracting officer was aware that the government's requirements under this solicitation were going to be changing frequently during the course of the acquisition. In order to most effectively deal with the constantly changing requirements, the contracting officer issued a solicitation amendment which indicated that there were going to be frequent changes to the scope of the solicitation and that he was going to issue oral solicitation amendments when this occurred. The solicitation was later modified to indicate that any oral modifications would be confirmed in writing within 48 hours. Several days after the President's last telephone call with the contracting officer, and less than one week prior to the original date for submission of proposals, COMPANY's President received a facsimile letter from the contracting officer informing him that the original date for submission of proposals would not be changed. COMPANY's President then summoned his proposal team and told them to work on the proposal on a 24-hour at day basis until it was complete. The location for delivery of proposals was located in another city several thousand miles away. The COMPANY's President left to deliver the proposal one day early but, since the proposal was not yet complete, he took it on computer disks and had it printed, bound and copied at a KINKO's on the morning of the original due date. He completed the printing; binding and copying process at Noon on the day proposals were due. Proposals were due at the contracting agency not later than 2:00 p.m. on that day.

While traveling from his hotel in a taxi on his way to the government agency, COMPANY's President was stopped by a motorcade for a visiting dignitary. He ordered the taxi driver to go around the roadblock and take the next exit off of the freeway. When the taxi approached a police vehicle, the driver was told that if he proceeded, he and the President would be arrested by the Secret Service. After the motorcade had passed, the President proceeded to the government agency but arrived at the room designated for receipt of proposals at 2:05 p.m. The President attempted to give the COMPANY's proposal to the contracting officer who refused to accept it saying, "Sorry, it is a late bid and I can't accept it." The President explained that he had been delayed by a government official's motorcade. The contracting officer still refused to accept it and gave the proposal back to the President who then returned home. The President left the proposal sealed and unopened since his return and no changes have been made to the proposal.

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Protest Problem *(continued)*

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The President again spoke with the contracting officer one week later and was again told that he could not submit his proposal even though no changes had been made to it and it was still in its original bound container. President then hired Lawyer's to file a bid protest. Lawyer's filed a protest with the contracting agency on March 28th. On April 1st, they also filed a bid protest with the GAO. Each protest claimed that the proposal should have been accepted since its lateness was excused by an act of the Government -- the motorcade delay -- and that the contracting officer had made an oral modification to the original due date for receipt of proposals, thus making the President's attempted submission of COMPANY's proposal timely. The GAO protest also claimed that the contracting officer had misrepresented that there would be an extension to the original due date and, in the interests of competition, the acquisition should be canceled and re-bid.

QUESTIONS:

1. What should the GAO do with the protest once it is received and why?
2. Was the COMPANY's lateness in submitting its proposal excused and why?
3. What should the contracting agency do with the protest and why?
4. May the contracting agency act on the protest? If so, what can the agency do?

CHAPTER SIX CASES

Appeal of Atlantic Electric Company, Inc.
Under Contract No. F38606-87-C-0061
ASBCA No. 38037
89-3 BCA ¶ 21,930

FINDINGS OF FACT

On 14 October 1987 appellant was awarded the contract here in dispute based on its sealed bid. The contract for repair of the emergency power system in a base hospital recited the following in the Technical Provisions, Division 1, entitled "Statement of Work":

1. SCOPE:

1.1 Removal of existing 100 KW generator, automatic transfer switch (ATS), and various safety switches, panels, and circuits.

1.2 Construction of 525 SF addition to existing electrical room.

1.3 Installation of 2 new 75 KW generators and associated paralleling/totalling switchgear and 3 new BP/IS ATSs, and various panelboard, etc.

9. SALVAGEABLE MATERIALS:

Material and equipment removed during construction and determined to be salvageable by the Contracting Officer shall remain the property of the Government and shall be turned over to the Contracting Officer or his/her designated representative. Material shall be delivered to the Defense Property Disposal Office, Bldg 526. Division 2 of the Technical provisions of the contract entitled "Demolition" provided in pertinent part as follows:

PART 1 -- GENERAL

7. AVAILABILITY OF WORK AREAS:

Areas in which salvage and demolition work is to be accomplished will be available in accordance with the following schedule:

Area	Date
Oxygen Storage Room	Start of Contract

PART 2—EXECUTION

10. DISPOSTION [sic] OF MATERIAL:

10.1 Title to Materials: Title to all materials and equipment to be demolished, excepting Government salvage, is vested in the Contractor upon receipt of notice to proceed. The Government will not be responsible for the condition, loss or damage to such property after notice to proceed.

10.2 Material for Contractor Salvage: Material for salvage shall be stored as approved by the Contracting Officer. Salvage materials shall be removed from Government property before completion of the Contract.

10.4 Materials for Government Salvage:

10.4.1 Property of the Government: Salvaged items shall be removed in a manner to prevent damage. The following items shall be reserved as property of the Government: Storage shelves, oxygen bottles.

The Oxygen Storage Room set out in the Demolition section of the Technical Provisions was housed in a room adjacent to the existing generator room containing the electrical equipment. Under the contract an addition to the existing structure was to be erected, a portion of which would house a new oxygen storage room. The contract provided for reinstallation of the salvaged storage shelves and oxygen bottles in the new oxygen storage room.

By contract modification, the contract completion date was extended to 10 October 1988. On or about 9 September 1988, the Government requested that appellant turn in salvageable materials such as copper wire, scrap metal and the existing generator including switchgear scheduled for removal in Paragraph 1.1, supra. In preparing its bid, appellant's president had reduced his estimate by the salvage value of materials not listed in 10.4.1, supra. The generator and switch gear equipment had a salvage value of approximately $15,000. By letter of 16 September 1988 appellant informed the Government that it considered this equipment to be its property. After correspondence between the parties, the switchgear was picked up by Government personnel on 30 September 1988 and the generator and scrap metal were turned in on 5 October 1988.

DECISION

In order for the Government to be divested of valuable property, there must be a clear indication of that in the contract. Here appellant argues that the language in Paragraph 10.1 of the Demolition portion of the Technical Provisions provided that title vested in the contractor for all demolished material and equipment not reserved prior to issuance of the notice to proceed. Since the items listed in 10.4.1 did not include the items here in dispute and were not noted prior to the notice to proceed, appellant argues that title to them vested in appellant.

The contract must be read as a whole. Reading the contract as argued by appellant, Paragraph 9 of the Statement of Work included in the Technical Provisions would have little or no meaning. The Demolition Section defined as its area of work the Oxygen Storage Room. The items here in dispute were not located in that room. We conclude that the reference to salvageable materials in that section pertained to the items in the oxygen storage room and did not include items to be removed which were not located in that room.

We, therefore, conclude that the contract failed to indicate clearly that title to the items here in dispute passed to appellant. Cf. Basic Construction Company, ASBCA No. 21140, 76-2 BCA ¶ 12,153. At best this created a patent ambiguity in the contract provisions regarding ownership of the generator and switchgear equipment about which appellant had the duty to inquire prior to bidding. Having failed to do so, appellant is not now entitled to either the property or the value of same.

The appeal is denied.

MATTER OF: ROTHE DEVELOPMENT, INC.
B-279839; 98-2 CPD ¶ 1

DECISION

Rothe Development, Inc. protests the award of a contract to any other offeror under request for proposals (RFP) No. F34608-98-R-0016, issued by the Department of the Air Force, for operation and maintenance services for the base telecommunications system (BTS) and network control center (NCC) at Columbus Air Force Base, Mississippi. Rothe, the incumbent contractor for a portion of the services, alleges that it was placed at a competitive disadvantage because the agency disclosed certain information, which allegedly is proprietary to Rothe.

We deny the protest.

The RFP, issued on March 6, 1998, provides for the award of a fixed-price requirements contract for a base period with four 1-year options. The contractor will be required to provide all personnel, equipment, parts, materials, tools, operation and maintenance documentation, and other items and services necessary to perform operations and maintenance of the BTS and NCC.

The RFP lists company organization, quality, and safety as the technical evaluation factors, and includes evaluation subfactors under each of these evaluation factors. With regard to the company organization evaluation factor, the RFP lists eight evaluation subfactors, including personnel. The RFP states that, under the personnel subfactor, the "availability of sufficient personnel with the required skills, training, and experience will be evaluated."

A pre-proposal conference was held, during which a potential offeror asked, "How many personnel are currently working at the NCC?" The Air Force explains that, in order to answer this question, the quality assurance evaluator (QAE) for the predecessor contract, who has a close working relationship with the Rothe employees performing the contract, "mentally went through each office and listed the names of the persons in the offices." According to the Air Force, the QAE found "that Rothe had 23 people working the contract with approximately 15 performing the NCC work." The agency subsequently issued 71 questions and answers (Q&A) regarding the RFP to potential offerors, with Q&A number 24 reading as follows:

> "24. How many personnel are currently working at the NCC? The contractor currently has 23 people working the NCC - however, only approx 15 of them are performing the work defined under this contract. Please note that individual personnel may be cross-trained and performing more than one function."

Rothe asserts that the agency's answer to question 24 improperly disclosed Rothe's "proprietary privileged and confidential manning criteria related to the solicitation . . . and destroyed its competitive position for the solicitation." Rothe contends that, contrary to the agency's assertions, the number of Rothe personnel currently performing the contract could only have come from the technical proposal submitted by Rothe for the predecessor contract, and points out that this proposal contained language to preserve the confidentiality of the information contained therein. Rothe requests that the RFP be canceled, and its current contract extended through December 1999 with 4 option years and modified to include the additional work required under the RFP. In the alternative,

Rothe requests that it be awarded a contract for the services on a sole-source basis, or that the RFP be amended to delete the evaluation preference for small, disadvantaged businesses or issued as a total small business set-aside.

We have recognized the right of a firm to protect its proprietary data from improper exposure in a solicitation in the context of a bid protest. The Source, B-266362, Feb. 7, 1996, 96-1 CPD ¶ 48 at 2; Ingersoll-Rand Co., B- 236391, Dec. 5, 1989, 89-2 CPD ¶ 517 at 2. As a general rule, proprietary information is that which is marked proprietary or otherwise submitted in confidence to the government. Good Food Serv., Inc., B-260728, June 20, 1995, 95-2 CPD ¶ 123 at 2. Where a protester alleges that such information was improperly disclosed, the record must show that the material involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge, and establish that the protester was competitively prejudiced by the release, before we will sustain the protest. Ursery Cos., Inc., B- 258247, Dec. 29, 1994, 94-2 CPD ¶ 264 at 2; Ingersoll-Rand Co., supra. Such competitive prejudice may not be established on the basis of speculation. JL Assocs., Inc., B-239790, Oct. 1, 1990, 90-2 CPD ¶ 261 at 4-5.

Here, considering the record most favorably to the protester, we do not believe that the information disclosed by the agency could reasonably be considered proprietary to the protester or that its disclosure resulted in any competitive disadvantage to Rothe.

First, as stated by Rothe in its April 6 letter to the agency, "the information [disclosed in Q&A No. 24] is incorrect." Indeed, the record confirms that the staffing levels disclosed are in fact different than those set forth in the proposal submitted by Rothe in response to the predecessor RFP. Where the information released is substantively different than that which the protester claims as its own, we fail to see how the protester can claim that the agency released its proprietary information.

Moreover, it appears that the released information was ascertained from the QAE's "mental" headcount, as asserted by the agency, not through the agency's review of Rothe's proposal submitted in response to the predecessor RFP. In our view, it is more likely that inaccurate information would result from a mistaken mental headcount rather than the review of a firm's proposal. Such a mental headcount is, in our view, akin to "reverse engineering," and the release of information or data developed through reverse engineering is not improper. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974); Si Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1255 (3rd Cir. 1985); Ingersoll- Rand Co., supra, at 4. In any event, matters, which are fully disclosed by the marketed product (such as the number of personnel performing a services contract monitored by the government) cannot be protected as a trade secret. Ingersoll-Rand Co., supra.

Further, we fail to see how the protester was competitively disadvantaged by the agency's release of the information. In this regard, the agency estimates that the contract being performed by Rothe includes 40 percent of the work required under this RFP. Rothe, on the other hand, estimates that its current contract includes 80 percent of the work required under the RFP. Assuming for the sake of argument that Rothe is correct, the fact remains that 20 percent of the work was not covered by the predecessor RFP, and neither the agency nor Rothe asserts that offerors construct a reasonable proposal by simply increasing the staffing levels disclosed by the agency proportionally to cover all of the work now being solicited. Moreover, the information disclosed did not reveal what labor categories, mix, or rates would be appropriate, or how Rothe calculated its profit,

overhead, and management costs--important elements of price and in some instances, technical approach. At best, the agency's release of the information may operate to normalize to a small degree the competition so that all offerors will have a very rough estimate as to how many individuals will be needed for contract performance. As such, even if the information disclosed could be considered proprietary, the effect of releasing the information on Rothe's competitive position under the terms of the RFP is speculative at best and provides no basis to sustain the protest. See Ursery Cos., Inc., supra, at 3.

The protest is denied.

Comptroller General of the United States.

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DOWTY DECOTO, INC. v. DEPARTMENT OF THE NAVY
883 F.2d 774 (9th Cir. 1989)

SCHROEDER, Circuit Judge:

The Navy appeals from a district court's permanent injunction prohibiting disclosure of a subcontractor's technical data. We affirm the injunction, holding that under any applicable regulations, the subcontractor never surrendered disclosure rights to the Navy.

The challenged injunction was obtained by the appellee Dowty Decoto, a manufacturer of aeronautical equipment. Since 1971 Dowty Decoto has supplied the Navy with "repeatable holdback bars" used in launching F-14 Tomcat fighter planes from aircraft carrier decks. Decoto has supplied the bars pursuant to a subcontract with Grumman Aerospace Corp., the prime contractor supplying the Navy with F-14s. Decoto also sells the bars directly to the Navy on a purchase order basis for use as spares. In addition to the F-14, Decoto also supplies holdback bars for the F-18 Hornet and T-45A trainer aircraft.

On all drawings and data Decoto supplied pursuant to the subcontract, Decoto placed a restrictive legend stating that the data was proprietary and subject only to limited disclosure rights under the contract. It is not disputed that the form of the legend was appropriate for reserving limited disclosure rights in Decoto.

In 1983 the Navy wrote to Decoto asking Decoto voluntarily to remove the restrictive legends from data it had furnished the Navy. Decoto refused, stating that the Navy had never obtained disclosure rights from Decoto. Three years later, the Navy requested Decoto to substantiate its position that the government had acquired only limited rights in the data. After an informal administrative review of Decoto's submissions, and some informal discussions, the Navy handed down an administrative decision in a letter dated April 27, 1987, advising that Decoto had failed to substantiate its use of restrictive rights legends. It advised that it would obliterate or ignore the legends on the data, and would disclose the data to third parties for the purpose of obtaining competitive bids. Decoto then filed this suit for a permanent injunction in district court, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §706 (1982), to prohibit the Navy from disclosing the data. The district court granted the injunction.

There is no dispute that unless the Navy has a right to Decoto's data and drawings, they otherwise represent trade secrets of Decoto. The Trade Secrets Act forbids government agents from disclosing confidential information "in any manner or to any extent not authorized by law." 18 U.S.C. §1905 (1982). If the Navy has no authority to disclose the holdback bar data, its disclosure of Decoto's trade secret would violate section 1905, and "any disclosure that violates §1905 is 'not in accordance with law' within the meaning of 5 U.S.C. §706(2)(A)." *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979). Thus, the APA authorizes this injunction preventing the Navy from disclosing Decoto's data, provided that such disclosure violates the Trade Secrets Act. *Id*. at 316-17; *Conax Florida Corp. v. United States*, 824 F.2d 1124, 1128 (D.C.Cir.1987).

Our determination of whether the Navy's action was properly enjoined as a violation of the Trade Secrets Act is in turn guided by regulations governing the Navy's authority to disclose the data in the absence of Decoto's acquiescence. The contentions of the parties center on a particular provision of the Armed Services Procurement

Regulations (ASPR), regulations promulgated by the Department of Defense governing the acquisition of items for military use, which were in effect when the contract between Decoto and Grumman was signed.

The provision at issue is contained in ASPR §§9-202 & 9-203, 32 C.F.R. §§9-202 & 9-203 (1965), which deal with rights in technical data. Section 9-202.2 declares the governmental policy of granting to the government unlimited rights to disclose data concerning any item developed at government expense. The policy restricts governmental disclosure of data only where an item was developed at private expense, and where the contractor takes care to mark all data and drawings with a legend prescribed by the regulations setting forth the proprietary nature of the data and the contract under which the data was furnished. Section 9-203(a) implements the policy by requiring that the text of section 9-203(b), which takes the form of a contract clause, be inserted into all government contracts. The language of section 9-203(b) carries out the apportionment of data rights anticipated by the ASPR.

* * * * *

...(W)e may overturn the contracting officer's decision that the Navy was authorized to disclose Decoto's data only if the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 5 U.S.C. §706(2)(A). After reviewing the record, we conclude that it compelled the district court's holding that the bar was developed at private and not government expense. The Navy contracting officer's decision was arbitrary, and its implementation was therefore properly enjoined by the district court.

The contracting officer's decision relied in part upon language of the Decoto-Grumman subcontract, which the Navy contends created unlimited data rights in the government under the ASPR. The subcontract language relied upon recited that design and development were within the subcontract's scope. The subcontract language calls for Decoto to "design, develop, manufacture, test and deliver all items as required."

The Navy, however, is mistaken in its belief that the recitals of a contract alone can determine whether an item was actually developed at private expense. ASPR §9-203(b) clause (b)(1)(i) purports to grant unlimited rights in the government to "technical data resulting directly from performance of experimental, developmental, or research work *which was specified as an element of performance* in this or any other Government contract or subcontract" (emphasis added). The regulation requires actual development and work not merely contract recitals. Procurement authorities use a test based on physical and economic reality, not language, to determine which party actually "develops" an item within the meaning of the statutes and regulations. This test has now been codified within the new Federal Acquisition Regulations System (FARS). See 48 C.F.R. §227.471 (1987).

The leading administrative decision in this area, from which the current regulation is derived, is *In re Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶18,415. It concerned a defense research project that had gone through various phases of funding alternately provided by the government and the private contractor. The Armed Services Board of Contract Appeals there recognized that the crucial factor in determining who "developed" an item concerned who took the risk of investing money to transform the item

from a speculative idea into a workable item that would probably succeed in its intended use. The Board defined the term "developed" accordingly:

> *In order to be "developed," an item or component must be in being, that is, at least a prototype must have been fabricated... and practicability, workability, and functionality (largely synonymous concepts) must be shown through sufficient analysis and/or test to demonstrate to reasonable persons skilled in the applicable art that there is a high probability the item or component will work as intended. All "development" of the item or component need not be 100 percent complete and the item or component need not be brought to the point where it could be sold or offered for sale. An invention which has been "actually reduced to practice" under patent law has been "developed," but the converse is not necessarily true in every case.*

The Department of Defense adopted this "workability" definition in a regulation it implemented in 1987 for defining the term "developed" in this context:

> *"Developed", as used in this subpart, means that the item, component or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended.... To be considered "developed," the item, component or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must [it] be actually reduced to practice within the meaning of [the patent law].* 48 C.F.R. §227.471.

The Navy points to no authority adopting a different definition for the term "developed," nor does it argue that the definition has changed since the time when the holdback bars were developed.

Under this standard, our review of the record must focus on the realities of who invested the money that transformed the holdback bar from an uncertain idea into a workable device for its intended application. The record overwhelmingly shows that Decoto's money, and not the Navy's, played this role.

The record reflects that Decoto clearly had the technology in place and had developed the bar to the point of workability even before Decoto entered into the contract with Grumman. By the time Decoto originally approached the Navy with the design for the bar, Decoto already had two patents in place on the "high energy release locking actuator ring," which forms the heart of the bar's design. The Navy apparently believed in the feasibility of Decoto's existing design, inasmuch as the Navy itself referred Decoto to Grumman for further funding. In negotiating the contract with Grumman, Decoto never quoted or asked for any funds for design effort or production tooling. The contract calls for the production of first units of the bar within a very short time; four preproduction units were to be delivered within three and a half months, and six production models were to follow within approximately three more months. Decoto's technology was sufficiently developed to allow Decoto successfully to meet these commitments.

The entire framework of the Decoto-Grumman subcontract operates as a straight parts procurement agreement rather than one for research and development. The contract calls for Decoto to supply holdback bars to the Navy as finished products. It contains no expenditure category for research and development work. The total price paid to Decoto under the contract represents simply the aggregate of individual payments for manufactured bars and supporting documentation. The contract is of the "fixed-price" type, promising payment of a specific price for each unit delivered, rather than a "cost-type" contract, which would reimburse the contractor for whatever expenses it incurred plus adding percentage for the contractor's profit. Fixed-price contracts like Decoto's have not normally been used for projects requiring research and development. See *Bell Helicopter Textron*.

The contracting officer's decision pointed to changes occurring in the bar's design during the course of performance of the subcontract to support the conclusion that the Navy indirectly financed design and development of the bar through payments by Grumman. The only evidence in the record that supports the position that the Navy actually financed any of the bar's development is a "Subcontractor Change Proposal" (SCP) that Decoto sent to Grumman during the term of the contract. The original preproduction contract, dated December 1970, carried a price of $72,344.88. Roughly two years later, in November 1972, Decoto sent six SCPs to Grumman in response to Grumman's request that the bars withstand 2,000 successful launch cycles rather than the 700 cycles demonstrated by the preproduction units. The proposals sought increases in the contract price, all of which were to be passed through to the Navy, requesting a total of $141,875.20 in additional payments to Decoto. Five of the six SCPs concerned small specific changes in the bar's design, and were approved by Grumman for the full amounts requested. The sixth request, upon which the Navy here relies, was characterized by Grumman as a "change in scope." It was the largest and most general in nature, and requested $106,724.22, of which Grumman approved only $53,000. As a result, the SCPs added only $88,158.98, bringing the total government expenditures for the bars from $151,721.94 to $239,880.92 as of that time.

The justification provided by Decoto in the sixth SCP for seeking reimbursement of nearly $107,000 refers to a "completely new design" that had been developed by Decoto in response to Grumman's demands that the bars last longer. The contracting officer's decision held, and the Navy argues on appeal, that this demonstrates that the Navy paid for development of the bar, the payment flowing through Grumman during the term of the contract.

Despite Decoto's assertions at the time that $107,000 was necessary, there exists no evidence in the record to show that the money actually paid by the Navy through the SCP "developed" the bar to workability within the definition established by *Bell Helicopter Textron* and 48 C.F.R. §227.471. The record contains nothing to suggest that prior to this SCP the holdback bar had a low probability of success in its intended application, or that the bar obtained a high probability of success only as a result of the funding provided by the SCP. Indeed, since the government provided less than half of the development costs requested in 1972, and in effect provided only partial reimbursement for development that had already taken place, the SCP does not support the government's position that the Navy financed the crucial research and development.

Other evidence in the record suggests that the bars had achieved workability before any government money was paid to Decoto, and that the changes that the government helped finance during the course of the contract were aimed at increasing performance rather than achieving workability. When the original Decoto-Grumman contract
was amended to reflect the increase in contract price, the additional payment was not placed under a research and development category, but was accounted for under a new heading of "qualification test."

The Navy itself recognized that the bars manufactured without the design changes covered by the SCP were workable. This is most clearly evidenced by the fact that, although the Navy was aware of the changes wrought by the SCPs, it nevertheless approved the ordering and use of forty-two pre-change design bars for use in launching F-14s from aircraft carriers. The Navy merely assigned a different part number to these pre-change units to keep track of their shorter life span. There is nothing in the record to suggest that any of these pre-change bars ever failed to operate properly. The record does contain evidence that in over 250,000 deck launches using the bar only one possible operational failure has ever been noted.

The government directs us to language in *Bell Helicopter Textron* suggesting that if a contractor receives even partial reimbursement for development costs previously voluntarily expended, the government may receive unlimited data rights. We do not believe such a rule, even if appropriate in some cases, should apply in a situation like this where the contractor could not reasonably have been aware that an application for reimbursement could later lead to total forfeiture of data rights which the contractor had in good faith sought to retain by appropriate legends. Here the government did not give Decoto any notice of its intent to claim data rights until ten years after the SCP was submitted.

The Navy contracting officer's findings that the key research and development, as defined under the standard of *Bell Helicopter Textron* and 48 C.F.R. §227.471, occurred after the contract had begun and was financed by the government were arbitrary and unsupported by the record, and are therefore insufficient under the APA to support a holding that the holdback bars were developed other than at private expense. Because Decoto's holdback bar was privately developed and its technical data contained the proper restrictive legend, ASPR §§9-202 & 9-203 granted only restricted data rights in the bar to the Navy These regulations do not authorize the Navy to disclose Decoto's technical data. Such disclosure would violate the Trade Secrets Act, and is therefore properly enjoinable under the APA.

The district court's entry of injunction against the Navy was proper and is AFFIRMED

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PROBLEM #1

McDonnell Douglas received an Air Force contract to modify the DC-10 commercial airplane into a military refueling tanker, which would be able to refuel military aircraft in flight. The modification involved adding fuel containers within the airplane, and installation of a boom arrangement at the tail of the plane which would attach to the aircraft which would be refueled in mid-flight. Fuel would then be transferred through the boom to the receiving aircraft. The military version of the DC-10 became known as the KC-10 air tanker.

At an air show, engineers from Boeing, a competitor of McDonnell Douglas, viewed the outside of the KC-10 and determined that it infringed a Boeing patent on boom arrangements for refueling. Boeing wrote to McDonnell Douglas claiming patent infringement. The McDonnell Douglas contract contained both the Patent Indemnity clause and the Authorization and Consent clause. McDonnell Douglas forwarded Boeing's letter to the Air Force, stating that this was an Air Force problem because those contract clauses make the contractor immune to a patent infringement suit. Is this a valid argument?

PROBLEM #2

A contractor entered into a contract for the fabrication of kits, and their installation, for on-board Auxiliary Power Units (APUs). The technical data was priced separately at $1,000,000.00, and was to be delivered in a form suitable for the competitive reprocurement of the kits by the Government. Nevertheless, the drawings and other data were delivered by the contractor with proprietary stamps and Limited Rights Legends. This is a critical procurement. What should the contracting officer do?

PROBLEM #3

A contractor designed and sold to the Government an innovative Ground Collision Avoidance System, which was subsequently installed on a large number of aircraft. The contractor delivered technical orders, manuals, and other instructional materials with a contractor "proprietary stamp" and a limited rights legend on all of this material. The contracting officer ordered the contractor to remove these unauthorized markings, or the markings would be removed by the Government. Was the contracting officer correct?

PROBLEM #4

A contractor developed a new aircraft fuel advisory system, and contracted with the Government to provide the system, with a redesigned pump. The data for the system delivered to the Government contained limited rights legends. The Government demanded that the data relating to the pump be delivered with unlimited rights, saying that the pump was "developed at public expense." The contractor did not remove the markings claiming the entire system was "developed at private expense." What next?

continued on next page

Problems *(continued)*

PROBLEM #5

Although many of us have been placed on hold and heard the local radio station over the telephone system, this service is not free just because you have the technology to do it. The American Society of Composers, Authors, and Publishers (ASCAP) represents songwriters and music publishers, and zealously guards the rights of the owners of music copyrights. For copyright law to attach, the performance must be considered a public place. Since a public place is " where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" (17 USC 101), your on-hold audience falls within the definition. The penalty for copyright infringement by playing non-licensed music is between $500 and $20,000 for each work infringed. Clearly, the magnitude of the cost involved outweighs the benefits of offering radio-on-hold to your listeners. Do you think you will never get caught? ASCAP actually employs a number of people whose sole job is to make telephone calls and get put on hold. If they hear music, they will automatically tell you that you are in violation of copyright law and you must stop the practice. They might offer to sell you a license to use that music. If you get caught a second time, they will file a lawsuit to recover license fees dating back to the inception of your radio-on-hold telephone system. These fees are in addition to the penalties discussed earlier. So, if your local command has a radio-on-hold system at your installation, what should they do?

CHAPTER SEVEN CASES

MATTER OF: MAGNAVOX
B-207433, 83-2 CPD ¶401

Background

This decision results from requests by two members of Congress concerning whether after the period of availability expires for an appropriation used to finance a contract for the purchase of thermal viewers, the Department of the Army may use cost underrun money due it under the contract to modify the contract to provide for an increased quantity. In 1977, the United States Department of the Army intended to purchase 557 thermal viewers from the Magnavox Government and Industrial Electronics Company. For this purchase the Army planned to obligate fiscal year 1977 funds, which, under a multiyear appropriation, were available until the end of fiscal year 1979. For the amount of money, which the Army was willing to spend, however, Magnavox would agree to provide only 509 viewers. Therefore, in April 1977, the Army and Magnavox entered into a fixed price incentive contract for the Army to purchase 509 viewers. The Army recorded the fixed price ($8.1 million) as an obligation against the FY 1977 appropriation. The contract also contained an option clause which, in 1978, the Army exercised to order 285 additional viewers, obligating FY 1978 funds.

In 1981, Magnavox learned that its cost would be below the target cost contained in the contract. It therefore proposed to modify the 1977 contract to increase the quantity to be provided from 509 viewers to 557 viewers. It suggested to the Army that the combined amount of the underrun money from the original contract and the option contract could be used for the purchase of additional viewers instead of decreasing the contract price.

The Army, citing Army Regulation 37-21, believed that such a procedure was contrary to law and refused to execute the modification agreement. The Army's position was that a modification to increase the quantity would be beyond the scope of the original contract. As such, it could not be charged to appropriations whose period of availability had expired, but would constitute an obligation against funds current at the time of the modification. We agree.

Discussion

Where funds are made available for obligation during a specific time period, once that period expires the funds may be used only to liquidate obligations, which were properly incurred within that period of availability. Funds from the appropriation, which are not obligated, must be withdrawn. Further, when an agency obligates more funds than are needed for a project, it must, upon learning the correct amount, deobligate the excess amount.

Based on these principles, we previously have determined that surplus funds, which result from a cost underrun, may not be used in a succeeding fiscal year. This result was reached notwithstanding that the agency desired to extend an existing contract. This holding would apply to the present situation to preclude the Army from using the surplus funds to procure additional thermal viewers. The Magnavox

Corporation, however, maintains that in 1977 the Army obligated sufficient funds to permit it to procure 48 additional thermal viewers in 1981.

First, Magnavox seeks to define the amount of money obligated in terms of the Army's original requisition for 557 viewers. Magnavox reasons that because the Army originally desired to purchase 557 viewers, the amount it obligated was intended to cover as many of this quantity as possible, rather than just to obtain 509 viewers. This argument, however, does not accurately reflect either the governing law or the terms of the contract.

The requirements for a valid obligation are stated in 31 U.S.C. §1501. In the case of a contract, the obligation must be supported by documentary evidence of a binding written agreement for the delivery of specific goods or services. In addition, the agreement must be executed while the appropriation to be charged is available for obligation. Further, the agreement must provide evidence of an offer and acceptance, and must impose legal liability to perform the contract upon both parties.

The record here shows that although the Army originally sought to purchase 557 viewers, Magnavox refused to supply this quantity for the amount of money, which the Army wanted to pay. Instead, Magnavox agreed to produce, and the Army agreed to accept, 509 viewers. Thus, there was no offer and acceptance for 557 viewers. As the contract terms demonstrate, neither was there imposed any legal liability upon the Army to pay for or upon Magnavox to supply 557 viewers.

The contract does not state that Magnavox will produce as many viewers as it can for the amount of money available. Rather, it provides for Magnavox to supply a fixed quantity of 509 viewers and the target cost for this quantity. Moreover, it does not state that Magnavox will produce additional viewers if the cost incurred in producing 509 viewers is below the stated target cost. On the contrary, the contract provides that in the event of a cost underrun, the Army will benefit from a downward adjustment in the contract price. Accordingly, under this contract, the Army could not have incurred a valid obligation for 557 viewers against the appropriation, which was available in 1977.

Magnavox next alleges that because in 1977 the Army had a bona fide need for 557 viewers, the appropriation, which was then available, is the correct one to charge for the purchase of this quantity of viewers. This is an inversion of the so-called “bona fide needs rule.” The essence of the rule is simply that an appropriation may be validly obligated only to meet a legitimate need existing during the period of availability. Under this concept, payments are chargeable to the year in which the obligation took place, even though not actually disbursed until a later year, as long as the need existed when the funds were obligated. Here, the fact remains that the funds in question were obligated under a contract (a) calling specifically for the production of 509 viewers, and (b) providing for the return of a portion of any underrun funds to the Government (in the form of a downward price adjustment).

Certainly the Army could have used underrun funds to procure additional viewers at any time during the period those funds remained available for obligation. Also, we are of course aware than an unmet need does not somehow evaporate merely because the period of availability has expired. However, nothing in the bona fide needs rule suggests that expired appropriations may be used for an item for which a valid obligation was not incurred prior to expiration merely because there was a need for that item during that period. In this connection, it makes no difference whether we are

talking about otherwise unobligated funds that were withdrawn to the Treasury or funds required to be deobligated pursuant to an underrun clause. Once the obligational period has expired, the procurement of an increased quantity must be charged to new money, and this is not affected by the fact that the need for that increased quantity may in effect be a “continuing need” that arose during the prior period.

Magnavox finally claims that the present situation is analogous to the treatment of replacement contracts. When an agency terminates a contract because of the contractor's default, it may enter into a replacement contract with another contractor and may, within limits, charge the cost to the appropriation which was originally obligated even though that appropriation has expired for purposes of new obligations. This concept, however, has no application here.

First, there was no default by Magnavox, and Magnavox did in fact complete its work under the contract. More importantly, however, in order to charge the cost of a replacement contract against the original appropriation, the replacement contract must be for the purpose of completing the original contract or procuring the materials called for by the original contract. It must be 'substantially similar in scope and size as the original contract,' and may not be used to order additional work. Therefore, the treatment of obligations under a replacement contract would not permit the Army to order additional viewers in this case and charge an expired appropriation with their cost.

We have recognized that certain contract modifications within the scope of the original contract may be chargeable to the appropriation used to fund the original contract. Here, however, we are not dealing with a contractual right enforceable by the contractor. The Magnavox proposal is for an additional quantity in excess of the quantity fixed in the original contract. As such, it is not within the scope of the original contract and would have to be treated as a new obligation chargeable to current funds.

The original contract did contain an option clause to permit the Army to order an additional quantity of viewers. However, under an option clause, an obligation is incurred only when the option is exercised. Thus, for example, when the Army exercised the option in 1978 to order an additional 285 viewers, it properly charged the option cost to its 1978 appropriation.

Conclusion

Funds from an expired appropriation can be used only to liquidate obligations, which were validly incurred while the appropriation was available. Since there was no binding agreement, which provided for the purchase of the 48 thermal viewers in question, no obligation for them could have been incurred. Accordingly, we agree with the Army that it may not use the cost underrun money to modify the 1977 contract to provide for the purchase of 48 additional viewers.

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THE HONORABLE MICHAEL B. DONLEY, ASSISTANT SECRETARY OF THE AIR FORCE FINANCIAL MANAGEMENT AND COMPTROLLER
Comp. Gen. Dec. B-234326.15, December 24, 1991

As you are aware, the General Accounting Office audited the Air Force's fiscal year 1989 reports to the Department of the Treasury. As part of this audit, we reviewed and tested transactions and accounts of the Depot Maintenance Service, an operating division of the Air Force Industrial Fund.

During the review of Depot Maintenance Service transactions at the Ogden Air Logistics Center (ALC), Hill Air Force Base (AFB), Ogden, Utah, we identified two instances where the Air Force Industrial Fund may have improperly financed military construction projects: the construction of an Investment Casting Facility at Hill AFB, and the replacement of twelve mobile home trailers at the Utah Test and Training Range (UTTR). On June 13, 1991, we asked the Air Force to explain its authority to finance these projects out of the Industrial Fund. We received a response to our inquiry from the Principal Deputy Assistant Secretary of the Air Force, Financial Management, dated September 12, 1991. We have now completed our analysis of these issues and conclude that both of these projects were improperly funded by the Industrial Fund.

LEGAL REQUIREMENTS FOR CARRYING OUT AND FINANCING MILITARY CONSTRUCTION PROJECTS

Title 10 of the U.S.Code contains specific provisions governing the Air Force's ability to complete military construction projects. A "military construction project" consists of "all military construction work ... necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility...."10 U.S.C. §2801(b) (1988). "Military construction" is defined as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." 10 U.S.C. §2801(a). Air Force Regulation (AFR) 86-1 implements these definitions within the Air Force and contains further guidance on what types of projects constitute military construction.

A "military construction project" must be specifically authorized by law in order to be carried out by a secretary of a military department. 10 U.S.C. §2802. Once a military construction project is authorized, it must be funded from an appropriation available to pay for the cost of the project. 41 U.S.C. §12; 63 Comp.Gen. 422 (1984). In general, Department of Defense appropriations are not available to finance military construction projects unless they are specifically made available for that purpose. See, 63 Comp. Gen. at 433. In this regard, 10 U.S.C. §2805(c)(1) provides the Department of Defense with the authority to use appropriations available for operation and maintenance to finance military construction projects, which cost $200,000, or less. Department of Defense Directive 7410.4, July 1, 1988, provides that Defense industrial funds (including the Air Force Industrial Fund) are available to finance military construction work as provided in section 2805(c)(1).

INVESTMENT CASTING FACILITY

A. Factual Background

During testing at the Ogden ALC, we found two contracts to build an Investment Casting Facility within building 511 at Hill AFB. The first contract, No. F42650-87C0034, called for adding a pre-engineered addition to building 511, as well as remodeling and installing new utility and power sources to the building. The funding documents associated with this contract show that its $324,046 cost was paid out of the Industrial Fund.

The second contract, No. F42650-89-B-0071 was to construct a pre-engineered building addition to building 511, including mechanical, electrical, and utility distribution systems. Documentation supporting the need for the new addition states that it was required to house special purpose air cooling equipment, and was essential to the completion of the Investment Casting Facility. This contract was awarded for $146,800. The cost of the contract was charged to the Industrial Fund.

B. Legal Analysis

In response to our request for its views on these matters, the Air Force acknowledged that the two contracts to produce the Investment Casting Facility constituted a single military construction project, which was improperly funded through the Industrial Fund. We agree with the Air Force. As a project costing less than $1 million, the Air Force was authorized to carry out the project as a minor construction project under 10 U.S.C. §2805(a)(1). However, because the project cost over $200,000, the Air Force was not authorized to finance the project out of the Industrial Fund. 41 U.S.C. §12; 10 U.S.C. §2805(c)(1); DOD Directive 7410.4.

The Air Force stated in its September 12 response that it has initiated action to reimburse the Industrial Fund with military construction appropriations, and to notify the Congress of this action. The Air Force also stated that it will investigate whether the use of the Industrial Fund caused a violation of the Anti-Deficiency Act. We agree with the Air Force that these are appropriate actions to correct the improper use of the Industrial Fund.

UTAH TEST AND TRAINING RANGE

A. Factual Background

Our review of minor construction projects at Hill AFB included two contracts for the acquisition and installation of trailers at the UTTR. The UTTR is located in the Great Salt Lake Desert, 120 miles west of Hill AFB, and is used for various training and testing missions. The UTTR is operated by the 6545 Test Group, a unit under the Air Force Flight Test Center, Edwards AFB, California. However, the UTTR facility is under the real property jurisdiction of the Ogden ALC at Hill AFB. Because the 6545 Test Group is not under the operational jurisdiction of the Ogden ALC, the Test Group is considered to be a "tenant" activity on a facility where the Ogden ALC is the "host."

According to the background documentation we reviewed, the Air Force determined that it needed to house about 48 personnel on temporary or permanent assignment to the UTTR. This need arose because a number of 30-year old mobile home trailers being used to house personnel had deteriorated and were judged to be uninhabitable. The first formal request for approval of a project to meet this need was

made on May 28, 1986. That request stated:

> "Due to the severity and complexity of our housing shortage, we strongly recommend a two part solution. The immediate purchase of modular/mobile home facilities to house our personnel until a Major Construction Project can permanently solve our housing shortfall."

The request to purchase 12 trailers to provide immediate housing was approved. On December 1, 1987, a final contract cost estimate stated that the 12 trailers could be procured for $188,000. However, the first contract solicitation seeking offers on 12 trailers failed to produce a bid of $200,000 or less. Air Force officials had determined that the Industrial Fund would not be authorized to award a contract to purchase the trailers at a cost exceeding $200,000. Accordingly, the Ogden ALC issued a new solicitation allowing offerors to submit bids either for all 12 trailers or for a number of options for providing fewer trailers, but each bid had to be lower than $190,000 in order to be considered for award. This solicitation resulted in the award of the first contract, No. F42650-88-C0143, for seven trailers at a price of $187,222. The contract was financed by the Industrial Fund.

On August 26, 1988, shortly after the first contract to install seven trailers was awarded, a Base Civil Engineer Work Request was prepared to seek additional funding for the other trailers. This request stated "[w]e recently requested twelve deteriorated mobile homes at [UTTR] be replaced. Due to fund limitations, a contract has been let to replace only seven." In July 1989, a second contract was awarded to replace trailers at UTTR. This contract, No. F42650-89-C0128 was to provide five trailers at a price of $184,178.58 and also was financed out of the Industrial Fund.

B. Legal Analysis

The Air Force's response to our inquiry acknowledged that the work called for under the two contracts to provide trailers at the UTTR was military construction. However, the Air Force asserts that it was authorized to carry out these contracts as separate military construction projects because

> "[t]he total cost for each project was considerably less than the $200,000 limit for minor construction requirements. The trailers were sited separately, not physically connected, and were managed as separate facilities. Accordingly, each trailer represented a separate minor construction project as stipulated in AFR 86-1 paragraph 5-3.b."

For several reasons, we do not agree that each trailer constitutes a separate military construction project.

First, the Air Force's position misconstrues the definition of a military construction project. As stated above, a project consists of all military construction work "necessary to produce a complete and usable facility." 10 U.S.C. §2801(b). We do not disagree with the Air Force's characterization of each trailer as a separate "facility". However, we do not agree with what must be a necessary component of the Air Force's position: that each trailer/facility can be considered "complete and usable" within the meaning of section 2801(b). To view each trailer as a "complete and usable facility" in this case ignores the Air Force's need for which the contracts were awarded.

Our cases have pointed out that the construction of a single "complete and

usable facility" may involve the construction of several interrelated buildings, structures, or other improvements to real property. The key factor in these cases is that a single building, structure, or other improvement could not satisfy the need that justified carrying out the construction project. For example, in B-213137, Jan. 30, 1986, we noted that the Army's construction of separate facilities such as a runway, control tower, and hanger constituted a single project to produce a complete and usable new airfield. Similarly, in B-159451, Sept. 3, 1969, we stated that the construction and renovation of a number of separate facilities at the Grand Hotel in Nha Trang, Vietnam, constituted a single project to produce a complete and usable Field Force I headquarters. Thus, when multiple interrelated buildings, structures, or other improvements are being constructed to meet a need for a single "complete and usable" facility, they typically will constitute one construction project.

The facts in this matter reveal that the Air Force officials involved considered the acquisition of the 12 UTTR trailers as a single construction project to produce a complete and usable facility to house 48 people. Air Force officials initially anticipated that all the trailers would be purchased at a cost of less than $200,000. It was only after the initial solicitations failed to produce a bid to provide 12 trailers for $200,000 or less, and the Air Force awarded the first contract for seven trailers, that the Air Force attempted to justify using two separate purchases to acquire 12 UTTR trailers.

The first attempt to justify a separate purchase occurred in September 1988, when Ogden ALC officials decided to characterize the second trailer purchase contract as a "repair by replacement" rather than a construction contract. At that time, some Ogden officials expressed concern about the legality of this action.

All the documentation available to us, including that provided by the Air Force, indicates that no one within the Air Force considered the 12 trailers to be 12 separate military construction projects prior to our inquiry. It is evident that characterizing each trailer as a separate project is an attempt to split the single UTTR construction project into smaller projects in order to meet the $200,000 limitation. This type of project splitting is inconsistent with the intent of 10 U.S.C. §2805(c)(1), and is prohibited by AFR 86-1, ¶5-6.

Second, ¶5-3.b of AFR 86-1, which the Air Force cites as supporting the contention that each trailer is a separate project, is not applicable to the acquisition of the UTTR trailers. That paragraph gives specific guidance on how to handle special minor construction situations, and states that

> "[t]he upgrading of one building is one [military construction] project, and the upgrading of a separate but similar building is a second separate [military construction] project. For example, installing separate new cooling systems in each of several dormitories simultaneously constitutes a separate project for each building."

However, the introduction to this paragraph states that "[e]ach paragraph below applies only to the special situation described, and cannot be used by analogy to cover different situations...." AFR 86-1 ¶5-3. In addition, the general instructions to Air Force managers on how to implement AFR 86-1 state that the regulation "is not intended to be liberally construed. When it says an act is not permitted, it means 'no', and ingenious formations to evade this result will not be sanctioned." AFR 86-1, ¶1-8.

The UTTR trailers were not "upgraded" in the manner discussed in ¶5-3.b.; they

were replaced. Further, even if the Air Force were to argue that ¶5-3.b. supports its position because the acquisition of a trailer is analogous to the upgrading of a building discussed in ¶5-3.b., AFR 86-1 itself precludes the application of ¶5-3.b. by analogy and admonishes Air Force officials to strictly construe the regulation. We therefore conclude that ¶5-3.b. is not applicable to acquiring the UTTR trailers.

Finally, ¶3-3.f. of AFR 86-1 is applicable to acquiring the trailers, and appears to instruct Air Force officials to treat replacing all of the UTTR trailers as a single project. This provision states "[i]f it can be done, consolidate facilities that are similar or have related functions into one 'composite' structure and program them as a single project." AFR 86-1, ¶3-3.f.

We conclude that the contracts to replace the UTTR trailers constituted a single military construction project costing about $371,000, and that the Air Force Industrial Fund was not available to finance these contracts. We therefore further conclude that the Air Force improperly financed these two contracts in violation of 41 U.S.C. §12, and should undertake the same corrective action with regard to the UTTR trailer contracts as it has already begun with regard to the Investment Casting Facility contracts discussed above.

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MATTER OF: USE OF APPROPRIATED FUNDS BY AIR FORCE TO PROVIDE SUPPORT FOR CHILDCARE CENTERS FOR CHILDREN OF CIVILIAN EMPLOYEES
B-222989, 67 Comp. Gen. 443 (1988)

DECISION

The Deputy Assistant Secretary of the Air Force for Accounting and Audit has requested our decision on whether appropriated funds are available to provide certain assistance to childcare centers for children of civilian Air Force employees. He asks specifically whether section 139 of Pub.L. No. 99-190, 99 Stat. 1185, 1323 (1985), codified at 40 U.S.C. §490b (Supp.III 1985), or any other statute, provides authority for the Air Force to use appropriated funds to lease facilities or renovate existing government-owned or leased facilities for such childcare centers, or to expand for this purpose existing facilities for children of military employees which are separately authorized by law. He also asks whether any reimbursement received under section 139 for capital improvement expenditures may be credited to the current appropriation providing childcare support costs, or must be credited to the appropriation that "initially absorbed them."

In brief, we conclude that: (1) in providing support for civilian childcare centers, the Secretary is authorized by section 139 to allot existing space under his control in government buildings, as well as the services delineated in section 139(b)(3), and may do so without charge; (2) the support provided also may include the cost of making the space suitable for childcare facilities, including the design, renovation, and modification of existing government-owned or leased space; (3) section 139 is applicable to space in all federal buildings, and authorizes the Secretary to expand existing military day care centers to include the children of civilian employees; and (4) reimbursement received by the Air Force for its capital improvement expenditures incurred in providing space for civilian childcare centers must be paid into the Treasury as miscellaneous receipts or result in an improper augmentation of Air Force appropriations.

BACKGROUND

In 1978, the American Federation of Government Employees and the Air Force Logistics Command (AFLC) reached an impasse in their negotiations over a collective bargaining agreement. One of the issues being pursued by the union was the establishment of day care centers for children of civilian employees. The union proposal provided: "[t]he employer will provide adequate space and facilities for a day care center at each [work site]" and stated that each center would be "self supporting, exclusive of the services and facilities provided by the employer."

The AFLC and the union initially agreed to submit to an arbitration panel this and other issues on which they could not agree. In May of 1980, the arbitration panel included the union's day care proposal in its award, but as a result of a procedural dispute the AFLC had not participated fully in the administrative proceedings or filed exceptions to the award. The union then brought an unfair labor practice action against the AFLC for failing to implement the arbitration award.

An administrative law judge and then the Federal Labor Relations Authority (FLRA) found that the AFLC had committed an unfair labor practice by not implementing

the award, and the FLRA ordered the AFLC to incorporate the terms of the arbitration award in its collective bargaining agreement with the union, 15 FLRA No. 27 (1984). The FLRA decision and order was upheld by the U.S. Court of Appeals in *Department of the Air Force v. Federal Labor Relations Authority*, 775 F.2d 727 (6th Cir.1985), a decision that dealt only with the administrative and procedural issues in this dispute. Neither the substantive terms of the collective bargaining the court addressed agreement, nor the Air Force's authority to implement them. Since the Air Force has raised with us a number of questions concerning its authority to implement the childcare provision of the collective bargaining agreement, and since the union has not opposed the submission of the questions to us, our responses are provided below.

The Air Force has asked us to determine what authority it has to comply with the arbitration award by leasing space for civilian day care facilities, renovating existing government-owned or leased space to make it suitable for providing day care, or expanding existing military day care facilities to handle civilian dependents.

DISCUSSION

Section 139

Section 139 of Public Law 99-190 permits government officials to make available to childcare providers space under their control in federal buildings, and certain designated services, and to do so without charge. Section 139 states in pertinent part:

> "(a) ... if any ... entity which provides or proposes to provide childcare services for Federal employees applies to the officer ... of the United States charged with the allotment of space in the Federal buildings ... in which such ... entity provides or proposes to provide such services, such officer ... may allot space in such a building to such ... entity if-
>
> "(1) such space is available;
>
> "(2) such officer ... determines that such space will be used to provide childcare services to a group of individuals of whom at least 50 percent are Federal employees; and
>
> "(3) such officer ... determines that such ... entity will give priority for available childcare services in such space to Federal employees."

Paragraph 139(b) states in part:

> "(b)(1) [I]f an officer ... allots space to an ... entity under subsection (a), such space may be provided to such ... entity without charge for rent or services.
>
> "(b)(2) If there is an agreement for the payment of costs associated with the provision of space allotted under subsection (a) or services provided in connection with such space, nothing in title 31, United States Code, or any other provision of law, shall be construed to prohibit or restrict payment by reimbursement to the miscellaneous receipts or other appropriate account of the Treasury.
>
> "(b)(3) ... the term 'services' includes the providing of lighting, heating, cooling, electricity, office furniture, office machines and equipment, telephone service (including installation of lines and

> equipment and other expenses associated with telephone service,) and security systems (including installation and other expenses associated with security systems)."

Section 139, in effect, authorizes all government agencies to use their appropriations in support of certain designated assistance to a childcare facility. The statute does not mandate the provision of such assistance, but if an agency head has decided to assist a childcare center, then under section 139, the agency can provide support in the form of suitable quarters and limited services, and may choose to do so without charge. In providing suitable facilities, the agency may renovate, modify or expand existing space in federal buildings.

In introducing the original version of section 139 as an amendment to the Treasury, Postal Service, and General Government appropriation bill for fiscal year 1986, Senator Trible noted that his amendment would "permit childcare facilities in Federal buildings to be treated in the same manner as credit unions," *i.e*., receiving space, utilities, and certain services without charge. Subsequently, during debate on the amended version of the bill that ultimately was enacted, Representative Conte noted that the legislation was designed to encourage these services in qualifying buildings around the country, and that the user agencies would determine the need for day care facilities and the space to be provided, and whether any additional services, such as furniture or telephones, would be furnished.

The legislative history makes it clear that section 139 was not intended to create a right or entitlement to free space or services for day care facilities, but, rather, to encourage the GSA and user agencies to make such assistance more readily available. The determination to support such facilities, based on the particular facts of each situation, still requires the individual exercise of agency judgment and administrative discretion.

Question 1

The first question asked by the Deputy Assistant Secretary is:

> "Does §139 of PL 99-190 (or any other statutory provision) provide authority for the use of appropriated funds to lease facilities for day care centers for children of civilian employees?"

Under 10 U.S.C. §114(a)(7), no funds may be obligated or expended for the operation and maintenance of the Air Force unless authorized by law specifically for this purpose. We are aware of no legislation other than section 139 that specifically authorizes funds for the Air Force to provide space for civilian childcare centers, so it appears that section 139 would be the exclusive legislative authority under which the Air Force might lease space for this purpose.

As noted previously, under section 139 the Secretary of the Air Force may use appropriated funds to allocate space under his control in federal buildings to civilian day care centers, and he may elect to do so without charge. However, this authority is limited by paragraph 139(a)(1) to the allocation of "available" space in federal buildings, which, in our view, precludes the Air Force from leasing new space specifically for civilian childcare facilities.

Question 2

The next question asked is:

> "Does §139 of PL 99-190 (or any other statutory provision) provide authority for the use of appropriated funds to renovate existing government owned or leased facilities to make those facilities suitable as day care centers?"

As noted in our discussion of section 139, that provision authorizes an agency head to assist a childcare center by, among other things, allotting to it existing space in federal buildings. In our view, this includes as well the authority to renovate or modify this space to make it suitable for use as a childcare facility.

Question 3

The third question asked by the Deputy Assistant Secretary is:

> "Does §139 of PL 99-190 now authorize the use of appropriated funds for expansion of existing day care facilities established to serve the military members to create space for children of civilian employees?"

Childcare centers for the children of military employees are included in the services provided and paid for in part with appropriations for the operation and maintenance of the active forces for welfare and recreation, made permanent law by Department of Defense Appropriation Act, 1984, Pub.L. No. 98-212, §735, 97 Stat. 1421, 1444 (1983). Under regulations defining Air Force Morale, Welfare, and Recreation (MWR) programs and activities, and establishing eligibility and use priorities (Air Force Regulation 215-1, March 25, 1985), the responsible base commander is authorized to provide services in an MWR childcare program for children of DOD civilian employees if there is sufficient space available to do so. *Id*., at §6(a)(9), (10), (14) and (15).

When there is no space available for children of civilian employees in an MWR facility housed in a government-owned or leased building, but the space is suitable for expansion, then section 139 authorizes the Secretary to use Air Force appropriations to do so. As noted in our first answer, however, section 139 does not authorize the leasing of new or additional space simply to permit expansion of an MWR facility for civilian children.

Question 4

The Deputy Assistant Secretary's last question is:

> "Reimbursement for costs incurred in providing day care facilities is optional under §139 of PL 99-190. If capital improvements are made with appropriated funds, could that portion of reimbursements received in future years representing recovery of capital improvement expenditures be credited to the then current appropriation that initially absorbed them?"

Paragraph 139(b)(2) states in pertinent part:

> "If there is an agreement for the payment of costs associated with the provision of space allotted under subsection (a). *nothing in title 31, United States Code*, or any other provision of law, *shall be construed to prohibit* or restrict *payment by reimbursement to* the miscellaneous receipts or *other appropriate account of the Treasury*." (Italics supplied.)

Under 31 U.S.C. §1301(a) (1982), an agency must use appropriated funds to pay for its authorized expenditures. Any reimbursements for these expenditures must be deposited into the Treasury as miscellaneous receipts, 31 U.S.C. §3302(b), unless an agency has specific statutory authority to retain them. Paragraph 139(b)(2) does not expressly authorize funds received from a childcare center as reimbursement to be credited to agency appropriations, and deposit of such payments to the credit of either of the suggested appropriation accounts would result in an improper augmentation of Air Force appropriations.

Although the reference in paragraph 139(b)(2) to "other appropriate account of the Treasury" is not clear, a reasonable construction of its terms leads us to conclude that the underscored portion of that paragraph is intended simply to preserve the right of an agency, where specifically authorized, to deposit the funds into some "other appropriate account." We are aware of no such specific statutory authority for the Air Force, and thus we conclude that such reimbursements must be deposited in the Treasury as miscellaneous receipts.

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MATTER OF: DICTAPHONE CORPORATION
B-244691.2, 92-2 CPD ¶380

DECISION

Dictaphone Corporation protests the Department of the Navy's proposed acquisition, pursuant to the Economy Act, 31 U.S.C. §1535 (1988), of a digital dictation system through an Air Force contract with Sudbury Systems, Inc. Dictaphone contends that the Navy failed to comply with the Economy Act's requirement that the user agency determine that the desired goods cannot be provided as conveniently or cheaply by a commercial enterprise.

We deny the protest.

On May 20, 1991, the Air Force issued a requirements contract for an estimated quantity of 40 centralized digital dictation systems for Air Force hospitals under request for proposals (RFP) No. F44650-90-R0038. Both Dictaphone and Sudbury had participated in the competition for the contract, which Sudbury won as the offeror of the lowest priced, technically acceptable proposal. Only 13 of the estimated 40 systems have been ordered to date.

Approximately 1 year after the Air Force issued the requirements contract to Sudbury, the U.S. Naval Hospital at Portsmouth, Virginia, decided to procure one dictation system. The Navy orally contacted three known vendors of such systems, Dictaphone, Sudbury, and Lanier Dictation Systems, to seek quotations. Dictaphone and Lanier notified the Navy that each held a General Services Administration Federal Supply Schedule (FSS) contract which covered the desired system, and each quoted a price pursuant to its FSS contract: $197,598.75 for Dictaphone and $201,373.92 for Lanier. The Navy is permitted, but not required, to obtain supplies under an FSS contract.

When the Navy telephoned Sudbury to obtain a quotation from that company, Sudbury stated that the system needed by the Navy could be obtained under the Air Force contract referenced above, and Sudbury quoted a price based on that contract: $176,259.00. Because the price, which Sudbury quoted, was lower than those quoted by Dictaphone and Lanier, the Navy decided to acquire the dictation system under the Air Force contract. On June 29, 1992, the Navy contracting officer made findings pursuant to the Economy Act to permit the Navy to place an order for processing under the Air Force contract. Upon review of the Navy request, the Air Force concluded that it was within the scope of the Air Force contract and that the Air Force had the authority to place the order on behalf of the Navy.

Dictaphone contends that the Navy treated offerors unequally. Specifically, the protester alleges that Dictaphone understood from the Navy's telephonic request for quotations that Dictaphone could only submit a quote under its FSS contract, while "[a]pparently in the course of discussions with one vendor, Sudbury, the Navy conveyed that Sudbury was not limited to quoting its GSA pricing." In Dictaphone's view, it would have been proper for the Navy to purchase the dictation system under an FSS contract, but acquiring the system under the Air Force contract amounted to receiving what Dictaphone terms an "open market" quotation from only one source. Dictaphone claims that, if the Navy had made clear to Dictaphone that vendors were free to offer open market prices, "[i]n order to meet competition, Dictaphone's open market quote would

have been lower than the quotes it submitted under its GSA contracts" and it "might have offered prices lower than the price Sudbury quoted under its Air Force contract."

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §2301 *et seq*. (1988), generally requires that, in conducting a procurement for property or services, the head of an agency obtain full and open competition through the use of competitive procedures. However, CICA exempts from this requirement procurement procedures expressly authorized by statute. 10 U.S.C. §2304(a)(1). The Economy Act authorizes such a procedure by providing:

> "The head of an agency . . . may place an order with another agency for goods or services if-
>
> (1) amounts are available;
>
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
>
> (3) the agency or unit to fill the order is able to provide the ordered goods or services; and
>
> (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise." 31 U.S.C. §1535(a).

Pursuant to the Economy Act, one agency may use its own requirements contract to satisfy another agency's needs. *Liebert Corp*., 70 Comp. Gen. 448 (1991), 91-1 CPD ¶413.

Dictaphone recognizes that the Economy Act provides a procurement methodology exempt from the normal competition requirements of CICA, and it concedes that the Navy complied with the first three requirements of the Economy Act set forth above. The protester contends, however, that the Navy failed to satisfy the fourth requirement. According to Dictaphone, the agency lacked a reasonable basis to decide that it could not obtain a dictation system more cheaply than through Sudbury's Air Force contract, because the Navy never gave Dictaphone the opportunity to offer an open market price. We disagree, because we find that the Navy had a reasonable basis to conclude that the single system it needed could not be acquired more cheaply than under Sudbury's Air Force contract.

Multiple-award FSS contracts are based on discounted prices associated with volume buying, Federal Acquisition Regulation (FAR) §38.101, and agencies are permitted to purchase from FSS contracts without testing the open market or otherwise seeking further competition. FAR §§8.404(a). The Air Force, however, had obtained prices even lower than the FSS contract prices after conducting a full and open competition that included Dictaphone. The Navy's use of Sudbury's Air Force requirements contract allowed the Navy to benefit from those lower prices.

Since Dictaphone does not dispute that it would have been permissible for the Navy to pay an FSS contract price (which for Dictaphone's system amounted to $197,598) without testing the open market, Dictaphone has no tenable basis to challenge the reasonableness of the Navy's paying the much lower price ($176,259) available under Sudbury's Air Force contract. Under the circumstances, we see no reason why the Navy should have had to further test the market before reasonably concluding that it could not obtain the system it required more cheaply or conveniently than through that contract.

Dictaphone's assumption that the agency treated the competing firms unequally is without factual basis in the record. Dictaphone does not explicitly allege that the Air Force advised the protester that only FSS contract price quotations were permissible, and nothing in the record supports such an allegation. Indeed, even if Dictaphone believed that the Navy would not consider a quotation outside the framework of the company's FSS contract, the company was not precluded from quoting a reduced price for the FSS contract items.

The protest is denied.

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APPEAL OF -- KEARFOTT GUIDANCE & NAVIGATION CORPORATION
1999 WL 617935 (A.S.B.C.A.), ASBCA No. 49,263
Under Contract No. F33657-84-C-0018
OPINION BY ADMINISTRATIVE JUDGE THOMAS ON THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

The Government set off an amount of $2,127,046.33 plus interest, allegedly due as a result of overpayments on the captioned contract, against appellant's vouchers on that and other contracts. Appellant filed a claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, to recover the amount of the offsets. Appellant moves for summary judgment on the alternate grounds that either (1) a release contained in a settlement agreement signed by the Department of Justice, or (2) the Government's alleged failure to comply with Section 605(a) of the CDA and Federal Acquisition Regulation (FAR) 32.608(c), invalidates the setoff. The Government cross moves for summary judgment denying the appeal. Appellant has advised that it does not dispute before the Board the validity of the debt arising from the alleged overpayments and the only issues to be decided by this appeal are those raised by appellant's motion.

STATEMENT OF UNDISPUTED MATERIAL FACTS

On 9 March 1984, the Department of the Air Force awarded Contract No. F33657-84-C-0018 (Contract 0018) to Singer Company (Singer), Kearfott Division, Little Falls, NJ. The contract included Defense Acquisition Regulation 7-103.12(a), Disputes (1983 FEB). As of 14 February 1992, the total value of the contract was $33,331,521.

Appellant does not dispute in this appeal that the Air Force made overpayments totaling $2,127,046.33 on Contract 0018. The overpayments arose as a result of payments on invoices submitted by Singer or its successors in interest subsequent to award of the contract.

Effective 25 April 1988, Singer sold the business of its Kearfott Guidance and Navigation Division, successor to the Kearfott Division, to appellant. On 19 August 1988, Singer, appellant and the Government entered into a novation agreement as of 25 April 1988 recognizing appellant as Singer's "successor in interest in and to the [division's] contracts." ...

On 7 September 1991, a Defense Finance and Accounting Service (DFAS) accounting and finance officer addressed a letter to "Singer Company" at the Kearfott Division's former address notifying Singer that an audit had revealed that it was indebted to the Government in the amount of $2,127,046.33 because of overpayments on Contract 0018 arising from billing errors and progress payments exceeding 90% of the total contract price. The letter demanded payment within 30 days. There is no indication that the accounting and finance officer was a contracting officer and the letter did not purport to be a contracting officer's final decision issued pursuant to the Disputes clause.

Appellant returned the 7 September 1991 letter to DFAS, providing DFAS with Singer's new address. Appellant also began an internal review of DFAS' allegations.

On 23 October 1991, DFAS sent a letter to appellant, referencing the 7 September 1991 letter, and notifying appellant that since payment of the $2,127,046.33 had not been received, interest would be charged starting 1 January 1991.

On 5 November 1991, appellant replied that it was a "totally separate and distinct company from The Singer Company and [had] no relationship whatever with The Singer Company" and that it was reviewing the claims asserted by DFAS, without admission of liability. Appellant requested data such as copies of canceled checks.

On 21 January 1992, the administrative contracting officer (ACO) at appellant's location, also referencing the 7 September 1991 letter, demanded payment of an amount of $2,242,207.43 within 15 days. Apparently this amount should have been $2,127,046.33. The ACO's letter did not purport to be a contracting officer's final decision issued pursuant to the Disputes clause and did not inform appellant of its rights as provided in the CDA.

On 19 February 1992, appellant responded to the ACO's letter. It reiterated that it had no relationship with Singer and questioned various amounts. It also stated:

"It is noted that your letter of January 21, 1992 does not comply with the provisions of the Debt Collection Act, 31 USC, Section 3701 and the following sections, or with the provisions of FAR 36.610 which include a requirement for: 'A notification that the contractor may submit a proposal for deferment of collection if immediate payment is not practicable or if the amount is disputed.'"

Appellant requested that the Government enter into a deferment agreement until the matters referred to in the 19 February 1992 letter were resolved.

The Government did not grant the request for a deferment agreement. Over the period from 29 April 1992 through 29 December 1992, it set off $2,173,761.74 ($2,127,046.33 plus $46,715.41 interest) from amounts invoiced by appellant on Contract 0018 and other contracts. ...

On 8 June 1995, appellant submitted a certified claim for the amount of the offsets. Appellant appealed from a deemed denial of its claim.

DECISION

"Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In this case, there are no genuine issues of material fact as to the matters set forth above and the motions may be decided as a matter of law. ...

Appellant … argues that "the collection by the Government of the alleged claim was inconsistent with and in violation of Section 605(a) of the Contract Disputes Act and FAR 32.608(c)" because "[t]he demand letters from DFAS dated September 7, 1991 and from the ACO dated January 21, 1992 are not final decisions" (app. memo. at 7, 8). The Government argues among other things that the ACO's 21 January 1992 letter constituted an appealable decision and that, even if it did not, the Government was entitled to make the offsets pursuant to its common law right of setoff.

Section 605(a) of the CDA provides that:

"All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. . . . The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter."

FAR 32.608(c), which is part of subpart 32.6 of the FAR relating to contract debts, provides:

"(c) For unilateral debt determinations, the contracting officer shall issue a decision as required by the clause at 52.233-1, Disputes. Such decision shall include a demand for payment (see 32.211(a)(4)(vi)). No demand for payment under 32.610 shall be issued prior to a contracting officer's final decision. A copy of the final decision shall be sent to the appropriate finance office."

We agree with the Government that it can rely upon its common law right of setoff and do not, therefore, reach its other arguments. The key recent case on this subject is Applied Companies v. United States, 144 F.3d 1470 (Fed. Cir. 1998), aff'g, 37 Fed. Cl. 749 (1997). In this case, the Government made overpayments as a result of a Government computer error and collected them by offset from amounts due the contractor as a result of a termination settlement agreement. The contractor argued, among other things, that the Government had violated the CDA because the setoff was not predicated upon a contracting officer's final decision. The lower court rejected this argument, reasoning that the Government had an inherent right to recover funds paid under a mistake of fact. 37 Fed. Cl. at 761 n. 8. On appeal, in the course of discussing the settlement agreement, the Federal Circuit noted the principle that (144 F.3d at 1476): "[I]t is well settled that the government retains its setoff right unless there is some explicit statutory or contractual provision that bars its exercise, which is not the case here. See United States v. Munsey Trust Co., 332 U.S. 234, 239, 108 Ct. Cl. 765, 67 S.Ct. 1599, 91 L.Ed. 2022 (1947); Marre v. United States, 117 F.3d 297, 302 (5th Cir. 1997)."

Addressing the contractor's argument referred to above, the Court said that before it could conclude that the Government had violated the CDA, it "must decide whether the setoff to recoup the erroneous overpayment can fairly be characterized as a claim 'relating to a contract.'" 144 F.3d at 1477-78. The Court concluded that it could not, and affirmed the lower court on that ground. In the case before us the setoff can fairly be characterized as "relating to a contract."

Nevertheless, in view of the time honored nature of the Government's common law right of setoff, we believe that the principle set forth by the Court in its discussion of the termination settlement agreement is still applicable. That is, since neither the CDA nor FAR 32.608(c) explicitly bars the Government's exercise of its common law right of setoff, the contracting officer was not required to issue a final decision under the CDA before collecting the amount due. The contractor was, of course, entitled to challenge the setoff pursuant to the procedures in the CDA, as it has. Cf. Cecile Industries, Inc. v. Cheney, 995 F.2d 1052, 1055 (Fed. Cir. 1993) ("Within its comprehensive scheme of protections and procedures for contract disputes, the CDA accommodates contractual offsets"); Building Services Unlimited, Inc., ASBCA No. 33283, 87-3 BCA ¶ 20,135 at 101,932 (where the contracting officer failed to comply with the prior version of FAR 32.608(c), his letter proposing to reduce the contract price to collect an alleged overpayment and a modification implementing the proposal constituted an appealable final decision).

CONCLUSION

We deny appellant's motion for summary judgment and grant the Government's cross motion for summary judgment.

The appeal is denied.

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FISCAL PROBLEM #1

In September 1995, the U. S. Geological Survey ordered certain microcomputer equipment to be delivered in November 1995. Following delivery, the microcomputers were stolen. The government wishes to replace the items. May it use FY95 money? If not, what type of money may it use?

PROBLEM #2

The Air Force entered into a firm-fixed-price supply contract in July, 1994, for the purchase of 500 widgets to be delivered over the next 18 months. In April, 1995, the contract was modified to require the contractor to provide an additional 75 widgets. What fiscal year money may be used to fund this modification and why?

PROBLEM #3

The installation at which you are employed has an identified need for a new aircraft painting facility. Because of the competition for limited military construction appropriation funds, it has been decided to pursue the use of O&M-type funds for the project. In arriving at the estimated cost of construction for the new facility, a decision is made to separately procure the capital equipment which will be housed in the new structure, using a procurement-type appropriation. The estimated cost of the building structure comes in at $225,000. The estimated cost of the capital equipment to be installed as permanent fixtures in the facility is $175,000. Can separate contracts be awarded? If your answer is yes, can they both be funded out of the O&M appropriation?

PROBLEM #4

The Army built what it termed an industrial equipment facility, specifically to house the Letterkenny Automated Storage and Retrieval System, using Army industrial funds. Was this a proper use of such funds? Why or why not?

PROBLEM #5

The Armored Personnel Carrier System Program Office (SPO) wishes to award six contracts, using research and development money, for the following purposes: perform research on an anti-lock braking system, build a new prototype personnel carrier; transport the personnel carrier to Ft Irwin for testing; conducting the testing at Ft Irwin; transport and display the prototype at an Armed Forces Day celebration at Ft Riley; and build 30 of these personnel carriers. Are there any fiscal limitations? Discuss.

PROBLEM #6

A recent inspection report noted certain discrepancies in two Air Force dormitories. To remedy these discrepancies the Base Commander wants to remove the still functional air conditioning system from another building damaged by fire one month ago, and install it in one of the dormitories, at a cost of $75,000, using O&M money. Secondly, the commander wants to purchase an air conditioning system for the second dormitory at a cost of $250,000, using O&M money. Are these appropriate uses of O&M money? Discuss.

continued on next page

Problems *(continued)*

PROBLEM #7

A DOD Depot has received unexpected "fallout money" in August to acquire some badly needed, state-of-the-art capital equipment for its re-manufacturing facility. This type of equipment is available from multiple commercial sources. The Commander wants to spend this money before it expires on 30 September, and has communicated his wishes to the contracting officer's supervisor. The contracting officer has already determined that it will be very difficult to meet a 30 September award deadline without an urgency justification. However, initial feedback received through acquisition channels suggests that this will not be easy to sell to the Business Clearance Authority. Meanwhile, the Chief of Maintenance has learned the Department of Energy is willing to process an order for this equipment under an existing requirements contract. This will avoid the need to synopsize the requirement or conduct a new competition. What are the legal and practical concerns here?

PROBLEM #8

The Air Force through its contracting office at Mayberry AFB, NC entered into a firm-fixed price supply contract in July 2001, for the purchase of 500 widgets to be delivered over the next 18 months. In April 2002 the Air Force modified the contract to require the contract to provide an additional 75 widgets. This was in response to the unexpected need for additional widgets as a result of the on-going war on terror. What fiscal year funds were obligated when the contract was signed ? What fiscal year money may be used to fund this modification and why? Bonus---May military construction funds be used to pay for the widgets? Why or why not?

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CHAPTER EIGHT CASES

BALL, BALL & BROSAMER, INC., Appellant,
v.
Robert B. Reich, Secretary of Labor, et al., Appellees
24 F.3d 1447 (D.C.Cir. 1994)

SENTELLE, Circuit Judge:

Appellant Ball, Ball & Brosamer, Inc. ("Ball") appeals from an order of the district court granting summary judgment in favor of the Secretary of Labor in an action to review the Secretary's determination that Ball and its subcontractor violated the Davis-Bacon Act while performing work on a federal construction project. Ball maintains that the district court erred in concluding that the terms of its contract with the government barred judicial review of its claims and that the regulations under which the Secretary acted were a reasonable interpretation of the Davis-Bacon Act. For the reasons set forth below, we conclude that appellant is correct on both counts and order the district court to enter summary judgment in Ball's favor.

I. BACKGROUND

In September 1985, Ball entered into a $14.5 million contract with the Department of Interior's Bureau of Reclamation to construct thirteen miles of the Tucson Aqueduct between Phoenix and Tucson, Arizona. Ball subcontracted with Red Rock Products, Inc., an Arizona-based company, for the concrete and gravel it needed for the project. Red Rock obtained raw materials from a local sand and gravel pit and set up a portable batch plant for mixing concrete. The borrow pit and batch plant were located about two miles from the construction site at its nearest point.

The Wage and Hour Division of the Department of Labor began an investigation to determine whether Red Rock's pay practices conformed with the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1988). The Act requires generally that laborers and mechanics under covered government contracts will be paid at least the prevailing wages for corresponding classes in the area of performance of the contract as determined by the Secretary of Labor. See id. By its terms, it applies to "all mechanics and laborers employed directly upon the site of the work." Id. (emphasis added). The Division found Red Rock's employees to be covered by the Act. As the Division also found that they had not received prevailing wages, it concluded that Red Rock and Ball had violated the Act. The Division notified the Bureau of Reclamation of its findings, and the Bureau of Reclamation withheld $60,976.71 from the contract price owed to Ball for back wages relating to the alleged Davis-Bacon violations. See id. §§ 276a(a) & 276a-2(a) (authorizing withholding and repayment of wages due under Act).

Ball filed a petition for review with the Wage Appeals Board, arguing that the Red Rock batch plant and borrow pit were not "directly upon the site of the work" within the meaning of the Act. The Board denied the petition, stating that the facts of record supported a finding that Red Rock's borrow pit and batch plant were on the site of the work, as the Secretary's regulations define that phrase.

The Secretary's regulations provide:

> Except as provided in paragraph (l)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are part of the site of the work provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

29 C.F.R. § 5.2(l)(2) (1993).

After the Wage Appeals Board denied the petition for review, Ball brought suit in the U.S. District Court for the District of Columbia. On cross-motions for summary judgment, the District Court ruled in favor of the Secretary. See Ball, Ball & Brosamer, Inc. v. Martin, 800 F.Supp. 967 (D.D.C.1992). The district court first held that Ball's challenge to the validity of the Secretary's regulations was precluded by the terms of its contract with the government. Paragraph I.7.9 of Ball's contract with the Bureau of Reclamation, referred to by the parties as the "incorporation clause," provided that "[a]ll rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 C.F.R. Parts 1, 3, and 5 are herein incorporated by reference in this contract." The district court accepted the Secretary's position that in the incorporation clause, Ball agreed to abide by the Secretary's definition of "site of the work" found in Part 5 of the regulations and therefore could not challenge the regulations as inconsistent with the Davis-Bacon Act. Id. at 971-73.

The district court also held that even if Ball were not contractually precluded from bringing its challenge, the Secretary's regulations at § 5.2(l)(2) were a reasonable interpretation of the statutory phrase "directly upon the site of the work." Id. at 975. In so holding, the district court rejected Ball's argument that this court's opinion in Building & Construction Trades Dept., AFL-CIO v. United States Dep't. of Labor Wage Appeals Board, 932 F.2d 985 (D.C.Cir.1991) (the "Midway" decision), required a strict geographical proximity test for evaluating what areas are "directly upon the site of the work" for purposes of the Davis-Bacon Act. Id. at 973-75.

II. DISCUSSION

A. Standard of Review

Because the parties agree that there are no genuine issues of material fact in dispute here, this court's only task on appeal is to ensure that the district court properly applied the relevant law to the undisputed facts. Beckett v. Air Line Pilots Ass'n, 995 F.2d 280, 284 (D.C.Cir.1993). Like the district court, our review of the Secretary's conclusion that Ball violated the Davis- Bacon Act is limited to determining whether the Secretary's decision was arbitrary, capricious, or contrary to law within the meaning of the APA. Dr. Pepper/Seven-Up Companies v. FTC, 991 F.2d 859, 862 (D.C.Cir.1993); 5 U.S.C. § 706(2)(A) (1988). We examine de novo the legal question whether judicial review of Ball's claims can be limited pursuant to the terms of its contract with the government. See HOH Co. v. Travelers Indem. Co., 903 F.2d 8, 12 n. 6 (D.C.Cir.1990).

* * * * *

C. Ball's APA Claims

Because Ball's challenge was properly before the district court, we now turn to the

merits of the claim that the Secretary's regulations at § 5.2(l)(2) are inconsistent with the Davis-Bacon Act. Our review of Ball's statutory challenge is governed by the rules laid down in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We first determine whether "Congress has directly spoken to the precise question at issue," id. at 842, 104 S.Ct. at 2781, looking to the " 'statutory language at issue, as well as the language and design of the statute as a whole.' " School Dist. of Hatboro-Horsham v. Alexander, 981 F.2d 1265, 1267 (D.C.Cir.1992) (quoting Chemical Mfrs. Ass'n v. EPA, 919 F.2d 158, 162 (D.C.Cir.1990)). If we find that Congress has spoken to the precise question at issue "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43, 104 S.Ct. at 2781. Only if the statute is ambiguous or silent with respect to the matter in question do we proceed to step two of the *Chevron* analysis and assess whether the Secretary's interpretation is reasonable in light of the "language, legislative history, and policies of the statute." Natural Resources Defense Council v. EPA, 822 F.2d 104, 111 (D.C.Cir.1987).

The Secretary concluded that Red Rock employees were subject to the prevailing wage provisions of the Davis-Bacon Act because Red Rock's borrow pit and batch plant "met the functional and geographical tests for coverage" under § 5.2(l)(2) of the Secretary's regulations. As noted above, § 5.2(l)(2) includes borrow pits and batch plants within "the site of the work" if the facilities are "dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them." 29 C.F.R. § 5.2(l) (2). Ball contends that the Secretary's inclusion of workers at off-site facilities is inconsistent with the plain language of § 276a(a) of the Davis-Bacon Act, which requires the payment of prevailing wages only to "mechanics and laborers employed directly upon the site of the work." We agree.

In *Midway*, a government contractor challenged the Secretary's determination that truck drivers were entitled to prevailing wages under the Davis-Bacon Act when those drivers were employed by the contractor to move off-site materials to the actual location of the federally funded construction project. 932 F.2d at 987-88. The Secretary's conclusion that the truck drivers were covered by the Act rested on 29 C.F.R. § 5.2(j), which defined the Act's coverage as extending to "the transporting of materials and supplies to or from the building." Id. at 987 (emphasis deleted). Utilizing the *Chevron* framework, we considered whether the regulation was consistent with the language of the Davis-Bacon Act. We found "no ambiguity in the text," id. at 990, and thought it clear that "the ordinary meaning of the statutory language is that the Act applies only to employees working directly on the physical site of the public building or public work under construction." Id. (emphasis added). Thus, we found no need to proceed to step two of the *Chevron* analysis and invalidated § 5.2(j) at *Chevron* step one to the extent that it included off-site material delivery truck drivers within the Act's coverage. Id. at 992.

Our opinion in *Midway* twice cautioned that the validity of the Secretary's definition of the "site of the work" at § 5.2(l)(2) was not before us, since it had not been challenged in the case. Id. at 989 n. 6 & 991 n. 12. That issue is squarely before the court today, and the reasoning in *Midway* obviously bears on the validity of § 5.2(l)(2) to

the extent that the regulation purports to extend the coverage of the Davis-Bacon Act beyond the actual physical site of the public building or public work under construction.

The Secretary maintains that the regulations at § 5.2(l)(2) satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway*. This might be the case if the Secretary were applying the regulatory phrase "so located in proximity to the actual construction location that it would be reasonable to include them" only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site. See 29 C.F.R. § 5.2(l)(1). But such an application is not before us and we express no opinion on its validity. Instead, the Secretary attempts to find any tiny crack of ambiguity remaining in the phrase "directly upon the site at the work" and cram into it a regulation that encompasses other sites miles from the actual location of the public works--in this case two miles, in another as much as 24 miles and in still another, 3,000 miles from the actual construction location. See Ross Bros. Const., Inc., WAB Case No. 87-36 (Nov. 21, 1988) (sand and gravel facility 24 miles from construction location); In re ATCO Const., Inc., WAB Case No. 86-1 (Aug. 22, 1986) (including fabrication facility for modular housing units located in Portland, Oregon in construction site on Adak Island, Alaska). In Midway, we determined "not surprisingly, that Congress intended the ordinary meaning of its words." 932 F.2d at 992. That is, the limitation in the statute making it applicable to " 'mechanics and laborers employed directly upon the site of the work' restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed." Id. The Secretary invites us to revisit Midway's conclusion that the statutory phrase "directly upon the site of the work" is unambiguous in the context of this controversy, asking for a "broad construction" of the Act to accomplish its "remedial purposes" and citing policy arguments favoring a broadly defined federal work site. None of this offers any justification for ignoring the clear language of the Act. See Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, ----, 114 S.Ct. 1439, 1453-54, 128 L.Ed.2d 119 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it.").

The Secretary's further argument that we should reconsider *Midway* in light of our purported misreading of the relevant legislative history is also unconvincing. We disposed of *Midway* on Chevron step one grounds and noted only in passing that the "little legislative history," 932 F.2d at 991, "support[ed] the plain meaning of the text that off-site mechanics and laborers are not covered by the Act," id. at 990.

In the end, we reach the same conclusion we did in *Midway*. The statutory phrase "employed directly upon the site of the work," means "employed directly upon the site of the work." Laborers and mechanics who fit that description are covered by the statute. Those who don't are not.

III. CONCLUSION

Because the Secretary's regulations under which Ball was held liable are inconsistent with the Davis-Bacon Act, summary judgment should be entered in Ball's favor. The district court's order of summary judgment is accordingly vacated and remanded for further action consistent with this opinion.

It is so ordered.

HERMAN B. TAYLOR CONSTRUCTION CO v. GSA
GSBCA No. 12,961, 95-1 BCA ¶27,572

BORWICK, Board Judge.

Respondent moves for summary relief in Herman B. Taylor Construction Co.'s (Herman Taylor Construction's) appeal of respondent's termination for default of its contract. We deny the motion as there are material facts in dispute.

Background

This appeal arises from the following termination for default decision of the contracting officer:

> I am in receipt of your letter dated June 9, 1994, whereby you advised me that you are with- drawing your workmen from the subject project. The workmen did not work the night of June 9, 1994. This is an act of repudiation of the contract and is a basis for default termination with common law remedies.
>
> The Department of Labor has also noted Davis-Bacon Act violations on the subject contract. In accordance with FAR 52.222-12-Contract Termination-Debarment (FEB 1988), you are terminated for default.
>
> A cure notice for your failure to timely perform and to make progress on the contract was previously sent to you on May 6, 1,994. As of this date you have failed to act to correct the concerns expressed therein.

Respondent asserts three bases for the termination for default: (1) anticipatory repudiation, (2) alleged violations of the Davis-Bacon Act, and (3) failure to make progress.

Respondent's motion for summary relief asserts that uncontested facts support all three bases of the termination for default. We discuss each in the order set out above.

* * * * *

Alleged Davis-Bacon Act violations

Respondent's statement of uncontested facts asserts that appellant has been investigated by the United States Department of Labor and has been advised by that agency that it was in violation of the labor laws and regulations of the United States; that appellant was directed to make payment to aggrieved employees; and that appellant stated its intent not to pay. Mr. Taylor disputes these assertions:

> [Herman Taylor Construction] has at all times during the project paid every worker wages in accordance with the Davis-Bacon Act. I have never received any notice from the [Department of Labor] that any particular sums were due for any particular violations. I have never received official notice from the [Department of Labor] that [Herman Taylor Construction] had Davis-Bacon Act violations on the project. If I knew what violations I was being charged with, I would produce evidence to refute such charges. If [Herman Taylor Construction] is charged with violations of the Davis-Bacon Act on

> the project, I will dispute and appeal any such charges, as allowed by law.

After the filing of that affidavit, the Department of Labor sent Herman Taylor Construction a notice that it had reasonable cause to believe that Herman Taylor Construction had violated the Davis-Bacon Act on the project and gave Herman Taylor Construction thirty days to request a hearing before the Department of Labor. The record is silent on whether Herman Taylor Construction has exhausted its administrative remedies at the Department of Labor.

Discussion

Similarly, respondent has not demonstrated that it is entitled to summary relief for the alleged Davis-Bacon Act violations. There are factual disputes whether Herman Taylor Construction violated the Davis-Bacon Act. Herman Taylor Construction denies such violations and Mr. Taylor has stated his intent to contest the preliminary findings of the Department of Labor that such violations have occurred.

Furthermore, this contract contained FAR clause 52.222-7 (1988), which requires the contracting officer, on his or her own action or upon the written request of the Department of Labor, to withhold from contractor amounts due under the contract to pay laborers or mechanics the full wages due them under the contract. Construing an earlier contract containing the predecessor clause in the Federal Procurement Management Regulations, one board held:

> While the Davis-Bacon Act does provide that a violation of its requirements may justify a default termination, the contract clearly gave the CO the discretion to consider withholding contract payment pending resolution of such underpayments by a contractor.
>
> We have searched the case law and can find no instance where any court or board has upheld the validity of a default termination where the contracting officer made no attempt whatsoever to confront a contractor with charges of underpayment and to either withhold funds or demand restitution, before so terminating that contractor's right to proceed. Failure to even attempt such a resolution is a failure to exercise the discretion envisioned by the terms of the contract. *Corban Industries, Inc*., VABCA 2559T, *et al*., 88-3 BCA ¶20,843, at 105,426.

Here, there is a dispute as to whether Herman Taylor Construction ever violated the Davis-Bacon Act in performing this contract. Further, even if Herman Taylor Construction had violated the Davis-Bacon Act, the present record is not sufficient to determine whether the contracting officer afforded Herman Taylor Construction the opportunity to mitigate alleged violations of the Davis-Bacon Act before basing the default termination on such violations.

Decision

Respondent's motion for summary relief is DENIED.

CARDIOMETRIX
B-260747, 95-2 CPD ¶28

DECISION

CardioMetrix protests the terms of request for proposals (RFP) No. F05611-94-R-2014, issued by the Air Force Academy for the Department of Defense Medical Examination Review Board (DODMERB) for professional medical examination services. CardioMetrix, a small business, primarily contends that the Air Force improperly failed to set aside the procurement for small business.

We deny the protest.

The RFP, which contemplates award of a fixed-price requirements contract for a base period with 4 option years, calls for a contractor to provide all personnel, supervision, equipment, and materials necessary to provide complete medical, dental, audiometry, and optometric examinations for applicants to the service academies, Reserve Officers' Training Corps (ROTC) scholarship programs and the Uniformed Services University of the Health Sciences. The RFP contains a detailed performance work statement describing the various tasks contemplated by the solicitation, which are listed as separate contract line items. The Air Force published a synopsis in the Commerce Business Daily (CBD) on October 31, 1994, announcing its intent to procure the medical services on an unrestricted basis, and issued the unrestricted solicitation on February 27, 1995.

In determining whether to issue the RFP as a small business set-aside, the contracting officer considered the scope of services required, such as the need to establish medical examination centers in 235 locations in 46 states, the number of medical examinations required each year (approximately 16,000), and the extensive scheduling and administrative requirements set forth in the RFP. The contracting officer also considered that the solicitation requires a contractor to have a $1 million liability insurance policy which, based on the agency's experience under similar solicitations with higher insurance requirements, the agency believed might prevent small businesses from submitting competitive prices. In addition, he considered the bids received on the previous solicitation for medical examination services at DODMERB, which had been issued on an unrestricted basis. Of the six bids received, although five of the six bids received were from small businesses, none of those five bids was considered price competitive since they were approximately 11 to 65 percent higher than the award price. Based on these considerations, the contracting officer determined that there was not a reasonable expectation of receiving two or more offers from responsible small business concerns at acceptable prices, and issued the RFP as unrestricted. This determination was reviewed by the agency's small business specialist and the local Small Business Administration (SBA) procurement center representative, each of whom concurred with the contracting officer's determination.

An acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation (FAR) 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a

clear showing that it has been abused. *Raven Servs. Corp*., B-243911, 91-2 CPD ¶203; *MVM, Inc. et al*., B-237620, 90-1 CPD ¶270. However, an agency must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals. *Stay, Inc*., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶248.

While the use of any particular method of assessing the availability of small business is not required in making such a determination, such factors as the government's estimate, the procurement history for the solicited services, the current market climate, and advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement. *FKW Inc*., B-249189, 92-2 CPD ¶270.

The Air Force's actions, described above, to ascertain whether there would be sufficient small business competition at acceptable prices to warrant a set-aside clearly were reasonable, as was its ultimate determination. The Air Force reviewed the results of the competition under the previous solicitation for the same services; the fact that five small business bids were received does not require a different result since the contracting officer concluded that those bids provided no indication that an award could be made at fair market prices to a small business since the bids were not within 10 percent of the award price. Moreover, although the protester argues that the small business second low bidder under the previous solicitation and itself are able and likely to submit competitive offers for the current requirement, the record indicates that the other firm did not request a copy of the protested solicitation in response to the CBD notice and, although a solicitation was mailed to that firm, it was returned by the Postal Service as undeliverable. Consequently, the contracting officer does not expect the firm will submit a proposal for this requirement. In addition, as discussed previously, the agency conferred with the SBA's representative who reviewed the available information and concurred with the contracting officer's decision to issue the solicitation unrestricted; we generally give great weight to the views of the SBA's representative in these matters. *MVM, Inc. et al., supra*.

In sum, we conclude that the information available provided a reasonable basis for the contracting officer to determine that a small business set-aside was not appropriate.

This protest is denied.

MATTER OF: GENERAL DISTRIBUTORS, INC.
B-257812; 94-2 CPD ¶ 184

DECISION

General Distributors, Inc. protests the failure of the Federal Prison Industries (UNICOR), to issue invitation for bids (IFB) No. 1PI-B-1023-94, as a small business set-aside. General contends that the agency had no basis for issuing the IFB on an unrestricted basis since there are numerous small business firms that can supply the agency's needs at reasonable prices.

We sustain the protest.

The IFB, issued on May 20, 1994, requested prices for a base year and 1 option year on four line items, each consisting of the estimated needs of the Federal Correctional Institution (FCI-El Reno) at El Reno, Oklahoma, for angle steel of different dimensions; and established a June 23 bid opening date. The IFB was mailed to 30 prospective bidders. General objected to the agency that it should set the procurement aside for exclusive small business participation, and when the agency declined to do so, General filed this protest with our Office and did not submit a bid because it did not believe it could be competitive under an unrestricted solicitation. Five bids--three from small businesses and two from large businesses--were received and opened. The low and second low bids were submitted by small businesses. On September 16, the agency determined that FCI-El Reno's needs for angle steel in order to complete a contract of its own by October 12 presented "urgent and compelling circumstances" which required award of the contract notwithstanding the protest. Award was made to the third low bidder--a large business. The low, small business bidders declined to extend their bid acceptance periods in response to extension requests by the agency, which resulted from this protest filing.

The agency contends that it made reasonable efforts to determine whether the procurement should be unrestricted or set aside, and on the basis of these efforts determined that there was no expectation that bids would be obtained from at least two responsible small business concerns at reasonable prices. First, it considered the recent procurement history at FCI-El Reno. The agency reports that, in April 1994, it was necessary to terminate a contract with a small business due to significant delays in its angle steel deliveries caused by that firm's inability to obtain steel in a timely fashion. According to the agency, similar problems had also occurred at other federal correctional institutions. These adversely affected the production of the institutions themselves. The agency also notes that prior to this protest the small business coordinator had not received any requests from small businesses to set aside FCI-El Reno's purchases of angle steel. Second, the agency considered the fact that the current domestic steel market was characterized by volatility and a greatly restricted steel supply. According to the agency, this problem resulted from tariffs that had been imposed on imported steel to deter dumping and increases in steel prices that domestic producers were able to impose by restricting the supply of steel.

An acquisition is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. FAR § 19.502-2(a). In this regard, a contracting officer must

undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work, Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248. We have found unreasonable the determination to issue a solicitation on an unrestricted basis where the determination is based upon outdated or incomplete information. See The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. We have also found the determination to issue a solicitation on an unrestricted basis unreasonable where the agency failed to investigate the capabilities of small businesses that it knew to exist at the time the determination was made. Wind Gap Knitwear, Inc., B251411; B-251413, Mar. 31, 1993, 93-1 CPD ¶ 281.

Here, the contracting officer's determination that there was no reasonable expectation that at least two responsible small businesses would submit bids at fair market prices was unreasonable under the existing circumstances. The fact that the small business coordinator had not had any requests that procurements of angle steel be set aside solely for small businesses, and that he may have agreed with the decision to issue this IFB on an unrestricted basis is not controlling where inadequate or incomplete information is the reason for the faulty decision not to set the procurement aside. Wind Gap Knitwear, Inc., B-251411; B-251413, Id. In this instance, the abstracts for the procurements of angle steel for a period of 3 years show the existence of a significant number of small business bidders. There is nothing to show that the small businesses listed on the bid abstracts received any consideration before the determination to advertise on an unrestricted basis was made. Further, the bidders' list for the immediate procurement -- which the record shows was developed from agency computer files containing the pertinent information from bidders' Forms 129, submitted by firms interested in bidding for this item and show size status -- contains the names of 30 small business concerns. This information was in the possession of the agency at the time the determination was made not to set aside the IFB. The record contains no explanation as to why the contracting officer did not consider that information.

The agency's justification for its method of determining small business availability is the statement from one of the agency's technical personnel that he finds the market research performed here "more effective than relying on contacting businesses regarding prices and ability to supply which has proven to be unreliable in my experience." This market research revealed the recent poor performance by one small business and the volatility of the market. We are not persuaded that one bad experience with a small business should excuse the agency from investigating further where there is expressed small business interest in this market. Moreover, the agency has provided no explanation for why the volatility of the current market would affect small business bidders either more or differently than it would affect large business bidders. In any event, the agency made no effort to discuss this issue with the potential small business bidders. As a result, the agency had no concrete information on the effect of market volatility on small business suppliers. The determination to issue an unrestricted procurement, therefore, was based on incomplete and insufficient information concerning potential small business participation.

Accordingly, we find that this procurement was improperly solicited on an unrestricted basis. The agency overrode the stay of award of this indefinite quantity contract based on an urgent need. However, since this is a requirements contract and only one order has been placed during the first 3 months of this contract, UNICOR should

resolicit the remaining base year requirements as a small business setaside and then terminate the current contract. If there are other circumstances, which are not reflected in the record before us, which cause the agency to conclude that termination is not feasible, we recommend that the option not be exercised and, if it is necessary to procure the option year needs, the procurement should be solicited as a small business set-aside. We also find that General should be awarded the expenses it incurred in pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1994). General should file its claim, detailing and certifying the time expended and costs incurred, with the Department of Justice within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(6).

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MATTER OF: THE URBAN GROUP, INC.; McSWAIN AND ASSOCIATES, INC
B-281352; 99-1 CPD ¶ 25

DECISION

The Urban Group, Inc. and McSwain and Associates, Inc. protest request for proposals (RFP) No. R-OPC-21230, issued by the Department of Housing and Urban Development (HUD) contemplating up to 16 separate contracts for management and marketing (M&M) services for single family properties in 16 designated areas of the United States. Urban challenges the set-aside for section 8(a) concerns in the area of Florida and Puerto Rico. McSwain challenges the bundling of Alabama, Georgia, Mississippi, North Carolina, and South Carolina into one area.

We deny the protests.

HUD insures hundreds of thousands of Federal Housing Administration (FHA) mortgages. Where defaulted mortgages result in foreclosure by the lender and payment of insurance claims by HUD to the lender, HUD gains title to thousands of properties throughout the country. HUD manages these properties by providing maintenance and repairs, and ultimately sells the properties in order to recoup funds paid on insurance claims. The Real Estate Owned Branch (REO) of HUD's Office of Housing is responsible for managing and marketing these properties.

Prior to the issuance of this RFP for M&M services, HUD generally contracted for the property management services separately, and the REO staff performed the marketing services in-house with some assistance from advertising contractors. The most recent management contracts were the Real Estate Asset Management (REAM) services contracts, which were usually performed by small business concerns covering small geographic areas and administered by REO staff in 81 HUD field offices. REAM contractors received a fixed-fee for managing the properties, and subcontracted for maintenance and repairs, the cost of which was directly paid by HUD.

Administration of the REAM contracts and marketing properties has been burdensome for HUD. Also, an audit of the REAM contract program, conducted by the General Accounting Office in response to congressional inquiries regarding reports or poor contract administration, found that HUD's oversight of these contracts was inadequate. Single-Family Housing: Improvements Needed in HUD's Oversight of Property Management Contractors (GAO/RCED-98-65, Mar. 1998). This report concluded that this inadequacy may have resulted in a decrease in the marketability of properties, as well as a decrease in the value of surrounding homes and a threat to the health and safety of neighbors and potential buyers, while also increasing the holding costs of these properties for the government. HUD essentially concurs with the conclusions of this report. In addition, HUD is in the process of reducing staff from a 1996 level of 10,500 employees to a 2002 level of 7,500 employees. This will reduce the REO staff from 500 in 1997 to 88 by the end of 1999. The reduced REO staff will transfer from the 81 field offices to 4 regional Home Ownership Centers (HOC). Consequently, HUD needed a more efficient and less costly method for managing and marketing its properties.

In order to decrease the burden of contract oversight and to improve the marketing of the properties, HUD has developed a new approach to its property management and marketing responsibilities, which entails issuing far fewer contracts covering much larger geographic areas, and combining the management and marketing requirements under

one contract. Three pilot programs successfully tested this approach. Under these pilot programs, contractors were reimbursed for repairs, but otherwise received a percentage of the price at which each property was sold. These pilot programs met or exceeded the sales goals established by HUD and reduced the average time a property was held by HUD. However, the risk of the cost of repairs and the associated oversight burden still existed for HUD.

To further reduce costs and administrative burden, the final M&M approach also placed responsibility for performing and paying for repairs with the contractor. The resulting solicitation provided financial incentives for the contractor to efficiently maintain, repair and market properties in a manner that would promote the highest possible selling price for each property by compensating the contractor based on a percentage of the sales price.

Prior to issuing the current M&M RFP, the agency issued four regional M&M solicitations, one for each HOC. None of these solicitations included small business or section 8(a) set-asides. The Small Business Administration (SBA) objected to these solicitations, recommending that the requirements be subdivided and partially set aside for small business concerns. The regional solicitations were canceled and replaced with the current M&M RFP, which incorporated the SBA's recommendations.

The M&M RFP, issued on August 17, 1998, identified four service regions corresponding to the four HOCs in Philadelphia, Atlanta, Denver and Santa Ana. Each HOC is responsible for 3 to 6 areas for a total of 16 geographic areas. The Atlanta HOC is divided into three areas. Area 2 of the Atlanta HOC, the subject of McSwain's protest, consists of Alabama, Georgia, Mississippi, North Carolina and South Carolina; Area 3, the subject of Urban's protest, consists of Florida and Puerto Rico.

The RFP contemplated the award of up to 16 fixed-price, indefinite-quantity contracts, covering the 16 areas, for 1 year with 4 option years. RFP cover letter at 1, ss B, M.VI. Offerors could submit proposals for as many areas as they chose, with a minimum of one entire area.

Contract price was to be determined primarily by applying the offeror's proposed fixed-price factor to the sale or rental price of each property. Except for a limited number of cost-reimbursable services, the proposed price factors determined the total compensation due for contract performance.

The RFP stated the following set-aside procedures at section M.IV:

> (c)(1) In accordance with [Federal Acquisition Regulation (FAR)] Subpart 19.8, any award for . . . Area 3 of the Atlanta HOC . . . resulting from this solicitation, will be made on a competitive basis to eligible Section 8(a) business concerns, *provided* that a minimum of two (2) competitive (technical and cost) offers are received from eligible Section 8(a) concerns.
>
> (2) If a minimum of two (2) offers from eligible Section 8(a) concerns are not received, the award for the area(s) specified in (c)(1) above will be made to a small business . . . in accordance with FAR Subpart 19.5, provided that a minimum of two competitive (technical and cost) offers are received from qualified small business concerns.
>
> (3) If a minimum of two (2) offers from qualified small business concerns are not received, the award for the area(s) specified in

> (c)(1) above will be made on the basis of full and open competition from among all responsible business concerns submitting offers.

A total of 6 areas were set aside in this manner. The remaining 10 areas had no restrictions on competition. RFP § M.IV. The above set-aside scheme was suggested, and the set-aside areas were selected, by the SBA, and HUD accepted the SBA's recommendations.

Proposals were due on October 20. Urban and McSwain protested prior to the time set for closing.

THE URBAN PROTEST

Urban protests that the agencies failed to determine if any incumbent small business REAM contractor would be adversely affected by the decision to solicit Area 3 of the Atlanta HOC as a section 8(a) set-aside.

Because the Small Business Act affords the SBA and contracting agencies broad discretion in selecting procurements for the section 8(a) program, we will review challenges to decisions to procure requirements under section 8(a) only to ensure that agency officials have not acted in bad faith, and that applicable regulations have been followed. John Blood, B-280318, B-280319, Aug. 31, 1998, 98-2 CPD ¶ 58 at 2; American Consulting Servs., Inc., B-276149.2, B- 276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 9. Since it is not alleged here that either HUD or the SBA acted in bad faith, nor does the record so indicate, our review of Urban's protest turns to the applicable regulations.

Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1994). The implementing regulations for the section 8(a) program provide that the "SBA will not accept a procurement for award as an 8(a) contract" which was not previously in the 8(a) program, where the acceptance of the procurement would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. Section 124.504(c), 63 Fed. Reg. 35756, 35757 (June 30, 1998) (to be codified at 13 C.F.R. § 124.504(c)). An adverse impact is presumed to exist where a small business has been performing the requirement and the requirement represents 25 percent or more of the small business's gross sales. Id. at § 124.504(c)(1)(i)(C). However, if the requirement being procured is a "new" requirement, i.e., one which has not been previously procured by the procuring activity, then the adverse impact rule does not apply, with one exception. That exception to the adverse impact rule states:

> "In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section."
>
> *Id.* at § 124.504(c)(2).

HUD states that this is a new requirement because it has not previously procured the marketing services and certain other requirements encompassed by this RFP, and thus the adverse impact rule does not apply. The SBA agrees.

The SBA states that the above-quoted exception to the adverse impact rule is not applicable where, as here, the consolidation of old requirements performed by small businesses, together with the addition of new requirements not previously procured, creates a "radically" different work requirement from that of the old requirements. SBA Report at 13. The SBA states that, unlike the REAM contracts: “The M&M contractor will not only take responsibility for deciding what repairs to perform on a specific property, but they will also market the properties and obtain much of their remuneration from the sale proceeds.” *Id.* The SBA thus considers the nature of the M&M contracts to "differ radically" from that of the REAM contracts, and states that the M&M RFP can therefore be set aside for section 8(a) concerns without consideration of adverse impact on small business concerns.

As the agency responsible for promulgating this regulation, the SBA's interpretation deserves great weight, and we are required to give deference to an agency's reasonable interpretation of its regulations.

We think that the SBA's interpretation of its regulation is reasonable. The terms of the exception do not encompass all types of new requirements, of which services previously performed by small businesses are a part. Specifically, the exception does not state that combining services previously performed in-house with otherwise existing contract requirements necessarily constitutes a new requirement subject to the exception; rather, the exception specifically addresses only new requirements which are created by combining existing contract requirements. Therefore, it is not unreasonable to interpret this language as limited only to those new requirements, which are created solely from combining existing contract requirements. Since the M&M RFP is a new requirement created by combining marketing requirements previously performed largely in-house with existing management contract requirements, the SBA reasonably determined that the section 8(a) set-asides could be created for this new requirement without an adverse impact analysis.

Urban next alleges that the conditional nature of the section 8(a) set-aside is unduly burdensome on small business concerns because they do not have the resources to prepare proposals that will not be considered if at least two competitive proposals are submitted by section 8(a) concerns.

As set out above, the RFP set-aside scheme for the six designated areas progresses from a section 8(a) set-aside, to a small business set-aside, and finally to an unrestricted procurement, depending on whether sufficient competitive proposals in the set-aside categories are received. Under this scheme, both small and large business concerns must submit proposals in response to the RFP to be considered for award in the event the more restrictive set-aside requirements are not satisfied, even though their proposals would not be evaluated if a contract is awarded under the section 8(a) set-aside.

The SBA recommended this order of precedence approach to HUD as an alternative to a completely unrestricted procurement. The SBA states that this approach is not barred by any statute or regulation, that the RFP clearly advised potential offerors of the set-aside scheme so that they could assess the risks prior to preparing a proposal, and that qualified small businesses may well be willing to accept the risks associated with the

order-of-precedence structure of the set-aside to have the opportunity to receive the relatively large contracts that will be awarded under these set-asides.

We are aware of no statute or regulation that would prohibit this approach, nor has the protester identified any such statutory or regulatory restriction. Since the scheme proposed by the SBA and accepted by HUD will have the effect of increasing the opportunity for small business concerns under an otherwise unrestricted solicitation, we have no basis to object to this set-aside scheme as unduly burdensome for small business concerns.

Finally, Urban alleges that the section 8(a) set-aside was imposed on Area 3 without assessing the need for such a restriction in that area, which is unconstitutional under the ruling in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), as interpreted by the U.S. District Court for the District of Columbia in *Cortez III Serv. Corp. v. National Aeronautics & Space Admin*., 950 F. Supp. 357 (D.D.C. 1996).

There must be clear judicial precedent on the precise issue presented to us before we will consider a protest based on the asserted unconstitutionality of a procuring agency's actions. *Ervin and Assocs*., Inc., B-279161 et al., Apr. 20, 1998, 98-1 CPD ¶ 115 at 3. We have consistently held that, since the Court in *Adarand* simply announced the standard that is to be applied in determining the constitutionality of programs involving racial classifications in the federal government and remanded the case to the lower court for further consideration in light of that standard, *Adarand* did not provide that precedent. Id.

The ruling in *Cortez* applied the standard stated in *Adarand* to a federal agency's decision to restrict a solicitation as a section 8(a) set-aside, and discussed the corresponding analysis which the court determined that the agency was required to perform before doing so. *Cortez v. NASA*, 950 F. Supp. at 361- 363. However, as noted by the SBA and HUD, the *Cortez* decision concerned only a motion for a preliminary injunction without a fully developed record, and the SBA advises that this matter previously has had limited exposure in the courts and is now the subject of on-going litigation in other courts. Since the *Cortez* decision is not binding on other courts and since the effect of the *Adarand* decision remains a contentious issue in the area of federal procurements, we do not think that the *Cortez* decision represents the clear judicial precedent that our Office requires to rule on protests alleging unconstitutional agency action. Thus, we decline to consider Urban's protest on this basis.

THE McSWAIN PROTEST

McSwain challenges the agency's designation of Area 2 of the Atlanta HOC for unrestricted competition, alleging that the five-state region which comprises Area 2 of the Atlanta HOC under the RFP was created by improperly bundling a large number of smaller REAM contract areas without assessing the impact on small business concerns and that if this area were broken up further it would be suitable for small business set-asides.

The Competition in Contracting Act of 1984, 41 U.S.C. § 253a(a) (1994), generally requires that solicitations permit full and open competition and contain restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency. Since bundled, consolidated, or total-package procurements combine separate, multiple requirements into one contract, they have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement. *Aalco Forwarding, Inc*.,

et al., B- 277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 6. Furthermore, the Small Business Act, 15 U.S.C.A. § 631(j)(3) (West Supp. 1998), states that, "to the maximum extent practicable," each agency shall "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors." We will review such solicitations to determine whether the approach is necessary and justified to satisfy the agency's needs.

The Small Business Act, 15 § U.S.C.A. 644(e)(2)(A), states that, before proceeding with an acquisition strategy that could lead to a contract containing consolidated procurement requirements, the head of an agency shall conduct market research to determine whether consolidation of the requirements is necessary and justified. An agency may determine that consolidation of requirements is "necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the Federal Government would derive from the consolidation measurably substantial benefits, including any combination of benefits that, in combination, are measurably substantial." 15 U.S.C.A. § 644(e)(2)(B). Such benefits may include: (i) cost savings, (ii) quality improvements, (iii) reduction in acquisition cycle times, (iv) better terms and conditions, or (v) any other benefits. Id. "The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated." 15 U.S.C.A. § 644(e)(2)(C).

HUD does not consider these requirements as bundled, as defined by the Small Business Act, because the RFP includes previously unsolicited marketing services and completely redesigns HUD's property management and marketing methodology. The SBA disagrees because the RFP includes substantial services previously provided or performed under separate smaller contracts. However, HUD and the SBA both conclude that any bundling that may exist under this RFP was necessary and justified. As discussed below, whether or not this RFP involved bundling, as defined under the Small Business Act, the protester has not established that the bundling was unnecessary or unjustified.

McSwain does not object to the bundling of the various types of services provided in previous contracts with the newly solicited types of services. What McSwain protests is the combination of numerous small geographical regions that were previously the subject of REAM contracts into a single five-state area because, while McSwain "possesses excellent skills in all aspects as required in [the RFP,] but [they are] not at a level of multi-state management."

Here, the M&M RFP includes consolidation of geographical areas of management service contracts previously administered by HUD's 81 field offices into 16 areas, which will be administered by the four HOCs as well as additional services not previously obtained by contract. HUD's REO was faced with the converging problems of being unable to adequately administer the large number of REAM contracts with the staff it had, as well as having a severely reduced staff in the near future. The impetus for the M&M RFP approach was a documented need for improved program efficiency and quality in the face of fewer resources to administer the program. Realistically, these circumstances left REO with little, if any, alternative to reducing its contract administrative burden by having far fewer contracts encompassing more requirements and by incentivizing the contractors to

more efficiently and successfully perform the M&M work. The structure of the M&M RFP can reasonably be expected to reduce the amount of oversight by REO staff by reducing the number of contracts from hundreds of REAM contracts administered from 81 field offices to a maximum of 16 contracts administered from 4 HOCs.

Additionally, the financial incentive for each contractor to perform the maintenance and repairs which they deem necessary to enable them to sell the contract at the highest possible price and to maximize profits will add a self- monitoring component that was not possible under the REAM contracting approach. Furthermore, the transfer of the marketing function to the contractors should provide improved performance over REO's in-house performance, as illustrated by the pilot program results. This should increase program efficiency and reduce program costs. The total result should reduce the administrative burden sufficiently so that the small REO staff will be able to adequately administer these contracts.

HUD also believes that the improved oversight under the M&M contracting approach, together with the financial incentives for contractors to achieve the highest price for the properties under their contracts, will improve the conditions of the properties, which in turn will increase the value of surrounding properties and improve the health and safety of the neighborhoods. Although this is yet to be proven by results, the expectation appears reasonable.

The SBA agrees with HUD that the restructuring of HUD's requirements was necessary, and that the resulting benefits in cost savings and quality improvements are substantial and justify the consolidation of property management requirements into the M&M approach. Furthermore, the SBA worked with HUD to ensure that the RFP provides opportunities to the maximum extent practicable for small business concerns, both as prime contractors and subcontractors, and urges our Office not to disturb the resulting structure of the RFP.

We conclude that the record supports the finding that substantial benefits of cost savings and quality improvements will likely result from the consolidation of the previously contracted-out requirements with HUD's new requirements into contracts covering relatively large areas, and that these benefits go beyond reducing administrative and personnel costs alone. The expected improved program efficiency and quality, as well as the substantial potential cost savings, support the finding that the consolidation of the requirements under the M&M RFP approach was necessary and justified.

Given the protester's statement that it does not have "multi-state" capability, it evidently seeks breaking up the five-state area in question into much smaller pieces presumably a contract for each state. This would result in a proliferation of contract vehicles that would undermine the basic benefits of the program. The protester has failed to identify a reasonable alternative to the RFP consolidation that would provide similar benefits. Thus, we cannot say this particular five-state grouping was unnecessary or unjustified.

The protests are denied.

Comptroller General of the United States

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ELRICH CONTRACTING, INC.; THE GEORGE BYRON COMPANY
B-262015, 95-2 CPD ¶71

DECISION

Elrich Contracting Inc. and The George Byron Company each protest a Department of Defense (DOD) small disadvantaged business (SDB) set-aside procurement, contending that the set-aside is inconsistent with *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995).

In Adarand, the Supreme Court held that racial classifications must be subject to strict scrutiny and must serve a compelling government interest and be narrowly tailored to further that interest. The protesters assert that these SDB set-asides, with eligibility requirements that in very large measure are based on race, see Defense Federal Acquisition Regulation Supplement §§219.001, 252.219-7000; 13 C.F.R. §124.105 (1995), do not meet the standard set forth in Adarand and therefore are unconstitutional.

Adarand, which dealt with a Department of Transportation (DOT) program involving financial incentives to prime contractors awarding subcontracts to SDBs, did not determine the constitutionality of the DOT program before it or any other racially-based program. The Court in Adarand simply announced the standard that is to be applied in determining the constitutionality of such programs and remanded the case to the lower courts for further consideration in light of that standard. Thus, whether any particular program is unconstitutional was left to the lower federal courts to determine in the first instance.

There must be clear judicial precedent before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions. *DePaul Hosp. and the Catholic Health Ass'n of the U.S.*, B-227160, 87-2 CPD ¶173. For this reason, we have declined to consider allegations that DOD's SDB set-aside program is unconstitutional because of the absence of any clear judicial precedent on the question. *C. S. McCrossan Constr., Inc.*, B- 259225, 95-1 CPD ¶146; *JWA Security Servs.*, B-253836, 93-2 CPD ¶219; *Sletager, Inc.*, B-241149, 91-1 CPD ¶74; *Seyforth Roofing Co., Inc.*, B-235703, 89-1 CPD ¶574. *Adarand* did not provide that precedent. Accordingly, consistent with our long-standing practice, we dismiss the protests.

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UNITED STATES v. VERTAC CHEMICAL CORPORATION
46 F.3d 803 (8th Cir. 1995)

McMILLIAN, Circuit Judge

Background

This case began as a cost recovery action brought by the United States under CERCLA against numerous potentially responsible persons associated with a former herbicide manufacturing facility located in Jacksonville, Arkansas (the Jacksonville facility). The present appeal arises from motions for summary judgment filed by Vertac, ADPCE, and Hercules, and a cross-motion for summary judgment filed by the United States. By memorandum opinion and order dated October 12, 1993, the district court granted the United States' motion and denied the motions brought by Vertac, ADPCE, and Hercules.

Undisputed Facts

During the late 1950s, Reasor-Hill Corp. owned and operated the Jacksonville facility, where it manufactured, among other things, chemical herbicides known as 2,4-D and 2,4,5-T. In December of 1961, Hercules purchased the Jacksonville facility from Reasor-Hill. In 1964, in response to contract solicitation proposals published by the United States, Hercules submitted and won competitive bids to supply the United States with an herbicide known as Agent Orange, to be used as a defoliant in Vietnam. Hercules began producing Agent Orange, a mixture of the butyl esters of 2,4-D and 2,4,5-T, at the Jacksonville facility.

From 1964 through 1968, Hercules produced and supplied Agent Orange to the Department of Defense (DOD) under rated contracts or orders and directives issued pursuant to the Defense Production Act (DPA), 50 U.S.C. app. §2061 *et seq*. The DPA provides, among other things, that the President has authority to designate a contract or order as a "rated order" which shall take priority over the performance of any other contract or order, on grounds that it is deemed necessary or appropriate to promote the national defense. Rated orders may also require the suppliers of a government contractor to give the government contractor similar priority. A "directive" is an official action taken by the Department of Commerce (DOC) under its regulations. It requires a person to take an action or to refrain from taking an action and may take precedence over a rated or unrated contract, to the extent stated in the directive. The rated orders and directives issued to Hercules were subject to rules promulgated by the Business and Defense Services Administration, a unit of DOC.

The rated contracts contained standardized government contract terms and conditions. The contract specifications, which governed matters such as physical properties of the product, packaging, labeling, and quality control, were mainly developed by the United States Army. Hercules and other manufacturers were allowed some input regarding the contract specifications. While DOD allowed Hercules limited opportunities to negotiate and modify the terms of the contract specifications, the specifications remained substantially dictated by DOD.

The rated contracts also subjected Hercules to the terms of the Walsh-Healey Act, 41 U.S.C. §35. Under the Walsh-Healey Act, Hercules was required to meet

certain health and safety standards. Regulations under the Walsh-Healey Act gave the Department of Labor authority to conduct random inspections at the Jacksonville facility, which it did on two occasions during the period Hercules was producing Agent Orange.

In 1967, the United States issued a directive ordering Hercules to accelerate its production and delivery of Agent Orange. As a result, Hercules devoted all of its efforts at the Jacksonville facility to producing Agent Orange. When Hercules was still unable to meet the United States' production demands, it contracted for the foreign importation of 2,4,5-T and 2,4-D. The government facilitated this importation by waiving import duties, pursuant to 10 U.S.C. §2383, which provided for duty-free treatment of emergency war materials purchased abroad.

None of the raw materials used by Hercules for the production of Agent Orange was ever owned or directly supplied by the United States. The United States did, however, issue directives to Hooker Chemical (Hooker), to ensure Hooker's supply of tetrachlorobenzene (TCB) to Hercules and other producers of Agent Orange. The United States also did not hold any financial ownership interest in the land, buildings, tools, machinery, or equipment used by Hercules during the time Hercules was producing Agent Orange. In fact, Hercules protected certain aspects of its Agent Orange production process as proprietary information. No representative of the United States ever hired, fired, disciplined, managed, or trained any Hercules personnel who worked on the production of Agent Orange.

The United States knew or should have known that the production of Agent Orange produced wastes. Some of the wastes generated by the production of 2,4,5-T contained hazardous substances, including dioxin. The rated contracts between Hercules and the United States did not address the manner in which Hercules was to handle wastes generated by the production of Agent Orange. Hercules chose to bury wastes generated by the production of 2,4,5-T on-site, which had been its practice before it began producing Agent Orange for the United States. Hercules chose to bury the wastes without consulting representatives of DOD or DOC. The United States did not take part in designing, performing, or supervising activities related to the handling, treatment, or disposal of wastes while Hercules owned and operated the Jacksonville facility.

Hercules profited from its sales of Agent Orange to the United States under the rated contracts. After Hercules stopped supplying Agent Orange to the United States, it continued to produce and sell to commercial customers other products manufactured with the use of 2,4-D and 2,4,5-T.

Operator Liability

Under CERCLA, there are four classes of responsible persons who may be held liable for response costs incurred by the United States or another person. 42 U.S.C. §9607(a). One class includes persons who operated a facility at the time hazardous substances were disposed of at the facility. *Id*. §9607(a)(2) (owners and operators of facility at time of disposal). This court recently addressed the legal standards for determining an individual's operator liability under §9607(a)(2) in *United States v. Gurley*, 43 F.3d 1188 (8th Cir.1994). We determined under the facts of that case that an individual's actual exercise of control over the waste disposal activities conducted at a dump site resulted in personal liability under CERCLA.

In the present case, we consider the legal standards for determining the government's operator liability under §9607(a)(2), which we view as similar to corporate liability. As noted in *Gurley*, the statute itself does not provide much guidance; it simply imposes liability upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. §9607(a)(2). The Third Circuit, however, recently addressed this precise issue and held that the United States was an operator under CERCLA in a case involving similar, but not identical, facts to those of the present case. *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir.1994). Upon review, we agree with the Third Circuit's conclusion that operator liability may result from actual or substantial control exercised by one entity over the activities of another. Determining whether an entity has exerted such actual or substantial control requires a fact-intensive inquiry and consideration of the totality of circumstances. In the present case, we hold that the United States cannot be held liable as an operator under CERCLA because it did not exercise actual or substantial control over the operations at the Jacksonville facility.

In *FMC*, the Environmental Protection Agency brought a CERCLA action against potentially responsible persons seeking response costs for cleaning up hazardous substances at a facility in Front Royal, Virginia (the Front Royal facility). The owner of the site, FMC Corporation (FMC), sought contribution from the United States pursuant to 42 U.S.C. §9613(f). FMC alleged that the United States was liable as an owner, operator, and arranger under 42 U.S.C. §9607(a)(2) and 9607(a)(3) because the War Production Board (WPB) exercised control over the manufacture of high tenacity rayon at the Front Royal facility during the 1940s. Following a bench trial, the district court held that the United States was liable as an owner, operator, and arranger. On appeal, the Third Circuit affirmed, discussing only the United States' liability as an operator. The Third Circuit applied an "actual control" test for operator liability as set forth in its decision in *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp*., 4 F.3d 1209 (3d Cir. 1993).

Under the "actual control" test, the Third Circuit considered whether the United States had exercised "substantial control" over the production of high tenacity rayon at the Front Royal site. That standard in turn required, at a minimum, "active involvement in the activities" at the Front Royal facility. *Id*. Based upon the specific facts of the case, the Third Circuit concluded that the United States had exercised actual control over the activities at the Front Royal facility during the relevant time frame. The Third Circuit reasoned as follows: In our view, it is clear that the government had "substantial control" over the facility and had "active involvement in the activities" there. The government determined what product the facility would manufacture, controlled the supply and price of the facility's raw materials, in part by building or causing plants to be built near the facility for their production, supplied equipment for use in the manufacturing process, acted to ensure that the facility retained an adequate labor force, participated in the management and supervision of the labor force, had the authority to remove workers who were incompetent or guilty of misconduct, controlled the price of the facility's product, and controlled who could purchase the product. While the government challenges some of the district court's findings, it simply cannot quarrel reasonably with the court's conclusions regarding the basic situation at the facility. In particular, the

government reasonably cannot quarrel with the conclusion that the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold. *Id*.

A key fact in *FMC* was that American Viscose, the owner of the Front Royal facility at the time high tenacity rayon was manufactured, had been ordered by the WPB to convert its facility to production of high tenacity rayon, rather than the regular textile rayon it had been producing. In other words, American Viscose itself did not choose its product; "the government determined what product the facility would produce." Thus, the United States was directly and entirely responsible for introducing a new manufacturing process at the Front Royal facility. That manufacturing process generated hazardous substances that were disposed of on-site. Moreover, the United States implemented the required plant conversion by leasing government- owned equipment and machinery and contracting with a third party to install the equipment at the Front Royal plant. By contrast, in the present case, Hercules elected to bid for the Agent Orange government contracts. To the extent Hercules had to change its operations to produce Agent Orange, as opposed to other herbicides using 2,4-D and 2,4,5-T, those changes resulted from its own decision to seek the government's wartime business.

Another important fact in *FMC* was that the United States "exerted considerable day-to-day control over American Viscose" during the relevant time period. For example, the United States participated in managing and supervising workers, and even appointed a full-time representative to reside at Front Royal to address problems at the facility concerning manpower, housing, community services, and other related matters. By contrast, in the present case, no representative of the United States ever managed or supervised any Hercules personnel during the relevant time period. Upon review, we hold that it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange. Moreover, the facts that Hercules was required to comply with the worker health and safety regulations under the Walsh-Healey Act, and that on two occasions inspectors visited the Jacksonville plant to investigate such compliance, are insufficient bases for imposing CERCLA liability on the United States as an operator of the facility. See, *e.g*., *United States v. Dart Indus., Inc*., 847 F.2d 144 (4th Cir. 1988) (state environmental agency not an owner or operator of waste site under CERCLA despite allegations that agency issued permits for waste storage, performed inspections, and failed to effectuate a cleanup); *United States v. New Castle County*, 727 F.Supp. 854, 867-70 (D.Del. 1989) (state's regulation of hazardous waste site insufficient to establish operator liability where state did not have a financial or proprietary interest in the site and did not actively participate in daily management and operations of the site).

In sum, the United States was not sufficiently involved, directly or indirectly, in the activities that took place at the Jacksonville facility to constitute actual or substantial control. Accordingly, we hold that, under the facts of the present case, the United States cannot be held liable as an operator of a facility under §9607(a)(2).

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CITIZENS' COMMITTEE TO SAVE OUR CANYONS and WASATCH MOUNTAIN CLUB, Nonprofit Organizations; WILLIAM THOMPSON and GAVIN NOYES, Individuals, Plaintiffs – Appellants
v.
UNITED STATES FOREST SERVICE; BERNIE WEINGARDT, Forest Supervisor, Wasatch-Cache National Forest; and PETER W. KARP, Forest Supervisor, Uinta National Forest, Defendants – Appellees
and SNOWBIRD CORPORATION, Intervenor - Appellee.

No. 01-4082
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2002 U.S. App. LEXIS 14774
July 23, 2002, Filed

PRIOR HISTORY

[*1] Appeal from the United States District Court for the District of Utah. (D.C. No. 00-CV-0374-B).

DISPOSITION

Affirmed. Injunctions imposed pending appeal were vacated.

This case centers around privately and publicly owned lands located in Northern Utah and the interactions between Defendant-Appellee United States Forest Service and Plaintiffs-Appellants Citizens' Committee to Save Our Canyons, the Wasatch Mountain Club, William Thompson, and Gavin Noyes (collectively SOC) regarding development plans for the Snowbird Ski and Summer Resort. At issue is whether the Forest Service complied with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and the National Forest Management Act (NFMA), 16 U.S.C. § 1601 et seq., in carrying out two transactions involving Snowbird. The Forest Service approved, was part of a larger plan, the construction of large resort facility on Hidden Peak, a mountain owned by the federal government but used by Snowbird pursuant to a special use permit.

SOC alleges that the Forest Service's handling of these transactions was arbitrary and capricious in that the Forest Service did not consider a sufficient number of alternatives before authorizing the Hidden Peak structure.

The United States District Court for the District of Utah rejected SOC's argument and, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I. Background

Snowbird owns and operates a ski resort located twenty-five miles southeast of Salt Lake City, Utah. All parties agree that Snowbird is a ski resort of some significance, and during the 1998-99 ski season over 380,000 people visited the resort. The resort itself is comprised of 881 acres of private land (called the Mineral Basin) and 1,674 acres of public land located within the Wasatch-Cache National Forest ("WCNF").

In 1979, the Forest Service issued a special use permit to Snowbird that allowed the resort to establish ski operations on national forest land. Because of its special use permit, Snowbird is required to submit periodically a master development plan outlining its long-range plans for the resort and the public lands it utilizes.

A. Master Development Plan

In 1997, Snowbird submitted a master development plan (MDP) to the Forest Service. In the MDP, Snowbird proposed extensive changes to its resort operations. In addition to calling for a general upgrade in operations, increased snowmaking equipment, additional chair lifts, and improved hiking trails, the MDP proposed the construction of a 78,000 square-foot conference center and resort facility on an area known as Hidden Peak, which is within the public property Snowbird uses pursuant to a special use permit. The facility proposed by Snowbird would be considerably larger than the existing ski tram and 1,700 square foot ski patrol and skier service center currently located on Hidden Peak. Under Snowbird's proposal, the new structure would essentially replace the two existing structures and would contain space for "a restaurant, lounge, meeting rooms, an interpretive area, retail space, ski patrol quarters, restrooms, snowcat garages, and a maintenance area."

In its MDP, Snowbird argued that the larger structure was needed because the limited nature of the existing Hidden Peak facilities adversely affected the resort in a number of ways. Ski and equipment rental offices, as well as restaurants, currently sit below Hidden Peak at the base of the resort, making Hidden Peak less amenable to skiers. In addition, although considered a world-class facility in many regards, in recent years Snowbird has been unable to meet all the requests for its services and facilities. In 1997, for example, Snowbird turned away 19 percent of conference requests because of space limitations. The limited space on Hidden Peak also adversely affects activities across the resort, limiting skier circulation and making general use of the resort less efficient.

Because Hidden Peak is located on land owned by the federal government, any substantial structures on the region require Forest Service approval, which, in turn, implicates NEPA. On May 17, 1997, the Forest Service began the NEPA process by announcing its intent to prepare an Environmental Impact Study (EIS) examining Snowbird's proposal and by sending a scoping document, which outlined Snowbird's proposal and solicited public comments to over 1,000 individuals and organizations. In addition, on July 19 and 30, 1997, Snowbird held a public open house to discuss its proposal. A year later, in October 1998, the Forest Service published a draft EIS (DEIS) that consolidated several possible courses of action.

On December 12, 1999, the Forest Service issued a final EIS (FEIS) and a Record of Decision (ROD) authorizing the construction of the Forest Service's preferred alternative, which, among other things, authorized the construction of "a building not to exceed 50,000 square feet" and amended the existing Forest Plan to permit the structure.

Before the district court, SOC alleged that the Forest Service violated NEPA. It claimed that the Forest Service did not consider an appropriate range of alternatives when examining the Hidden Peak structure. Specifically, SOC argued that the Forest Service should have examined in more detail either constructing a facility smaller than 22,000 feet or not building a structure on Hidden Peak at all.

On April 10, 2001, the district court rejected SOC's argument. In particular, it concluded that the Forest Service considered a sufficient range of alternatives when looking at the Hidden Peak project.

Following the district court's order, SOC filed a motion with this court seeking an injunction pending appeal. SOC specifically asked that this court enjoin all construction on Hidden Peak.

Because Snowbird stipulated it would not begin construction on the Hidden Park building during the pendency of this appeal, we enjoined construction on that facility. SOC challenges Forest Service's EIS for not considering an appropriate number of alternatives when evaluating Snowbird's proposal for erecting a new Hidden Peak facility. SOC attacks the Forest Service's actions through a two-prong argument. First, SOC contends that the Forest Service inappropriately read the EIS's statement of purpose as focusing exclusively upon building a structure on Hidden Peak. Second, having made this error, SOC alleges, the Forest Service then failed to evaluate the possibility of building a smaller structure on Hidden Peak or, alternatively, placing facilities off peak. We disagree.

A. Standards

One of the key provisions of NEPA and its corresponding regulations is that government agencies must "include in every recommendation or report on proposals" detailed statements analyzing "alternatives to the proposed action." 42 U.S.C. § 4332(c)(iii). According to CEQ regulations, considering alternative actions "is the heart of the environmental impact statement." 40 C.F.R. §1502.14; see also All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992). Not only must an agency "rigorously explore and objectively evaluate all reasonable alternatives," agencies must also "briefly discuss the reasons" for having eliminated other alternatives. 40 C.F.R. § 1502.14(a).

As court opinions and the CEQ regulations make clear, however, an agency is only required to consider "reasonable alternatives." Id. § 1502.14. In determining whether an agency considered reasonable alternatives, courts look closely at the objectives identified in an EIS's purpose and needs statement. See Colo. Envtl. Coalition, 185 F.3d at 1174-75. Where the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor. See City of Grapevine v. Dep't of Transp., 305 U.S. App.D.C. 149, 17 F.3d 1502, 1506 (D.C. Cir. 1994); La. Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1048 (5th Cir. 1985).

Nevertheless, courts will not allow an agency to define the objectives so narrowly as to preclude a reasonable consideration of alternatives. Davis v. Mineta, F.3d, 2002 U.S. App. LEXIS 12285, 2002 WL 1401690 (10th Cir. June 20, 2002)(holding that a statement of objectives would be unreasonably narrow if it would permit only one particular crossing across a river in order to improve traffic flow).

Once an agency appropriately defines the objectives of an action, "NEPA does not require agencies to analyze 'the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." All Indian Pueblo Council, 975 F.2d t 1444 (quoting City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir.1984)). [*44] Instead, we apply a "rule of reason test" that asks whether "the environmental impact statement contained sufficient discussion of the relevant issues and opposing viewpoints to enable the Forest Service to take a hard look at the environmental impacts of the proposed expansion and its alternatives." Colo. Envtl.

Coalition, 185 F.3d at 1174. Alternatives that "do not accomplish the purpose of an action are not reasonable" and need not be studied in detail by the agency. Custer County Action Ass'n, 256 F.3d at 1041.

B. Alternatives

In this case, SOC does not directly challenge the Forest Service's stated objectives in evaluating Snowbird's overall master development plan, which included upgrading or replacing outdated facilities, improving circulation throughout the resort, balancing and making more efficient terrain use, and maintaining a "vigorous forest" and "quality recreational experience."

Rather, SOC argues that the Forest Service inappropriately restricted the range of alternatives it considered by not fully exploring alternatives that could have accomplished these goals without requiring a large structure on Hidden Peak. All the Forest Service proposals, SOC contends, contained "colossal structures" that would dwarf the existing Hidden Peak structures and obstruct the view of Hidden Peak.

The Forest Service, however, considered alternatives that had differences in size spanning over 56,000 square feet. Besides the no-action alternative, which would have left the smaller existing structures in place with minor alterations, it considered a 22,000 square foot structure,Snowbird's proposal for a 78,000 square foot building, and the preferred alternative, which called for a structure ranging between 22,000 square feet and 50,000 square feet.

Contrary to SOC's claim, the Forest Service did not breach the "rule of reason" by refusing to study in detail alternatives that would have limited the structure's size to between 1,600 square feet and 22,000 square feet or moved the structure off-peak altogether. See Colo. Envtl. Coalition, 185 F.3d at 1174. As the record illustrates, proposals calling for smaller structures on Hidden Peak, or removing the Hidden Peak structure to another location altogether, were impractical and failed to satisfy the objectives of the project, which, again, were to improve the recreational use in the area while balancing environmental interests. See Custer County Action Ass'n, 256 F.3d at 1041. Evidence in the record demonstrates that the following alternatives were considered: moving the structure to nearby resort areas; building a structure underground (so as to avoid impairing the ridge line altogether); and building a structure that is smaller than 22,000 square foot.

The Forest Service concluded that the building proposed in the preferred alternative, even though much larger than the existing structures on Hidden Peak, could blend in better with Hidden Peak's ridge line and "could potentially improve the visual impact of the peak."

Accordingly, we reject SOC's claims that Forest Service considered an impermissible range of alternatives.

VI. Conclusion

The district court's decision is AFFIRMED in all respects.

Accordingly, we hereby VACATE the injunctions imposed pending appeal.

SOCIO-ECONOMIC PROBLEM #1

You receive a call from a subcontractor who is supplying materials under one of your construction contracts. He is desperate for help since the prime owes him $20,000 and has not paid him in 3 months. He has a judgment and order against the prime to get paid. He has been without success to date. What can you do?

PROBLEM #2

You are the contracting officer at a base recently placed on the BRAC list. There are numerous environmental concerns, which must be resolved before closing and turning the base over to the local community. A single solicitation is issued to cover all the necessary remediation and restoration costs. Bids are received from firms throughout the United States, including two local firms, and firms in Canada and Mexico. The lowest bid is $7.2M from a Canadian company and the next low bid is $7.5M from a U.S. contractor. How should the bids be evaluated? Are there any preferences you should consider in this situation?

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CHAPTER NINE CASES

UNITED STATES ex rel. SUTTON
v.
DOUBLE DAY OFFICE SERVICES, INC. et al.
121 F.3d 531
United States Court of Appeals,
Ninth Circuit.
Decided Aug. 11, 1997.

FARRIS, Circuit Judge:

Richard Sutton brings a qui tam False Claims Act action against Double Day Office Services, Inc., his former employer, alleging that Double Day fraudulently reported to the United States that it was in compliance with the Service Contract Act. Sutton appeals the district court's holding that he lacks standing because his claim is effectively an SCA claim and the SCA bars private rights of action.

The district court had jurisdiction pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291, and reverse.

BACKGROUND

Richard Sutton was employed by Double Day Office Services, Inc., a moving company that had contracts with the United States for moving federal employees. Sutton brought a qui tam relator False Claims Act action on behalf of the United States against Double Day and its officers alleging that Double Day: executed contracts with the federal government that required the payment of prevailing wages; made false statements regarding the services rendered with the purpose of creating the impression that prevailing wages were paid to service employees; had knowledge of the falsity of the statements; and received payment for the false claims from the United States. Sutton may also claim damages to himself because Double Day did not pay him prevailing wages (the drafting of the complaint makes this unclear).

The United States declined to intervene. The district court held that Sutton lacked standing to bring suit under the FCA for the alleged fraudulent activity because his claim was equivalent to a Service Contract Act claim, and there is no private right of action under the SCA. Sutton appeals this decision and requests attorney's fees.

DISCUSSION

A. Standard of Review

We review issues of standing de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir.), as amended (July 24, 1996), cert. denied, - U.S. -, 117 S.Ct. 765, 136 L.Ed.2d 712 (1997).

B. Standing

The Service Contract Act, 41 U.S.C. §§ 351-58, requires government contractors to pay service employees minimum wages and benefits determined by the Secretary of Labor. 41 U.S.C. § 351(a). The SCA restricts employee remedies for violations of the

Act to administrative channels. The SCA does not confer a private right of action to employees; the Secretary of Labor has the exclusive right to enforcement. *Miscellaneous Service Workers, Drivers, & Helpers, Teamsters Local # 427 v. Philco-Ford Corp*., 661 F.2d 776, 781 (9th Cir.1981). Employees have no standing to enforce their claims against employers for failure to pay SCA-required wages. *Id.*

The parties agree that the contracts at issue are governed by the SCA. To the extent any of Sutton's claims are for damages to himself because he was not paid SCA-required wages, Sutton lacks standing to pursue those specific claims. *Id.*

The False Claims Act, 31 U.S.C. §§ 3729-33, makes any person who knowingly induces the United States to make payment on a false claim liable to the United States. 31 U.S.C. § 3729(a). Violators are liable for a civil penalty between $5,000 and $10,000 for each false claim plus treble damages. *Id*. FCA claims may be brought by the Attorney General or by a qui tam relator. 31 U.S.C. § 3730. If a qui tam relator is successful, he or she receives a portion of the recovery. *Id.*

Richard Sutton brings his claim under the FCA. He alleges that Double Day executed contracts requiring payment of prevailing wages on government service contracts, knowingly made false statements to the United States regarding services rendered to create the false impression that prevailing wages had been paid, and received payment from the United States based on the false statements. Double Day argues that because Sutton's claim is based solely on violations of the SCA, it is preempted by the SCA's bar on private rights of action.

Other plaintiffs have tried to make an end-run around the SCA's bar on private rights of action by bringing actions under RICO for damages from an employer's failure to pay SCA wages. See *Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220 (D.C.Cir.1991). In *Danielsen*, the court held that allowing a plaintiff to pursue a private action under RICO for SCA-based damages would undercut the intended specific remedy prescribed by Congress in the SCA. *Id.* at 1228. We are persuaded by the D.C. Circuit's reasoning that a party may not bring an action for the equivalent of SCA damages under the guise of another statute.

Sutton, however, does not bring his FCA action for SCA damages. He brings his action as a qui tam plaintiff for the United States to recover for damage to the United States, not to recover for damage to himself. If his action were equivalent to an SCA action, then his damage would be his lost wages due to Double Day's failure to pay prevailing wages. 41 U.S.C. § 354(b). However, here the damage he seeks and may recover as a qui tam plaintiff are FCA civil penalties plus three times the damage to the United States. 31 U.S.C. § 3729.

Further, Sutton's FCA claim is based on different actions by Double Day than an SCA claim would be. Double Day's failure to pay Sutton prevailing wages was a violation of the SCA; however, it was not a violation of the FCA. Double Day violated the FCA when it submitted a claim for payment to the United States falsely stating that it had complied with the SCA. The FCA attaches liability to the claim for payment, not to the underlying activity. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir.1996), cert. denied, - U.S. -, 117 S.Ct. 958, 136 L.Ed.2d 844 (1997). The violation of a statute does not itself create a violation of the FCA - "[i]t is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.*

Because Sutton's qui tam claim under the FCA is based on different actions and for different damages than a claim under the SCA would be, his suit is not barred by the SCA's bar on private rights of action. See *United States ex rel. Fallon v. Accudyne Corp.*, 880 F.Supp. 636, 639 (W.D.Wis.1995) (action under FCA for false claim of environmental compliance is not barred by specific remedial provisions of environmental statutes because the actions that give rise to the claims and the remedies they provide are different). Any other result would require the implausible conclusion that Congress intended to deprive the United States of a remedy for contract fraud by creating a remedy for underpayment of wages.

Double Day argues, citing *Danielsen*, that this holding effectively preempts the SCA because no plaintiff will pursue administrative remedies under the SCA when more lucrative remedies are available under the FCA. See *Danielsen*, 941 F.2d at 1228. However, in *Danielsen* the plaintiff was seeking to recover for damage under RICO that was exactly the same as the damage under the SCA - failure to pay plaintiff prevailing wages. Here, Sutton is trying to recover a different kind of damage - damage to the United States plus statutory damages. Regardless of what happens in this case, Sutton can still pursue his remedies for underpayment of wages under the SCA. Allowing an FCA-based claim here does not preempt the SCA because, unlike *Danielsen*, it is not for, and will not affect, any of the remedies or damages available through the SCA.

Further, a qui tam FCA plaintiff brings his or her action in the name of the United States. 31 U.S.C. § 3730(b)(1). That Sutton happens to be an employee who was damaged by Double Day's failure to pay SCA wages is irrelevant to his bringing an action qui tam. If Sutton were barred from bringing this action qui tam, then any plaintiff, including the United States, would also be barred from suing Double Day for its alleged fraudulent activity. This cannot be a result that Congress intended. Accepting Double Day's position would require the improbable conclusion that Congress intended to authorize suits for fraud on the government where a contractor lies about lawful actions but to preclude suits where a contractor lies about unlawful actions.

Holding that Sutton lacks standing to bring his qui tam suit would frustrate the purpose of the FCA, which was "intended to reach all kinds of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 961, 19 L.Ed.2d 1061 (1968). It would also preclude qui tam actions by the people who are most likely to know that a fraud against the United States has been committed. "The archetypal qui tam FCA action is filed by an insider at a private company who discovers his employer has [defrauded the government]." *Hopper*, 91 F.3d at 1266.

Finally, holding that the SCA bars actions under the FCA would require concluding that the SCA impliedly preempts the FCA. It is "a cardinal principle of statutory construction that repeals by implication are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976). "[S]o long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Connecticut National Bank. v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992); *United States v. General Dynamics Corp.*, 19 F.3d 770, 774 (2nd Cir.1994) (Anti-Kickback Act does not preempt the FCA because implied preemption is strongly disfavored).

Sutton has standing to pursue his FCA claim.

C. Attorney's Fees

Sutton seeks attorney's fees for his appeal "pursuant to 31 U.S.C. § 3730(D)(5)(d)." This subsection does not exist. The only references to attorney's fees in section 3730 are: (1) for a plaintiff where there has been a recovery against a defendant (31 U.S.C. § 3730(d)(1)-(2)); (2) for a defendant where a plaintiff brings a frivolous suit (31 U.S.C. § 3730(d)(4)); and (3) for a plaintiff where a defendant retaliates against the plaintiff for pursuing an FCA claim (31 U.S.C. § 3730(h)). The FCA also incorporates the attorney's fees provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(d). 31 U.S.C. § 3730(g). As Sutton is within none of these categories, his request for attorney's fees on appeal is premature and is DENIED without prejudice.

CONCLUSION

The district court's holding that Richard Sutton lacks standing to bring a qui tam False Claims Act action against Double Day is REVERSED and REMANDED. To the extent any of Sutton's claims are for damages to himself because he did not receive prevailing wages, Sutton lacks standing to pursue those specific claims.

UNITED STATES
v.
HATFIELD
108 F.3d 67
United States Court of Appeals,
Fourth Circuit.
Decided March 7, 1997.

OPINION

NIEMEYER, Circuit Judge:

This case presents the question of whether a debarred government contractor may be prosecuted criminally for the same fraudulent conduct that led to the debarment. The defendant, arguing that his debarment constituted punishment, asserts that the Double Jeopardy Clause of the Fifth Amendment bars his subsequent criminal prosecution. Because we conclude that debarment is civil and remedial, we reject the argument and affirm the district court's order refusing to dismiss his indictment.

In a twelve-count indictment, the government charges that over a period of several years beginning in September 1990, Fred L. Hatfield, Sr., doing business as HVAC Construction Company, made false and fraudulent statements to the government. The indictment charges that on several occasions when bidding for government work, Hatfield fraudulently misrepresented that he had never had a government contract terminated for default. It also charges that in performing government contracts, Hatfield had on various occasions made certifications for payment that fraudulently stated that work had been performed and that payments had been made to his subcontractors. The government further charges that on one occasion Hatfield presented a false subcontractor invoice.

This conduct alleged in the government's indictment was also the basis for Hatfield's earlier debarment from government contracting. In July 1994, the Department of the Army debarred Hatfield and his companies from all government contracting for a period of 26 months. That debarment, Hatfield claims, cost Hatfield and his company $1,147,227 in attorneys fees, lost profits, and out-of-pocket expenses. He attributes the majority of that assessment to lost profits and his own unpaid compensation.

Hatfield filed a motion to dismiss the indictment, arguing that under *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), his debarment constituted punishment because it caused him far more loss than the loss sustained by the government. Accordingly, he argued, his current prosecution would result in a second punishment in violation of the Double Jeopardy Clause. From the district court's order denying Hatfield's motion to dismiss the indictment, this interlocutory appeal followed.

The Double Jeopardy Clause, which provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. amend. V prohibits not only successive criminal prosecutions but also successive punishments for the same offense. Thus, if the government's debarment of Hatfield and his companies constituted punishment for double jeopardy purposes, he is entitled to have his subsequent criminal prosecution dismissed. As Hatfield argues, it does not matter

whether the debarment preceded or succeeded the criminal prosecution. If both are punishment, the second proceeding is barred. See *United States v. Reed*, 937 F.2d 575, 576 n. 3 (11th Cir.1991); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir.1990). If, on the other hand, debarment is a civil proceeding, it does not implicate the Double Jeopardy Clause because that clause prohibits "two criminal trials [or] two criminal punishments." *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235, 93 S.Ct. 489, 492, 34 L.Ed.2d 438 (1972). To determine whether debarment is civil or criminal, we look to (1) whether the procedure was designed to be remedial, and (2) whether the remedy provided, even if designated as civil, "is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 237, 93 S.Ct. at 493; see also *United States v. Ursery*, - U.S. -, -, 116 S.Ct. 2135, 2147, 135 L.Ed.2d 549 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362, 104 S.Ct. 1099, 1103-05, 79 L.Ed.2d 361 (1984).

Debarment is the action taken against a contractor to exclude it from government contracting for a specified period. See 48 C.F.R. § 9.403. The action is an agency proceeding which is "as informal as is practicable, consistent with the principles of fundamental fairness." 48 C.F.R. § 9.406-3(b)(1). The cause for debarment, if not based on a conviction or judgment, must be established by "a preponderance of the evidence." 48 C.F.R. § 9.406-3(d)(3). Finally, debarment cannot be imposed to punish but only to serve the remedial goal of protecting the government. See 48 C.F.R. § 9.402(b).

There can be little doubt that debarment was designed to be a civil proceeding. By its own procedural rules, it may not be imposed for punishment, but only to protect the government in its dealings with contractors. See *id*. Moreover, its procedures are informal and the proof demanded is by a preponderance of the evidence. See 48 C.F.R. § 9.406-3(b)(1), (d)(3). Finally, the remedial purpose is linked to specific conduct that relates to the protection of the government from fraud, neglect, nonperformance, or other conduct lacking integrity, with a focus on the "present responsibility" of the contractor. 48 C.F.R. § 9.406-2; see also *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir.1990) ("debarment constitutes the rough remedial justice permissible as a prophylactic governmental action" (internal quotation marks omitted)); cf. *Ursery*, - U.S. at -, 116 S.Ct. at 2148 (even though in rem civil forfeiture has "certain punitive aspects," it is designed to serve important nonpunitive goals and is, therefore, a remedial sanction).

We also believe that debarment for 26 months is not so "unreasonable or excessive" as to transform what is designed as a civil remedy into a criminal penalty. Hatfield is accused of fraudulently misrepresenting material facts on numerous occasions over a span of years, and of overstating a subcontractor's billing by more than $10,000. These facts raise a serious question about his "present responsibility" as an honest and dependable contractor to the government. In *United States v. Glymph*, 96 F.3d 722 (4th Cir.1996), where the facts are strikingly similar -lymph was debarred for knowingly supplying the government with parts that did not conform to purchase order specifications - we rejected the argument that a four-year debarment was "overwhelmingly disproportionate" where the government paid more than $40,000 for nonconforming parts. See *id.* at 723-26. We so held even though the regulations provide that generally debarment should not exceed three years. See 48 C.F.R. §

9.406-4; see also *Glymph*, 96 F.3d at 725 n. *. We believe the holding of *Glymph* controls the disposition of this case. The government estimates that Hatfield caused direct losses between $40,000 and $60,000, which does not take into account victims and losses sustained by subcontractors and suppliers whom Hatfield did not pay. In these circumstances, the 26-month debarment was not so unreasonable or excessive as to transform the remedial sanctions into a criminal penalty.

Hatfield argues that notwithstanding our holding in *Glymph*, the Supreme Court's holding in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), requires a "particularized assessment" to determine whether the debarment in this case is punitive. He maintains that such an assessment would disclose that his losses sustained from the debarment were excessively disproportionate to the harm caused to the government.

In *Halper*, the contractor was assessed a civil penalty of $130,000, which was 220 times greater than the government's $585 in damages. The Supreme Court held that while the civil penalty did not rise to the level of punishment solely because Congress provided for a remedy in excess of the government's actual damages, its precedent did not "foreclose the possibility that in a particular case a civil penalty ... may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." 490 U.S. at 442, 109 S.Ct. at 1898. The Court held in the particular circumstances that Halper's $130,000 liability was sufficiently disproportionate as to constitute punishment. See *id*. at 452, 109 S.Ct. at 1903-04.

We do not believe that the *Halper* decision applies to a case of the type before us. In *Ursery*, the Supreme Court noted that the *Halper* balancing test - weighing the government's harm against the penalty's size - was appropriate only where the penalty was for a "fixed monetary" amount. - U.S. at -, 116 S.Ct. at 2145. Consequently, the Court noted that when confronted with the in rem forfeiture sanction where the "nonpunitive purposes served" were "virtually impossible to quantify," the *Halper* test is "inapplicable." *Id.* Indeed, though we had no need to decide the issue in *Glymph*, our opinion indicated that the applicability of *Halper* to debarment was doubtful. See *Glymph*, 96 F.3d at 723-26 (citing *United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir.1996)).

For the same reasons given in *Ursery*, we believe that debarment here is not subject to the same type of "particularized assessment" which *Halper* requires for fixed-amount penalties. That is, the government does not seek the return of a particular quantity of funds but instead seeks to protect the quality of its acquisition programs. Of course, the debarred contractor may quantify its losses in terms of potential profits, and the government may even be able to attach a number to much of the reason for debarment. For instance, we identified a $40,000 loss in nonconforming parts in *Glymph*. See 96 F.3d at 726. But the government may also debar a contractor for nonmonetary causes such as those affecting the responsibility of a contractor or for disreputable business practices. See 48 C.F.R. § 9.406-2(a)(5), (c). Where the sanction and the purposes it seeks to achieve are qualitative rather than merely quantitative, the *Halper* inquiry is inapplicable. Instead, the question becomes the one raised in *Ursery* - whether the debarment is in effect so unreasonable and excessive, i.e. so punitive, that we must, from the "clearest proof" conclude that the proceeding is not civil but criminal in nature. See *Ursery*, -- U.S. at -- , 116 S.Ct. at 2148-49.

In the case before us, Hatfield has not carried the burden of demonstrating with clearest proof that his 26-month debarment is disproportionate to the benefits received by the government in protecting it against the effects of willful failures to perform in accordance with the terms of government contracts, the effects of a history of failures to perform, and the adverse effect of having the government contract with an irresponsible contractor. See 48 C.F.R. § 9.406-2(b)(1), (c); § 9.402(b); see also *Glymph*, 96 F.3d at 723-26. Indeed, we doubt that any debarment within the three-year guideline established in the regulations, see 48 C.F.R. § 9.406-4, could present a case sufficiently punitive to implicate the Double Jeopardy Clause. Cf. *Glymph*, 96 F.3d at 725 n. * (holding a four-year debarment not to be of constitutional significance).

Accordingly, we affirm the district court's order denying Hatfield's motion to dismiss the indictment in this case. The case is remanded for further proceedings.

SDA Inc.
B-253577.2, 93-2 CPD ¶132

DECISION

SDA Inc. protests its exclusion from the competition for a contract under solicitations for offers (SFO) Nos. 93-01, RNE-92071, and RIA-13999, issued by the General Services Administration (GSA) for acquisition of leased space for federal offices. SDA was excluded from competing on the basis of its status as a suspended contractor. SDA contends that its suspension was improper, and that the company's resulting exclusion from the competition was therefore also improper.

We deny the protests in part and dismiss them in part.

On December 15, 1992, the Resolution Trust Corporation (RTC) filed a civil complaint, No. 92-2465, in the United States District Court for the District of Colorado against Stephen M. Biagiotti, then the president of SDA. The complaint contains detailed allegations asserting that Biagiotti was involved in fraudulent real estate transactions involving substantial sums of money.

On April 2, 1993, the GSA's assistant inspector general for investigations recommended that GSA consider instituting suspension proceedings against Biagiotti, SDA, and several affiliated companies, based on the allegations in the RTC civil complaint. GSA followed that recommendation and, in an April 20 letter to SDA, informed the company that it had been suspended on a temporary basis, effective from the date of the letter, pending resolution of the Colorado litigation. The letter stated that SDA was permitted to submit information and argument in opposition to the suspension.

The agency agreed to Biagiotti's request for an immediate hearing, and a meeting was scheduled for April 29. In an April 27 letter to GSA, Biagiotti's counsel (who is also SDA's counsel) advised the agency that, at the April 29 meeting, Biagiotti would address the allegedly "spurious nature" of the RTC allegations and "correct factual inaccuracies" in the RTC complaint. In addition, Biagiotti's counsel argued in the April 27 letter that the suspension was improper because it was based solely on the allegations contained in a civil complaint. He contended that, as a matter of law, allegations in a civil complaint could not constitute the "adequate evidence" on which a suspension must be based pursuant to Federal Acquisition Regulation (FAR) §9.407-2(a)(5).

At the April 29 meeting, Biagiotti corrected certain minor factual matters in the RTC complaint, such as the date of incorporation of the suspended companies and the relationship among the companies. However, other than these minor matters and a blanket denial of the RTC allegations, Biagiotti did not address the substance of the allegations. In particular, he offered no specific information, which purported to refute the accuracy of the allegations.

In a May 4 letter, GSA informed SDA that the suspension precluded the company from receiving a GSA contract and that offers from the company under outstanding SFOs would not be evaluated. The letter advised that, if the suspension were lifted prior to award, the contracting officer was permitted, but not required, to consider an offer that the company had submitted.

In its protests, which all concern SFOs under which SDA submitted an offer, SDA repeats the argument made to GSA that a suspension must be legally inadequate if based solely on allegations contained in a civil complaint. SDA has not addressed the

substance of the allegations at all, and at no point during the protest process has SDA provided any information or argument that would cast into doubt the accuracy of the allegations in the RTC complaint.

The FAR provides for procedures for the suspension and debarment of contractors, and prohibits agencies from soliciting offers from, or making award to, suspended or debarred contractors unless the agency's head or his or her designee determines that there is a compelling reason for such action. FAR §9.405(a).

Suspensions are imposed for a temporary period before suspected misconduct is proven and while an investigation of the contractor is taking place. FAR §9.407-4. An agency may suspend a contractor suspected, upon "adequate evidence," of misconduct indicating a lack of business integrity. FAR §9.407-2. "Adequate evidence" is more than uncorroborated suspicion or accusation. *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C.Cir.1972). The FAR provides that, in assessing the adequacy of the evidence, agencies should consider, among other factors, "how much information is available, how credible it is given the circumstances, [and] whether or not important allegations are corroborated." FAR §9.407-1(b)(1).

Because suspensions are imposed in order to provide immediate protection of the government's interest where contractor misconduct is suspected, there is no requirement that a contractor be afforded an opportunity to be heard prior to the suspension. See FAR §9.407-3(b). Following the suspension, however, the contractor must be afforded an opportunity to submit information and argument in opposition to the suspension.

Generally, our Office does not review protests of suspension or debarment decisions, since the appropriate forum for challenging the sufficiency or correctness of the agency's reasons for imposing the suspension or debarment is with the agency after notice of the suspension or proposed debarment has been given. FAR §9.407-3(b); *TS Generalbau GmbH; Thomas Stadlbauer*, B-246034 et al., Feb. 14, 1992, 92-1 CPD ¶189. However, when a protester alleges that it has been improperly suspended or debarred during the pendency of a procurement in which it was competing, we will review the matter to ensure that the agency has not acted arbitrarily to avoid making an award to an offeror otherwise entitled to award, and also to ensure that minimum standards of due process have been met. *Far West Meats*, 68 Comp.Gen. 488 (1989), 89-1 CPD ¶547; *TS Generalbau GmbH, supra.*

SDA does allege that it was improperly suspended during the pendency of procurements in which it was competing for award. However, SDA does not allege that GSA suspended the company in order to avoid awarding it a contract or that the agency failed to afford the protester procedural due process. There is no suggestion in the record that GSA suspended the protester for the purpose of avoiding awarding a contract to the company. As to the process afforded SDA, GSA provided SDA an opportunity to be heard immediately after the suspension was imposed, both in a face-to-face meeting and through numerous written submissions. As noted above, there is no requirement that the company be provided an opportunity to be heard prior to imposition of the suspension. In terms of the limited review conducted by our Office in this area, therefore, neither SDA's protest nor the record before us raises any concern, which would call into question the propriety of GSA's action.

SDA's allegation really goes to the sufficiency of the evidence relied on by the agency in deciding to suspend the company, a matter generally outside the scope of our review. SDA would have our Office rule that it is a *per se* violation of the FAR requirement that suspensions be based on adequate evidence for an agency to base a suspension on the content of a civil complaint. We decline to do so.

Even if it is assumed, as SDA argues, that the mere fact that allegations are included in a civil complaint does not generally constitute adequate evidence for the purposes of suspension decisions, here the civil complaint was filed by a federal government entity in the course of its official duties. As noted above, in determining whether information available constitutes adequate evidence of suspected misconduct, agencies are to consider the credibility of the information. FAR §9.407-1(b)(1). It is reasonable and appropriate for GSA to attribute a substantial level of credibility to allegations which a federal entity has determined form a sufficient basis for instituting litigation in federal court; such allegations need not be treated as mere uncorroborated suspicions or accusations. In this regard, we will presume that government officials have acted in good faith. See, *e.g.*, *SDA Inc.*, B-248528.2, Apr. 14, 1993, 93-1 CPD ¶320. GSA reasonably was entitled to presume that the RTC did not initiate district court litigation based on unsupported suspicions and without reasonable inquiry.

We therefore disagree with SDA's blanket proposition that the FAR prohibits agencies from considering as evidence adequate for suspension another agency's federal district court complaint presenting detailed allegations of misconduct, where no doubt has been raised concerning the accuracy, reliability, or fairness of those allegations. Within the confines of our limited review in this area, SDA has not established that GSA acted improperly in suspending SDA, and the protester's exclusion from the competitions at issue was therefore also proper.

The protests are denied in part and dismissed in part.

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PROBLEM #1

Gatewood hired 3 subcontractors to work on its construction contract with the Navy. Two of the subcontractors were paid in part, and one was not paid at all because its work was deficient. Gatewood submitted its final invoice to the Navy with a signed certification that "payments to subcontractors have been made from previous payments received under the contract." The Navy paid the full amount of the invoice, but later charged Gatewood with a knowing and willful violation of the False Statements Act. As described by the Navy, Gatewood's certification was false because "he had not made full payments to the subcontractors … from previous payments received." Gatewood was convicted in the Federal District Court, but has appealed. What defense (if any) does Gatewood have? Was the Navy correct in alleging that he violated the False Statements Act?

PROBLEM #2

Contractor A is required to perform specific tests (or to perform specific tasks pursuant to contract specifications). The Government's on-site representative is aware that the contractor has not completed these tests in strict accord with the contract's requirements. Does the contractor's conduct amount to fraudulent misconduct?

PROBLEM #3

Contractor B enters into a research and development contract with the Government to develop an improved blivet. No blivet of the type proposed has ever been built and operated before and B has serious reservations about the success of the project. B fails to share these concerns with the Government. Is this fraud?

PROBLEM #4

You hear rumors that double-billing is going on in the firm-fixed price contract you are administering. What actions should you take?

PROBLEM #5

Contractor advises employees to use Vaseline petroleum jelly as a lubricant on O-ring gaskets. The contract specifies certain lubricating agents, which contractor may use, but Vaseline is not one of them. Contractor then certifies to the Government that the completed O-rings meet contract specifications. Is this conduct amounting to fraud?

PROBLEM #6

A contracting officer was provided a golfing trip to Florida by a prospective contractor. The contracting officer claimed that since she retired from federal service within a month following her return, it was impossible for her to have granted this prospective contractor any favors in return for having paid for the cost of the trip. Therefore, since the payments were not made in return for the contracting officer performing some specific act, she could not have violated the criminal statute prohibiting acceptance of bribes and gratuities. Discuss.

PROBLEM #7

Aero contracted to sell 300 master rod bearings to the Navy. The specifications called for new, unused bearings to be subjected to 100% final inspection. Aero supplied reworked bearings, which to the naked eye were indiscernible from new bearings, which the Navy failed to inspect at the 100% inspection rate. Aero's program manager, who had signed the original bid submitted by Aero, also requisitioned the rebuilt bearings. Furthermore, Aero can show that within the industry the reworked bearing is considered the equivalent of the new bearing. Would the program manager be likely to be found civilly liable under the False Claims Act?

continued on next page

Problems *(continued)*

PROBLEM #8

You now learn that Joe Smith, who is the immediate subordinate of Aero's program manager, and who had full knowledge that reworked bearings were being supplied the Government has been found to be not liable in a False Claims Act suit? Would it still be appropriate to initiate a False Claims Act suit against the program manager?

PROBLEM #9

Joe Smith has initiated a *qui tam* action against Aero. What is the process, which he must follow, and what do you think is the likelihood of his being able to collect personally from any judgment entered against Aero?

PROBLEM #10

You are a contracting officer having two contracts with Avionix Corp. under your jurisdiction, one being a research and development contract attempting to determine a suitable composite material for compressors on a next-generation jet engine, and the other being a production contract for an existing jet engine model. An auditor advises you he thinks he has discovered some cost mischarging under the production contract in which Avionix appears to have charged some direct labor expended in the production contract against the research and development contract. What are the remedies available to the Government in the event the auditor's allegations are substantiated?

CHAPTER TEN CASES

ARCO Engineering, Inc
ASBCA 52450
01-BCA ¶ 31,218

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from contracting officer's decisions terminating the contract for default and assessing reprocurement costs of $32,361.66. The underlying contract between the United States Air Force, Hill Air Force Base, Utah, and appellant is for bushings for F- 16 aircraft. The parties have waived a hearing pursuant to Board Rule 11.

We deny the appeal as to the default termination and administrative reprocurement costs. We sustain the appeal with respect to the excess repurchase costs.

FINDINGS OF FACT

1. Contract No. F42630-97-C-0079 was awarded to appellant on 13 February 1997 for a first article and 5259 production units of 3120-01-257-2740LE bushing for F-16 aircraft. The part number was 2007404-23. The firm fixed-price of the negotiated contract was $34,683.50 (5259 bushings at $6.50 and $500 first article costs). Delivery of the first article was to be within 90 days, and the contract stated "Urgent: this is an extremely urgent requirement concerning public exigency." After first article approval delivery was to be FOB origin as follows:

1000 units	60 days
2000 units	90 days
2259 units	120 days

2. Appellant was the low offerer. Six of 37 unidentified offerors were in the competitive range, with per unit prices of $6.75, $7.648, $7.879, $8.38, $8.95 and $8.95.
3. The contract contained FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). That clause permits the contract to be terminated for various failures of performance and the Government to acquire the supplies from another vendor,and makes the contractor liable for excess costs incurred as a result. he clause does not specifically address administrative costs. However, the contractor may not be liable if the failure to perform the contract arises from causes "beyond the control and without the fault or negligence of the Contractor."
4. Appellant's first article was conditionally approved by letter of 1 October 1997. Delivery of the first production lot of 1000 was due by 6 December 1997. By letter of 4 November 1997 appellant informed the contracting officer that it could not "produce this product, for the price originally quoted." Appellant admitted underbidding the job and stated that its production process was "incompetent." A price increase to $10.50 per

unit was proposed. When appellant missed the 6 December 1997 delivery date, a show cause letter was issued on 16 December 1997.

5. By letter of 31 December 1997 appellant's president, Steve Watson, informed respondent that it could not complete the contract. Mr. Watson offered, however, to provide a quantity sufficient to meet emergency requirements. Mr. Watson subsequently refined his offer and agreed to provide emergency units at $2.00 per unit above the contract price. The contracting officer evaluated the situation pursuant to FAR 49.402 on 2 March 1998. She rejected appellant's offer and concluded, inter alia, that the items were still needed and would have to be repurchased. The contract was terminated for default on 6 April 1998. Appellant did not deliver any production units.

6. Respondent thereafter issued a request for proposals (RFP) to reprocure 5,260 bushings. Bid opening was 30 July 1998. The number of vendors to whom RFPs were issued is not indicated in the record. Three offers were received, of which two were responsive: Mayday Manufacturing Co. (Mayday) at $65,276.60 ($12.41 per unit) and Yeager Mfg. Division at $84,686.00 ($16.10 per unit). A contract was thereafter awarded to Mayday on 3 August 1998 for 5,260 units at $12.41 per unit. Delivery was to be in 13 weeks, FOB origin. Mayday shipped the units ahead of schedule and was paid by respondent. The record contains only the first two pages of the Mayday contract, which do not evidence a first article provision. There is no evidence of cost analysis or negotiation of price by respondent. The record does not disclose whether any of the original offerers was solicited. The record does not disclose why the offers were higher than the original offers. Neither does the record disclose when the parts were needed.

7. The contracting officer issued a demand for excess costs of $32,361.66 for repurchase of the bushings ($31,080.69) and related administrative costs 1,280.97) in a decision dated 12 August 1999. The excess repurchase costs were calculated by subtracting the $6.50 unit price in appellant's contract from the $12.41 unit price in Mayday's contract ($5.91) and multiplying that by 5259 units. The administrative costs were calculated using "Pro Cost 1995," a manual developed at Hill Air Force Base to determine the administrative costs associated with procurement and reprocurement of contract orders. The manual is based on studies of administrative costs. Data for the studies was obtained from an information control system at Hill Air Force Base. In an affidavit, the author of the manual represents that the administrative costs assessed against appellant were consistent with the manual and that the costs assessed would have been higher if the manual were current. We find the manual contains reasonable estimates of the administrative costs of reprocurement and that it was reasonably applied by the contracting officer. A timely appeal was filed by letter of 2 November 1999.

DECISION

Appellant does not attempt to excuse its failure to deliver, but asks the Board to do "the fair thing" and deny reprocurement costs. Respondent argues that appellant's letters amount to an anticipatory repudiation and that, in any event, appellant did not deliver any production units (finding 5). We need not address anticipatory repudiation, as respondent has met its burden of proving that appellant defaulted on its obligation to manufacture and deliver bushings under the contract (id.). The burden shifts to

appellant to prove the default was excusable. Caskel Forge, Inc., ASBCA No. 6205, 61-1 BCA ¶ 2891. Appellant does not even argue that its performance failure was excusable. We thus deny the appeal as to the propriety of the default termination.

The record establishes that the bushings were still needed (finding 5). With respect to the excess costs of reprocuring the bushings, it is respondent's burden to establish: 1) the reprocured bushings are the same as or similar to those in appellant's contract; 2) that excess costs were actually incurred; and 3) that it acted reasonably to minimize the excess costs. Cascade Pacific International v. United States, 773 F.2d 287, 294 (Fed. Cir. 1985). The evidence establishes that the same part was reprocured (finding 6) and that the excess costs were actually incurred (id.). Respondent has therefore succeeded in establishing that it met the first two conditions.

To meet the third condition - whether respondent acted reasonably to minimize costs - respondent must establish that it acted "within a reasonable time of the default, use[d] the most efficient method of reprocurement, obtain[ed] a reasonable price, and mitigate[d] its losses." In determining whether this condition was met, the courts upheld the refusal to assess excess reprocurement costs because the reprocurement contract was not in the record. Here, we have only the first two pages of the reprocurement contract, enough to identify the contractor, date of award, delivery provisions, method of tracking, part number, price and quantity. However, we cannot determine if the procurement contract contained other conditions affecting price, so that we cannot find, that respondent acted reasonably to minimize the excess costs. In this regard, we also note that evidence of cost analysis or negotiation is not in the record, and we do not know if any of the original offerors were solicited. The record does not disclose when the parts were needed, so, notwithstanding the "urgent" status of appellant's contract, we do not know if the accelerated delivery under the reprocurement contract was warranted.

Although the Default clause does not specifically mention administrative costs as part of the excess costs of reprocurement, such costs have been treated as part of the Government's right to common law damages. Birken Manufacturing Company, ASBCA No. 32590, 90-2 BCA ¶ 22,845 at 114,718. Appellant has not challenged the administrative costs, which are properly recoverable if supported by reasonable estimates. Arctic Corner, Inc., ASBCA No. 38075, 94-1 BCA ¶ 26,317. The costs are consistent with respondent's 1995 internal manual for determining the administrative costs of procurement and reprocurement in similar contract actions. We have found the manual to contain reasonable estimates of such costs and that the manual was reasonably applied by the contracting officer (finding 7). Accordingly, we conclude respondent is entitled to recover administrative costs of $1,280.97.

The appeal is denied with respect to the propriety of the default termination and the administrative reprocurement costs of $1,280.97. It is sustained with respect to the assessment of $31,080.69 for the excess repurchase costs.

Dated: 12 December 2000

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Appeal of--Shelby's Gourmet Foods
Under Contract No. SP0300-96-C-0201
01-1 BCA 31,200, November 27, 2000

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

Shelby's Gourmet Foods (Shelby or appellant) appeals from a contracting officer's decision asserting a Government claim for repayment of $42,508.80 plus interest, the price of alleged nonconforming supplies acquired by the Government from appellant. The Government's claim arises from an alleged defective shipment of rolled oats supplied by appellant. The Government based its decision to demand repayment upon a warranty clause of the contract that gives the Government the right to return or hold for the contractor's account any rejected group of supplies for repayment of the contract price paid by the Government. A hearing was held and only entitlement is before us for decision.

FINDINGS OF FACT

On 4 October 1995, the Defense Personnel Support Center, through the contracting officer awarded Contract No. SP0300-96-C-0201 to appellant to supply the Government with quick preparation rolled oats (oatmeal). Shelby J. Craw is the owner of Shelby's Gourmet Foods.

The contract contained DPSC 52.246-9P36, WARRANTY OF SUPPLIES (COMMERCIAL ITEMS) (JAN 1992), which provided in part as follows:

(B) CONTRACTOR'S OBLIGATIONS
(1) NOTHWITHSTANDING INSPECTION AND ACCEPTANCE BY THE GOVERNMENT OF SUPPLIES FURNISHED UNDER THIS CONTRACT, OR ANY CONDITIONS OF THIS CONTRACT CONCERNING THE CONCLUSIVENESS THEEREOF, THE CONTRACTOR WARRANTS THAT FOR SIX MONTHS AFTER RECEIPT OF SUPPLIES AT DESTINATION OR, IN THE CASE OF SUPPLIES REQUIRED TO BEAR AN EXPIRATION DATE, FOR THE EXPIRATION DATING PERIOD INDICATED IN THE LABELING THEREOF, ALL SUPPLIES FURNISHED — (IU) ARE WITHIN THE VARIATIONS PERMITTED BY THE CONTRACT, AND ARE OF AN EVEN KIND, QUALITY, AND QUANTITY WITHIN EACH UNIT AND AMONG ALL UNITS;
(IV) ARE ADEQUATELY CONTAINED, PACKAGED, AND MARKED AS THE CONTRACT MAY REQUIRE;
AND
(C) REMEDIES AVAILABLE TO THE GOVERNMENT.
(1) THE CONTRACTING OFFICER SHALL GIVE WRITTEN NOTICE TO THE CONTRACTOR OF ANY BREACH OF WARRANTIES IN PARAGRAPH (B)(I) OF THIS CLAUSE WITHIN SEVEN MONTHS FROM RECEIPT OF SUPPLIES AT DESTINATION OR, IN THE CASE OF SUPPLIES REQUIRED TO BEAR AN EXPIRATION DATE, NO LATER THAN ONE MONTH FOLLOWING THE EXPIRATION DATE INDICATED IN THE LABELING.
(2) CONFORMANCE OF SUPPLIES OR PARTS THEREOF SUBJECT TO WARRANTY ACTION SHALL BE DETERMINED IN ACCORDANCE WITH THE INSPECTION AND ACCEPTANCE PROCEDURES CONTAINED IN THE CONTRACT EXCEPT AS

PROVIDED HEREIN. IF THE CONTRACT PROVIDES FOR SAMPLING, THE CONTRACTING OFFICER MAY GROUP ANY SUPPLIES DELIVERED UNDER THIS CONTRACT. THE SIZE OF THE SAMPLE SHALL BE THAT REQUIRED BY THE SAMPLING PROCEDURE SPECIFIED IN THE CONTRACT FOR THE QUANTITY OF SUPPLIES ON WHICH WARRANTY ACTION IS PROPOSED . . . .WITHIN A REASONABLE TIME AFTER THE NOTICE, THE CONTRACTING OFFICER MAY EXERCISE ONE OR MORE OF THE FOLLOWING OPTIONS; AND ALSO, FOLLOWING THE EXERCISE OF ANY OPTION, MAY UNILATERALLY CHANGE IT TO ONE OR MORE OF THE OTHER OPTIONS SET FORTH BELOW:

(IV) RETURN ANY SUPPLIES OR GROUP OF SUPPLIES UNDER THIS CLAUSE TO THE CONTRACTOR (IRRESPECTIVE OF THE F.O.B. POINT OR THE POINT OF ACCEPTANCE) FOR SCREENING AND CORRECTION OR REPLACEMENT;

(V) RETURN OR HOLD FOR CONTRACTOR'S ACCOUNT ANY SUPPLIES OR GROUP OF SUPPLIES DELIVERED HEREUNDER, WHEREUPON THE CONTRACTOR SHALL REPAY THE CONTRACT PRICE PAID THEREFOR. IN SUCH EVENT, THE GOVERNMENT MAY REPROCURE SIMILAR SUPPLIES UPON SUCH TERMS AND IN SUCH A MANNER AS THE CONTRACTING OFFICER MAY DEEM APPROPRIATE, AND CHARGE TO THE CONTRACTOR THE ADDITIONAL COST OCCASIONED THE GOVERNMENT THEREBY.

(3) WHEN EITHER OPTION THREE OR FOUR OF THIS CLAUSE IS EXERCISED, THE CONTRACTOR IS REQUIRED TO SUBMIT IN WRITING AND WITHIN 30 DAYS AFTER RECEIPT OF NOTICE OF SUCH INVOCATION A SCHEDULE FOR EITHER;

(I) CORRECTION AND/OR REPLACEMENT OF ALL DEFECTIVE SUPPLIES AND SUBSEQUENT REDELIVERY OF THE RETURNED SUPPLIES; OR,

(II) SCREENING DEFECTIVE SUPPLIES AT EACH DEPOT INVOLVED AND SUBSEQUENT REDELIVERY OF ALL CORRECTED AND/OR REPLACED SUPPLIES. SUCH SCHEDULE WILL BECOME A PART OF THE CONTRACT DELIVERY SCHEDULE UPON AGREEMENT THERETO BY THE GOVERNMENT. IF THE CONTRACTOR FAILS TO PROVIDE AN AGREEABLE SCHEDULE WITHIN THE SPECIFIED PERIOD, OR ANY EXTENSION AGREED TO BY THE GOVERNMENT, THE GOVERNMENT MAY CORRECT THE ITEMS AND CHARGE THE CONTRACTOR'S ACCOUNT; OR, ISSUE A CONTRACT FOR CORRECTION OF THE ITEMS AND CHARGE THE CONTRACTOR'S ACCOUNT; OR, EXERCISE ONE OR MORE OF THE REMEDIES SPECIFIED IN PARAGRAPH (4) BELOW.

(4) IF THE CONTRACTOR FAILS TO ACCEPT RETURN OF THE NONCONFORMING SUPPLIES; OR, FAILS TO MAKE REDELIVERY OF THE CORRECTED OR REPLACED SUPPLIES TO THE GOVERNMENT WITHIN THE TIME ESTABLISHED; OR, FAILS TO MAKE PROGRESS AFTER THEIR RETURN TO CORRECT OR REPLACE THEM SO AS TO ENDANGER PERFORMANCE WITHIN THE TIME ESTABLISHED FOR REDELIVERY AND DOES NOT CURE SUCH FAILURE WITHIN A PERIOD OF 10 DAYS (OR SUCH LONGER PERIOD AS THE CONTRACTING OFFICER MAY AUTHORIZE IN WRITING) AFTER RECEIPT OF NOTICE FROM THE CONTRACTING OFFICER SPECIFYING SUCH FAILURE, THE CONTRACTING OFFICER MAY EXERCISE ONE OR MORE OF THE FOLLOWING REMEDIES:

(II) RETURN OR HOLD THE NONCONFORMING SUPPLIES FOR CONTRACTOR'S ACCOUNT, OR REQUIRE THE RETURN OF THE NONCONFORMING SUPPLIES AND THEN HOLD FOR CONTRACTOR'S ACCOUNT, WHEREUPON THE CONTRACTOR SHALL REPAY THE CONTRACT PRICE THEREFOR. IN SUCH EVENT, THE GOVERNMENT MAY REPROCURE SIMILAR SUPPLIES UPON SUCH TERMS AND IN

SUCH MANNER AS THE CONTRACTING OFFICER MAY DEEM APPROPRIATE, AND CHARGE TO THE CONTRACTOR THE ADDITIONAL COSTS OCCASIONED THE GOVERNMENT THEREBY.
(III) IF THE CONTRACTOR FAILS TO FURNISH TIMELY DISPOSITION INSTRUCTIONS, DISPOSE OF THE NONCONFORMING SUPPLIES FOR THE CONTRACTOR'S ACCOUNT IN A REASONABLE MANNER IN WHICH CASE THE GOVERNMENT IS ENTITLED TO REIMBURSEMENT FROM THE CONTRACTOR OR FROM THE PROCEEDS FOR THE REASONABLE EXPENSES OF THE CARE AND DISPOSITION OF THE NONCONFORMING SUPPLIES, AS WELL AS FOR ANY OTHER COSTS INCURRED OR TO BE INCURRED.
(5) THE RIGHTS AND REMEDIES OF THE GOVERNMENT PROVIDED IN THIS CLAUSE ARE IN ADDITION TO AND DO NOT LIMIT ANY RIGHTS AFFORDED TO THE GOVERNMENT BY ANOTHER CLAUSE OF THIS CONTRACT.
(D) FAILURE TO AGREE UPON ANY DETERMINATION TO BE MADE UNDER THIS CLAUSE SHALL BE A DISPUTE CONCERNING A QUESTION OF FACT WITHIN THE MEANING OF THE "DISPUTES" CLAUSE OF THIS CONTRACT.

There were six line items enumerated in the contract. Each line item represented a certain amount of oatmeal to be supplied by a specific date to one of three different delivery points, FOB destination. The oats were to be supplied in accordance with Commercial Item Description, which stated as follows: When required in the solicitation, contract, or purchase order, the Federal Grain Inspection Service (FGIS), U.S. Department of Agriculture, will determine the quality assurance of the rolled oats according to FGIS procedures. The product shall be examined and/or analyzed in accordance with applicable provisions in the CID, and when applicable, the United States Standard for Condition of Food Containers currently in effect on the date of the solicitation.

The contract required commercial packaging. Quick cooking. Eighteen or 42 ounces of product shall be packaged in a paperboard box, or 16 ounces of product shall be hermetically sealed in a size 401 by 411 metal can in accordance with good commercial practice. Cans shall be hermetically sealed and tested for leakage in accordance with section 4.3.1 of PPP-C-29. PPP-C-29 is the Federal specification for the packaging of canned subsistence items. Section 4.3.1 of PPP-C-29 sets forth a leakage test as a method of inspection, called the bell jar test.

The contract provided that the acceptance point was at origin following inspection by the United States Department of Agriculture at the contractor's expense. Inspection was also permitted at destination by the military for count, condition and identity. In addition, inspection after acceptance was allowed by the Warranty clause of the contract. Only Line Item 0005 is at issue in this appeal. Line Item 0005 consisted of 51,840 cans of oatmeal to be delivered to Defense Depot Tracy, California (Tracy), by 20 December 1995. This delivery date was extended until 15 March 1996 by Contract Modification No. P00002. Line Item 0005 was packed at the appellant's plant in St. Marys, Georgia where, after inspection by Walter Seidel, USDA, it was accepted on 22 February 1996. Line Item 0005 was shipped on or about 23 February 1996, to Tracy. The Government has paid appellant the price of line item 0005, $42,508.80.

Steve F. Jackson, an experienced Government Subsistence Quality Auditor, inspected line item 0005 at destination as part of a random audit of food products. He properly evaluated a sample of the oatmeal, consistent with USDA standards. Jackson

rejected line item 0005 for numerous defects. Twelve cans out of 228 had major defects. A second defect was found when the test for hermetic seal was performed using the bell jar test. Jackson performed this test on twenty cans and six failed. In accordance with criteria set forth in Federal Specification PPP-C-29 only one failure required rejection. Rejection of the entire shipment of line item 5 was warranted based upon either of the two aforementioned categories of defects.

Following the inspections, the contracting officer notified appellant of the substandard oatmeal by letter dated 14 March 1996. Included in the letter was a description of the warranty actions available to the Government under the contract and appellant was given an opportunity to cure the defects by repair or replacement of the oatmeal. Appellant did not take the steps necessary to cure the defects. Instead, appellant requested the contracting officer issue a final decision from which she could appeal. Appellant's decision not to cure the defects was based on the fact that the oatmeal had been inspected and accepted by the USDA prior to delivery; therefore, appellant argues the oatmeal was good as delivered and the warranty action was unwarranted. There is nothing in the record to indicate that appellant inspected the oats in question at the point of delivery, nor did it produce any witnesses to testify that the oatmeal was in satisfactory condition upon delivery at Tracy.

Originally, the contracting officer chose to enforce warranty action (C)(2)(TV) which required the supplies be returned to appellant for screening and correction or replacement. Because of the contractor's adamant refusal to take any action toward curing the defective product, the contracting officer modified her decision and invoked warranty remedy (C)(2)(V). Under this clause, the contracting officer has the option to reject the entire line item shipment and demand repayment of the price paid if the contractor does not take steps to cure the defects in the product. On 3 June 1996, the contracting officer issued a final decision instructing appellant to accept return of the goods and repay the government $42,508.80, the price of the supplies in question, as well as interest if not paid within 30 days. A timely appeal followed from that decision.

At the time of trial, the goods were segregated in a warehouse awaiting action by appellant, and coded in such a way as to preclude shipment. Subsequently, after the expiration of the 18-month shelf life of the oats, the entire shipment was destroyed

DECISION

We have long held that the warranty clause survives final acceptance and provides remedies to the Government in addition to those provided by the standard inspection clause. See, e.g., Vi-Mil, Inc., ASBCA Nos. 16820,18005,75-2 BCA ¶ 11,435 at 54,481; Cross Aero Corp., ASBCA No. 14801,71-2 BCA ¶ 9075 at 42,086. We stated in Vi-Mil as follows: When the Government asserts its rights under the warranty clause, it assumes the burden of proving all elements of its claim and must establish that [within the warranty period] the supplies did not conform to contract requirements, Phoenix Steel Container Co., ASBCA No. 9987,66-2 BCA ¶ 5814. It must do so in accordance with the provisions of the warranty clause, which governs the method and procedures for the warranty inspection. 75-2 BCA at 54,482.

Here, the oatmeal was inspected at destination within the requisite six months after receipt of the supplies and appellant was notified of the results of the inspection within the requisite seven months from receipt of the oatmeal. The Government

inspected the oats pursuant to the sampling procedures set forth in the USDA Standards for the twelve major defects and pursuant to the sampling procedures set forth in PPP-C-29 for the six leak defects discovered.

Following appellant's refusal to take any action to correct the defects in the product, the contracting officer unilaterally changed her choice of options and invoked clause (C)(2)(V). With selection of this remedy came the demand for repayment of $42,508.80, the price of the supplies at issue.

The Government has sustained its burden of proof as to its claim under the warranty clause of the contract. Accordingly, the appeal is denied.

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SENTELL BROTHERS, INCORPORATED
DOTCAB No. 1824, 89-3 BCA ¶21,904

OPINION BY ADMINISTRATIVE JUDGE STERN

We have before us the appeal of Sentell Brothers, INC. ("Sentell" or appellant") from the final decision of the contracting officer terminating Sentell's contract with the Federal Highway Administration ("FHWA or "respondent") for default. The contract in issue was one for bridge rehabilitation, painting, and other work on the Natchez Trace Parkway Bridge in Alabama. The termination was issued after work was completed and accepted. The FHWA took this action due to the failure of portions of the paint system on the bridge. Upon discovery of the paint failure, the contracting officer refused to make final payment. Sentell seeks a ruling that the termination for default is invalid and that it is entitled to final payment. We have before the Board the appeal file, transcripts, and other documentary evidence introduced at the hearing of this appeal.

DECISION

Sentell agreed with the FHWA to rehabilitate, clean, and repaint the Natchez Trace Parkway Bridge in Alabama. Sentell completed the sandblasting and painting work on the bridge in October 1984. The FHWA, which had conducted the inspections of Sentell's painting and blasting operations during contract performance, conducted a final inspection of the bridge on November 1, 1984. On December 6, 1984, the FHWA notified Sentell that the work had been satisfactorily completed and that final acceptance was effective on November 7, 1984. By March 1985 the FHWA became aware of a possible problem with the paint on the bridge when the paint began peeling in certain areas. Thereafter, the FHWA investigated the problem and notified Sentell that it had not properly sandblasted the bridge and that it should redo the work. Meanwhile, the FHWA withheld the final contract retainage of about $11,000. The FHWA had an independent analysis of the paint failure performed. This analysis concluded that the failure of the paint was caused by separation of the mill scale on which the paint was applied from the steel surface of the bridge. The contract did not contain a warranty provision. After investigating the incident and exchanging correspondence with Sentell, the FHWA terminated the contract for default and refused to make final payment to Sentell. The appeal here is to determine the validity of the termination.

Sentell contends that it fully complied with the specifications but that the specifications were faulty. In any event, Sentell asserts, the FHWA's attempted rejection of the work came too late since the defect, if any, was not latent. The FHWA claims that Sentell failed to meet the requirements of the specifications, resulting in the paint failure. The respondent asserts that its acceptance of Sentell's work could be rescinded since the work was defective and the defect was latent. The FHWA explains that it had no knowledge of the non-compliance at the time of acceptance and that the defect was latent because Sentell failed to provide its inspectors proper access to the work area, and as a result the FHWA had no way of learning about the defective work.

We will first determine whether termination is an appropriate remedy in a situation where work has been completed and final acceptance made, but before final payment. The question we are focusing on here is whether the FHWA could at that

point in time, terminate Sentell's right to proceed, assuming, arguendo, that FHWA's acceptance could be revoked because the defect was latent, or otherwise.

The Termination for Defaults clause in this contract permitted the FHWA to terminate Sentell's right to proceed with the work if Sentell failed to complete the work within the time specified in the contract. The Inspection and Acceptance clause provided that Sentell was obligated to correct work found by the FHWA to be defective. The clause further provided that if Sentell refused to correct such work the FHWA could terminate Sentell's right to proceed with the work.

Early cases found terminations after final acceptance and payment to be improper. *Astabeco, Incorporated,* ASBCA Nos. 8727, 9084, 1963 BCA ¶13941; *H.P. Carney/b/a Carney Construction Co.,* ASBCA Nos. 8222, 8556, 1964 BCA ¶4149. More recently, Boards have held that where the Government has a right to recover for defective work under another contract provision, termination is an appropriate remedy. *M-Pax, Inc.,* HUBDCA No. 80-529-C-11, 81- 2 BCA ¶15,410; *Cross Aero Corp.,* ASBCA No. 15092, 71-2 BCA ¶9076. Here, the Inspection clause permitted termination in the event of a refusal by Sentell to correct defective work. The contract was not closed, and final payment not made. The FHWA notified Sentell of allegedly defective work and Sentell refused to correct it. Assuming that Sentell's work was defective and that the FHWA's acceptance could be revoked, termination of Sentell's right to proceed would be the FHWA's appropriate remedy.

We now turn to consideration of whether the FHWA can avoid its acceptance of Sentell's work. The paint failure here occurred after final acceptance. The parties agreed that in certain circumstances the FHWA would retain some rights in spite of such acceptance. The Inspection clause provides that acceptance "shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee." The parties to this contract agreed that these would be the only four exceptions to the finality of the FHWA's acceptance of defective work. There is no other provision upon which the FHWA may rely.

The parties did not include a warranty or guarantee provision in this contract. The Federal Acquisition Regulations do not mandate the inclusion of such a clause. Therefore, we will not read it into the contract. A clause not mandatory under the provisions of Government regulations will not be read in by operation of law. The Government has a right to take the risk upon itself of having a contractor's work fail after acceptance. There is a good basis for taking such a risk. Since the contractor does not have to factor such a risk into in bid, the Government receives the benefit of a lower price. Thus, there is no warranty provision upon which the FHWA may rely.

A second exception to the finality of the FHWA's acceptance, established by the Inspection clause, applies if fraud was involved in obtaining the FHWA's acceptance. We can readily dispose of this element since there has been no allegation, and the record has uncovered no instance, of fraud.

The two remaining bases for the FHWA to revoke its acceptance and hold Sentell responsible for the paint failure are for gross mistakes amounting to fraud and for latent defects.

The proof needed to show a gross mistake amounting to fraud falls short of that needed to prove actual fraud. Whereas with fraud it is necessary to show a

misrepresentation of a material fact, an intent to deceive, and reliance upon the misrepresentation by the other party to his detriment, proof of intent to deceive need not be proven to establish a gross mistake amounting to fraud. *Bar Ray Products, Inc. v. United States,* 167 Ct.Cl. 839 (1964). While no intent to deceive need be shown, to establish a gross mistake amounting to fraud, there must be "a false representation or misrepresentation of a material fact." *Catalytic Engineering and Manufacturing Corp.,* ASBCA No. 15257, 72-1 BCA ¶9342 at 43,366. This element is absent from the appeal before us.

We have no allegation and have seen no evidence of any misrepresentation by Sentell. The evidence demonstrates that the FHWA was well aware of Sentell's sandblasting and painting performance. There is no indication that Sentell misrepresented any material fact to the FHWA. We conclude that there was no gross mistake amounting to fraud here. Therefore, the FHWA could not revoke its acceptance based on this exception.

Finally, the contract permits revocation of the FHWA's acceptance if the paint failure was caused by a latent defect that was present at the time of the FHWA's acceptance. In order to fall within this exception, the FHWA has the burden of proving that a defect existed at the time of final acceptance and that the defect could not have been discovered by the exercise of reasonable care. *Triple "A" Machine Shop, Inc.,* ASBCA No. 16844, 73-1 BCA ¶9862. Thus, the FHWA must show that the work was defective and that the defect was latent. Based on the following discussion we find that Sentell's performance was not defective and that even if it was, all aspects of Sentell's work in cleaning and painting the bridge were known to the FHWA.

The contract set forth several standards for the cleaning of the steel. First, section 555.22 of FP-79, as amended, provided that "all steel surfaces to be painted were to be thoroughly cleaned to the satisfaction of the Engineer." Second, the same provision required cleaning in accordance with the "Steel Structures Painting Council's Surface Preparation Specification No. 6, Commercial Blast Cleaning." This specification stated that Commercial Blast cleaning is a method of preparing steel surfaces which, when viewed without magnification, shall be free of all visible oil, grease, dirt, dust, mill scale, rust, and paint." Under this standard, no more than 33% of stains of rust, paint, and mill scale were allowed to remain.

However, another portion of that specification referenced a commentary in the specification. The commentary stated that where commercial blast cleaning is specified in maintenance painting, the steel does not have to be cleaned to such a stringent standard. This was yet a third standard that Sentell might be required to meet. The contract also referenced Painting Application Guide No. 4 which similarly established this lesser standard for blasting where maintenance painting was to be performed. According to this specification provision, previously painted steel is considered to be in a maintenance condition. We have already found that this contract was one requiring maintenance painting. Under these specification provisions, tightly adherent paint in any quantity could be left on the steel surface. Only loose, non- adherent paint was required to be removed. Further, the commentary to Specification No. 6 provided that when Specification No. 6 is used in maintenance painting, specific instructions should be given on the amount of surface to be blast cleaned in accordance with Specification

No. 6. Thus, one provision of the specifications required that all mill scale and paint be removed while other portions did not require that degree of cleaning.

We find that these provisions created a blasting requirement that was ambiguous on its face. Such a conflict gave rise to a duty on the part of Sentell to seek clarification from the FHWA as to the extent of cleaning required under the terms of the contract. *Newsom v. United States,* 676 F.2d 647 (Ct.Cl. 1982). If a contractor fails to make such an inquiry prior to bidding it risks that the Government will adopt a different interpretation of the specifications. Failure to make this inquiry normally leads to a ruling in favor of the Government's interpretation of the contract.

However, we find that the rule is otherwise where, subsequent to award, the parties have clarified the requirements of the contract. Such action supersedes a contractor's failure to make an inquiry prior to contract execution. Here, Sentell and the FHWA agreed that a test blast was to be performed. The only logical purpose for such a blast would be to established the standard to be followed during contract performance.

The test blast was carried out before contract performance, in the presence of the FHWA's project engineer and his assistant, and from every indication in the record was entirely acceptable to those FHWA representatives. The weight of the evidence in the record indicates that Sentell performed the remainder of its sandblasting operations in accordance with the standard established by the test blast. Where the parties have run a test (similar to a first article in a *supply* contract) and the Government has accepted the contractor's method of performing and the results of the test, performance in accordance with that standard is reasonable where the specification is otherwise ambiguous.

But, separate from the test blast, the conduct of the parties during performance would require a finding favorable to Sentell's 's specification interpretation. Here, the specification stated that the steel was to be cleaned to the satisfaction of the engineers. * * * These engineers and their supervisors witnessed Sentell's 's blast cleaning throughout contract performance, without objection. Sentell's sandblasting and painting operations received the engineer's stamp of approval. Thus, blast cleaning to the satisfaction of the engineer became the standard of performance of this contract.

* * * When an inspector is present during performance of work and accepts the work, or voices no objection to the contractor's performance, this is strong evidence that the contractor's interpretation of the specifications is reasonable, especially where that specification is found to be otherwise unclear. * * *

We find that Sentell's sandblasting of the steel on the bridge complied with the terms of the contract. Thus, Sentell was permitted to leave significant amounts of mill scale and tightly adherent paint on the bridge.

In any event, even if Sentell's work was defective, we would be compelled to find that the FHWA's acceptance could not be revoked. The acceptance was made in writing by the contracting officer, the one authorized to act on behalf of the FHWA. The FHWA's inspector testified that he witnessed the degree of cleaning and painting that was being performed by Sentell. The FHWA specifically informed Sentell that this inspector had the authority to accept the work. While the FHWA contends that it did not have access to inspect all parts of Sentell's work, it voiced no objection prior to final acceptance. Further, we have found that the access provided to the FHWA was

adequate and in accordance with normal industry practice. In fact, the FHWA was well aware of the extent of cleaning being performed by Sentell.

A latent defect is a defect that could not be readily discoverable by the exercise of reasonable care.

Solid Stale Electronics Corp. (SSEC), ASBCA No. 23041, 80-2 BCA ¶14,702. The blasting and painting performed by Sentell were witnessed by the FHWA on a daily basis. The FHWA took pictures of and was fully aware of the extent of cleaning by Sentell. If Sentell's work was defective there was nothing latent about it. A contractor's performance in full view of a Government inspector cannot give rise to a latent defect. The FHWA's argument fails. Its final acceptance cannot be revoked.

Based on the foregoing, the termination for default was improper. Appellant's appeal is granted.

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JOHN C. KOHLER CO. v. UNITED STATES
204 Ct.Cl. 777, 498 F.2d 1360 (1974)

COOPER, Trial Judge:

Plaintiff contracted to install a boiler for defendant. After plaintiff had installed and vested the boiler, but before final payment to plaintiff had been made, defendant took custody of the boiler and operated it from mid-April to July 18, 1967. On July 18, while the paperwork necessary to conclude the contract was being processed, the boiler exploded. The question presented in this Wunderlich Act review is as to which of the parties should bear the cost of repairing the boiler.

Although plaintiff contended the explosion was caused by the negligence of defendant's operator, the contracting officer assigned the cause of the explosion to defective equipment and required plaintiff, at plaintiff's expense, to make the repairs necessary to restore the boiler to operating condition. Plaintiff timely appealed the decision of the contracting officer to the Department of Agriculture Board of Contract Appeals (Board). After a full hearing with oral testimony and documentary evidence, the Board concluded that the cause of the explosion could not be determined with reasonable certainty; however, it sustained the decision of the contracting officer, finding that defendant had never accepted the boiler and that plaintiff had failed to discharge its burden of showing that it was not responsible for the explosion.

The matter is before this court on the parties' cross-motions for summary judgment. From a review of the administrative record, and upon consideration of the motions and arguments in support thereof, it is concluded, for the reasons hereinafter stated, that plaintiff's motion should be granted and defendant's cross-motion denied.

I.

Under contract No. 12-14-100-8968(73), plaintiff undertook to perform all work required to remove an existing boiler and install a new 'package boiler' in one of defendant's buildings. By mid-April 1967, the old boiler had been removed and plaintiff had completed installation and testing of the new boiler. On or about April 15, 1967, defendant assumed custody of the boiler and began regular operation of it with its own personnel. From the commencement of its operation, the boiler functioned without mishap until July 17, 1967, when difficulty was experienced in getting the boiler started. It was the next day, July 18, as defendant's operator commenced the first of the approximately 60 steps necessary to start the boiler, that it exploded.

* * * * *

III.

The remaining issue is the Board's conclusion that defendant had not accepted the boiler prior to its explosion and that, under the terms of the contract; plaintiff had the risk of loss until there was acceptance.

The facts pertinent to this issue are not in dispute. As noted previously, plaintiff's work in installing the boiler was completed by mid-April. Plaintiff then provided instruction in the operation of the boiler for defendant's employees and, thereafter, defendant operated the boiler under its exclusive control up to the time of the explosion, a period of

almost 3 months. It was defendant's employee who was operating the boiler at the time of the explosion.

It appears that final payment to the contractor had not been made since some of the paperwork was incomplete. The record contains a letter dated June 2, 1967, in which defendant's superintendent summarized the status of the contract in the following terms: "It appears that you have completed this project except for furnishing payrolls of your painting subcontractor, a small rolling platform ladder and the test reports."

A letter from the contracting officer, dated July 17, 1967, indicates that, as of that date, only paper work involving payrolls remained uncompleted.

The contract contained the usual "responsibility for work" provisions. Under General Provisions, Standard Form 23A, Section 12, the contractor was to be responsible for all materials and work until the work was accepted by defendant. General Requirement No. 9(b) states that the contractor's responsibility will terminate "when all work has been completed, the final inspection made and the work accepted * * *." Under General Requirement No. 19, the final inspection was to be made when the contract work was completed and upon written notice by the contractor as to the date on which the inspection was to be made.

Paragraph 1-5 of the specification required plaintiff to instruct defendant's employees on the use of the boiler. This instruction was to occur during the week "after the equipment has been accepted for regular operation."

As manifested in these provisions of the contract, the sequence of events contemplated by the parties at the time the contract was made was (1) completion of work on the boiler, (2) notice by plaintiff of readiness for inspection, (3) inspection by defendant, (4) acceptance of the boiler by defendant, (5) turnover of the boiler to defendant for regular operation, and (6) instruction of defendant's employees by plaintiff.

Plaintiff never gave defendant written notice either that the work was completed or that the boiler was ready for inspection. Nor did defendant ever formally advise plaintiff that it had accepted the boiler. Yet, defendant did take possession of the boiler and operate it, and plaintiff did provide the required instruction of defendant's employees, all of which were to occur after acceptance.

Based on these facts, the Board reached the following conclusions: (1) The responsibility for work provisions constituted an express agreement by the parties that plaintiff was to bear the risk of loss up to the time the boiler was accepted by defendant; (2) under the contract, notice by plaintiff that work was completed and ready for inspection, and inspection by defendant, were to precede acceptance; (3) defendant did not waive the notice provision of the contract; (4) the required notice not having been given, and no inspection having been made, defendant could not be said to have accepted the boiler.

Neither party disputes the first and second conclusions of the Board. The dispute here centers on the third and fourth conclusions. Since the questions presented involve the legal consequences flowing from defendant's actions in taking possession of the boiler and operating it over a prolonged period, as well as an interpretation of the inspection provisions of the contract, the Board's conclusions on those questions are not binding on the court. *Gresham & Co. v. United States*, 200 Ct.Cl. 97 (1972); *Paccon, Inc. v. United States*, 185 Ct.Cl. 24, 35 (1968).

As to the contract requirement that plaintiff give defendant written notice when the boiler was installed and ready for inspection, defendant argues that the giving of this notice was an unfulfilled condition precedent to its acceptance of the boiler. Plaintiff urges that defendant, by its actions, waived this notice requirement.

No provision of the contract authorized defendant either to take possession or to operate the boiler prior to the written notification from plaintiff. To the extent the notice was a condition precedent to acceptance of the boiler, it was equally a condition precedent to defendant's possession and operation of the boiler. Yet, defendant did take possession and did operate the boiler for an extended period.

From these undisputed facts, it is apparent that this is one of those cases where the absence of strict compliance with the notice requirements of the contract is of no consequence. By placing the boiler in operation, defendant rendered unnecessary a written notice from plaintiff that work on the boiler was complete and that the boiler was ready for inspection. No useful purpose would have been served by plaintiff advising defendant of what defendant was already well aware. In short, the failure of the Government to await a written notice from plaintiff before taking possession of the boiler constituted a waiver of the notice provision of the contract. *Penn-Ohio Steel Corp. v. United States*, 173 Ct.Cl. 1064 (1965); *Copco Steel & Eng'r Co. v. United States*, 169 Ct.Cl. 601, 616 (1965); *cf. Roberts v. United States*, 174 Ct.Cl. 940, 952 (1966). Nor, having waived the notice requirement can defendant now revive it and assert it as an impediment to acceptance of the boiler. *Cf. Branch Banking & Trust Co. v. United States*, 120 Ct.Cl. 72, *cert. denied*, 342 U.S. 893, 72 S.Ct. 200, 96 L.Ed. 669 (1951).

Notwithstanding waiver of the notice provision, defendant urges that final inspection of the boiler was also an unfulfilled condition precedent to its acceptance of the boiler.

As the Board noted, there is little in the record concerning the final inspection that was to be made. Although expressly providing for a final inspection, the contract does not prescribe the form the inspection was to take. The only testimony on this subject was that of the contracting officer who testified that a project inspector was to make the final inspection and render a report. However, the contract did not, by its terms, require inspection by the project inspector. The mere fact defendant may have intended the inspection to be conducted in a certain manner and by a certain individual is not controlling, for the subjective, unexpressed intentions of one party are not binding on the other. *Firestone Tire & Rubber Co. v. United States*, 195 Ct.Cl. 21, 30 (1971); *Singer-General Precision, Inc. v. United States*, 192 Ct.Cl. 435, 446-447 (1970).

What is controlling here is the clear intention of the parties, manifested in the terms of the contract, that defendant was to make its inspection before the boiler was turned over to defendant for regular operation. Since the substance of the inspection was not specified in the contract, defendant had substantial discretion to make such reasonable inspection as it deemed appropriate. However, that discretion was to be exercised before defendant took possession of the boiler. It is insufficient, on the issue of whether a final inspection was made, for defendant to show that, long after it placed the boiler in operation, it intended to have a project inspector make an inspection. Since the inspection was defendant's responsibility, and since defendant did take possession of the boiler and place it in operation, defendant is in no position to complain that it did not make a final inspection.

There is nothing in the contract that would suggest that the final inspection was to consist of anything more than a visual inspection of the boiler to ensure it was of the type specified in the contract and that it was operational. By its actions in taking possession of the boiler, defendant clearly manifested its satisfaction that the boiler was of the type for which it had contracted. The operability of the boiler was obviously demonstrated to defendant when plaintiff provided training for defendant's employees. Defendant's actions in thereafter operating the boiler far beyond any trial period make it plain that defendant was satisfied that the boiler was operational.

It is the substance of these actions, although they may not have borne the label of a final inspection, that demonstrate that defendant made such inspection as it deemed necessary before placing the boiler in operation. Had it wanted to conduct a more comprehensive inspection, it had more than ample opportunity to do so. Instead, and for whatever reason, defendant elected to place the boiler in operation. In so doing, defendant theory waived whatever additional inspections it may have wanted to make before accepting the boiler.

Defendant urges that 41 C.F.R. §1-14.101(a) precludes finding a waiver of the inspection. While that regulation does require an inspection in all cases prior to acceptance, there is nothing in the regulation specifying the type or scope of inspection to be conducted. Indeed, subsection (b) of the same regulation permits substantial discretion as to the type of inspection conducted, providing that "the type and extent of inspection needed depend on the particular procurement. It may amount to nothing more than a check for identity, quantity and shipping damage." 41 C.F.R. §1-14.101(b). In this case, it can hardly be disputed that, by taking possession and operating the boiler, defendant necessarily checked the boiler for identity, quantity and absence of shipping damage. Whether a more comprehensive inspection was to be conducted rested within the discretion of the contracting officer; it was not mandated by the regulation.

There remains the question of whether defendant accepted the boiler. Under General Requirements No. 9(b), the boiler was to be accepted 'by the Head of the Department or his authorized representative.' The contract is otherwise silent as to the form the acceptance was to take, although plaintiff was to be given a release, presumably in written form. The record is also silent as to who authorized taking possession of the boiler and placing it in operation. However, defendant makes no contention that its use of the boiler was the result of unauthorized acts by its employees. Accordingly, the question is simply whether defendant's acts of taking possession and operating the boiler constitute an acceptance of the boiler.

The Uniform Commercial Code, §2-606(1)(c), declares that acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership. The most common act which falls under this provision is the retention and use of the goods by the buyer. See, *e.g.*, *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966). *Marbelite Co. v. City of Philadelphia*, 208 Pa.Super. 256, 222 A.2d 443 (1966); *F. W. Lang Co. v. Fleet*, 193 Pa.Super. 365, 165 A.2d 258 (1960).

Here, defendant's custody of the boiler, its operation of the boiler for its own purposes for over 80 days, its selection of the employees to operate the boiler, its control over when the boiler was operated and for what periods, its determination of the load the boiler was to carry, and the selection of fuel, air and steam ratios to use, are among the factors present here which are inconsistent with ownership by plaintiff. Conversely, the

record is barren of any evidence that plaintiff, during the period from mid-April to July 18, had any control over the boiler, or the employees operating it. So far as the record indicates, plaintiff's only interest in the boiler was in concluding the necessary paperwork so that it would receive payment for the work therefore completed.

In these circumstances, and as a consequence of its custody and operation of the boiler over a prolonged period, defendant must be deemed to have impliedly accepted the boiler.

The boiler having been accepted by defendant, and the cause of the explosion not having been found to be the fault of plaintiff, it follows that defendant must bear the loss resulting from the explosion. Accordingly, plaintiff is entitled to recover the costs incurred in complying with the contracting officer's directive to restore the boiler to operating condition.

CONCLUSION

Plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. The case is remanded to the Board for a determination of the amount plaintiff is entitled to receive for restoring the boiler to an operable condition.

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TAI WAH RADIO MANUFACTORY LTD. v. AMBASSADOR IMPORTS LTD
3 UCC Rep.2d 117 (S.D. N.Y. 1987)

MOTLEY, District Judge

Tai Wah, a Hong Kong company, is a manufacturer of electronic goods and components for electronic goods. Ambassador Imports, a New York company, is an importer and wholesale distributor of various products, including electronic goods. Ambassador Imports has an affiliate, Ambassador Watch Corporation ["Ambassador Watch"], which imports watches and small goods. Both Ambassador Imports and Ambassador Watch are owned solely by Solomon Roth, who is also the president of both concerns. Defendant Ambassador Imports has been doing business with plaintiff for approximately five years.

In February, 1985, Ambassador Watch placed an order with plaintiff for two thousand sets of stereo cassette recorders. On or about April 15, 1985, Tai Wah delivered the recorders to Ambassador Watch in Los Angeles. Ambassador Watch accepted the goods and the company never particularized any nonconformity in that shipment.

Ambassador Watch claims that early in May 1985 it began to receive complaints from its customers about the recorders in the first shipment. A few hundred pieces from the order allegedly were returned to Ambassador Watch before June 24, 1985.

On or about April 4, 1985, Roth placed another order for cassette recorders with Tai Wah on behalf of Ambassador Imports, this time for 2,040 units. This order was confirmed by plaintiff under invoice number 4043 on May 28, 1985. Ambassador Imports picked up the second shipment on or about June 24, 1985 in Los Angeles.

Ambassador Imports has failed to pay plaintiff for the 2,040 recorders that constituted the second shipment. The recorders also have not been returned to plaintiff. The contract price of these recorders is $90,780.00. None of the recorders has been resold.

After receiving the first shipment of recorders but prior to receiving the second shipment, Mr. Roth, in a telex dated May 31, 1985, advised plaintiff that he had received complaints from customers concerning the recorders in the first shipment. The telex provided:

> I HAVE BEEN GTTING NUMEROUS COMPLAINTS FRM MY CSTMRS ON MDL MC-2498.
> THE PLSTC COVRING OF THE DIAL SELECTOR IS ALL SPOTTED. I EVEN TRIED SCRUBBING THE STAINS OUT, BUT NOTHING WRKS.
> I WNT THS PRBLM CORRCTD IMMDLY 4 ALL FUTURE ORDRS. I JUST HOPE U R NT USING ANY RECYCLD PLSTC;
> 2. PLS GVE SHPPNG INFO ON SHPMENT THT WAS SNT ON 5/30.

By telex dated June 1, 1985, plaintiff advised defendant that it was trying "everything possible to improve" the quality of the plastic and that future orders would be corrected. Plaintiff also indicated that the second shipment was sent out to defendant on May 24, 1985

On June 7, 1985, defendant sent another telex to plaintiff complaining about the recorders sent in the first shipment. This telex provides in relevant part:

> WE R GETTING COMPLAINTS ON THE UNTS WE HAVE IN STOCK, PLUS WE R GETTING COMPLNTS ON THE CASST DOOR IT DOES NOT CLOSE N IT BRKS. SO WE R HVNG 3 PRBLMS....

Despite its complaints about the quality of the recorders, defendant picked up the second shipment of recorders. On June 29, 1985, plaintiff received a telex from defendant's President, Solomon Roth. Mr. Roth stated:

> WE REFUSED THE DOCUMENTS [concerning the second shipment] 4 WE DID NOT WANT THE MRCHND. THE ONLY REASON WE PICKD UP THE GOODS IS FOR COLLATERAL AGST THE 1ST 2000 UNTS U HAD SENT. WE HAD RCVD SO MANY DAMGD PCS N COMPLAINTS FRM CSTMRS THT I FELT U HAD 2 COMPENSATE US 4 ALL THE REPAIR EXP AND PUNITIVE DAMAGES CAUSD 2 MY REPUTATION, BY HLDNG THE GOODS IN A WAREHOUSE, I AM IN A BTTR POSITION 2 NEGOTIATE COMPENSATION 4 FOR THE 1ST SHPMNT. IF I JUST REFUSED THE GOODS N THEY WERE RETURND 2 U, I WLD NEVER RECEIVE ANY COMPENSATION FRM U 4 THE DAMAGES THE MRCHDS HAS CAUSED ME.
>
> ONC AGAIN, I DO NOT WNT THS GOODS, I JUST WANT 2 B COMPENSATD 4 ALL MY AGGRAVATION N MY EXPENSES. IN FACT, I HVE CSTMRS WHO R REFUSING 2 DEAL W ME ANYMORE BCZ OF THIS UNIT. BLV ME 100,000USD IS NOT ENOUGH 2 EVEN COMPENSATE THE LOSS OF GOOD CSTMRS.
>
> YR GOODS R NOT WHAT I WANT. ALL I WANT 2 DO IS COME 2 AN AGREEMENT WHERE I DO NOT LOSE ANY MONEY. I WLD JUST WANT 2 B COMPENSATD 4 MY LOSSES. NOTHING MORE THAN THAT.

On July 1, 1985, defendant sent yet another telex to plaintiff. In this telex, sent after defendant had accepted the second shipment, Mr. Roth states:

> I DONT WANT YR GOODS. I WILL GLADLY RETURN THEM 2 U. ALL I WANT IS 2 B COMPENSATED 4 ALL MY DAMAGES ON THE 1ST SHIPMNT U SENT US.
>
> PLS B REASONABLE. THE FASTER WE COME UP WITH SOME SORT OF AGREEMNT THE FASTR U WILL HVE YR GOODS BACK.

DISCUSSION

Plaintiff asserts that it is entitled to partial summary judgment against defendant on its first cause of action on the ground that defendant did not timely reject the second shipment of the recorders as required pursuant to the New York Uniform Commercial Code ["U.C.C."]. Defendant contends that the notice of defects in the first shipment constituted notice of defects in the second shipment. Defendant refers to the various telexes it had sent to plaintiff.

The documentary evidence submitted by both parties in connection with this motion for partial summary judgment establishes that defendant had advised plaintiff that the first shipment of recorders was defective and that defendant was keeping the second shipment until the parties could reach some agreement as to monies owed for the first shipment. It is also evident from the telexes that defendant accepted the second shipment, not for the purpose of reselling the goods, but for the purpose of working out a settlement with plaintiff as to the first shipment of recorders. Defendant did not want the second shipment of goods. There is no indication that defendant inspected the second shipment of goods, although in Mr. Roth's telex of July 1, 1985, plaintiff was advised that defendant did not want the second shipment of goods.

Accordingly, a question of fact exists as to whether defendant advised plaintiff of its rejection of the merchandise. Whether or not notice was given and whether that notice, if given, was timely and sufficient under the circumstances as required under U.C.C. §2-607 is a question of fact.

An additional problem exists in this case, however, which the court must consider. It is undisputed, based on the submissions in this case, that defendant accepted the second shipment for the sole purpose of negotiating a settlement with plaintiff concerning the money owing on the first shipment. Defendant obviously did not intend to pay for the second shipment of recorders and accepted the shipment with the knowledge that it would reject the recorders. In addition, it knew that the recorders were allegedly defective at the time of acceptance. The parties have not adequately addressed this issue in the papers submitted in connection with this motion for summary judgment.

§2-608 of the U.C.C. provides:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

Thus, a buyer with knowledge that goods are defective when he accepts them does not lose his right to revoke the acceptance if the acceptance was based on the reasonable assumption that the nonconformity would be seasonably cured but the cure was not effected. In addition, acceptance may be revoked if the buyer, without discovering the nonconformity, was reasonably induced to accept the goods either by the difficulty of discovery before acceptance or by the seller's assurances. Neither of these exceptions is applicable to this case. When defendant accepted the second shipment of cassette recorders, it had knowledge of the recorder's allegedly defective nature. Defendant did not assume that plaintiff would cure this nonconformity. Thus, defendant did not have the right to revoke the contract for the second shipment.

Although defendant may not have intended to keep the products when it took possession of the second shipment, this does not change the result. From the undisputed facts in this case, it is obvious that defendant was attempting to engage in a form of commercial "kidnapping" to compel plaintiff to resolve its differences with defendant. Defendant, instead of taking possession of the second shipment of recorders,

should have rejected the second shipment. Plaintiff, in telexes, had advised defendant, prior to defendant's receipt of the second shipment, that the recorders had been shipped prior to plaintiff's receipt of defendant's first complaints about the first shipment and prior to plaintiff having the opportunity to make the needed corrections. Thus, defendant, with knowledge of the allegedly defective nature of the goods, should have rejected them. Accordingly, it is apparent that plaintiff is entitled to payment for the second shipment.

However, if it is established at trial that defendant complained in a timely manner about the defects in the goods, defendant may be entitled to damages for breach of warranty--the difference between the contract price of the recorders and their actual value. Since this amount would be an offset to the amount defendant allegedly owes plaintiff, entry of judgment is delayed until after the trial on this matter.

CONCLUSION

Plaintiff's motion for partial summary judgment is granted.

CATO EQUIPMENT COMPANY, INC. v. MATTHEWS
91 N.C.App. 546, 372 S.E.2d 872 (1988)

In May of 1985, defendant ordered a crankshaft through plaintiff from the John Deere Company. He ordered the crankshaft and various related parts in order to re-build a tractor engine owned by Charles Wooten. The parts were delivered to plaintiff and defendant picked them up without plaintiff ever uncrating them.

Defendant re-built the engine, but after only 35 hours of use it developed a knocking sound. He disassembled the engine and found that one of the rod bearings was extensively damaged as well as the crankshaft.

Defendant initially thought that he had received a crankshaft that was too small in diameter, thus causing the damage. He returned the crankshaft to plaintiff stating that it was too small. Plaintiff assured defendant that if the part were defective; John Deere would stand behind its product. Only after these assurances did defendant order a second crankshaft in January of 1986.

Plaintiff had the diameter of the crankshaft measured and found it to be the correct size. He returned the part to defendant telling him that it was not undersized. Defendant then noticed a crack in the crankshaft and determined that this was the cause of the bearing damage. Plaintiff claimed that the bearing and crankshaft damage was oil related.

Defendant was billed for the parts ordered in January of 1986 and when he refused to pay, plaintiff brought this civil action for the purchase price. Defendant answered and counterclaimed for an alleged breach of the implied warranty of merchantability and fitness for a particular purpose. He also filed a third party complaint against the John Deere Company, which the trial court dismissed.

ARNOLD, Judge.

* * * * *

Plaintiff next contends that under the Uniform Commercial Code (U.C.C.) he breached no implied warranties. We disagree.

The U.C.C. as adopted in North Carolina provides that "[u]nless excluded or modified (§2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." §2-314(1). Plaintiff claims that any implied warranty is excluded under U.C.C. §2-316(3)(b) which states that "when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him...."

Defendant did not examine the crankshaft before he ordered it through plaintiff, nor did he refuse to do so. The Official Comment to the U.C.C. states that in order to bring a transaction within the scope of "refused to examine" in §2-316(3)(b), it is not sufficient that the goods are available for inspection; there must be a demand by the seller that the buyer examine the goods fully.

Under U.C.C. §2-608, a buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it ... without discovery of such nonconformity if his acceptance was reasonably induced either

by the difficulty of discovery before acceptance or by the seller's assurances. The trial court found that cracks existed in the crankshaft at the time defendant received it. It also concluded that the plaintiff had breached its implied warranties to defendant and allowed a set-off by defendant of the purchase price. By implication, the trial court determined that defendant revoked his acceptance and was entitled to damages for the defective crankshaft.

In order for a buyer to show that his revocation was justifiable, the following four elements must be proved: (1) that the goods contained a nonconformity that substantially impaired their value to him; (2) that he either accepted the goods knowing of the nonconformity but reasonably assuming that it would be cured, or that he accepted the goods not knowing of the nonconformity due to the difficulty of the discovery or reasonable assurances from the seller that the goods were conforming; (3) that revocation occurred within a reasonable time after he discovered or should have discovered the defect; and (4) that he has notified the seller of his revocation.

The trial court determined that the crankshaft was cracked when defendant installed it in the engine. It also found that the crack caused damage to the rod bearing. Obviously a crankshaft, which was cracked and caused damage to other parts of the engine substantially, impaired its value to defendant.

From the record and the trial court's findings of fact, it is apparent that the cracks were impossible to discover prior to their use in the engine. Only when the crankshaft was removed from the engine and cleaned up did defendant discover the cracks.

What is a reasonable time for a buyer to revoke his acceptance is ordinarily a question of fact for the jury. In determining what is a reasonable time, it is proper to consider all the surrounding circumstances, including the nature of the defect, the complexity of the goods involved, the sophistication of the buyer, and the difficulty of the discovery.

Defendant was not able to discover the hairline cracks in the crankshaft until after its use in the engine when they became more severe and apparent. Apparently, Mr. Wooten used the tractor only sparingly and it was several months before the cracks caused the damage to the bearings. There was no unreasonable delay in defendant's revocation.

Defendant notified plaintiff of his revocation as soon as he learned of the damage to the crankshaft and bearings. He ordered a new crankshaft under the impression that John Deere would replace the first crankshaft if it were defective.

Under §2-608(3), a buyer who revokes his acceptance has the same rights and duties with regard to the goods involved as if he had rejected them. The measure of damages for breach of warranty is the difference at the time of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. §2-714(2). The crankshaft had no value as delivered and the damages were the purchase price. We find error neither in the trial court's implicit determination of revocation and damages, nor in its set-off of defendant's damages against the purchase price owed to plaintiff.

Affirmed.

PROBLEM #1

Ogden Air Logistics Center (OALC) ordered a large, complex machine from Union Tool for $103,000. Three months after installation and several attempts to repair by Union Tool, OALC canceled the contract. Union Tool filed suit for damages. After the suit was filed, OALC attempted to modify the machine and on one occasion used part of it in its production process. What arguments do you anticipate the parties making and what is the likely outcome?

PROBLEM #2

O'Leary contracted with McCormick for the construction of a custom-built trailer to be used in O'Leary's wholesale nuts, bolts and fasteners business to bring merchandise to the door of his customers. O'Leary was planning his transition out of the Navy and becoming an independent businessman in the ever growing marketplace of wholesale nuts, bolts and fasteners. McCormick knew that O'Leary planned to build bins and racks for carrying merchandise. On May 9, O'Leary took delivery of the trailer but upon road testing discovered it fish-tailed, so he returned it. McCormick discovered a mistake in the coupler. Over the next three weeks O'Leary telephoned McCormick of many problems such as the trailer was not square (such that premade racks would not fit), the trailer roof leaked, and it still swayed. McCormick refused to make corrections. O'Leary made final payment and took the trailer elsewhere for repairs. To his surprise, two repair places said it should be junked; it had several other defects such as improper wiring, welding, and poor overall design. The State Bureau of Motor Vehicles refused him a permit to operate it on the road. O'Leary then advised McCormick in writing that he wished to revoke his acceptance and wanted his $3,200 back.

A. Does O'Leary have a right to revoke his acceptance of the trailer?

B. Is his revocation timely?

C. McCormick says that O'Leary refused to bring the trailer to McCormick's shop for repairs and this terminates O'Leary right to revoke. Does it?

PROBLEM #3

Cali Manufacturing shipped 50,000 new Air Force uniform shirts to the Uniform Supply Center (USC) in Philadelphia, Pennsylvania. The "off the shelf" procurement order arrived on Friday, earlier than anticipated, and on a very busy day for the receiving department. The shirts were cursorily examined and sent to the warehouse for storage. A few weeks later, upon closer examination, it was found that the epaulets were missing. What are the USC's rights, if any?

PROBLEM #4

Pursuant to its fixed-price supply contract with the Army, Nick's Computers factory orders 15,000 circuit boards from Computronix. Upon their delivery, sample circuit boards are weighed, critical dimensions measured, and burn in testing is conducted. Upon completion of this inspection, a Nick employee tells the Computronix driver that the goods are satisfactory. Two weeks later, when Nick's employees attempt to process the circuit boards, the tools on their Surface Mount Technology machines keep breaking. Its engineers discover pieces of a hard foreign substance in drill holes in the circuit boards, which render them inoperable. Computronix position is that by inspecting the goods and saying they were acceptable, Nick's gave up its right to reject the goods later. Evaluate this argument.

continued on next page

Problems *(continued)*

PROBLEM #5

The Services Squadron Commander, Major Roberts, goes to a sporting goods store and requests to purchase racquetball racquet covers for the 200 new racquets that he just received from the newest high tech world class racquetball manufacturer. He informs the store clerk of the model number and name of the new racquets. The clerk returns with a box full of covers and accepts Major Robert's IMPAC card. When Major Roberts returns from temporary overseas duty, three weeks later, he finds that the covers do not fit. He seeks to return the covers but is told that the store's advertised policy is that all sales are final. Do you have any advice for Major Roberts?

PROBLEM #6

Due to the recent BRAC hearings and base closure lists, Mr. Schauer is the proud new owner of a six year old government building. He plans to use the building as a home, which begins to exhibit foundation cracking. It appears that the foundation was defectively poured. Schauer brings suit against the builder and the government on implied warranty grounds. Can he maintain this cause of action against the builder? Would he have implied warranty actions against the federal government?

PROBLEM #7

Army SSgt. Jones made seven or eight trips to his local Fantastics Truck dealer for repairs during the first five months after delivery of his new pick up truck. When he learned that most of his difficulties were caused by a twisted frame, a condition that would continue to cause excessive wear and tear on the moving parts, Jones requested that the truck be replaced. Fantastics Truck refused, saying it would continue to fix problems as they arose for the length of the warranty (12 months). The warranty contained an exclusive remedy by repair clause. What remedies, if any, are available to SSgt Jones?

CHAPTER ELEVEN CASES

Matter of: MAKRO JANITORIAL SERVICES, INC.
B-282690; 1999 WL 628668

DECISION

Makro Janitorial Services, Inc. protests the Department of the Army's failure to compete the procurement of housekeeping services for locations at the Kimbrough Ambulatory Care Center (Ft. Meade), Aberdeen Proving Grounds, and Edgewood Arsenal, Maryland. The agency issued task order No. 0084 for these housekeeping services to BMAR and Associates, Inc. under contract No. DACA01- 96-D-0023, which was for preventive maintenance and equipment inventories at medical facilities in the continental United States, Caribbean, Alaska, and Hawaii. The BMAR contract was modified in 1997 to include housekeeping and exterior grounds maintenance services. Macro contends that the issuance of the task order in lieu of competing the procurement was improper and resulted in prices higher than those that would have been obtained through competition.

We sustain the protest.

An indefinite-delivery/indefinite-quantity (IDIQ) contract was competitively awarded by the U.S. Army Corps of Engineers, Mobile District Contracting Division, to BMAR on May 2, 1996, for a base year with four 1-year option periods at a total not-to-exceed value of $27,500,000. The work would be accomplished through fixed-priced task orders. Under the contract, BMAR would supply all plant, labor, materials, and equipment in performing "Real Property Inventory (RPI), Demand Maintenance Repairs, and surveys of Medical Facilities." As noted, the contract was modified subsequently to include housekeeping and exterior grounds maintenance services. As relevant here, the contract modification defines "Housekeeping Services" as "all labor and materials to maintain the cleanliness of all medical facility spaces." The cleaning services include damp wiping and dusting, spot cleaning of surfaces, vacuuming, and cleaning plumbing fixtures, windows, beds and linens. The BMAR contract was awarded as part of the U.S. Army Medical Command's program to ensure that its hospitals, clinics, and other facilities would meet the standards of the Joint Commission on Accreditation of Healthcare Organization standards by means of a collection (toolbox) of contracts that would be available to the facility manager at each medical facility.

The agency notes that the procurement was described in the Commerce Business Daily under Code M, operation of government-owned facilities, and that in paragraph 1.03 of the solicitation/contract it was stated that the covered work previously was done in-house (that is, some of the larger installations performed their own housekeeping). Further, in solicitation/contract paragraph 2.1.1, "Maintenance" is defined as that which keeps real property in such a condition as to be usable continuously for its intended purpose. The agency asserts that housekeeping is necessary to keep the facilities functional. The agency argues that since the intended purpose of the contract was for the successful operation of the facilities, the 1997 modification was merely a clarification of the

original requirements under BMAR's contract, rather than a change that was outside the scope of the original contract.

The Competition in Contracting Act of 1984 (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (1994). Once a contract is awarded, however, our Office will generally not review modifications to that contract, because such matters are related to contract administration and are beyond the scope of our bid protest function. 4 C.F.R. § 21.5(a); Stoehner Sec. Services, Inc., B-248077.3, Oct. 27, 1992, 92-2 CPD ¶ 285 at 4. The exception to this rule is where it is alleged that a contract modification is beyond the scope of the original contract, since the work covered by the modification would otherwise be subject to the statutory requirements for competition (absent a valid determination that the work is appropriate for procurement on a sole-source basis). MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7.

In determining whether a modification triggers the competition requirements in CICA, we look to whether there is a material difference between the modified contract and the contract that was originally awarded. ... Evidence of a material difference between the modification and the original contract is found by examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification. CAD Language System, Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342 at 4. The overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated." Ervin and Assoc., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 8, quoting Neil R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 3.

Based on the record, we conclude that the modification to include housekeeping services and, therefore, the task order issued based on the modification, were beyond the scope of the contract as originally awarded. As noted above, under BMAR's original IDIQ contract, the scope of work requires the contractor to furnish all work for "Real Property Inventory (RPI), Demand Maintenance Repairs, and surveys of Medical Facilities." The detailed breakdown of work to be performed all relates to the above identified categories of work. For example, the contractor is required to "Prepare and execute a program for performing Real Property Inventories, Preventive Maintenance & Inventory, Demand Maintenance Repairs . . . for the facilities listed above and all equipment, controls, and building systems." Under another requirement, the contractor must keep records of each repair and maintenance task and preventive maintenance and inventory data on equipment, including boiler reports. There is nothing in the original scope of work that even remotely suggests that the contract contemplated the acquisition of housekeeping services as defined by the modification.

Further, the personnel required under the contract are those associated with facility maintenance repair, such as HVAC mechanic, boiler operator, plumber/pipefitter, general maintenance mechanic, electrician, painter, carpenter, electronic technician, welder and kitchen equipment mechanic. In addition, the term "Maintenance" is defined as "[t]he recurring work required to keep real property in such a condition that it may be utilized continuously . . . for the intended purpose," and the term "Preventive Maintenance" is defined as "[t]he systematic and periodic inspection and servicing which is required to prevent breakdown and to prolong the life of real property." Similarly, emergency and

demand maintenance are defined to require the maintaining of the real property and equipment, i.e., the physical plant.

Moreover, in addition to the language of the original contract, which, in our view, supports the conclusion that housekeeping services were not contemplated under the original contract, the various letters and memorandum from agency officials regarding the intent and purpose of the original contract also support our conclusion. For example, the memorandum of agreement (MOA) between the Army Corps of Engineers and the Army Medical Command that establishes the framework for the Corps' support to the Army medical facilities identifies the goods and services to be provided as including "project management, contract award and administration, design, A-E support services, technical support and construction management." It further states that the agreement is limited to "facility operation, maintenance, repair and minor construction." The agreement more specifically covers "scheduled or predictive maintenance" and "repairs to real property." Id. The other correspondence and memorandum in the record concerning the purpose of this program and the BMAR contract are consistent with the MOA. For example, in one document, the Director of Sustainment states that the contract is intended to address "an ever-increasing backlog of maintenance and repair" and to meet "the basic requirements that medical facilities be repaired, if necessary, to meet . . . Life Safety Code Standards, and that maintenance be documented on critical life support systems." Finally, a U.S. Army Medical Command memorandum concerning the "toolbox" of contracts states that:

"The Mobile contracts have a specific role in this program. The contracts support the Sustainment portion of the program . . . [which] includes preventive maintenance services, minor repair, and major repair . . . . The Facility Support Program is absolutely essential to our future ability to attain accreditation and adequately maintain our . . . building infrastructure." [Memorandum from the Assistant Chief of Staff for Installations, Environment, and Facility Management to Mr. Leo Hickman, U.S. Army Corps of Engineers (June 3, 1999)]

The agency's argument that the modification did not materially expand the scope of the contract, since the original contract--which covered all work necessary for the maintenance of the real property--reasonably included housekeeping and exterior grounds maintenance, is not persuasive. The specific contract language and explanatory documents, as discussed above, show that the program and contract are intended to address the facilities' physical plant. There is simply no indication that the original contract contemplated housekeeping services or that any of the Army officials in charge of the program believed that housekeeping was a service contemplated under the program. We do not agree that the use of the term "maintenance" is a "catch- all" phrase that justifies a modification, which could not reasonably have been anticipated under the original competition. The term must be read in context and, as noted above, the language of the contract and the explanatory documentation do not support the Corps' position that the scope of the IDIQ contract contemplated housekeeping services. We conclude that the modification and, therefore, the task order issued to BMAR for housekeeping services, were beyond the scope of the original contract.

Accordingly, we sustain the protest and recommend that the task order for the three locations be terminated and that the Army procure the housekeeping services in accordance with the competition requirements of CICA, 10 U.S.C. § 2304 (a)(1)(A). We also recommend that the protester be reimbursed the reasonable costs of filing and

pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Makro's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

Comptroller General of the United States

APPEAL OF MAX J. KUNEY COMPANY
DOTCAB No. 2759, 94-3 BCA 27,245
October 14, 1994

OPINION BY ADMINISTRATIVE JUDGE ROBERTORY ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Max J. Kuney Company ("Kuney") appealed from a decision by the Contracting Officer under its contract with the Federal Highway Administration ("FHWA"), denying in toto its claim for compensation in the amount of $8,819.84. The basis for the claim was the FHWA's refusal to accede to a Kuney request to drill holes in the webs of the steel plate girders of a bridge Kuney was constructing. The purpose of the holes would have been to enable Kuney to bolt to those girders the steel support brackets for the deck overhang form work.

The parties elected to submit their positions on the written record pursuant to Rule 11. The respondent has now moved for summary judgment, alleging that there is no issue of fact, the only issue being one of contract interpretation, a question of law.

FINDINGS OF FACT

Based upon those allegations of the parties that are undisputed, and upon the documents in the appeal file, the Board, for purposes of this Motion, makes certain findings of fact:

1. On February 1, 1993, the FHWA awarded Contract DTFH70-93-C-0004 to Kuney for construction of a steel plate girder bridge (the Laughingwater Creek Bridge) and approaches in the Mount Rainier National Park, Washington. The contract price as awarded was $2,788,329.00.

. The contract included the clause entitled "Specifications and Drawings for Construction (April 1984)" taken from Federal Acquisition Regulation § 52-236.21, and required submission of shop drawings. Under paragraphs (e) and (f) of the clause, if shop drawings contain any variation from the contract requirements, an approval by the Contracting Officer of those drawings will not constitute an approval of the variation itself, unless the contractor in [a] separate writing flags those variations.

3. The contract incorporated the FHWA's Standard Specifications For Construction Of Roads And Bridges, 1985 edition, generally known as "FP-85."

4. FP-85 paragraph 104.01, "Intent of Contract", restating what is a legal obligation of any party to a contract, states that the contractor shall complete the work in accordance with the plans, specifications, and terms of the contract.

5. FP-85 paragraph 105.01 "Authority of the Engineer" sets forth the authority of the FHWA Engineer:

> "The Engineer will decide all questions that may arise as to the quality and acceptability of materials furnished and work performed . . . ; all questions that may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the Contractor.
>
> "Decisions will be based on engineering judgment, taking into

> consideration all facts . . . including all regulations, instructions, and guidelines established by the Government for administration of contract work. . . ."

6. Paragraph 105.02 of FP-85 is entitled "Plans and Working Drawings." Subparagraph (c), "Specific Requirements for Steel Structures," states in part that:

> ". . . working drawings are to conform to the contract plans and shall consist of shop detail, erection and other working plans showing all detailed dimensions of all component parts including bolt and pin hole sizes and locations . . . After the [FHWA] Engineer's review there shall be no deviation from the working drawings or changes made thereon without the prior approval of the Engineer. . . ."

7. Attached to the Motion is an affidavit by Mr. Marc A. Veneroso, a bridge engineer with the FHWA. Two undisputed paragraphs of this affidavit describe the work in issue:

> "7. One aspect of this project involves forming and placing a concrete deck with overhangs on top of the steel girders comprising this bridge. As shown, the plan does not specify how the deck 'overhang' forms are to be supported. To support the overhang forms, a temporary bracket is used. After the concrete and reinforcing steel is placed and the concrete has gained sufficient strength to support its own work, the temporary brackets and forms are removed.
>
> "8. There are essentially two methods used to hold the temporary brackets in place on steel girders. The brackets can either be held up by a device which hooks over the top of the girder flange, or by bolting directly to the girder web."

8. Kuney's shop drawings were approved by the FHWA on May 7, 1993. … [They] did not state which method would be used.

9. FHWA policy has been to not permit girder webs to be drilled for bolts to support overhead form brackets, for aesthetic[1] reasons. (Veneroso affidavit, pp 11-14). Accordingly, if the shop drawings had shown the appellant's intent was to drill and bolt the brackets to the web, and that was noticed by the reviewer, the shop drawings or that approach would have been rejected. (Veneroso affidavit, p 10).

10. Mr. Veneroso's affidavit also states his opinion of the standard in the trade in the area:

> "16. . . . [I]t is my professional opinion that while drilling holes in the girder webs to attach overhang supports is often allowed by other state highway departments, it must still be approved and therefore is not an industry standard, but rather a discretionary method of construction that rests with the owner.
>
> "17. Further, it is my opinion the fact that the FLHD[2] is not a small program, the contract did not show holes in the webs, and has never allowed drilled holes in steel girder webs to support overhang brackets, also indicates that this is not an industry standard and that the contractor should have been on notice that FLHD does not allow drilling and questioned this before submitting its bid."

11. Replying to FHWA's arguments that the appellant should have asked the FHWA before planning to use bolting, appellant notes that there are many different construction methods a contractor may choose that visually impact the final appearance and usability of the structure (giving a list of such choices, e.g., form materials, types of ties), and all of these choices are not submitted for pre-approval. Replying to aesthetic arguments, the appellant notes that the Laughingwater Creek Bridge already had a significant number of splice plates and bolts, so that the added formwork bolts would have little added adverse impact.

12. Regarding the question of industry practice, the appellant states:

> "Enclosed is a letter dated August 23, 1994 from Washington State Department of Transportation where they state in the last paragraph that in Washington State all contractors use the bolted overhang bracket method. It should be noted that this would include all cities and counties as they use the same specifications. Therefore, how can this be an industry standard?
>
> "I can appreciate that WFLHD [the respondent] has a budget of $74 million but, according to Veneroso Para. 13, they have built only 9 steel bridges in the last 20 years. This could not possibly influence industry standards considering WSDOT [Washington Department of Transportation] builds more than this in one year."

13. The State of Washington Department of Transportation does permit such holes to be drilled. [It states]:

> … "If the Engineer permits bolt holes in the weld support brackets, the Contractor shall fill the holes with fully-torqued AASHTO M 164 bolts. Each bolt head shall be placed on the exterior side of the web."

The conditional "If" indicates that permission is discretionary with the Engineer.

14. The letter from the State of Washington that was referenced by the appellant (see Finding 12) is addressed to it, signed by "J.A. Weigel, P.E., Construction Engineer, Bridges" and states as its subject, "Requirements of Section 6023(17)G of the 1991 Standard Specifications" (quoted in part in Finding 13). The letter states:

> "This letter is verification of our telephone conversation and will document our discussion concerning the interpretation and intention of the referenced Standard Specification Section. …
>
> "The third paragraph of this section allows holes through the girder web to support roadway slab overhang form brackets. A vast majority of our structural steel plate girder bridge roadway slabs were constructed utilizing these bolt holes through the exterior girder webs. The statement 'if the Engineer permits' is used so the department has the opportunity to review the number and placement of these bolt holes. In fact, the 1994 Standard Specifications requires that the roadway slab form drawings be submitted along with the structural steel girder shop drawings.
>
> "As discussed on the telephone, the third paragraph of the referenced section, was added to the 1988 Standard Specifications. Prior to the

> 1988 Standard Specifications, a note was added to the approved structural steel shop drawings allowing the bolt holes in the webs and requiring that these holes be filled with high strength bolts. Due to an oversight in one project, the requirement to fill the holes with high strength bolts was overlooked. And, since the holes were always utilized by the contractors, we added the paragraph to the Standard Specifications."

15. When Kuney indicated its intent to drill such holes, but before proceeding, the FHWA refused to allow them to proceed with the drilling, and required the use of hanging brackets. The claim resulted, Kuney seeking reimbursement for the additional cost of drilling and bolting vice using the alternate method.

16. The Contracting Officer denied the claim by decision of March 30, 1994. The basis for the denial was that the matter had properly been decided by the Engineer pursuant to the authority given him by paragraph 105.1 (supra, Finding 5). The Contracting Officer also noted that in his opinion Washington State Department of Transportation did not allow unrestricted drilling of holes in girder webs, citing the State Standard Specifications (see Finding 13).

DISCUSSION

Summary judgment is only appropriate when there is no issue as to any material fact. The moving party bears the burden of proving that no question of material fact exists. Any doubts as to whether summary judgment is appropriate are to be resolved against the moving party, in this case the FHWA. *General Dynamics Corporation*, 83-1 BCA p 16,386 (DOTBCA 1983) at 81,458-459.

(Recognizing that the appellant is not represented by counsel, and to avoid creating confusion, we point out that in this case it is Kuney that bears the overall burden of proving its entitlement to relief and, in the light of the result reached below, it will be Kuney's burden to prove that the trade practice in the area is for contractors to use, and owners to permit the use of, drilled holes for bracket mounting.)

We first address the authority of the FHWA project Engineer, as described in FP-85 paragraph 105.01 (Finding 5). The paragraph does not give the Engineer authority to alter the terms of the contract, but only to make engineering judgments and interpretations. If any such judgment or interpretation alters the terms of the contract or the contractor's obligations thereunder, then under the terms of the contract and of contract law the contractor may be entitled to compensation.

The crucial issue in the case before us is what do the contract terms require, for that is the work upon which the prospective contractors bid and it is to the contractual requirements that the successful contractor must be held, no less and no more.

The appellant argues that if it was the FHWA policy not to permit such holes, it was incumbent upon the FHWA to include that policy in its specifications, so that bidders would be aware that the work would be required to be accomplished in a more expensive manner. In essence, it also argues that, while the Engineer does have certain authority, that does not permit the FHWA to escape responsibility to a bidder who bid according to the specifications.

The Board agrees with this analysis. Bidders are not responsible for knowing of construction policies, which a federal agency has not, published and which are neither stated nor referenced in the terms of a proposed contract. If the respondent deemed it to be important that contractors not drill holes for support brackets, then it was incumbent upon the FHWA to include such a prohibition in the FP-85 or in the supplements/modifications thereto in the contract itself, so that bidders would be forewarned as to the required method to be followed in achieving the finished product. "Where, as here, the contract does not designate the method of performance to be utilized, the contractor's reliance upon its own expertise and ingenuity is particularly significant in selecting the method of performance. It is also axiomatic that the rejection of a method of performance selected by the contractor, which is permitted by the contract, constitutes a constructive change." *DOT Systems, Inc.*, 82-2 BCA p 15,817 (DOTBCA 1992) at 78,373.

This is not to say that, due to the absence of any restriction in the contract terms as put out for bid, a contractor may adopt any approach it desires. The planned approach must be reasonable in the light of the trade practice in the area; i.e., if Kuney is to be held to an obligation not to drill for brackets, then such obligation can only arise from standard trade practice in the area.

It is axiomatic that summary judgment only lies if there is no disputed question of fact relevant to a determinative decision. The question of what is the trade practice in the area where this bridge was to be constructed is a disputed question of fact, to be proved. "A trade custom has to be something which is well-established within a specified geographical area, and proof of it must rest upon more than mere allegations." *Southwest Marine, Inc.*, 93-3 BCA p 26,170 (DOTBCA 1993) at 130,146. Both parties have gone beyond mere allegations of trade practice, accompanying their arguments with statements of experts giving their views of what is the trade practice in the area. The parties clearly differ on what is the trade practice. However, neither party has presented statements that are sufficiently precise to establish what is the trade practice regarding similar bridges in the area.

The FHWA states that its policy is not to permit drilling; however, the facts indicate that the FHWA only constructs a minority of the steel bridges in the area. The fact that the FHWA has imposed the practice of not drilling webs upon what is patently a small minority of steel bridges constructed in the geographical area does not make the FHWA practice a trade practice.

The appellant bases its position upon the letter from Mr. Weigel quoted in part in Finding 14. Accepting at face value (even with room for exaggeration) the appellant's statement that the State of Washington builds more steel bridges in a year than the FHWA western division has ever built, it may well be that the Washington State practice would more likely than not set the trade practice for the area. However, the letter is insufficient, for it does not state how often Washington State Engineers permit drilling in steel bridges similar to the Laughingwater Creek Bridge, or whether similar bridges are built by entities using standards other than the FHWA's or State's[6]. To establish a trade practice in the matter before the Board, his statement would have to clearly state (i) that when bridges similar to this are being constructed and there is no prohibition against drilling in the specifications, Washington State invariably permits drilling with the Engineer essentially reviewing only the number and location of bolt holes and (ii)

indicating that this practice is followed in a sound majority of such bridges in the area.[7]

It cannot be said that the facts, what is the applicable trade practice, are undisputed and, therefore, summary judgment does not lie.

DECISION

There being a disputed question of fact that is relevant to the adjudication of this case, summary judgment does not lie. Accordingly, the respondent's motion for summary judgment is denied.

Normally at this point the Board would set down a case for trial of what appears to be the only factual dispute between the parties, namely, what is trade practice in the area. However, the parties have elected to submit their cases on the written record. … The Board determines that the parties have thirty days from their respective receipts of this Opinion in which to either negotiate a resolution or to augment their previous submissions.

> The Board determines that Kuney is entitled to an equitable adjustment.

APPEAL OF NEWS PRINTING COMPANY, INC.
G.P.O.B.C.A. 13-94
February 20, 1998

Before BERGER, Ad Hoc Chairman.

DECISION AND ORDER

News Printing Company, Inc. (Appellant), P.O. Box 373, Claysburg, Pennsylvania 16625, timely appealed the March 11, 1994, final decision of Contracting Officer James T. Reingruber of the U.S. Government Printing Office (Respondent or GPO), denying the Appellant's request to be compensated in the amount of $12,863.23 for expenses incurred in redrilling holes, at the Respondent's direction, in copies of the Index of Specifications and Standards (DODISS) and Associated Publications which it produced pursuant to Print Orders 80003, 80004, 80005, and 8006, Program 1216-S, Purchase Order B6196. For the reasons, which follow, the Contracting Officer's decision is REVERSED and the appeal is GRANTED.

I. BACKGROUND

1. On or about May 12, 1993, the Appellant was awarded a requirements contract for Program 1216-S. The contract, for the period of June 1, 1993 through May 31, 1994, provided in the "Ordering" clause of the General Terms and Conditions section that the items to be furnished under the contract would be ordered through the issuance of print orders and that all print orders issued thereunder were "subject to the terms and conditions of this contract." The clause also provided that "[t]his contract shall control in the event of conflict with any print order." In the "Drilling" provision of the Specifications section, the contract stated the following: "Drill 3-3/8" diameter holes centered on the 11" side, 4-1/4" center to center."

2. On June 22, 1993, Print Orders 80000, 80001, and 80002 were issued to the Appellant. On August 18, 1993, Print Orders 80003, 80004, 80005, and 80006 were issued. Unlike the print orders issued in June, which set forth a 4-1/4" center to center drilling requirement, the latter four print orders specified a 4-1/2" center to center distance. This was later determined to be the result of an error in typing. Rule 4 File, Tab P, Report of Prehearing Conference.

3. The Appellant produced the publications in accordance with the print orders. The requiring agency (the Navy) considered the publications produced under Print Orders 80003, 80004, 80005, and 80006 to be unusable because the holes were drilled 4-1/2" center to center instead of 4-1/4" center to center. Rule 4 File, Tab J. The Respondent subsequently directed the Appellant to pick up the publications, correct the problem by drilling holes 4-1/4" center to center as required by the contract specifications, and to redeliver the corrected publications.

4. The Appellant followed the Respondent's instructions, but advised the Respondent that because it had adhered to the requirements of the print orders it did not consider itself to be at fault and that it would be making a claim "for compensation for the additional freight and labor involved in this additional work." Thereafter, the Appellant requested additional compensation in the amount of $12,648.37, later revised to $12,863.23. The Contracting Officer denied the request on the basis that the contract

and its specifications were controlling over the print orders and that the discrepancy between the contract and the print orders was "so blatant that it should have prompted an immediate query to the [Respondent] for clarification." This appeal followed.

II. DISCUSSION

This appeal involves the very straightforward issue of what should happen when a print order issued by the Respondent to a contractor under one of the Respondent's requirements contracts is inconsistent with the specification provisions of that contract. The Respondent asserts that when, as here, there is a patent ambiguity between the two, the contractor has a duty to seek clarification from the Respondent and, if it fails to do so, must bear the consequences if it resolves the ambiguity incorrectly. Respondent's Brief. The Appellant asserts that there was no patent ambiguity because, under its interpretation of the contract as well as its experience with the Respondent, it could not ignore, and had no reason to question, the print orders as issued. Appellant's Brief. In this regard, the Appellant argues the following: (1) since no work under the contract may be initiated without a print order and since the contract, in the "Assignment of Jackets, Purchase and Print Orders" provision of the General Terms and Conditions section, provides that the print order "will indicate the quantity to be produced and any other information pertinent to the particular order," it "should be able to . . . rely" on the print order for "specific guidance and information as to how to produce a particular order under the contract"; (2) the language in the "ordering" clause that states the contract shall control over a print order applies with respect to contract terms and conditions but not to contract specifications; and (3) in prior dealings with the Respondent the Appellant was told "to follow the print order." The Appellant concludes that under the circumstances it was justified in viewing the four print orders as written change orders to the contract. Complaint; Appellant's Reply Brief.

GPO relies on print orders to obtain printing and binding services from contractors who have been awarded term contracts. Printing Procurement Regulation, GPO Pub. 305.3 (Rev. 10-90) (hereafter PPR), Chap. XII, Sec.1, p 5; GPO Form 2511, "Print Order", PPR, Chap. XVI. The term contracts contain specifications which set forth mandatory requirements applicable to the printed products to be furnished. GPO's regulations provide that the print orders, for ordering "[i]tems to be furnished under this contract," are to "include" information concerning ink color, number of pages for cover and text, kind of paper, number and size of foldins, method of binding, trim size, total copies, and quantity breakdown for various delivery destinations, PPR Chap. XII, Sec. 1, p 5.a.(1); the print order form also contains a section for hole drilling requirements. In some instances the contract and print orders will overlap, with both specifying particular requirements. (In this case, for example, both documents specify the trim size and the ink color as well as the hole drilling requirements.) In other cases, the contract specifications will refer the contractor to the print order or impose a requirement that can be "waived" by the print order. See *RD Printing Assocs., Inc.*, GPOBCA 02-92 (December 16, 1992), slip op. at 3, 1992 WL 516088 ("Margins will be as indicated on the print order . . . . Blank apron of 8-1/2 x 11" required on bind side of all foldouts unless waived in the print order."). Either way, it is the original contract document and the print order that together constitute the enforceable contract between GPO and the contractor. See *Reprographex, Inc.*, GPOBCA 14-86 (July 7, 1987), slip op., 1987 WL

228971; PPR, Chap. I, Sec. 1, p 2 (definition of "contract").

In this case it is undisputed that Print Orders 80003, 80004, 80005, and 80006 contain a hole drilling requirement that is different from the hole drilling requirement in the original contract specifications. It is also undisputed that the Appellant was aware of this difference prior to entering into performance in response to those print orders. Complaint; Report of Prehearing Conference. Where specifications or other contract terms are inconsistent on their face, a patent ambiguity arises. *Newsom v. United States*, 676 F.2d 647 (Ct. Cl. 1982) (. . . a patent ambiguity existed. Two parts of the contract said very different things."); *Assurance Co.*, ASBCA 25254, 83-2 BCA p 16,908; *MPE Business Forms, Inc.*, GPOBCA 10-95 (August 16, 1996), slip op. at 44, 1996 WL 812877. The existence of this patent ambiguity creates a duty to on the part of the contractor to seek clarification. *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298 (Fed. Cir. 1996); *S.O.G. of Ark. v. United States*, 546 F.2d 367 (Ct. Cl. 1976); *Renfrow v. United States*, 38 Fed. Cl. 435 (1997); *Fry Comms., Inc./ InfoConversion Joint Venture v. United States*, 22 Cl. Ct. 497 (1991); *MPE Business Forms, Inc.*, supra. While in the typical case this duty will arise in the preaward environment as a result of ambiguity in the solicitation, see, e.g., *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990 (Fed. Cir. 1996), the underlying rationale for the patent ambiguity rule - avoiding later disputes and expensive litigation by clarifying ambiguous language before the parties are locked in, *S.O.G. of Ark. v. United States*, supra; *Int'l Transducer Corp. v. United States*, 30 Fed. Cl. 522 (1994) - is equally applicable when the issuance of orders under term/requirements contracts first gives rise to the ambiguity. See *Goal Chemical Sealants Corp.*, GSBCA 8626 (unpub.), 1988 WL 71816 (the agency erroneously issued a delivery order that was inconsistent with the contract specifications, the contractor followed the delivery order, the agency rejected the delivered supplies and ultimately defaulted the contractor, and the default was upheld because the contractor did not meet its duty to inquire in the face of the patent ambiguity) and *C-Mor Co.*, ASBCA 30479, 87-2 BCA p 19,682 (delivery order specifications were different from the contract specifications, the contractor followed the contract specifications, the agency rejected the delivery and terminated for default, and the default was upheld because upon receipt of the delivery order the contractor "should have . . . resolved the matter with [the] Army."). In other words, where a term contractor is aware of an ambiguity between its basic contract and a print order issued under that contract, the same duty to inquire is present because it is only through such inquiry, a "device of preventive hygiene," *S.O.G. of Ark. v. United States*, supra, that disputes such as this one can be avoided. If the contractor fails in its duty to inquire, it bears the risk of misinterpreting the Government's actual requirements. *MWK Int'l, Ltd. v. United States*, 2 Cl. Ct. 206 (1983).

The Appellant asserts that it had no duty to inquire because it was aware of no patent ambiguity. It bases this assertion on its position that under the circumstances it was entitled to view the print orders as written change orders. If these print orders did constitute change orders, of course, the Appellant would be correct as there would have been no ambiguity at all concerning the hole punching requirement - the contract would have been modified to require 4-1/2" center to center drilling.

The "Changes" clause, incorporated in the contract by reference, allows the Contracting Officer to make unilateral changes, within the general scope of the contract,

to drawings, designs, and specifications. GPO Contract Terms, Solicitation Provisions, Supplemental Specificatioons, and Contract Clauses, GPO Pub. 310.2, effective December 1, 1987 (Rev. 9-88), Contract Clauses, p 4. As the Board has previously pointed out, while a formal change order issued pursuant to the "Changes" clause need not be on the specific form (Form 913) identified for that purpose in GPO's regulations, see PPR, Chap. XII, Sec. 2, p 2.b., it must: (a) be directed to the contractor by the person with contracting authority; (b) be in writing; (c) be within the general scope of the contract and concern the specifications or other matters encompassed by the clause; (d) provide for an equitable adjustment in case costs are increased by the change; and (e) inform the contractor that it must submit any equitable adjustment proposal within 30 days from receipt of the order. *GraphicData, Inc.*, GPOBCA 35-94 (June 14, 1996), slip op. at 99-102, 1996 WL 837426.

The print orders clearly do not provide for an equitable adjustment or inform the contractor of any adjustment submittal requirement. More importantly, the record does not establish that the print orders were signed by a contracting officer. (The Respondent's regulations make it absolutely clear that formal change orders may be issued only by the Contracting Officer. See PPR, Chap.XII, Sec. 2 [change orders "require the signature of the contracting officer only." PPR, Chap. XII, Sec. 2, p 1.c.(2)]). Two contracting officers are identified in this record: Annamarie T. Mierson, who awarded the original contract to the Appellant. The print orders were not signed by either of these individuals - they were signed by Joan Ridgway. While Ms. Ridgway is not further identified in the record, the Respondent's regulations make clear that the signature on print orders normally will not be that of the contracting officer, but of an individual from the requiring agency authorized to sign print orders. Accordingly, on this record the Board cannot consider the print orders to be formal change orders. Compare *GraphicData, Inc.*, supra, where the Board found all the necessary elements of a formal change order to be present.

The Board does find, however, that the issuance of the print orders constituted a constructive change. "A constructive change occurs when the contract work is actually changed but the procedures of the 'Changes' clause have not been followed." John Cibinic, Jr. and Ralph C. Nash, Jr., Administration of Government Contracts 429 (Third ed. 1995) (hereafter Cibinic & Nash, Administration). Since the Government may be bound only by the actions of its officers acting within the scope of their authority, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Wilber Nat'l Bank v. United States*, 294, U.S. 120 (1935), the act or acts asserted to be a constructive change to a contract must be those of someone with authority to make a change to the contract. That someone, of course, is the contracting officer. Thus, for a constructive change to be recognized, the basis for it must be some action by either the contracting officer or someone authorized to act on his/her behalf, *DOT System, Inc.*, DOTCAB 1208, 82-2 BCA p 15,817; *Inez Kaiser & Assocs., Inc.*, ASBCA 22212, 88-2 BCA p 20,732, or a ratification by the contracting officer or other authorized official of some other official's unauthorized act. *Reliable Disposal Co., Inc.*, ASBCA 40100, 91-2 BCA p 23,895. As discussed, the print orders were not issued by the Contracting Officer, and there is no suggestion in the record of a ratification. Accordingly, the issuance of the print orders can be a constructive change only if they were issued by someone who had express or implied authority to change the contract.

According to the Respondent's regulations, print orders, when received from customer agencies, are reviewed by a GPO "printing specialist and/or the procurement assistant (program operator) to determine that the work is within the scope of the contract and that the print order is properly filled out . . . ." When it is determined that those requirements, including one for an authorized signature (with authorization for the signature "on file" with the Respondent's Central and Regional Offices), id., have been met, "the order may be placed." It is clear from other references in the regulation that the order is to be placed by the program operator. Thus, under the Respondent's regulatory scheme for print order processing for the type of contract involved here, the print orders will be signed by someone from the customer agency and, after review, placed with the contractor by a GPO program operator. A program operator is defined as "a printing specialist or procurement assistant assigned responsibility for processing and administering orders under a term contract." While "processing and administering orders" by itself falls far short of an express grant of authority to make changes to the contract, the role and function of the program operator in GPO's contractual scheme, along with GPO's regulations concerning print orders, are sufficient, in the Board's view, to establish implied authority in the program operator to make changes to the contract.

Despite the language in the "Changes" clause empowering only the contracting officer to issue change orders, Government employees other than the contracting officer, such as the contracting officer's technical representatives, inspectors, and project managers, have been held to have implied authority to act for the contracting officer and bind the Government to constructive changes. See Cibinic & Nash, Administration at 44-47, 441-2. The authority generally has been implied when "considered to be an integral part of the duties assigned" to the employee. Cibinic & Nash, Administration at 45, citing *H. Landau & Co v. United States*, 886 F.2d 322 (Fed. Cir. 1989), and *DOT System, Inc.*, supra. For example, one of the predecessor panels to this Board held that certain employees of the requisitioning agency who acted as inspectors for GPO had implied authority to act for the contracting officer on technical matters and that their instructions to the contractor resulted in a constructive change. *Pikes Peak Lithographing Co.*, GPOCAB 77-7 (October 6, 1978), slip op. On the other hand, this Board held that a GPO press sheet inspector had no implied authority "with respect to acceptance of the paper." *Graphic Litho*, GPOBCA 21-84 (February 4, 1985) slip op. at 20-21, 1985 WL 154850. In so holding, the Board relied on "a careful reading of the contract" to conclude that the inspector's job was simply to make a visual inspection which fell considerably short of what the Respondent was entitled to do to determine compliance with the specifications prior to acceptance. *Id.* at 20. Thus, what is ultimately dispositive here is whether the authority to bind the Government is an integral part of the duties assigned to the program operator.

The term contract awarded here tells the contractor that it is to do no work except that called for by print orders issued "by the Government" for "[i]tems to be furnished under this contract." That is, the contract, the document signed by the contracting officer, establishes the print orders as the contractual documents to which the contractor is to look for its specific production and delivery requirements. In other words, it is the print orders that give rise to specific contractual performance obligations and therefore, as recognized in the PPR definition of "contract," are themselves, in that sense, contracts. Under the PPR the GPO program operator is charged with administering and

processing print orders, including, for this contract, placing them with the contractor. Thus, it is clear that once a GPO term contract (other than a "direct-deal" contract, which is discussed below) has been awarded, the contracting officer's authority to order specific tasks of the contractor and to bind the Government to pay for that effort has been delegated to the program operator and it is from that official that the contractor receives its binding orders to perform.

Since the print orders are the mechanism through which the Respondent deals with the contractor when imposing specific production obligations on the contractor, and it is through the program operator that the print orders are issued[5], the program operator necessarily has the implied authority to specify what those obligations will be. See *D.W.S., Inc.*, ASBCA 29743, 93-1 BCA p 25,404. The Respondent, of course, could place express limitations on the program operator's authority, and indeed it has done so. Those limitations, however, which are set forth in the PPR, are themselves limited. First, the program operator is to determine that the print orders are within the scope of the contract and that the delivery schedule complies with the contract schedule. *Id.* at p 5.a.(1)(ii). Second, if the order submitted by the customer agency contains an item not included in the contract schedule of prices, the program operator is to obtain a price for the item from the contractor and if that price is determined to be fair and reasonable, the contracting officer is to modify the contract and the program operator is to then place the order. Thus, under the PPR the program operator may not issue a print order unless it is within the scope of the contract and consistent with the delivery schedule of the underlying contract, and may not include in the print order an item not priced in the original contract without first obtaining contracting officer approval and contract modification. Nothing in the PPR calls for the program operator to ensure that the print orders, with the exception of the delivery schedule, adhere precisely to the various contract specifications. By singling out only the delivery schedule from the contract specifications as having to be unchanged from the contract and identifying only the inclusion of an unpriced item as requiring contracting officer approval and contract modification, the PPR, under recognized principles of both statutory and contract interpretation, may be reasonably read as impliedly authorizing the program operator to issue print orders that do contain changes to the original contract specifications exclusive of those pertaining to the delivery schedule. See, e.g., *Supermex, Inc. v. United States*, 35 Fed. Cl. 29 (1996) (interpret so as to give effect to every word and clause and not render any provision meaningless or superfluous); *Henry J. Korpi*, ASBCA 6948, 61-1 BCA p 3,030 (failure to list an item when specifically referencing other items "would lead reasonably intelligent persons to conclude" that the unlisted item was not meant to be included).

The Board notes that the Respondent, when it wants to place express limits on the authority of those issuing print orders, has no difficulty in so doing. Certain term contracts awarded by the Respondent are "direct-deal" contracts, under which print orders are issued to the contractor directly by the customer agency, see *Swanson Printing Co.*, GPOBCA 27-94 and 27-94A (November 18, 1996. When "direct-deal" contracts are awarded, the Respondent explicitly informs the contractor in the award notification letter that while direct contact with the customer agency is authorized "for transmitting print orders," the "[r]epresentatives of the ordering agency do not have authority to alter or change the specifications, contract terms, or the print orders, once

issued." *Swanson Printing Co*., supra, at 34 (an agency's direct-deal authority "extends only to the placement of print orders and to the transmission of copy and proofs. . . . All other authority rests with GPO's Contracting Officers.") Thus, the contractor is explicitly placed on notice from the outset that the individual issuing the print orders is without authority to change the specifications and contract terms. In contrast, the award notification in this case advised the contractor that print orders would be transmitted by GPO, that direct contact with the customer agency was not authorized, that representatives of the ordering agency had no authority to change the specifications, and that changes requested by other than GPO "are without authority and shall have no force or effect unless confirmed in writing" by GPO. There is absolutely nothing in this letter that would alert the contractor to any limitation on the authority of the GPO official who would be issuing print orders.

Accordingly, the Board concludes that GPO's program operator had implied authority to change the contract specifications so long as the change did not involve the delivery schedule and was within the scope of the contract. The Board further concludes that the issuance of Print Orders 80003, 80004, 80005, and 80006 with the 4-1/2" center to center distance hole drilling requirement properly could be viewed by the Appellant as a constructive change to the contract since the two elements of a constructive change - a "change" and an "order," see Cibinic & Nash, Administration at 431 - are inherent in the print orders. That being so, the Appellant did not proceed improperly when it performed in accordance with those print orders. Consequently, the Respondent's direction to the Appellant to retrieve the publications it had furnished under the print orders and to correct them in accordance with the original contract specification was tantamount to another constructive change, see *Custom Printing Co.*, GPOBCA 28-94 (March 12, 1997), 1997 WL 742505, entitling the Appellant to an equitable adjustment to compensate it for the extra work it was directed to perform.

While the Appellant has requested $12,863.23, broken down by print order and by freight costs and labor, the Appellant has not met its burden to establish its entitlement to that amount as it has furnished no supporting documentation. Thus, the Board is unable to determine the reasonableness of either the total amount claimed or the amounts claimed under each print order. In *Custom Printing Co*., supra, the Board denied a claim for the costs incurred in performing certain extra work because no evidence was offered to support the claim. However, in another case where the contractor also failed to provide evidentiary support for the amount of its claim, the Board determined an equitable adjustment amount after noting the "undisputed fact" that the Respondent had ordered the contractor to do extra work and that it was "inescapable that the contract changes ordered . . . had some cost impact." *Universal Printing Co.*, GPOBCA 09-90 (June 22, 1994), 1994 WL 377586. In that case, both the contractor and the Respondent had staked out positions as to the monetary amount to which the contractor was entitled, and the Board was able to utilize a jury verdict approach to resolve the matter. Here, it is also inescapable that the extra work ordered by the Respondent had a cost impact, but there is no indication in the record that the Respondent has ever determined an amount to which the Appellant would be entitled. The record contains only a statement from the Contracting Officer, which pre-dates his final decision on this matter, that he had not determined the reasonablenesss of the amount claimed. Under the circumstances, the matter is remanded to the Contracting

Officer for a determination of a fair and reasonable equitable adjustment amount.

III. ORDER

The Contracting Officer's final decision is REVERSED, the appeal is SUSTAINED, and the matter is REMANDED to the Contracting Officer.

It is so Ordered.

HOF CONSTRUCTION, INC., Appellant,
v.
GENERAL SERVICES ADMINISTRATION, Respondent.

GSBCA No. 13,317, GSBCA No. 13,321, 96-2 BCA 28,406

HYATT, Board Judge.

Hof Construction, Inc. has appealed two contracting officer's final decisions, both issued on April 6, 1995, denying claims for equitable adjustments submitted by Hof on behalf of subcontractors. The appeals arise under a contract for architectural, mechanical, and electrical remodeling of portions of the basement and first floors of the U.S. Court and Customhouse in St. Louis, Missouri. The first appeal, GSBCA 13317, concerns a dispute over the number of labor hours for which the plumbing subcontractor, Feit Plumbing Co., Inc., seeks to be paid under a modification to the contract. GSBCA 13321 presents a dispute over charges for millwork and casework items furnished by subcontractor Classic Woodworking, Inc. for the remodeling of a judge's courtroom and chambers on the seventh floor of the courthouse. …

Findings of Fact

Background

1. Hof was awarded contract number GS06P-93-GY00309 for the conversion and renovation of portions of the basement and first floors of the U.S. Court and Customhouse in St. Louis, Missouri on April 20, 1993. The notice to proceed was issued on June 5, 1993. The basement portion of the work entailed conversion of vacant space to office space and a fitness center. The first floor work consisted of renovation of existing office space.

GSBCA 13317

2. On June 25, 1993, respondent, the General Services Administration (GSA), issued Proposal Request P-3 eliciting a price from Hof for all material and labor necessary to install a sewage pump and related electrical and piping components in the basement level. This proposal request also contemplated deletion of some of the plumbing work under the contract.

3. Hof submitted a price proposal, by letter dated July 9, 1993, setting forth amounts for work to be performed by Hof and two of its subcontractors. After a period of negotiations, Hof and one of its subcontractors, Kaemmerlen Electric, reached agreement with GSA on prices for their portions of the work added by Proposal Request P-3. Agreement could not be reached with Hof's other subcontractor, Feit proposed $27,785 for its part of the added work. On October 20, 1993, Proposal Request P-3 was issued as a unilateral change order, PC11, on a price-to-be-determined later basis not to exceed $34,387.93. The change order included bilaterally negotiated amounts of $4,402.93 for Hof Construction work and $2,200 for Kaemmerlen Electric work. The amount of $27,785 for Feit Plumbing work remained subject to negotiation.

4. Feit's portion of the work was completed on February 23, 1994. Eventually, Feit reduced the amount it sought from $27,785 to $19,073, and then to $18,700. Although Feit had agreed in negotiations that GSA should be able to deduct $1,063.26 for the deleted work, it did not reduce the amount of $18,700 to reflect this because of the inability of the parties to reach an agreement on the price of the added work.

5. Material costs, overhead, profit, and labor rates per hour are not in dispute. The only area of disagreement involves the number of hours worked. In support of its claim, on March 18, 1994, Feit submitted a breakdown of labor hours it states were incurred in performing the added work. The labor hours are set forth in three categories: 1) unloading and receiving materials at the shop, delivery to the site and unloading at the site (18 hours); 2) work on the job (118 hours); and 3) future adjustments and start up (7.5 hours), for a total of 143.5 hours. This list of who worked when and for how long is the only evidence Feit submitted to support its labor hour calculation. Feit has provided neither time sheets nor certified payroll information to support its claim, nor has it provided an explanation as to why such documentation might not be available.

6. The Government's records differ. GSA maintained its own Construction Engineer's Daily Diaries, reflecting progress on site, including on the work performed by Feit under Change Order PC11. Wayman Affidavit pp 9-10. These records have been supplied by GSA in support of its position. GSA's calculations for the amount owed Feit reflect that some 101 labor hours were incurred by Feit. GSA's documentation was created contemporaneously and supports its position that in some instances Feit Plumbing did not have labor on-site on the days it claims.

7. Since a negotiated price could not be agreed upon with Feit and because justification for the proposal of $27,785 was not received, the contracting officer unilaterally determined that Feit was due $15,330. The contracting officer thus concluded that the firm price settlement due Hof Construction for PC11 was $23,861.23 (15,330 + 2,200 + 4,402.93 + mark-ups of 10% and 1%).

8. In his affidavit, the contracting officer's representative sets forth a revised calculation of the change order amount due Feit and Hof, concluding that the total payment to Feit should have been $15,353.54 rather than $15,330. As a result, Feit is owed an additional $23.54 and Hof is owed its ten percent markup, which comes to $2.35, plus the one percent markup for bond premium, for a total of $26.15.

GSBCA 13321

9. The Government issued Proposal Request P-20 on April 29, 1994, seeking prices for the performance of added work required for the remodeling of a judge's office space. The contemplated additional work included electrical, mechanical, plumbing, painting, and woodworking components. Classic Woodworking, Inc.'s portion of the work encompassed providing and installing cabinet work, new bookshelves, a walnut door frame, a podium table, and a judge's shelf unit. To minimize disruption of court business, respondent wanted the work completed by June 6, 1994.

10. Because an agreement on price could not be reached in advance of performing the changed work, Change Order number PC-20 was issued on May 13, 1994, for all of the work on a price-to-be-determined later basis, with a price not to exceed $62,312.97. This unilateral change order was issued to permit work to proceed while appellant and its subcontractors refined their price proposals.

11. Thereafter, negotiations were conducted between Hof Construction and GSA personnel. During the period from May 13, 1994 through April 6, 1995, the contracting officer's representative met with Hof and its subcontractors in an effort to settle on the price of this change order. With the exception of Classic, Hof and its subcontractors cooperated in providing requested documentation to support claimed costs. On March 7, 1995, the parties agreed on prices for Hof and all subcontractors except Classic.

12. Agreement could not be reached with Classic, which continued to claim the amount of $29,506 for its portion of P-20 work, plus markups for Hof of $3,276, for a total of $32,782. The only documentation provided by Classic in the record is 1) an invoice addressed to Hof, dated June 6, 1994, seeking total costs of $29,506.29[5], 2) a letter dated September 2, 1994, stating that Classic's overhead rate is 38%; and 3) a letter dated May 1, 1994 setting forth hourly fringe benefits for Classic's employees.

13. Classic did not respond to requests for backup documentation or otherwise provide justification for its claimed costs of $29,506. After Classic failed to show up at a meeting scheduled for only GSA and Classic, the contracting officer concluded that this dispute could not be settled and unilaterally determined that the amount due for Classic's work was $20,935. That determination was based on the Government's estimate of the cost to complete the Classic portion of the work. This amount included applicable mark-ups for Hof. The contracting officer's decision was issued on April 6, 1995.

14. In its notice of appeal, Hof states that it was informed that Classic had had previous dealings with the United States District Court, which recommended that Hof Construction have Classic provide the millwork and casework for the change proposal in question. In addition, Hof notes that the project needed to be completed in a short time frame, which did not permit the usual process of agreeing to a firm-fixed price in advance of performing the work.

15. The notice of appeal filed by Hof seeks the difference between the amount submitted by Classic in its invoice dated June 6, 1994, and the amount the GSA unilaterally determined was due Classic for this project. Additionally, Hof Construction requests its mark-up and additional bond premium.

Discussion

The issue presented by both of these appeals is the proper amount of the equitable adjustment due to the subcontractor for performance of additional work. The proper measure of an equitable adjustment in general is the actual cost impact on the contractor, so long as those costs are reasonable. See, e.g., *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963); *Plaza Maya Limited Partnership*, GSBCA 9086, 91-1 BCA p 23,425, at 117,501 (1990). The contractor bears the burden of proving the amount of any upward adjustments it may be due for added or changed work; the Government bears the burden of proving the proper amount of a claimed downward adjustment. *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971).

GSBCA 13317

Hof's subcontractor, Feit Plumbing, claims that the cost to it of performing the additional work in installing the sewage ejection system under change order PC11 was

$18,700. The contracting officer, based on the information available, unilaterally determined that the cost to Feit was $15,330. Hof seeks to recover, in this appeal, the difference - or $3,370 - plus its ten percent markup and one percent bond premium, in the amount of $374, for a total of $3,744.

Appellant contends that Feit Plumbing incurred a total of 143.5 labor hours under Proposal P-3. The only evidence appellant has offered to support this allegation is a one page handwritten list of the days and numbers Feit worked. Feit submitted this list three weeks after it had completed its work. Neither Hof nor Feit has submitted time sheets and certified payrolls to support its claim, nor has appellant or Feit offered any reason for the failure to introduce actual cost data.

Respondent, in contrast, has submitted daily logs supporting its allegations that Feit was not working at the site on all of the days for which it alleges time was spent performing the changed work. These logs were created contemporaneously, in contrast to the one page summary document that Feit has submitted. The preferred method for proving a contractor's claim is through the introduction of actual cost data such as time sheets or payroll records, if available. See, e.g., *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 882 (Fed. Cir. 1991); *Cen-Vi-Ro of Texas v. United States*, 210 Ct. Cl. 684, 685 (1976); *Delco Electronics Corp. v. United States*, 17 Cl. Ct. 302, 303, 321 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); *Labco Construction, Inc.*, AGBCA 90-115-1, 94-2 BCA p 26,910, at 133,999. In the absence of an explanation for the failure or inability to produce records substantiating the actual labor hours incurred, the Government's contemporaneous records and the sworn testimony of its employee are more persuasive. Since appellant's subcontractor has submitted only a one-page summary document which is not substantiated by contemporaneous records or by detailed sworn statements of its employees, the burden to prove by a preponderance of the evidence its entitlement to the additional monies claimed has not been met. See *Griffin Services, Inc.*, GSBCA 11171, 92-1 BCA p 24,556, at 122,534 (1991). Thus, this appeal must be denied except to the extent that the Government concedes that an additional payment of $26.15 is owed to appellant. See *Universal Development Corp. v. General Services Administration*, GSBCA 11251, 93-1 BCA p 25,425, at 126,640 (1992).

GSBCA 13321

Hof seeks the difference between the amount submitted by Classic in its invoice dated June 6, 1994, and the amount the GSA unilaterally determined was due Classic for this project. Additionally, Hof Construction requests its mark-up of ten percent plus an additional one percent for bond premium. Neither Hof nor Classic, however, has furnished documentation to meet the minimum requirements of the contract or to otherwise satisfy a contractor's burden to demonstrate the actual cost incurred in performance of added work. Classic has provided only an "invoice" that was created before completing the work, a letter stating that Classic's overhead rate is 38%, and a letter describing employee benefits. Classic has failed to submit any evidence, such as payroll records, receipts for materials, or time sheets of its employees that would demonstrate the actual costs incurred in performing the work as required under the terms of the contract. Nor has it explained why such evidence might not be available. Nor has Classic provided an affidavit with detailed sworn testimony of a knowledgeable employee to support the claimed costs.

The claimant bears "the burden of proving the amount of loss with sufficient certainty so that the determination of damages will be more than mere speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 823, 831 (Ct. Cl. 1961), cert. denied, 370 U.S. 903 (1962). The most convincing evidence to prove costs incurred would come from contemporaneous reports routinely prepared as the effort was expended. See *KRW, Inc.*, DOT BCA 2572, 94-1 BCA p 26,435, at 131,537 (1993). Here, appellant and its subcontractor have done nothing more than allege entitlement to the estimated amount originally requested by Classic in response to Proposal Request P-20. Appellant must prove its entitlement to any amount greater than that allowed by the contracting officer. Mere unsupported allegations are insufficient to prove the amount of a claim. *B.F. Carvin Construction Co. v. General Services Administration*, GSBCA 12770, et al., 95-1 BCA p 27,445, at 136,737; *Indelsa*, S.A., ENG BCA PCC-117, 95-2 BCA p 137,771, at 137,775; *Anchor Fabricators, Inc.*, ASBCA 42022, 94-2 BCA p 26,659, at 132,638; *Monoko, Inc.*, ASBCA 46283, 94-1 BCA p 26,570, at 132,215 (1993). Because Hof and Classic have not provided evidence of the actual costs incurred in performing the added work, there is no basis to award any amount over and above what the contracting officer concluded was due for this work in the decision dated April 6, 1995.

Decision

GSBCA 13317 is GRANTED IN PART to the extent stated above; GSBCA 13321 is DENIED.

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APPEAL OF TOTEM CONSTRUCTION CO.
ASBCA No. 35,985, 91-1 BCA 23,585
November 30, 1990

OPINION BY ADMINISTRATIVE JUDGE ELMORE

Totem Construction Co. ('Totem' or 'appellant') appealed the contracting officer's ('CO') failure to issue a final decision on its claim, filed on behalf of its demolition, grading and paving subcontractor, Loren Construction Corporation ('Loren'), for an equitable adjustment of $47,850.75, with interest, for (1) unsuitable subsurface soil conditions, * * * * *

The parties offered evidence at a one day hearing. Each party submitted post-hearing and reply briefs. The record consists of the appeal (R4) file, appellant's 'Rule 4' (AR4) file, Government (G) and appellant (A) exhibits. Only entitlement is to be decided (tr. 11-12).

FINDINGS OF FACT

GENERAL

1. Totem was awarded contract No. DACA09-85-C-0125 on 27 September 1985, and on 23 October 1985 it acknowledged receipt of the 21 October Notice to Proceed, to construct a fire station at Luke Air Force Base ('Luke') at a cost of $1,978,379 (R4, tabs 2, 9, 11). Totem's contract, in part, called for the demolition and removal of hangar buildings 448 and 455, including the concrete foundations and surrounding pavement, as noted in the contract documents (R4, tabs 6, Demolition Notes 1-5, 7; tr. 33-35).

2. The contract incorporated by reference the following Federal Acquisition Regulation ('FAR') clauses (R4, tab 2): 52.233-1, DISPUTES; 52.236-2, DIFFERING SITE CONDITIONS; 52.243-4, CHANGES; and 52.246-12, INSPECTION OF CONSTRUCTION.

3. FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) clause provided in pertinent part:

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) 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 shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contact modified in writing accordingly.

4. Specification, SECTION 2B, GRADING (EARTHWORK), subparagraph 8, COMPACTION, in pertinent part, stated

> 8.1 Other Than Paved Areas: Each layer of the fill or embankment shal[l] be compacted to at least 95 percent of laboratory [3/] maximum density.

5. Specification SECTION 2C, EXCAVATION, FILLING AND BACKFILLING FOR BUILDINGS, subparagraph 5, EXCAVATION, in pertinent part, stated:

> 5.1 General: . . . Unsatisfactory material encountered below the grades shown shall be removed as directed and replaced with the satisfactory material (payment therefor will be made in conformance with the CHANGES clause of the GENERAL PROVISIONS). Satisfactory material removed from below the depths indicated without specific direction of the Contracting Officer shall be replaced at no additional cost to the Government to the indicated excavation grade with satisfactory materials, except that concrete footings shall be increased in thickness to the bottom of the over depth excavation and over-break in rock excavation. Satisfactory material shall be placed and compacted as specified in paragraph FILLING AND SUBGRADE PREPARATION. Determination of elevations and measurements of approved over depth excavation of unsatisfactory material below grade indicated shall be done under the direction of the Contracting Officer.
>
> 5.2 DRAINAGE: Excavation shall be performed so that the area of the site and the area immediately surrounding the site and affecting operations at the site will be continually and effectively drained. Water shall not be permitted to accumulate in crawl space areas and in the excavation. The excavation shall be drained by pumpin[g] or other satisfactory methods to prevent softening of the foundation bottom, undercutting of footings, or other actions detrimental to proper construction procedures.

6. Drawing sheet D-7, BORING LOGS, apprised prospective bidders that five borings, were made at or in the near proximity of the existing hangars' building line and the prospective new building. Although we are unable to determine the elevation to which appellant was to dig from the documents provided, boring logs specified only the thickness of the existing hangar buildings' concrete slabs, which were to be demolished, and removed. Boring logs described the condition and composition of the material found at noted depths and used the descriptive terms 'DAMP' or 'MOIST' to address the material's wetness. Boring log, made in 1982, noted the composition of soil but included a column entitled 'MC', 'FIELD MOISTURE CONTENT IN PERCENT OF DRY WEIGHT', listing the moisture content in percentages to a depth of 13 feet and, thereafter, by the term 'DAMP'.

UNSUITABLE SUBSURFACE SOIL CONDITIONS CLAIM

7. Loren's President, Mr. Kendall Walker, prior to submitting a bid to Totem, made a site visit but was unable to determine the condition of the soil under the pavement and foundations. Loren expected to encounter 'dry' or 'moist' soil because Luke is in the

desert. In October 1985 Totem subcontracted to Loren the demolition, paving and grading portion of the contract. Bud's Crane Services ('BCS' or 'BCS Enterprises') was subcontracted by Loren to perform the demolition portion, which included the demolition and removal of the hangars and foundations, and the pavement. Loren would perform grading and paving.

8. Approximately on 18 November 1985 BCS completed demolition of the first hangar building and commenced demolition of the concrete slab, pavement, and the second hangar building. BCS completed demolition approximately on 5 December and approximately on 8 December Loren began grading the site.

9. Upon removing the concrete foundation and pavement appellant described the soil as being 'quite wet', 'totally saturated', 'a mud bog', unable to support BCS's loader being used to remove the concrete and pavement. Appellant alleged the wheels of the equipment, used to remove the concrete and for landscape grading, would sink 'two, three, four feet'. The Government, supported by photographs of the demolition site dated 20 November 1985 depicting tire tracks at a maximum depth of 'five to six inches, varying down to none in areas', disputed this contention. Appellant has failed to provide evidence sufficient to establish that the condition of the soil was as described by it. (

10. Mr. Walker, in a sworn affidavit dated 5 April 1988, stated his reliance upon the 'contract plans and the soil information represented therein' led him to anticipate encountering soil which was 'at most, damp or moist.' During the hearing Mr. Walker recanted, in part, his sworn statement and testified that he relied very little on the information provided in boring log, column line MC, or the descriptive term 'damp' because he considered the boring to be 'at the very extreme edge of that site' and not 'under where the [new] building went.'

11. Appellant neither provided evidence of what it understood moist, as used in the boring logs, to mean nor did appellant make inquiry of the Government, prior to bidding, of what the terms moist and/or damp meant.

12. During November and December, when the demolition phase of the contract was ongoing, the climatological reports recorded the following:

MONTH/DAY	INCHES OF RAIN
November 12	.43
25	.90
26	.21
29	.27
30	.01
December 11	.88

13. Although 40 to 50 percent of the pavement and foundations had been removed, exposing the soil to the elements, prior to 25 November 1985, Loren took no precautions to protect the exposed soil from the November 25 rainfall.

14. The first written notice regarding the wet and muddy condition was not made until 19 December 1985. Although Mr. Walker testified he continually complained to the Government inspectors and supervisors making daily visits to the site about the wet soil, the Government maintains that the condition complained of resulted from the appellant's improper use of its equipment and failure to protect the site from rain.

15. Foree & Vann, Inc. ('F&V'), hired by appellant in late November 1985 to ascertain the moisture content of the soil, conducted tests on 6 and 24 December 1985, the results of which were that the soil's moisture content ranged from 1.9 to 9.8 percent above the optimum moisture content.

16. F&V's president, Mr. Daniel Foree, testified that although the soil he tested was 'saturated' he could not state what caused it or when. Mr. Foree conceded 'it was anybody's guess what [moist and damp] meant,' and that equipment running over the exposed soil, rain, ponding, and water soaking through the asphalt cracks were all factors which 'could have attributed' to the soils 'saturated condition'.

17. Mr. Edward Ketchum, the Corps of Engineers' Chief of the Military Unit, Soil Design section, testified that at Luke you 'normally' expected to encounter dry material but that you 'can expect the materials underneath [a pavement] to have a higher than normal moisture content'. He described the levels of moisture content at Luke as 'dry, damp, moist, or saturated' and 'optimum moisture content' between '9 and 12 percent'. In Mr. Ketchum's opinion soils at Luke with 16 to 19 percent moisture content are considered 'moist'; that to have saturation at Luke the soil's moisture content had to be somewhere above 19 percent; that the material depicted in 24 December 1985 photos, which was originally under the pavement, was only 'moist' but 'real heavy' construction equipment would have a 'tendency to over stress it '.

18. The Government neither took borings of the material under the concrete foundation and pavement nor performed laboratory tests on the material removed during the borings that were done. The contract documents did not define the percentages of moisture, which were encompassed by the terms dry, damp, moist, and saturated.

19. Appellant experienced rain run-off from the airplane parking apron bordering the excavation site. In like manner, the base fire station bordered the southwest corner of the excavation and the water run-off from washing of fire vehicles went onto the appellant's work area. Totem's allegation that the fire hydrant adjacent to the fire station was being left running all night was denied by the station personnel and substantial proof on the issue is lacking.

20. By letter dated 18 December 1985 Loren informed Totem that 'due to the very wet conditions at the site' which it called a 'latent site condition and not due to the recent rains,' it shut down the project at 11:30 A.M.

21. By letter dated 19 December 1985 Totem informed Mr. James Lafrenaye, the contracting officer's representative ('COR'), as well as the resident engineer, that 'due to latent earth conditions' site work was being discontinued. The COR's response, dated 27 December, admitted that '[r]ecent excavations to 5' below grade indicated moisture content above optimum, but did not conclusively indicate the material was unsuitable' and, continuing, stated:

> I feel the difficulty encountered in working the site were [sic] due to your failure to protect the site during recent rains. Your contract,

> section 2B, 'grading' Para. 3 'excavation', requires you to do so. Further, this section requires all unsatisfactory material within the excavation limits to be removed and replaced at contractors [sic] expense.
>
> You are directed to proceed with the work. Failure to do so can be considered abandonment on your part and could result in termination of your contract.

22. By letter dated 10 November 1986, Totem filed a claim on behalf of Loren seeking an equitable adjustment of $41,344.86 for having to replace excavated material, in compliance with the COR's order to proceed with the work. The appellant contends that the boring logs' description of the soil as 'damp' or 'moist' led it to believe that it could be used as fill during the construction. However, when during demolition the material was allegedly found to be 'saturated,' appellant contends this amounted to a differing site condition and it was entitled to the cost it incurred in removing and replacing the existing material with new material.

23. On 12 November 1987 Totem appealed from the contracting officer's failure to issue a decision on its claim for an equitable adjustment for the soil conditions encountered to the Armed Services Board of Contract Appeals ('Board ').

DECISION

The DIFFERING SITE CONDITIONS clause recognizes two types of differing site conditions. Type I is described as 'subsurface or latent physical conditions at the site differing materially from those indicated in this contract.' Type II differing site condition, involves 'unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.'

Appellant, to prevail on a claim for an equitable adjustment for a Type I differing site condition claim, must prove, by a preponderance of the evidence, the following six indispensable fundamental elements: 1) the contract documents affirmatively indicate the subsurface conditions forming the basis for the claim; 2) the contractor must have acted as a reasonable and prudent contractor in interpreting the contract documents; 3) the contractor must have relied on the indications of the subsurface conditions in the contract; 4) the subsurface conditions actually encountered at the contract site must materially differ from the contract document indications of conditions at the site; 5) the actual conditions encountered must have been reasonably unforeseeable; and 6) the cost claimed must be solely attributable to materially different subsurface conditions. *Weeks Dredging & Contracting Inc. v. United States*, 13 Cl.Ct. 193 (1987); aff'd, 861 F.2d 728 (Fed. Cir. 1988).

Success in Totem's case turns on its ability to prove the subsurface conditions encountered were materially different from those indicated in the contract documents. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913 (Fed. Cir. 1984). There is no dispute that the borings address the nature and character of the soils to be encountered. In like manner it is undisputed that the borings defined the soil's wetness as moist or damp. However, we are unable to agree with appellant that the Government's use of the terms moist and damp amount to an 'indication' that the soil would be usable for fill. As the court held in *P.J. Maffei*:

> While it is true that a contract 'indication' need not be explicit or specific, the contract documents must still provide sufficient grounds to justify a bidder's expectation of latent conditions materially different from those actually encountered. *Foster Construction* [*C.A and Williams Brothers Company v. United States*, 435 F.2d 873 (Ct.Cl. 1970)] at 875. '[T]here must be reasonably plain or positive indications in the bid documents that such subsurface conditions would be otherwise than actually found in contract performance . . . .' *Pacific Alaska Contractors, Inc. v. United States*, 436 F.2d 461, 469 (Ct.Cl. 1971).

The contract specifications require that the fill be compacted to at least 95 percent of laboratory density. Appellant's ability to meet this requirement required that it have knowledge of the percent of moisture contained in the soil and the terms moist and damp are not sufficient for this purpose. It is painfully clear that appellant's differing site condition claim as to the usability of the soil for fill was based, not on clear contract indications, but upon independent assumptions for which only it, as the maker of these assumptions, must bear final responsibility. See, *Weeks Dredging*, supra, at 223.

We now turn to the question of whether appellant has established entitlement to a Type II differing site condition. To succeed in a Type II claim, a claimant 'must establish that the conditions encountered were unexpectedly and materially peculiar in nature from the conditions anticipated and perceived as intrinsic in common contract interpretation.' *Spirit Leveling Contractors v. United States*, 19 Cl.Ct. 84, 95 (1989). In establishing a Type II claim the claimant carries a heavier burden since there is a greater duty to conduct pre-bid inquiries or reasonable site inspections inasmuch as recovery is available only if the condition is unknown, which means it would not have been revealed upon inquiry or during a reasonable site investigation. *Huntington Construction, Inc.*, ASBCA No. 33526, 89-3 BCA par. 22,150.

The premise under which appellant could recover under a Type II differing site condition is to prove that the physical condition was both unknown and unusual, which was not done. It is undisputed that it is not unusual for the percentage of moisture in material found under a pavement to be higher than that found when there is no covering. Appellant's claim fails under a Type II analysis as well.

* * * * *

CHANGES PROBLEM

ABC was awarded a contract to replace steam lines at a major installation. The government did not show all necessary valves on the drawings attached to the contract. Upon beginning work, ABC found that there were more valves than were shown on the drawings. The site visit consisted of looking down manholes, because lines that were to be replaced were leaky, and safety concerns dictated that no one could enter the area; service requirements on the other hand dictated that the steam only be unavailable for a short time, so the system could not be shut down. Although drawings did not show all valves, the solicitation required "replacement of all valves." While installing the replacement pipe, a government inspector directed some of the contractor's workers to add a line to feed a separate area of the building; the inspector thought that this work was included in the contract, and that he was simply clarifying what the workers needed to be doing. It was not included in the contract. ABC's superintendent discovered this new line when it was half completed, told the workers to discontinue work, and asked the government for direction. He was told to work on other areas pending further guidance. ABC had its workers do what work could be done, and then asked for further direction, and, after two weeks, was given a change order to add the line, increasing the amount of needed pipe by 20 sections. The original contract required 100 sections. Discuss the government's liability, indicating the various theories of recovery available to the contractor.

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CHAPTER TWELVE CASES

INDUSTRIAL TECTONICS BEARINGS CORPORATION, Plaintiff,
v.
The UNITED STATES, Defendant.
No. 97-767.
44 Fed.Cl. 115 (1999)

OPINION AND ORDER

HEWITT, Judge

This case is before the court on Plaintiff's Motion for Summary Judgment of Entitlement and Defendant's Cross-Motion for Summary Judgment. Plaintiff claims that it is entitled to recover its incurred costs for work-in-process inventory in a termination for convenience settlement. Defendant argues that plaintiff/contractor's disposal of its inventory of work-in-process without the government's permission bars recovery by the contractor of its incurred costs. For the following reasons, plaintiff's motion is GRANTED in part and otherwise DENIED. The defendant's motion is DENIED.

I. BACKGROUND

Plaintiff, Industrial Tectonics Bearings Corporation ("ITB" or "plaintiff") manufactures bearings and related products, including bearing retainers. ITB entered into a contract with the government (sometimes also referred to as "defendant" or "the Navy") in January 1989 to produce, among other items, three types of steel bearing retainers. The contract was partially terminated by the government in May of 1991 as to two of the three types of steel bearing retainers pursuant to a Termination for Convenience clause in the contract. The validity of the termination itself is not at issue. This dispute arises out of the alleged failure of the contractor to discharge its responsibilities under a valid termination.

The contracting officer, pursuant to FAR regulations, issued Modification P00005 (the "Modification") to inform ITB of its post-termination responsibilities. Plaintiff disputes the government's characterization of Modification P00005, particularly that the Modification "clearly delineat[ed] ITB's responsibilities for its inventory." Subsection (c) of the Modification, entitled "Termination Inventory," contained the following directions: (1) As instructed by the Contracting Officer, transfer title and deliver to the Government all termination inventory of the following types or classes, including subcontractor termination inventory that you have the right to take: NONE

(Contracting officer insert proper identification above or "None") (2) To settle your proposal, it will be necessary to establish that all prime and subcontractor termination inventory has been properly accounted for. For detailed information, see FAR 45.

There are several factual disputes regarding the resulting settlement discussions between ITB and the termination contracting officer (TCO). Nonetheless, the only factual issue relevant to Plaintiff's Motion for Summary Judgment of Entitlement is the status of the work-in-process inventory.

The status of the work-in-process inventory first became an issue when during the plant clearance officer's inspection; ITB could not locate the inventory. According to ITB,

its employees threw the inventory away as scrap. The government does not dispute that the inventory was "lost or discarded." The government also notes that the inventory was discarded without the government's approval as required by Part 45 of the FAR.

On March 30, 1994, the TCO issued a unilateral determination denying all the amounts ITB had claimed as incurred costs for work-in-process. The TCO's determination letter gave the following reasons for the denial: The modification notified ITI that to settle its proposal, it would be necessary to establish that all termination inventory had been properly accounted for in accordance with FAR Part 45. FAR 45.603 states that the government may require delivery of any contractor inventory.... Although ITI's invoices support expenditures in the amount of $52,469 for material and tooling, the inventory to substantiate these expenditures as allocable to the terminated portion of the contract could not be located. FAR 49.204 requires that the fair value of termination inventory that is destroyed, lost, or stolen prior to delivery to the government be deducted from the amount payable in the termination settlement. The Armed Services Board of Contract Appeals has held that a contractor is not entitled to compensation for materials purchased for use on a contract that was terminated for convenience when the materials could not be located. Acme Coppersmithing & Machine Co., 4473, 5017, 59-1 B.C.A. (CCH) 2136, 59-2 B.C.A. (CCH) 2314 (1959).

In January 1995, ITB requested that its October 4, 1991 termination settlement proposal be converted into a claim under the Contract Disputes Act.

Around August 1995, the Defense Contract Audit Agency (DCAA) conducted an audit of ITB's termination settlement proposal. The DCAA reported that ITB's incurred costs of performing the terminated work totaled $215,970. The audit report took exception to $4,275 of ITB's proposed settlement of $95,475 and verified that the total of ITB's costs minus loss adjustment was $91,182. The DCAA qualified ITB's entire report "because all the physical inventory items are missing."

On March 10, 1997, the TCO issued a final decision on the claim, allowing $3,644 in settlement expenses but otherwise denying all costs incurred. The final decision contained the following explanation of the denial of work-in-process costs:

Discussion of Final Decision: a. Work-in-Process: The proposed costs for this expense are disallowed in totality on the basis that the Contractor failed to comply with the termination modification P00005 dated 1 May 1991 which notified ITB that it would be necessary to establish that all termination inventory had been properly accounted for in accordance with FAR Part 45. FAR 45.603 states that the Government may require the delivery of any contractor inventory. FAR 49.204 requires that the fair value of termination inventory that is destroyed, lost, or stolen prior to delivery to the government be deducted from the amount payable to the termination settlement. b. Other Costs: These costs are disallowed on the basis that this expenditure is directly related to the Work-in-Process expense. Without support for the Work-in-Process, it is impossible to support the proposed Other Costs.

II. DISCUSSION

A. Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." RCFC 56(c); …

In the narrow scope of Plaintiff's Motion for Summary Judgment of Entitlement, the only factual issue that is material is the fate of the work-in-process inventory. Because both parties agree that the work-in-process inventory was either "lost or discarded," the remaining dispute on the relevant law is appropriate for summary judgment.

B. Fair Value of Missing Inventory

Missing termination inventory is not uncommon in supply contracts. There are two FAR provisions on the subject. The Termination for Convenience clause itself provides: "Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (f) above, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer." FAR § 52.249-2(h). The FAR also provides that the amount payable to the contractor under a settlement shall be reduced by: "[t]he fair value, as determined by the TCO, of any part of the termination inventory that, before transfer of title to the Government or to a buyer under part 45, is destroyed, lost, stolen, or so damaged as to become undeliverable...." FAR § 49.204(b).

These FAR provisions make clear the loss of inventory generally results in the deduction of its "fair value" from the entire cost figure payable to the contractor. At issue here is the meaning of "fair value."

According to the government, the "fair value" of undelivered inventory, is the amount sought by the contractor for reimbursement in the settlement proposal. Consequently, the amount that should be deducted, i.e., the "fair value," is equal to ITB's full claim in its settlement proposal. The government argues that, because the Termination for Convenience clause places the risk of loss of termination inventory upon the contractor, it is not enough for the contractor to prove that it has incurred costs. The contractor must deliver the work-in-process in order to be reimbursed for its costs.

In contrast, ITB argues that the term "fair value" has consistently been interpreted to mean "fair market value." ITB finds support for a "fair market value" rule in governing principles of cost reimbursement and "the general principle that the contractor should be compensated fairly for the work terminated," articulated by this court in Best Foam Fabricators, Inc. v. United States, 38 Fed.Cl. 627, 638 (1997) (setting out the cost reimbursement principles that control when the government terminates for convenience).

The key case in support of the government's view is the 1960 Armed Services Board of Contract Appeals case cited by the TCO. Atlas Can Corp., ASBCA No. 3381, 60-1 B.C.A. (CCH) (1960. With no discussion, the Board in Atlas denied all costs and reasonable profit related to the cost of inventory because the loss was not the result of normal spoilage, nor had the Government assumed the risk of loss. Atlas Can Corp., ASBCA No. 3381, 60-1 B.C.A. P 2651. It held, citing earlier Board opinions, that "to the extent that the claim includes amounts for undeliverable inventory it must be, and is disallowed." The difficulty with the Atlas precedent is that the Board, without explanation, declined to use what, by that time, had become the "universally accepted" approach to the reimbursement of contractors when termination inventory was missing. See Bolinders Co., ASBCA No. 5740, 60-2 B.C.A. (CCH) P 2746 (1960).

In Bolinders, the Board decided that the "fair value" was equivalent to the amount claimed in the settlement proposal. This case appears to support the government's

position regarding the definition of fair value. However, the Bolinders court justified its decision on evidence that caused it to question the good faith of contractor's claim that the termination inventory was missing. … [I]t found that in light of the suspected fate of the inventory, to allow the contractor to recover any amount could result in a double recovery for the contractor.

Unlike the contractor in Bolinders, there is no suggestion that ITB has in any way profited from the sale of or use of the termination inventory. In fact, the fate of the termination inventory is not in dispute. ITB employees threw it away.

Similarly, the government's reliance on Lisbon Contractors, Inc. v. U.S., 828 F.2d 759 (Fed.Cir.1987) is misplaced. … In Lisbon … the contractor offered no evidence to explain what happened to the materials claimed in the settlement proposal to have been purchased for the job. The Federal Circuit found that the contractor must prove "that the materials were not kept by the contractor or sold." Finding that the contractor had not in fact met this burden, the Court stated, "a [contractor] cannot recover simply by pleading ignorance of the fate of those materials." There is no suggestion here that ITB either kept the work-in-process, sold it, or otherwise used the materials to its benefit. Absent fraudulent conduct or conduct grossly in disregard of its contractual obligations, the authorities do not require that all incurred costs and reasonable profit be denied the contractor. See … John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts 1118 (3d ed. 1995) ("Allowable costs include those costs incurred in producing defective material ... as long as the amount of defective material is not unreasonable.").

We note that our view of the treatment of missing inventory in this case does not dispose of all contested issues. For example, the amount of the fair market value remains in dispute. [FN6] Other areas of controversy are discussed above at note 1.

III. Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment of Entitlement is GRANTED to the extent that, if plaintiff is otherwise entitled to recovery, calculations of plaintiff's recovery shall reflect the cost of its work-in-process inventory less its fair market value. Plaintiff's Motion for Summary Judgment of Entitlement is otherwise DENIED. Defendant's Cross-Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

APPEAL OF THE SWANSON GROUP, INC.
ASBCA No. 44664
November 7, 1997

OPINION BY ADMINISTRATIVE JUDGE GROSSBAUM

This dispute arises under a contract to provide armed security guard services at the naval shipyard in Long Beach, California. The appeal was taken from a contracting officer's decision terminating the contract for default three days after issuing a cure notice.

FINDINGS OF FACT

1. In March 1991 the Western Division of the Naval Facilities Engineering Command (NAVFAC) issued an invitation for bids (IFB) for providing security guard services at the Long Beach Naval Shipyard (LBNSY). ****

3. The IFB and resulting contract required the contractor to provide at least one armed guard at approximately 18 designated gates or posts, the locations of which were shown on a map of the shipyard included with the IFB. One post (Gate 3) required guards only two days per week, while guards were required at the other posts either five or seven days per week. The hours of required guard services varied from eight to 24 hours each day and the contract also required some of the gates/posts to have from one to six extra guards posted for traffic control during specified peak traffic hours.

4. Special conditions in the IFB and resulting contract provided for a phase-in period "commencing 60 days prior to contract start date" to enable the contractor to plan, estimate and procure material. The special provisions also required the contractor to procure and maintain specified liability and workmen's compensation insurance coverage. In addition, the contractor was required to arm its guards with .45 caliber semiautomatic pistols and assure that each guard was licensed by the State of California and that they carried required state patrol person registration and firearms permits for the .45 caliber pistol while on duty.

5. The contractor was responsible for staffing its guard force and determining the working schedule for each guard to satisfy the requirements for manning designated gates/posts at specified times. Special provision H-32, Schedule of Work, required the contractor to submit to the contracting officer within five days after award "guard/post schedules ... indicat[ing] the date, day or days of the week, hours and guard/post assignment of each employee." The contractor was also required to provide a copy of the working schedule, and any changes, to the contracting officer at least seventy-two hours prior to the start of each schedule period. No provision of the contract prescribed either the minimum numbers of guards in the contractor's guard force nor the maximum numbers of hours each guard could work. Nor did the contract specify a minimum number or maximum duration of guard shifts.

6. The contract general provisions incorporated the Default (Fixed-price supply and service) (APR 1984) clause prescribed by FAR 52.249-08. This clause provided, in part:

> (a)(1) The Government may,... by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

7. Section E, Inspection and Acceptance, in the IFB and resulting contract schedule included the FAR 52.246-4 Inspection of Services - Fixed price (APR 1984) clause, which provided, in part:

d. 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 the 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.

e. 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 Contractor any cost incurred by Government that is directly related to the performance of such service or (2) terminate the contract for default. *****

9. On 20 December 1991 the Navy awarded the captioned contract to appellant, The Swanson Group, Inc. (Swanson), to provide guard services at LBNSY at the firm fixed price of $2,441,492.70 for a basic one year term. The contract also provided for an additional three option years. Shortly after award, contract administration responsibilities were transferred to NAVFAC's Southwestern Division in San Diego, California.

10. During pre-performance meetings held in January 1992, the Government advised Swanson that work would commence on 1 March 1992 and authorized the immediate start of phase-in work. The parties understood that the contract would expire at the end of its basic term on 30 September 1992, unless the option to extend performance was exercised. After the pre-performance meetings Swanson began attempting to "gear up for the contract." Among other things, appellant started interviewing applicants for guard positions, including several of the Government's ISF guards.

11. From the beginning of the contract, appellant had problems with both its document submittals and its efforts to hire qualified guards. By the end of January 1992 the Government informed appellant that nine required submittals were past due, including the required certificate of insurance, and that six of its submittals were considered unacceptable. Meanwhile, although appellant had been under the impression it would

be able to take over a "ready-made guard force," comprising 90 to 100 trained ISF guards possessing California licenses, appellant learned in early 1992 that some of the LBNSY employees had state licenses and some of them did not. Moreover, few of the ISF guards had permits for .45 caliber weapons.

12. By letter dated 3 February 1992, appellant informed the contracting officer that it learned there was a three-month backlog in processing state licenses for armed guards. Appellant recommended that the Government consider either using unarmed guards while applicants' licenses were being processed or permit using guards armed with .38 caliber revolvers, rather than .45s, to facilitate the speedy hiring of enough guard force personnel. The Navy denied both these alternative requests.

13. On 5 February 1992 the contracting officer issued a "cure notice" to Swanson. The notice advised appellant that its failure to furnish a properly executed insurance certificate was considered a condition endangering performance of the contract and warned that the contract might be terminated for default if the condition was not cured within 10 days. Appellant filed an executed certificate of insurance dated "2-6-92," but this submission was not approved because of several discrepancies, including the failure to indicate workmen's compensation coverage.

14. Appellant submitted several separate letters concerning contract performance, each dated 15 February 1992. One of these letters informed the Government that Swanson estimated it would start the contract with 64 employees and expected to bring its total guard force up to at least 85 employees. The letter enclosed a roster of employees, along with a listing of each guard's licenses and permits.

15. By delinquency letter dated 18 February 1992, the Government invited appellant to present facts bearing on whether the contract should be terminated for default because of approximately 11 overdue submittals. According to the letter, delinquent submittals included the required schedule of deductions, employee roster, permits and licenses, and insurance certificate. Appellant's 25 and 26 February 1992 replies informed the Government that all of the documents referred to in the show cause notice had already been submitted, with the exception of the workmen's compensation insurance certificate, and requested approval of its submittals. Appellant also asserted that any alleged delinquencies arose from causes beyond its control and without its fault or negligence.

16. In a letter dated 27 February 1992, the contracting officer advised appellant that he had approved four of the submittals but that eight other submittals, including firearms permits and work schedules, were found to be unacceptable. The letter also noted that the required insurance certificate and staffing chart remained delinquent. The Government reminded appellant that it could not commence work prior to submitting proper proof of insurance and approval of its work schedule, employee roster and firearms permits and licenses for each of its guards.

17. On 28 February 1992 appellant arranged for an insurance agency in Fairfax, Virginia, to fax to the Government a letter and certificate indicating that the agency was providing workmen's compensation insurance for appellant. By letter that same day the Government informed appellant that guard services could not begin until noon on 5 March 1992, due to appellant's late submittals, and that this new start date was contingent on all submittals being acceptable.

18. Swanson began performing the contract at LBNSY on 5 March 1992, with approximately 57 guards available, and continued providing guard services until 25 March 1992. On at least ten days during that period, Government inspectors observed several guard posts either unmanned or undermanned. In April 1992 the Government took more than $2,500 in deductions from appellant's invoice for March services with respect to unmanned guard posts.

19. On 25 March 1992, the State of California ordered Swanson to stop work at the shipyard because it did not have required workmen's compensation coverage for its employees. Appellant discontinued contract performance on that date. There is no credible evidence in the record showing that appellant's failure to obtain required workmen's compensation insurance was due to causes beyond its control or without its fault.

20. At the time Swanson discontinued performance, the resident officer in charge of construction (ROICC) at LBNSY requested the NAVFAC Southwestern Division contracting officer to terminate the contract. Although the Southwestern Division contracting officer believed that the Government would have been justified in terminating the contract at that time, he did not have authority to terminate the contract. Therefore, he forwarded the request and relevant information to NAVFAC headquarters, which simply directed him to assist the ROICC in administering the contract.

21. Appellant delivered proof of workmen's compensation insurance to the Navy on 30 March 1992 and submitted revised work schedules, staffing charts and a strike contingency plan on 10 April 1992. By letter from the ROICC to appellant dated 10 April 1992, the Government accepted appellant's submittals and "allowed [Swanson] to begin performance at 1400 hours on 14 April 1992."

22. Appellant resumed contract performance on 14 April 1992, with approximately 40 to 45 qualified guards working on 12-hour shifts. By 21 April appellant had added 11 fully qualified guards. Meanwhile, the Government began to furlough its in-house guard force in two phases, with one half of the ISF to be furloughed by early May.

23. The ROICC was "concerned about the fatigue level in the guards" working up to 12-hour shifts and felt that on occasion some guards "looked tired." In response to a 20 April 1992 letter from the ROICC complaining about the apparently insufficient number of contractor guards and their being "required to work 60 to 70 hours per week," by letter dated 21 April 1992 appellant stated that it "need[ed only] four more guards to convert to eight hour shifts." Appellant's letter advised that it expected to have "the final licensing or clearances [on these four guards] in very soon" and requested the Government's assistance in expediting the clearance process. No evidence was presented showing that any guards were sleeping on post or were otherwise inattentive to their duties or engaged in unsafe behavior.

24. Handwritten notes by a Government contract specialist (not by an inspector with first hand knowledge) regarding traffic guard and entry/exit guard postings suggest that some posts were improperly manned on several occasions between 14 April and 27 April 1992. However, the record does not clearly establish the duration of alleged undermanning of particular posts or whether any post was completely unmanned for more than 30 minutes. Moreover, we find that the contract required a total of 32 (not 33) guards during morning traffic postings and the inspector admitted that his April 1992

inspection reports consistently overstated the number guards required to be posted at Gate 15 as six, rather than five.

25. At about 10:30 a.m. on 24 April 1992 the Government contract specialist met with appellant's representatives to discuss contract performance. The Government's main concerns at this meeting revolved around its perception that Gate 15 was not satisfactorily manned during the morning traffic period and with appellant's "working armed people 12 hours a day, 6 days a week." In response to the contract specialist's inquiry as to "when he anticipated switching to 8-hour shifts," Swanson's contract manager indicated they were waiting on security clearances and weapon permits and hoped to be able to work 8-hour shifts with 55 employees by Friday, 1 May 1992.

26. Despite the ROICC's and the contract specialist's concerns, the record establishes that the contract did not prescribe or specify either a minimum number of guard shifts nor the maximum numbers of hours each guard could work and that the Government inspector's April 1992 inspection reports consistently overstated the number guards required to be posted at Gate 15. Moreover, although no official Navy instruction specified the number of hours a guard could work, we find that LBNSY had an unwritten policy permitting armed guards to work shifts of up to 12 hours.

27. By mid-April 1992 NAVFAC headquarters gave the Southwestern Division contracting officer "one time authority for termination of this [Swanson's] contract." On or about 10:21 a.m. on 24 April 1992, the NAVFAC Southwestern Division contracting officer signed and faxed to the LBNSY ROICC a "cure notice" letter addressed to appellant. The 24 April 1992 "cure" letter referenced a 22 April LBNSY letter concerning "serious discrepancies in contract performance" and stated in part:

> ...Improper staffing and unqualified staff members have been a serious condition since the date of contract award. The failure to properly staff a guard post is a serious failure and cannot be remedied solely through deductions taken in accordance with the schedule of deductions.
>
> In order for the Contracting Officer to ensure compliance with the contract, this condition shall be cured no later then 12:00 noon on Monday, 27 April 1992. The only acceptable evidence of cure will be a work schedule including the names and hours of assignment of personnel to be assigned guard posts and supervisory positions as required by the terms of the contract. This list will also provide evidence that each named person meets all requirements imposed on personnel by the terms of the contract. Work in excess of the normal eight hour work day for any one or more persons will be considered additional evidence of Swanson's inability to provide a fully adequate guard force. Failure to meet any of the conditions required here shall be considered a default of the contract as of 12:00 noon, Monday 27 April 1992 and the contractor's right to perform under the contract will end at that time.

The cure notice was delivered to and received by appellant's contract manager on 24 April 1992.

28. The contracting officer explained that the "cure notice" gave Swanson three days to cure its failure to make progress, rather than the 10 days specified in the Default clause, because:

> We felt the contractor had had ample time in that he had been given cure notices throughout the performance of the contract. It was not a situation where we were asking the contractor to make physical changes in his performance; we were asking him to tell us how he intended to make physical changes in his performance. If he was, indeed, going to be up to eight-hour shifts by 1 May, and this was three and a half days prior to that, he certainly should have had some sort of plan, I would think.

29. Appellant responded to the cure notice by letter from its attorney dated 27 April 1992, which the contracting officer received at 10:40 a.m. on 27 April. The response asserted that any deficiencies in manning and schedules had already been cured at the 24 April meeting between the Government contract specialist and appellant's contract manager. Moreover, appellant asserted that the Government had breached its obligations under the contract - specifically, by failing to provide required vehicles, ammunition magazines, nightstick equipment and serviceable leather gear - and charged the Government with not having "complied with its implied duty to cooperate with the contractor." The foregoing allegations of Government interference and failure to cooperate were litigated fully at the hearing but were not proved by a preponderance of the evidence.

30. Appellant's attorney's letter did not enclose a work schedule as requested in the cure notice. However, "at approximately 1500 hours" on 27 April 1997, appellant's contract manager delivered to the Navy contract specialist a series of documents, which included a revised staffing chart and a new employee roster.

31. By letter dated 27 April 1992, the contracting officer issued a final decision, terminating the contract in whole for default as of noon that day. The decision referred specifically to the 24 April cure notice and stated that appellant had "failed to comply with the terms of the contract and failed to meet the conditions identified in the above referenced [cure notice] letter." This timely appeal followed.

DECISION

The Government "must follow the proper procedures" when it exercises the contractual right to terminate a contract for default. *Scott Aviation*, ASBCA No. 40776, 91-3 BCA p 24,123 at 120,726. The Government failed to follow proper procedures in this case.

The contracting officer's default termination decision ascribed part of its reason to appellant's "fail[ure] to meet the conditions identified in the [cure notice] letter." To that extent, the decision appears to terminate the contract for failure to "[m]ake progress, so as to endanger performance of this contract," in accordance with subparagraph (a)(1)(ii) of the Default clause. However, such a termination cannot be justified on the record before us.

If the Government contemplates terminating the contract due to the contractor's failure to make progress endangering performance under subparagraph (a)(1)(ii), "the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the

failure." FAR 49.402-3(d); see *Bailey Specialized Buildings, Inc. v. United States*, 404 F.2d. 355 (Ct. Cl. 1968). Thereafter, the Government's exercise of its right to terminate the contract under subparagraph (a)(1)(ii) of the Default clause is conditioned on the contractor's not having cured such failure "within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure."

The governing regulation and the implementing Default clause, quoted herein, establish a minimum "cure" period of 10 days, and accord the contracting officer discretion to lengthen that cure period "as necessary." Neither the regulation nor the clause grant the contracting officer authority to impose a cure period shorter than 10 days. Since the contracting officer lacked authority to issue a cure notice affording the contractor only three days to cure its alleged progress failure, his 24 April 1992 letter was ineffective as a cure notice and amounted to no cure notice at all. Failure to give the required 10-day written cure notice is fatal to a default termination for failure to make progress. *Fairfield Scientific Corporation*, ASBCA No. 21151, 78-1 BCA 13,082 at 63,906-07, recon. denied 78-2 BCA 13,429 (supply contract).

The Government contends that the contract was terminated "pursuant to subparagraph [(a)(1)](i) of the Contract's Default clause" and, therefore, "[n]o advance notice or opportunity to cure is required to be given...". Summary termination of a supply or service contract, without issuing a cure notice, is permitted under subparagraph (a)(1)(i) for the contractor's failure to render promised performance. See *Fairfield Scientific Corporation*, 78-1 BCA at 63,906. In this case, Swanson promised to provide guard services to LBNSY by posting a specified number of trained armed guards at locations and times designated in the contract. The record discloses that on some occasions, in both March and April 1992, certain of the guard posts were not properly manned, but that is not dispositive.

The Government concedes that in March 1992 appellant was "marginally perform[ing] the contract" and that its delinquent performance on at least ten days during the period from 5 March to 25 March 1992 was not so severe. In any event, these March 1992 performance deficiencies were overtaken and rendered moot by appellant's unexcused discontinuance of performance on 25 March 1992 and the Government's waiver of this total breach by "allow[ing]" appellant to cure its breach and resume performance on 14 April. By knowingly and voluntarily reinstating the breached contract, the Government reestablished its duty to accept continued performance and waived its right to terminate the contract for prior defaults. (However, such waiver did not relinquish the Government's right to recover damages caused by the breach, such as additional costs of performing the unperformed services, nor to terminate for subsequent defaults.)

The Government bears the burden of proving that the termination for default was justified and must demonstrate the propriety of its default termination action. *Lisbon Contractors, Inc. v. United States* 828 F.2d 759, 765 (Fed. Cir. 1987); *Lanzen Fabricating, Inc.*, ASBCA No. 40328, 93-3 BCA 26,079 at 129,608. The Government has presented evidence of some performance deficiencies by appellant after it resumed work in mid-April 1992, mainly the undermanning of certain guard posts during morning traffic periods. Even though some of this evidence is flawed, we are satisfied that on one or more occasions in April 1992 appellant failed to furnish the required personnel at

certain guard posts, when required. Each failure to furnish any item of service, when required, is technically a default under subparagraph (a)(1)(i) of the Default clause. See *Pride Unlimited*, ASBCA No. 17778, 75-2 BCA 11,436. Nevertheless, "for [a service] contract to be terminated on that basis, a sufficient number of such failures must accumulate such that it could be said that there had been a substantial failure of performance." *Suburban Industrial Maintenance Co.*, 85-2 BCA 18,148.

To satisfy its burden of proving the propriety of the default termination of a service contract, the Government must demonstrate the accumulation of a sufficient number of items of unperformed or unsatisfactorily performed services to establish such a "substantial failure of performance." The placing of this burden of proof on the Government means that the appellant is not required to prove that its performance was satisfactory. Until the Government has satisfied its threshold burden, the contractor is not obliged to come forward with proof of affirmative defenses, such as excusable delays.

In this case, the Government has failed to sustain its burden of proof. The Government's evidence of Swanson's performance deficiencies in April 1992 shows that appellant's performance was not exemplary, but does not persuade us that a substantial failure of performance had yet occurred by the time it terminated the contract for default. Cf. *Sentry Corp*., ASBCA No. 29308, 84-3 BCA 17,601 (record established failure to provide any guard services for 21 hour period, absence of a required guard throughout an entire weekend and simultaneous abandonment of posts by two guards). Accordingly, we hold that the Government could not properly have terminated the contract summarily under subparagraph (a)(1)(i) of the Default clause.

The appeal is sustained. The termination for default is converted to a termination for the convenience of the Government.

GIVENS SERVICES
DOTCAB No. 2907, 96-2 BCA ¶28,271

OPINION BY ADMINISTRATIVE JUDGE WARE

On October 28, 1994, the U. S. Department of Transportation, Federal Aviation Administration, awarded Contract No. DTFA14-95-C-33601 to appellant, Givens Services, of San Jose, California. The contract, in the amount of $6,600.00, was for janitorial services to be performed at the Air Traffic Control Tower/Tracon (ATCTT) in Freeland, Michigan. Work under the initial contract period was to commence at 12:01 a.m. on November 1, 1994 and to be completed on September 30, 1995. Four renewable option years were to follow based upon satisfactory performance. Appellant's award was based upon its low responsible bid for the initial year and all four option years. The contract included the standard Disputes clause, Alternate I (April 1984) and Default (Fixed-Price Supply and Service) (1984) clause.

Under the terms of the contract appellant was to furnish labor, supervision, equipment, materials and supplies as necessary to provide janitorial services for approximately 5,001 square feet of space at the AF/AT Facility (Air Facility/Air Traffic) in Freeland (Saginaw), Michigan in accordance with the Work Schedule and Specifications included in the contract. The work specifications required cleaning to be performed seven (7) days per week in the Tower Cab, TRACON Operations Area, breakrooms and restrooms; and five (5) days per week (excluding National Holidays) in all other areas. All of the services were to be performed between the hours of 9:00 p.m. and 8:00 a.m. with the exception of window washing, which was to be performed during daylight hours. However, certain annual or special project maintenance tasks in non-operational areas could be performed on weekends between 8:00 a.m. and 9:00 p.m., when scheduled or pre-approved.

* * * * *

By letter dated January 27, 1995, the Contracting Officer terminated appellant's contract for default due to appellant's continuing failure to perform adequately pursuant to the terms and conditions of the contract. The termination was effective at 12:00 a.m. local time on February 1, 1995. The letter advised appellant that it might be held liable for all excess costs associated with the termination. It also advised appellant of its right to appeal the default termination to this Board within 90 days of receipt of the Contracting Officer's decision or to bring an action directly in the U.S. Court of Federal Claims within 12 months. Appellant did not appeal the Contracting Officer's termination for default.

In an undated decision placed in the appeal file, the Contracting Officer informed appellant that the Government had reprocured the janitorial services for the ATCT/Tracon facility for $6,128.00 on February 1, 1995, from Michigan Merchant Supply Company of Mt. Morris, Michigan. The decision advised appellant that under the Default clause of the contract it was obligated to pay the FAA reprocurement costs in the amount of $1,328.00 as detailed in an enclosed Reprocurement Cost Summary. In addition, the decision stated that the FAA had incurred other emergency costs of $902.59 for completing work during appellant's non-performance under the contract for which appellant also was liable. Those additional costs, also detailed in the Reprocurement Cost Summary, brought the total cost appellant allegedly owed to $2,230.59. The decision requested appellant to

submit the latter amount to the FAA within 30 days from receipt of the decision. Finally, the decision advised appellant of its appeal rights, in pertinent part, as follows:

> This decision is made in accordance with the Default Clause of the contract and shall be final and conclusive as provided herein, unless within 30 days from the date of receipt of this decision, a written Notice decision, a written Notice of Appeal, in triplicate, is addressed to the Secretary of Transportation.
>
> The notice of appeal shall be in accordance with the Disputes clause of the contract and shall be signed by you as the Contractor, or by an attorney acting on your behalf. This notice may be in letter form and should indicate that an appeal is intended, with reference to this decision by the contract number. The notice of appeal may include a statement of the reasons why the decision is considered to be erroneous.
>
> The Department of Transportation Contract Appeals Board is the authorized representative of the Secretary of Transportation in hearing, considering, and deciding such appeals. The rules of the Department of Transportation Contract Appeals Board are set forth in the Code of federal Regulations.

As indicated above, the copy of the Contracting Officer's decision in the appeal file is undated. However, the right margin of the decision has several apparent inter-office signature concurrences, all of which are dated March 31, 1995, and the bottom margin also indicates the decision was typed on that date. It thus appears that the decision was sent to appellant at its San Jose, California, address on or after that date. A postal return receipt in the appeal file shows that appellant's mother, Ms. Bonnie J. Givens, signed for receipt of the decision on April 10, 1995.

In a letter received by the Board on July 18, 1995, appellant appealed the Contracting Officer's March 31, 1995 determination assessing excess reprocurement costs and also challenged, for the first time, the Contracting Officer's determination that its work under the contract was deficient as well as the February 1, 1995 default termination of the contract. The letter specifically disputed appellant's obligation to pay excess reprocurement costs of $1,328.00 and enclosed a handwritten, notarized statement by Mr. Alfred S. Blackwell, appellant's former janitorial employee at the Freeland, Michigan ATCT/Tracon facility, to support appellant's position that all janitorial services required by the contract were performed by Mr. Blackwell during the period January 17 to January 30, 1995. Appellant did not dispute its failure to provide services prior to the latter period nor the COR's evaluation of the quality of such service as was provided. Additionally, Mr. Givens stated in the letter: "I decided not to appeal the 1-27-95 decision [terminating the contract for default] because I want to concentrate on providing janitorial services to my other current contracts with the FAA knowing the fact that my firm did not at all default the contract with the FAA. I have invested time and money in the ATCT/Freeland, Michigan contract, I am willing submit [sic] information."

In his statement Mr. Blackwell provides a detailed narrative of the work he alleges he performed from January 17, 1995 through January 30, 1995. The handwritten

narrative, set forth on two-and-one-fourth pages, describes the work allegedly performed at the facility each day during the above period, except January 22, 23, and 31. At the end of the narrative for 1-21-95 the entry states "End of the Week." January 22 and 23, 1995 were on Sunday and Monday, respectively; January 31 was on a Tuesday. No explanation is given as to why these days were missed, or whether they were regular workdays. The contract indicates they were not National holidays. Since the work specifications required cleaning to be performed seven days per week in the Tower Cab, TRACON Operations Area, breakrooms and restrooms, and five days per week, except National holidays, in all other areas, appellant thus was obligated to clean the Tower Cab TRACON Operation Area, breakrooms and restrooms on each of the above days and to clean the other areas of the facility on January 23 and 31, 1995. The Contracting Officer was entitled to deduct from the contract price an appropriate amount for appellant's failure to perform such services.

Discussion - Validity of the Default Termination

Appellant, Givens Services, Inc., (or "Mr. Givens") has taken this appeal from the Federal Aviation Administration (FAA) Contracting Officer's assessment of excess reprocurement cost applicable to its terminated contract for janitorial services at the FAA Air Traffic Control Tower in Freeland, Michigan. In a letter to appellant dated January 27, 1995 the Contracting Officer notified appellant that the termination of its contract was effective February 1, 1995. That letter properly informed appellant of its right to appeal the default termination to this Board within 90 days of receipt thereof or to bring an action in the U. S. Court of Federal Claims within twelve months. Appellant elected not to appeal the termination within the statutory period. On or shortly after March 31, 1995 the Contracting Officer sent appellant another decision informing it that the janitorial services had been reprocured on February 1 for $6,128.00 and that appellant was obligated to pay a total of $2,230.59 for excess reprocurement costs of $1,328.00 and other emergency costs of $902.59 which the Government had incurred for cleaning the facility during appellant's non-performance prior to the default termination.

In addition to appealing the Contracting Officer's March 31, 1995 decision assessing excess reprocurement costs, appellant also initially challenges the propriety of the Contracting Officer's decision of January 27, 1995 terminating its contract for default. We have held that a contractor who elects not to appeal a default termination of its contract may properly contest the propriety of the antecedent default in its subsequent timely challenge of the Government's assessment of excess reprocurement costs arising out of the default termination. Appellant's challenge of the default termination in its July 18, 1995 appeal, therefore, is timely. *Appeal of Southwest Marine, Inc.*, DOTBCA No. 1891, 96-1 BCA ¶27,985. Where such a challenge is made, the Government shoulders the burden of proving the validity of the default termination by a preponderance of the evidence. *Michigan Building Maintenance, Inc.*, IBCA No. 1945, 87-1 BCA ¶19,461; *Building Maintenance Specialists, Inc.*, DOTBCA No. 71-35, 72-2 BCA ¶9553. To meet its burden the Government must show that the contractor did not perform to the requirements of the contract and that there were no excusable causes, attributable to the Government, for such non-performance. *Daniel Huff d/b/a Deep Clean Janitorial*, DOTBCA No. 77-20, 79-1 BCA ¶13,635; *Mr.'s Landscaping and Nursery*, HUDBCA Nos. 75-6, 75-7, 76-2 BCA ¶11,968.

Generally, in janitorial and other service-type contracts, the necessary proof may be found in contemporaneous detailed inspection and evaluation reports, which usually are an essential part of the record keeping process of such contracts. *Building Maintenance Specialists, Inc., supra*, 72-2 BCA at 44,488; *Shamrock Industrial Maintenance*, DOTBCA 72-11, 72-2 BCA ¶9482. A showing by such contemporaneous documents that the contractor failed to perform daily, weekly, monthly and quarterly tasks in the manner and at the times prescribed in the contract raises a *prima facie* case of non-performance which, if not contradicted by the contractor, will place it in default within the purview of Paragraph (a) (1) of the contract's Default clause. *Daniel Huff d/b/a Deep Clean Janitorial, supra*, 79-1 BCA at 66,883.

As indicated above, the Contracting Officer terminated appellant's contract for default by letter dated January 27, 1995 following an obviously poor performance by appellant during November 1994, and a similarly poor performance in December 1994, as was evidenced by the COR's inspection report dated December 31, 1994. That report revealed that from December 7 through December 31, 1994, appellant failed to perform the monthly task of washing the Tower Cab windows and performed only minimally the daily tasks of cleaning the floors, baseboards, windows, lights, furniture, and window sills; the weekly tasks of vacuuming and spot cleaning carpets, and failed to provide essential supplies such as an extension handle for washing the Cab windows, vacuum cleaner bags, paper towels, soap for dispensers and toilet tissue. The COR's inspection report for January 1995, dated January 31, rated appellant's work unsatisfactory for the entire month and noted that appellant had failed to perform any work on January 4, 22, 23 and 31, neither of which was a National Holiday. The report shows that until January 16 the work performed consisted almost exclusively of emptying trash cans, and cleaning sinks and toilets, and that the employee worked only an hour each day, "in at 6:30 out at 7:30". Although the report shows that the quality of the work improved somewhat from January 17 through 31, the COR still considered the quality of the service to be below that required and what reasonably could be expected under the contract, due to a lack of tools and supervision.

These cleaning services were vital to the proper functioning of the ATCTT facility and the Government had a right to have them performed satisfactorily and in strict compliance with the contract. *Cleanway Janitorial Services*, HUDBCA Nos. 79-422-C41, 79-423-C42, 80-2 BCA ¶14,792. Rather than getting such compliance, the aforementioned documentary evidence of record clearly reveals that appellant was consistently derelict in discharging its daily, weekly and monthly tasks immediately prior to its termination for default. Because of its persistent absences from the job and less than adequate performance in November and December 1994, the COR sent appellant cure notices on November 22 and again on December 13, 1994. Despite these warnings, appellant showed only marginal improvement in its work performance in December and January, and failed to work at all on four days in January 1995. Indeed, despite the receipt of the cure notices, there is no evidence that appellant's president, who resided in San Jose, California, ever came to the ATCTT facility in Saginaw, Michigan to observe the problems with the work.

In a job calling for such daily tasks as were required under the instant contract, each failure to perform a daily task amounted to a technical default under the contract which was not cured by the performance of that task the following day. While one or two

failures to perform such daily tasks may not be a basis for termination, when a number of such individual failures occur, combined with general and continuing deficient performance, a sound basis exists for terminating the contract for default. *Reliable Maintenance Service*, ASBCA No. 10,487, 67-1 BCA ¶5331; *motion for recon. denied*, 67-1 BCA ¶6194.

Although no cure notice was sent out after December 13, 1994, prior to the default termination of appellant's contract on February 1, 1995, none was required to validate the termination under FAR, Clause 52.249-8, the Default clause of the contract. That clause provides in Paragraph (a)(1) that cure notices are required only in cases of failure to "(ii) Make progress, so as to endanger performance of this contract...; or (iii) Perform any of the other provisions of this contract." The Clause does not require the issuance of a cure notice where the contractor fails to comply with the terms of Paragraph (a) (1) (i) of the contract to "Deliver the supplies or to perform the services within the time specified in this contract..." *Cleanway Janitorial Services, supra*, 80-2 BCA at 73,012; *Daniel Huff d/b/a Deep Clean Janitorial, supra*, 79-1 BCA at 66,883; *Building Maintenance Specialists Inc, supra*, 72-2 BCA at 44,491. We find that by failing to perform the daily, weekly, monthly and quarterly tasks in the manner and at the times prescribed, and by failing to furnish the supplies as required, appellant was in default of the contract within the purview of Paragraph (a) (1) (i) of the Default clause. Although a termination for default is a harsh remedy that is looked upon with disfavor, there is ample evidence here of appellant's continuing inadequate service to fully justify the default termination.

Assessment of Excess Reprocurement Costs

On the question of the propriety of the assessment of excess reprocurement costs, the Government also shoulders the burden of proving the accuracy and validity of those costs, just as it had the burden of proving the validity of the termination for default. To sustain its burden, the Government must prove by a preponderance of the evidence that the services reprocured were similar to or substantially the same as those prescribed in appellant's terminated contract, that it actually incurred excess costs, and that it acted reasonably to minimize the excess costs incurred. *Cascade Pacific International v. United States*, 773 F.2d 287 (CAFC 1985); *Building Maintenance Specialists, supra.* We note initially that appellant has placed in the record no evidence to demonstrate the invalidity of the reprocurement itself or the inaccuracy of the assessment. Nonetheless, since the Government must carry the burden on the issue, it must produce at least sufficient proof of the validity of the excess cost assessment to establish a *prima facie* case.

The Government's evidence supporting its assessment of excess reprocurement costs consist of its letter to appellant of March 31, 1995 advising appellant that the Government had reprocured the janitorial services on February 1, 1995 from Michigan Merchant Supply Company at a cost of $6,128.00; that excess reprocurement costs for which appellant was obligated amounted to $1,328.00; and that other costs incurred by the Government for procuring emergency cleaning services prior to the default termination amounted to $902.59. The letter advised appellant that it owed the Government a total of $2,230.59 as shown on an enclosed Reprocurement Cost Summary. The Reprocurement Cost Summary, a copy of which is in the appeal file, gives a breakdown of the $6,600.00 annual costs of appellant's contract, the reprocurement contract amount of $6,128.00, at an annual cost of $766.00, (or additional

cost of $166.00 per month), and a total balance due by appellant of $1,328.00 for the eight months remaining on it contract at the time it was terminated for default. The Reprocurement Cost Summary also gives a breakdown of expenses the Government incurred to procure temporary cleaning services on the days appellant either failed to appear on the job or for services appellant failed to perform when it did appear. It shows, for example, expenses for janitorial supplies purchased by the Government, the amounts paid to local contractors for window cleaning and other services, and deductions taken from appellant's monthly payments for services not performed. The supplies purchased and amounts paid to local contractors are supported by copies of receipts in the record. These receipts, and the deductions for non-performed work, all appear to be reasonable and corroborate the amount of $902.59 the Contracting Officer alleges appellant owed to defray the cost of Government procured supplies and emergency services, and for deductions for work not performed.

However, while the amount of $902.59 has reasonable support in the record, the record is devoid of any evidence to support either the fact or cost of the reprocurement contract allegedly awarded to Michigan Merchant Supply Company, and the resulting excess cost assigned to appellant. In short, although the Contracting Officer's letter to appellant of March 31, 1995 states that such a contract was let, there is no copy of that contract in the record, and no evidence that it was in fact executed, such as an affidavit or statement by Michigan Supply Company, or other contract documents or receipts showing that $6,128.00 was paid to the reprocurement contractor for its services. There is, therefore, insufficient proof in the record before us to show that appellant is obligated to pay the $1,328.00 excess reprocurement costs which the Contracting Officer seeks. However, as indicated above, the record is sufficient to demonstrate that appellant is liable for the amount of $902.59 for expenses the Government incurred for emergency services and for other contractual services appellant failed to perform.

For the foregoing reasons, the termination for default is sustained and the excess reprocurement assessment is approved, but only in the amount of $902.59.

WALSKY CONSTRUCTION COMPANY
ASBCA No. 41541; 94-1 BCA ¶ 26,264

A termination for default was appealed by the contractor as improper because the contracting officer was improperly influenced by a smallest thing.

On 15 March 1990, the Government issued an IFB for a project known as "Repair Roof Structure and Install Fire Protection Building 1306 lieutenant colonel's direction to monitor the contractor more closely than usual and to terminate for the," at Eielson AFB, Fairbanks, Alaska. In brief, the work involved the removal of the existing roof and its replacement with a new standing seam metal roof; reinforcing the existing structural system; and the installation of a fire sprinkler system.

On 4 Jun 1990 the Director of Contracting, a lieutenant colonel at Elmendorf AFB, Headquarters Alaskan Air Command, telephoned the contracting office at Eielson and wished to speak to the base contracting officer. The base contracting officer was not available, and the contract administrator for this contract took the call in his absence. The following was the contract administrator's written summary of this conversation:

Situation:

Received a call from [the lieutenant colonel] who stated there was a possible problem with the award to Walsky Construction. He stated the *Corp of Engineering are working [sic] a file to try to deny award to Walsky and by us awarding to them it weakened there [sic] position*. I questioned him as to what we could do now as award has been made and a pre-con scheduled for 05 Jun 9[0] and *he stated we could only monitor this company more than normal and if the smallest thing goes wrong take normal steps to default.* [The ACO] did a background check prior to award and amoung [sic] other people spoke with Elmendorf and did not have any information that would lead to a non-responsibility rejection; however, it sounds like the Corp. [sic] does. Anyways [sic] to make a long memo short [the lieutenant colonel] wants you to call him when you get in. [Emphasis added] Neither the lieutenant colonel, the contracting administrator, nor the base contracting officer gave testimony at the hearing.

The Army Corps of Engineers directly contacted key Government contracting personnel on 4 June regarding the award to Walsky, including the termination contracting officer (TCO) and the contract administrator. The TCO gave testimony at trial. When confronted with the Corps' telephone notes of his conversation, he testified that he did not remember the call.

The Eielson base contracting officer, the ACO and the contract administrator met to discuss the lieutenant colonel's directive. On the official file copy of the contract administrator's written summary, the words "the smallest thing" were circled in red ink. At the hearing, the ACO was able to identify that certain handwritten notes on the summary were made by her direct supervisor, the base contracting officer. She testified that the words "the smallest thing" were probably circled by the base contracting officer as well. Absent other evidence, we find that the base contracting officer did in fact circle the phrase.

At hearing, the ACO, a master sergeant, testified that she was not influenced by, nor did she follow the lieutenant colonel's directive in the administration of this contract,

nor was she influenced by the matter which was circled by the base contracting officer, her immediate supervisor.

In response to the apparent needs of the Army Corps of Engineers, Elmendorf AFB directed Eielson AFB to monitor Walsky more than normal and to default terminate if the smallest thing went wrong. On the memorandum that memorialized this directive, the ACO's immediate supervisor circled the words "the smallest thing" in red ink for emphasis.

We hear the Government to argue, first, that there was "nothing wrong" with this directive. We do not agree. While we can think of many legitimate reasons for a contracting officer to monitor a contractor "more than normal," to do so to detect performance problems for the purpose of supporting an agency's denial of an award is not one of them. Moreover, for the Government to default terminate a contractor for "the smallest thing" would be a breach of the duty that the Government owes every contractor—to exercise discretion whenever the issue of default termination is presented. *Darwin, supra.*

Alternatively, the Government asks us to believe that military personnel at Eielson ignored the lieutenant colonel's directive, and administered this contract as if the directive did not exist. For us to accept this proposition would require us to suspend our common sense and to ignore the weight of the evidence. Based on this record, we do not have the slightest doubt that the Government's administration of this contract was impermissibly influenced by the lieutenant colonel's directive, as well as by the emphasis placed upon it by the ACO's immediate supervisor.

Preaward, the ACO, after investigation and deliberation, found appellant to be an acceptable and responsible contractor, and made an affirmative determination of appellant's responsibility for purposes of award. Less than two weeks after award, and after receipt of the lieutenant colonel's directive, the ACO suddenly was of the view that appellant was a "marginal" contractor, *i.e.,* a purveyor of shoddy work. She told appellant that she had her "marching orders" (read—the lieutenant colonel's directive), and would not stand for the slightest glitch in appellant's performance.

A mere 10 days after the notice to proceed, the ACO issued a cure notice to appellant on the grounds that its failure to provide shop drawings and submittals within 10 days after notice to proceed was endangering contract completion, even though she was well aware that the major design drawings would take much more than 10 days to submit. This was the earliest date that a cure notice could have been issued on this ground. Barely two work days after appellant's timely reply to the cure notice, the ACO decided to issue a show cause notice for default. About 70 percent of the contract time still remained. Notwithstanding that appellant had 10 days to reply to the show cause notice, a decision to default terminate, insofar as Eielson was concerned, was made prior to the date that appellant's reply was due. Apparently, Eielson's mind was already made up—nothing appellant could have said in the reply would have made any difference.

When appellant's reply to the show cause notice arrived on Friday, 20 July, the default termination plan went into high gear. Both the ACO and the project engineer worked over the weekend to put together a package of documents for the review of the TCO. The package was telefaxed to the TCO on Monday, 23 July. The TCO issued the default termination on Tuesday, 24 July.

We are at a loss to logically explain this frenetic activity, this rush to judgment—at least without reference to the lieutenant colonel's directive. The Government does not suggest that such a quick termination would have allowed a new contractor to complete performance by 4 September. In fact, the surety began and completed the work the following year.

Clearly, the administration of this contract was impermissibly tainted by the lieutenant colonel's directive. We cannot believe that Eielson would have rushed to default so early in the contract period absent the lieutenant colonel's marching orders. We must now address whether the review by the TCO had the effect of dissipating the taint. While we would grant the possibility that a complete, deliberate and unbiased review of the facts by one unfamiliar with or untouched by the Government's hidden agenda might dissipate the taint and legitimize the Government's position on the merits, we are not persuaded that the TCO's review was of such a character. This TCO was familiar with the Corps' concerns about Walsky. He was the TCO who received the Corps' inquiry of 4 Jun; it was his boss who issued the 4 Jun directive to Eielson. In fact, the TCO fed the ACO damaging information about Walsky during contract performance. On top of this, the TCO's deliberations were incomplete and inadequate. We must conclude that is default termination was not a reasonable exercise of discretion.

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RA-NAV LABORATORIES, INC.
v.
Sheila WIDNALL, Secretary of the Air Force
137 F.3d 1344
United States Court of Appeals,
Federal Circuit
March 4, 1998

LOURIE, Circuit Judge

Ra-Nav Laboratories, Inc. appeals from the final decision of the Armed Services Board of Contract Appeals dismissing its appeal for lack of jurisdiction. *Ra-Nav Lab., Inc.*, ASBCA No. 49211, 96-2 BC ¶ 28,514 (Aug. 26, 1996), reconsideration denied, 97-1 BC ¶ 28,650 (Nov. 22, 1996). Because the Board did not err in determining that the appeal period of 41 U.S.C. § 606 (1994) had run before Ra-Nav filed its appeal, we affirm.

BACKGROUND

In 1985, Ra-Nav was awarded a government contract for the production of data tape cartridges. In early 1986, when Ra-Nav failed to timely deliver the first installment of tapes due under the contract (the "First Articles"), the government terminated the contract for default. The Default Notice stated that:

> [t]his is the final decision of the termination contracting officer [TCO]. This decision may be appealed to the Armed Services Board of Contract Appeals. If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the [Board] ... within 90 days from the date you received this decision....

Following the Default Notice, Ra-Nav sent a letter to the TCO requesting that the contract be reinstated with an extended delivery schedule. In response, the TCO sent Ra-Nav a letter on January 29, 1986 ("Cautionary Notice"), which stated in relevant part:

> 2. The contents of your letter did not reveal an excusable reason for your failure to deliver the First Articles....
> 2. [sic] This is to advise you:
> a. The default remains in effect and the contract is not reinstated.
> b. The Government is not encouraging you to continue performance.
> c. Any continued performance will be voluntary on your part and at your own risk.
> 3. In order to mitigate your damages, the Government agrees to inspect completed First Articles provided:
> a. They are submitted to the Government by 15 Mar 86....
> b. The defaulted item is still required by the Government at the time you present them for inspection/testing....
> c. A reprocurement contract has not been awarded by the time you present the First Articles for inspection/testing.....
> 4. If the First Articles meet the contract requirements, you agree to a

> sufficient decrease in contract price to cover the administrative damages to issue the default, initiation, processing of the reprocurement to the point of cancellations, delivery schedule extension, rescision [sic] of the default, reinstatement of the contract.
> 5. The Default Notice and the appeal periods specified in the Default Notice are not changed as a result of the above comments.

Following this letter, Ra-Nav continued to attempt to provide suitable First Articles until late 1986, during which period the parties sent several communications to each other. Most of the correspondence from the government made specific reference to the "conditions" specified in the Cautionary Notice, although the appeal period was not specifically mentioned.

In April 1987, the government notified Ra-Nav that its latest submission of First Articles had been rejected and indicated that it would accept no further resubmissions. The government awarded reprocurement contracts in March 1987 and August 1987 to two other data tape cartridge manufacturers.

Over six years later, in September 1993, the government notified Ra-Nav that it desired to recover progress payments paid to Ra-Nav during the performance of the contract. In November 1993, Ra-Nav expressed its intention to "[a]ppeal this termination for default and the demand for excess reprocurement charges as soon as a final determination of the termination contracting officer was issued" and noted that it had requested a final determination as far back as late 1987. Ra-Nav alternatively proposed a settlement in which the termination for default would be changed to one for convenience, which would have the effect of nullifying Ra-Nav's claim for its contract expenses and the government's claim to recoup the progress payments. The TCO expressed an interest in Ra-Nav's proposal and requested evidence supporting Ra-Nav's claim. However, in September 1994, Ra-Nav revoked its proposal because "it could not walk away from the over $100,000" difference between its contract expenses claim and the government's progress payments claim.

In May 1995, the government informed Ra-Nav that it would not seek to recoup the progress payments. Ra-Nav then submitted its claim for contract expenses to the TCO; it went unanswered. In October 1995, over eight years after the termination of its contract, Ra-Nav appealed the "deemed denial" of its claim to the Board.

The Board dismissed Ra-Nav's appeal for lack of jurisdiction on the ground that Ra-Nav's appeal was not taken within ninety days of the termination for default. See 41 U.S.C. § 606 (1994) ("Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title."). Ra-Nav appeals the dismissal to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) (1994).

DISCUSSION

The standard under which we review a decision of the Board is dictated by the Contract Disputes Act, which provides in relevant part:

> the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall

> be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b) (1994). We review questions of law, including whether jurisdiction exists under section 606, de novo. See *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1479-80 (Fed.Cir.1997) (citations omitted). Notwithstanding this lack of deference concerning questions of law, "legal interpretations by tribunals having expertise are helpful to us, even if not compelling." *Erickson Air Crane Co. v. United States*, 731 F.2d 810, 814 (Fed.Cir.1984).

Ra-Nav argues that its appeal to the Board was timely because the contract was still in effect. The cornerstone of Ra-Nav's argument is that it was reasonable in believing that the termination of the contract in January 1986 had been reconsidered or "vitiated" by the events subsequent to the termination.

The government responds that substantial record evidence supports the Board's finding that the government did not reconsider its decision to terminate the contract, and therefore that the appeal period had expired many years before. The government asserts that the Cautionary Notice clearly warned Ra-Nav. The government also questions the reasonableness of Ra-Nav's belief that the termination had been vitiated, and points out that the interaction between the government and Ra-Nav subsequent to the termination of the contract was consistent with the stated purpose of the Cautionary Notice, viz., mitigation of Ra-Nav's damages for default.

We agree with the government's arguments. Specifically, we disagree with Ra-Nav that the TCO, through his actions subsequent to the default termination, reinstated the contract. Reinstatement of a contract terminated for default is provided for by regulation, which reads as follows:

> Notwithstanding [other termination for default regulations], the contracting officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination, after a written determination is made that the supplies or services are still required and reinstatement is advantageous to the Government.

48 C.F.R. § 49.401(e) (1997). It requires amendment of the notice of termination and a written determination that the supplies are still required and that reinstatement is advantageous to the government. Whatever the requirements are for amending the notice of termination, they surely must indicate a clear and unequivocal desire to reinstate the contract. This did not occur here. On the contrary, the TCO's actions did not reinstate the contract; they were completely consistent with what the Cautionary Notice stated, viz., only allowing Ra-Nav to mitigate its damages. That Ra-Nav was on notice that the TCO had not reinstated the contract was further underscored by the government's continuing reference to that notice in its subsequent correspondence.

Ra-Nav argues that precedent indicates that actions of a contracting officer short of express clear and unequivocal action can suffice to reinstate a terminated contract. In support, Ra-Nav devotes a substantial portion of its brief to arguing the applicability of *Roscoe-Ajax Construction Co. v. United States*, 198 Ct.Cl. 133, 458 F.2d 55 (1972), to its appeal. Ra-Nav cites Roscoe for the proposition that a decision by a contracting

officer to terminate a contract can be "vitiated" by the contracting officer's subsequent conduct. Ra-Nav further postulates that whether the decision to terminate is vitiated is governed by a reasonableness standard. Ra-Nav then points to conduct described in the record that shows the reasonableness of its position. In particular, Ra-Nav notes that: (1) the TCO did not make it clear in his correspondence with Ra-Nav that the appeal period was still running; (2) the reference to "conditions" in subsequent correspondence did not refer to the appeal period; (3) the TCO encouraged Ra-Nav to continue performing post-termination; (4) the government took several months to seek reprocurement from other suppliers, thereby convincing Ra-Nav that the contract was still in effect; (5) a letter from the TCO dated April 18, 1986 set a date for resubmission of the First Articles that was five days past the expiration of the appeal period, and which contained no reference to the original termination decision; (6) in the April 18th letter, the government, in what Ra-Nav calls a new spirit of cooperation, allowed Ra-Nav to use government test equipment; (7) the government did not aggressively pursue recovery of progress payments made to Ra-Nav or reprocurement costs against Ra-Nav; (8) Ra-Nav believed that the government would issue a new final termination decision when the government decided to pursue reprocurement options; and (9) the government's consideration of Ra-Nav's settlement proposal in 1993-94 evidenced that both parties thought the contract to still be in effect.

We disagree with Ra-Nav that Roscoe is controlling. *Roscoe* involved the informal reconsideration by a contracting officer of his letter interpreting a contractual provision.

The Default Notice in this case clearly stated that it was a final decision of the TCO, made pursuant to the requirements of the Contract Disputes Act; it clearly indicated that further work on First Articles would only be to mitigate damages, not to reinstate the contract. All of the subsequent correspondence and activity were consistent with this interpretation. Neither *Roscoe* nor any other controlling authority of which we are aware indicates that the factors recited by Ra-Nav show that the present contract was reinstated.

Substantial evidence supports the conclusions that the TCO clearly terminated the Ra-Nav contract on January 24, 1986, that Ra-Nav received the Default Notice, and that the Default Notice clearly specified Ra-Nav's appeal options. At that point, the section 606 appeal period began to run, and the informal actions of the TCO in light of the Cautionary Notice could leave no doubt that Ra-Nav had ninety days within which to appeal the termination to the Board. Such actions by the TCO did not constitute reinstatement of the contract.

CONCLUSION

The Armed Services Board of Contract Appeals did not err in dismissing Ra-Nav's appeal because it was not taken within ninety days of its receipt of the TCO's final decision to terminate its contract for default. Accordingly, the decision of the Board is

AFFIRMED.

APPEAL OF – HARRIS PRODUCTS, INC.
87-2 BCA ¶ 19,807, ASBCA No. 30,426
April 24, 1987
OPINION BY ADMINISTRATIVE JUDGE COLDREN

ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Appellant has taken a timely appeal pursuant to the Contract Disputes Act from a contracting officer's final decision terminating appellant's contract for default for untimely delivery of helical gearshafts. The appellant argues that the termination was improper because it was in violation of the automatic stay provisions of the Bankruptcy Code which are contained at 11 U.S.C. § 362. The Government has moved for summary judgment arguing that the automatic stay provisions are not applicable because appellant was in default prior to the filing of the petition for reorganization under Chapter 11 of the Bankruptcy Code and because appellant has alleged no valid excuse for its untimely delivery. Appellant replied that the automatic stay provision of the Bankruptcy Code was controlling and that its failure to make timely delivery was due to the default of its subcontractor which was beyond its control. We reach only the automatic stay argument which we find to be dispositive.

FINDINGS OF FACT

1. On 9 November 1982, appellant entered into a contract requiring the delivery of 640 helical gearshafts on or before 6 September 1983. The Contract incorporated standard Default clause DAR 7-103.11 (1969 Aug).

2. Two subsequent contract modifications containing additional monetary consideration provided by appellant extended the delivery date to 1 April 1984.

3. Appellant failed to meet the 1 April 1984 delivery date. The Government issued a cure notice to appellant dated 10 May 1984 (Rule 4, tab 20). By a letter dated 18 May 1984, appellant replied to the cure notice by blaming its failure to deliver on mechanical breakdowns and describing its corrective actions (Rule 4, tab 21).

4. The Government, without any consideration from appellant, extended the delivery date to 1 August 1984.

5. Appellant failed to meet the 1 August 1984 delivery date.

6. By letter of 24 August 1984, appellant informed the Government that appellant had filed for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. 1101 et seq.

7. The Government issued a cure notice dated 19 September 1984. Appellant expressed its desire to complete the contract in a letter dated 27 September 1984. Appellant did not, however, describe any plan or schedule for such completion.

8. By a final decision dated 26 October 1984, the Government terminated the contract for default. The Government indicated in its decision that it would not (1) repurchase any of the contract items at appellant's expense or (2) make any claim against appellant under the contract.

9. Appellant appealed to this Board in a Notice of Appeal dated 29 November 1984.

DECISION

The Government alleges in its motion for summary judgment that the appeal should be denied as a matter of law because the appellant has asserted no valid defense to its default in its complaint. The Government's argument continues that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, is not applicable because the appellant was in default prior to filing for bankruptcy and that the alleged excuse for its non-performance concerning appellant's subcontractor is equally without merit because to be excusable under the terms of the contract's Default clause the default must be without the fault of both appellant and its subcontractors.

Appellant argues that the automatic stay provision of the Bankruptcy Code precluded the contracting officer from issuing the default termination. If this argument is persuasive, appellant must prevail as a matter of law even though it has failed to file a counter motion for summary judgment. Boeing Company, ASBCA No. 28342, 85-3 BCA ¶ 18,435 at 92,608. We find the argument controlling and grant summary judgment for the appellant.

The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, provides as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(3) any act to obtain possession of property of the estate or of property from the estate or exercise control over property of the estate;

* * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(b) The filing of a petition under section 301, 302, or 303 of this title ... does not operate as a stay--

* * *

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power

Section 362(a)(3) of the Bankruptcy Code automatically stays any act to obtain possession or control over property of the bankruptcy estate of a debtor. An executory contract was found to be property within the meaning of Section 362(a)(3), Government action taken to default that contract was determined to be an act violating the automatic stay, and the contract was held to remain executory. Corporation de Servicios Medicos Hospitalarios de Fajardo v. Mora, 805 F.2d 440, 444 (1st Cir.1986) at fn. 3. Thus, the contracting officer's attempt to terminate this contract after appellant's filing of its bankruptcy petition was null and void. The contract remains executory and not subject to termination action unless and until the automatic stay is lifted by the Bankruptcy Court.

PROBLEM #1

The agency awarded a requirements contract to Kaufman to furnish certain kitchen utensils. Kaufman was unable to obtain a National Sanitary Foundation (NSF) approval for the manufacture of a particular frying pan, and such approval was a precondition to the Government's inspection of preproduction samples. The agency then terminated that portion of the contract for default on May 26. On July 20 Kaufman received the required certification from NSF, and conveyed this information, along with the fact that it had 1300 approved frying pans in stock, to the agency. The agency never responded. On August 19 the agency awarded a definite quantity reprocurement contract for the frying pans to another source and has assessed the excess cost of reprocurement against Kaufman. Discuss.

PROBLEM #2

Christensen was awarded a contract by the Forest Service to thin 124 acres of timber. He encountered hundreds of feet of abandoned steel cable and debris from prior logging operations, which damaged his equipment and created an allegedly hazardous working condition. Christensen notified the Government he was halting performance because of the unsafe conditions and would not resume until the problem was resolved.. The Government terminated the contract for default, claiming abandonment of the jobsite justified the termination and later sought liquidated damages. Christensen appealed the termination. Analyze the appeal and provide a decision.

PROBLEM #3

To comply with the Army's urgent need for air conditioning units, Applied agreed to a production schedule requiring it to perform considerable work on production units prior to approval of First Article Tests (FAT). The revised schedule specified the FAT report was due on 22 May and delivery of the first 300 production units was due on 8 July. Applied failed to submit the report on time. On 4 June it submitted a request for progress payments for the period ending 31 May, which was paid on 10 June. Also on 4 June the Government notified Applied of certain deficiencies in the FAT conducted on 15-18 April. The following day the Government requested and received Applied's analysis of the test failure. On 11 June Applied advised it was ready to test the First Article. The Government could not witness the tests until 18 June at which time it required Applied to rerun other tests that Applied objected to as unnecessary. On 19 June the Government sent Applied a Show Cause and Cure Notice, citing failure to submit the FAT report and giving Applied 10 days to respond. On 20 June the requiring activity advised the Contracting Officer there was no longer an urgent need for the air conditioning units. On 21 June Applied advised the Government that the FAT report would be submitted on 1 July, with the first 100 production units to be delivered on 8 July and the next 200 by 31 July. On 24 June the Government's industrial specialist, following an inspection of Applied's plant, reported that it could meet its proposed delivery schedule. On 27 June the Contracting Officer advised that Applied had not satisfied the concerns expressed in the Show Cause and Cure Notice letter. Applied submitted the FAT Report on 28 June and a second response to the show cause order on 1 July. On 8 July it delivered 100 production units, which were refused because the FAT Report had not been approved as yet. It was approved on 11 July. On 12 July the Government terminated the contract for default, citing failure to deliver timely the FAT Report and the production units. Applied appealed. What result?

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Problems *(continued)*

PROBLEM #4

In early June the contracting officer unilaterally established a new delivery schedule for its contract with ABC Corp, the Government having waived its right to terminate for default for failure to meet the original schedule. The revised schedule called for submission of a First Article Test Report on 12 August. It received the following letter, dated 18 June, from ABC Corp's attorney: "[T]he president of ABC Corp has directed me to advise you that, after trying in good faith since receiving the contract to develop the contract item in a satisfactory fashion, and after expending $24,900, this corporation is unable to produce this item. We have requested a number of times, perhaps not in the required fashion, that they be relieved of this contract due to their inability to produce the item. This is not a case of willful or even negligent failure to perform. This small shop simply does not have the expertise to complete the contract item, if in fact it can be completed in accordance with the prints with which they were furnished. In conclusion, I state that you have been previously advised that ABC Corp is unable to complete the item." Without further correspondence the contracting officer terminated the contract for default on 29 July. ABC Corp challenges the default. Discuss.

PROBLEM #5

RMS had been performing building maintenance and repair at a Navy facility. After four months of performance, which the vice-commander considered to be substandard, a major problem developed after a severe thunderstorm. A lightning strike at each of two buildings severely damaged each building's electrical generator and left the buildings without electricity. Also as a result of the lightning strikes, the self-contained back-up electrical power systems at the two buildings no longer functioned. Unfortunately, the intrusion systems work on emergency battery power for not more than 6 hours. The contract provided that emergency repairs would be made within 24 hours after system failure.

The thunderstorm ended at 1800, June 12th. The contractor personnel at the site were aware of the problem, but were unable to get replacement generating equipment. At 1900 the vice-commander contacted the contracting officer and told her that the two buildings must be operational by 0630 the next day. Gleason, the President of RMS, was immediately informed of this. Gleason said that was impossible. After being told this was an emergency, he responded that his requirement for emergencies did not pertain to Acts of God. The commander of the Engineer Battalion was then contacted and asked to provide emergency generators for the buildings. He did and the buildings were operational by 0700. At 0800, 13 June, the vice commander, after being briefed on the events of the preceding evening ordered the contracting officer to terminate the contract with RMS and to do whatever was necessary to get the buildings maintained. The contracting officer issued a verbal order for building maintenance to Butler Industries, the next-in-line offeror. At 1630, 13 June, she faxed Mr. Gleason a notice of termination for default. RMS has appealed the contracting officer's final termination for default decision. Identify and discuss the arguments RMS would be likely to make in support of its appeal.

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Problems *(continued)*

PROBLEM #6

The Agency awarded a requirement contract to Kaufman to furnish certain kitchen utensils. Kaufman was unable to obtain a National Sanitary Foundation (NSF)Approval for the manufacture of a particular frying pan, and such approval was a precondition to the Government's inspection of preproduction samples. The agency then terminated that portion of the contract for default on May 26th. On July 20th, Kaufman received the required certification from NSF, and conveyed this information; along with the fact that it had 1300 approved frying pans in stock, to the agency. The agency never responded. On August 19th, the agency awarded a definite quantity reprocurement contract for the frying pans to another contractor. The agency then assessed the excess cost of the reprocurement against Kaufman. Discuss—

What are excess reprocurement costs?

Can the Government assess excess reprocurement costs against Kaufman?

Why or why not?

Under what circumstances may the Government assess excess reprocurement costs?

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CHAPTER THIRTEEN CASES

GEORGE LEDFORD CONSTRUCTION, INC.
VABCA 6630-6632, 2001 WL 1352902
October 31, 2001

FINDINGS OF FACT

On January 5, 1994, the Appellant, George Ledford Construction, Inc. (Ledford or Contractor) submitted several claims arising out of Contract No. V564C-236 (Contract) to the Contracting Officer (CO), Victor E. Fongonis, alleging that it was entitled to a $25,558.30 equitable adjustment and additional time of 536 days:

The CO ultimately denied the claims in their entirety by a final decision issued on May 10, 1995. The final decision individually addressed each of the nine items claimed and contained the following appeal language:

> In accordance with the findings above, your claims are hereby denied. This is the Contracting Officer's final decision in the matter. 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 this appeal is taken. This 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 $10,000 or less or its accelerated procedure for claims of $50,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U. S. C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision).

Ledford appealed the May 10 final decision in a letter dated May 23, 1995, sent certified mail (Z 212 011 820) on May 24 addressed to: VA Medical Center, 810 Vermont Ave., NW, Washington, DC 20420, Attn: Recorder. This letter was subsequently delivered to VA Central Office (VACO) in Washington, DC, and on May 30, 1995, was signed for as follows: "(mailroom) R. Harris". Appellant alleges that a copy of the appeal letter was also mailed by certified mail to the CO at the VA Medical Center, Fayetteville, AR, but does not provide a copy of the certified mail receipt. Government Counsel represents in its RESPONSE that the VACO mailroom routed the May 23 letter to the Board of Veterans Appeals, which forwarded it to the CO instead of to the Board of Contract Appeals. On June 19, 1995, referencing the May 23 appeal letter, the CO wrote Ledford reiterating the appeal language contained in the final decision, and inviting the Contractor to contact him if it had any questions. The letter did not mention that the appeal letter had been routed in VACO to the Board of Veterans Appeals and then to the CO, or that it was in any way "misdirected" or "defectively filed."

On July 30, 1996, Ledford submitted invoices for 11 items that it referred to as "Constructive Change Orders for Payment Nos. 1 through II." The CO wrote Ledford on

September 24, 1996 informing it that he had already addressed "Constructive Change Order for Payment Nos. 1 through 9" in his May 10 final decision, and would not further consider them. He also returned the new items without action indicating that the referenced documentation was not attached, and that without the documentation he did not have sufficient information to evaluate the new issues.

On September 11, 1996, Ms. Ledford sent a letter to Assistant General Counsel Phillipa Anderson in Washington, DC (with a copy also forwarded to the CO) explaining that the Contractor had already submitted an appeal in May 1995 and was waiting for a response to the appeal, and complaining that the CO "has not responded to our recently filed claims. "While there was no correspondence in the Record indicating a response from Ms. Anderson, the CO wrote to Ledford on October 8 informing it that "no further action will be taken" and: [Y]our time for appeal expired on May 10, 1996 ... Ledford's appeal rights were provided with the Contracting Officer's Final Decision issued on May 10, 1995. In our June 19, 1995 response to your letter of May 23, 1995, your rights were reiterated. Receipt of these rights was acknowledged in your letter of September 11, 1996. It is the contractor's responsibility to follow the appropriate procedures throughout the appeal process.

By letter dated December 1, 1996, Ms. Ledford wrote back to the CO:

I have finally realized the address you provided us to appeal your decision was evidently an incorrect address. We mailed our appeal to that address, delivered and accepted May 30, 1995 by R. Harris, with a copy mailed to you at the same time. I have never received acknowledgment of the Appeal from you or Washington, despite numerous contacts with the Office of Counsel.

Please provide me the correct address to resubmit my request for the Appeal. I consider your actions in providing us with an incorrect address as fraudulent, malicious and deceptive.

The CO responded on December 9, 1996 disputing the allegation of a deliberate intent to deceive and asserting: "Ledford's original appeal letter, forwarded to the VAMC Fayetteville for response, does not indicate a carbon was provided to the Contracting Officer, nor was a copy received from the appellant. As stated in our letter of October 8, 1996, the time for appeal expired on May 10, 1996."

By a subsequent letter bearing this Board's proper address, mailing symbol, and a December 16, 1996 date, Ledford asserts it attempted to file an appeal "from the Contracting Officer's decision on claims filed July 30, 1996 and returned without action September 24, 1996." (Exhibit B-2) This Board has no record of having received the December 16 letter. Contractor avers that, on December 20, it received a facsimile response from "Charlma Jones and/or Joan Ratliff [VA Office of General Counsel] promising action" on the December 16 letter, but a copy of said facsimile has not been made part of the Record. The Record provides no further indication that Appellant attempted to pursue the matters that are the subject of VABCA-6630 from January 1997 until May 10, 2001, when this Board first became aware of these matters.

DISCUSSION

Pursuant to the Contract Disputes Act of 1978, the Board lacks jurisdiction over an appeal filed more than 90 days after the contractor's receipt of the contracting officer's final decision. 41 U.S.C. § § 605 (b) and 606. The 90-day filing period is a statutory waiver of sovereign immunity, that must be strictly construed and which cannot be waived by the Board. Cosmic Construction Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982). The

three appeals in issue were not docketed by our Board until May 2001, approximately five years after the Appellant received the CO's final decisions.

With regard to this case, Ledford avers that it submitted its appeal in a timely manner, and even if it did not timely submit the appeal, the Board should permit Ledford's appeals by "equitably tolling the 90-day limitation period," because it "actively pursued its judicial remedies." Arguing that the appeal is untimely, the Government avers: "[u]nder the present facts, there is no dispute as to when the Contracting Officer's final decision was issued. May 10, 1995, and when the present appeal was filed. May 21, 2001," and, accordingly, this case should be dismissed for lack of jurisdiction.

When the May 10, 1995 final decision was issued, Federal Acquisition Regulation required the CO's written decision to include, inter alia, a "[paragraph substantially as follows":

> "This is the 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 this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision."

VA Acquisition Regulation (VAAR) 833.211 supplements the FAR required appeal language and requires that, when issuing a final decision, a VA contracting officer include language stating the VA Board of Contract Appeals is the appropriate agency board to which to direct the appeal, the location of the Board Rules, and most pertinent to this appeal, the Board's address. In 1995, VAAR 833.211 (c) required the CO to insert the following notice:

> The Department of Veterans Affairs Board of Contract Appeals (VABCA) is the authorized representative of the Secretary for hearing and determining such disputes. The rules of the VABCA are published in section 1.783, of Title 38, Code of Federal Regulations. The address of the Board is 810 Vermont Avenue, NW, Washington, DC 20420.

The appeal language the CO used in his May 10 final decision denying Claims 001 through 008, was consistent with the language required by FAR 33.211. However, the CO failed to include the required VAAR notice in the final decision, which would have provided more specific information about our Board and its address. Notwithstanding the CO's omission, and well within the statutory appeal period, Ledford sent a certified letter addressed to "VA Medical Center, 810 Vermont Ave., NW, Washington, DC 20420" indicating its intent to appeal the May 10 final decision. The May 24, 1995 appeal notice was received in the VACO mailroom on May 30, where, according to Government Counsel, it was routed within VA to the Board of Veterans Appeals. Upon realizing the notice was associated with a contract matter instead of a veteran's claim, it appears that

the Board of Veterans Appeals routed the notice to the Fayetteville VA Medical Center instead of forwarding it to our Board. Ultimately, as admitted in GOVERNMENT'S RESPONSE, the notice found its way to the CO, where it stayed for 5 years. The CO failed to forward the appeal notice to our Board, which he knew to be the proper VA organization to receive the appeal. Instead, he chose to write Ledford reiterating the defective appeal language contained in his final decision. He did not mention that the appeal notice had been misrouted to him or that there were problems with Ledford's attempt to appeal the final decision. Under the facts here, Ledford had informed the CO of the problems it was having getting a response from the VA to its appeal, and still, the CO did not provide the Appellant our Board's name or address. Nevertheless, when the notice of appeal was received in the VACO mailroom on May 30, 1995, the matter that is the subject of VABCA-6630 was effectively appealed.

It is well established that misdirection of a notice of appeal is not fatal. An otherwise proper notice of appeal misdirected to the agency contracting officer rather than to the board of contract appeals has been found to be a valid notice of appeal. Delivery of a notice of appeal to Government counsel has also been found to be sufficient. Essentially, a writing manifesting the requisite intent to appeal can be effective notice even though it is sent to a wrong element in an organization.

So too, the CO's June 19 letter did not negate the effectiveness of the May 30 appeal. A contracting officer cannot "undo" what was otherwise an effective notice of appeal simply by putting a contractor on notice that he or she believes the notice of appeal was inadequate. While it failed to do so, even had the CO's June 19 letter properly informed Ledford that the appeal had been misdirected and was yet not properly docketed at the Board, this appeal would still be effective. Given the facts presented here, we have no difficulty finding Appellants May 23 letter addressed to "VA Medical Center, 810 Vermont Ave., NW, Washington, DC 20420, Attn: Recorder" was timely, expressed the requisite intent to appeal to a higher authority, and operatively appealed these matters to our Board.

We address Appellant's argument that defective appeal language effectively tolled the statute of limitations on this appeal because, pursuant to Pathman Construction Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987) and its progeny cases, a defective final decision that does not adequately explain appeal rights does not trigger the running of the limitations period. VA relies on a subsequent decision of the Federal Circuit, Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996), which it argues adds an additional requirement to the Pathman precedent requiring an appellant to allege and demonstrate that the lack of notice in a final decision actually prejudiced its ability to appeal the final decision. In this appeal, we are faced with the challenges of considering the deficiencies in the appeal notice, weighing Appellant's subsequent actions and inaction in light of those deficiencies, and reconciling existing case precedent with those findings. As is readily apparent from the facts and the parties' arguments, there is considerable room for discussion here.

On May 17, 1995, the CO issued a final decision defaulting Ledford effective Friday, May 26, 1995. The only reference to appeal rights in that final decision was a repeated general statement to the effect that "the Contractor has the right to appeal the decision under the DISPUTES clause of the Contract." The final decision failed to include both the mandatory FAR and VAAR appeal rights language, which would have provided Ledford critical details about, among other things, the time periods in which the appeal was statutorily required to be made, and the contractor's choice of forums, including the name of the appropriate court and board, to which to make an appeal.

The Government admits that the final decision on the default omitted the "specific

verbiage" required by the CDA, but argues that the Appellant's position that it was left "without the lack of knowledge as to how to proceed" and "unable to defend itself," was made without consideration of the fact that it received another final decision one week earlier that did set forth sufficient appeal rights. It is true that this matter is complicated somewhat by the fact that, approximately 10 days earlier on May 10, 1995, Appellant received another final decision. By taking appropriate steps to appeal that decision, Ledford preserved its rights before this Board. At the time the appeal from the final decision on the default action arguably should have been taken, the Contractor did not know that the earlier final decision, lacking the VAAR notice requirements, was also deficient. Ergo, Government argues, had it wanted to do so, Ledford had all the information it needed from that earlier final decision to effectively appeal the default termination.

Ledford's correspondence to the CO, sent shortly following the default action, certainly indicated that it vigorously objected to and "rejected] the Termination for Default as not being in accordance with the PARS, 48 U.S.C. and the law of the land." It is unclear from the Record, however, whether Ledford understood that if it did not appeal the default action within the statutory time period, it would permanently lose its right to appeal the default. Even though it was told in correspondence various times that it had the right to appeal the termination decision under the Contract's DISPUTES clause, the Appellant was not informed in this final decision that the appeal must be made within 90 days to the Board or within 12 months to the Court of Federal Claims. No attempt at an appeal was made, with Ledford continuing to obstinately insist "[y]our final decision is rejected in its entirety as being an improper Termination for Default."

We carefully reviewed other cases, for guidance in addressing the issues presented by this appeal.

Until 1996, Pathman Construction Co. v. United States, was considered by boards of contract appeals to be the leading case when considering deficiencies in final decisions. In Pathman, the Federal Circuit addressed a Government argument that the statutory limitation periods should be applied in instances where a final decision could be considered "deemed denied," because the contracting officer failed to render it within the regulatory time periods. The court rejected Government's argument stating that:

> The "receipt"' of the contracting officer's decision by the contractor is the critical event that starts the running of the limitations period.

Following the Federal Circuit's issuance of Pathman, a body of case law developed at the Armed Services Board of Contract Appeals (ASBCA) rejecting a requirement that the Contractor show detrimental reliance when arguing that incorrect advice of appeal rights prevented the limitation period from commencing.

The Federal Circuit addressed the issue of detrimental reliance in its Decker decision. Explaining its holding, the Decker Court wrote:

> Section 605(a) [of the CDA] requires that the Government provide the contractor sufficient information concerning his rights to make an informed choice as to whether, and in what forum, he will pursue an appeal. The focus of this requirement is the protection of the contractor. When a contractor's determination regarding appeal is unaffected by the defect, the notice does not fail in its protective purpose. The notice thus continues to be an effective Contracting Officer's decision under §605 with respect to triggering the limitation period. 76 F.3d at 1579-80 (emphasis added).

The Decker Court acknowledged, "numerous Board cases have rejected a reliance

requirement," but stated:

> This court, however, has never so held. To the contrary, in Philadelphia Regent Builders, Inc. v. United States, 634 F.2d 569,225 Ct. Cl. 234 (1980), our predecessor, the Court of Claims, held that various minor or technical defects in a default termination notice did not invalidate the termination, finding that the contractor had not demonstrated that it had relied to its detriment on those defects.

In the appeal before us, Government avers:

Appellant neither alleges prejudice nor would it be able to demonstrate prejudice if it was alleged. Appellant did not attempt to appeal the final decision, nor did Appellant seek out further instructions as to how to file an appeal or where it should be brought. Rather, Appellant accepted the termination without murmur.

We find the facts and circumstances presented in this appeal to be more analogous to those in Pathman than in Decker. Decker involved a final decision that gave the contractor incorrect information as to where to appeal the default action. In the matter before us, the defect in the final decision is not simply one of incorrect information or misdirection, the May 26 final decision did not give Ledford any information as to when or where to appeal the default action. It merely told the Contractor that it had the "right to appeal this decision under the DISPUTES clause." A review of the Contract's DISPUTES clause reveals that it did not contain any information about when, where, or how Ledford should appeal the default action.

We are not persuaded by the Government's assertion that Ledford should have known where to appeal because the CO had, approximately one week earlier, rendered another final decision containing the "statutorily prescribed appeals language." While the default was issued in the form of a final decision, there was nothing in that decision that put the Contractor on notice that it was expected to appeal the "Government" default claim in the same manner as it appealed the denial of its earlier "Contractor" equitable adjustment claim. Our determination is supported by the fact that the default final decision actually did contain appeal instructions that were different from the earlier final decision, when instead of including the FAR clause it directed Ledford to the DISPUTES clause of the Contract.

Based on the foregoing facts and analyses, we conclude that the May 26 final decision contained more than "various minor or technical defects" and that it lacked critical appeal information to put Ledford sufficiently on notice of its rights of appeal. As such, the final decision was substantially deficient and unable to meet the minimum requirements necessary to trigger the running of the limitations periods.

While under a reading of Decker and Pathman we are not required to address detrimental reliance when a decision lacks "critical" or "essential" information, we note that the Appellant represents it "was prejudiced by this defective final decision because it did not know what to do or how to proceed." To the extent an appellant can actually "rely on" something that is not provided, Ledford "relied" on and, as a result, was adversely impacted by the deficient appeal rights provided in the final decision.

DECISION

Based on the foregoing, we conclude that this case is properly before the Board.

APPEAL OF DEFENSE SYSTEMS COMPANY, INC.
ASBCA No. 50,534; 97-2 BCA ¶ 28,981

OPINION BY ADMINISTRATIVE JUDGE TING ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Defense Systems Company, Inc. ("DSC") submitted a $71 million "Claim for Breach" to an Army contracting officer. The contracting officer notified DSC that due to the complexity of the claim, he would issue his decision on the claim on 11 July 1997, nine months after receipt. DSC appealed the contracting officer's failure to issue a decision on the date DSC designated -- 31 January 1997 -- as when the decision should be issued. After the Board docketed the appeal, the Army filed the instant motion to dismiss, contending that DSC's appeal was premature, and we have no jurisdiction.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 9 April 1992, the United States Army Industrial Operations Command ("IOC") awarded DSC Contract No. DAAA09-92-C-0477 for production and delivery of specified quantities of HYDRA 70 Rocket Systems. The contract was for a firm fixed price of $47,625,609.90.

2. By letter dated 1 October 1996, DSC submitted to the Procuring Contracting Officer (PCO) its "Claim for Breach" of the contract. DSC claimed "Cost, Fee and Damages" in the total amount of $71,999,163.

3. The "Claim for Breach" was accompanied by a "Certificate Of Current Cost Or Pricing Data" signed by DSC's Vice President/Chief Financial Officer on 30 September 1996. This certificate stated:

"This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.801 of the Federal Acquisition Regulation [FAR] and required under FAR subsection 15.804-2) submitted, either actually or by specific identification in writing, to the contracting officer or the contracting officer's representative in support of BEI's Breach Claim under Contract DAAA09-92-C-0477 are accurate, complete, and current as of 30 September 1996. This certificate includes the cost or pricing data supporting any advanced agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal."

4. The submitted "Claim for Breach" was in two volumes. Volume 1 contains 162 pages and included five sections: I. Introduction And Executive Summary, II. Statement Of Facts, III. Quantum, IV. Statement Of Entitlement, and V. Summary And Conclusions. Volume 2 contains 49 exhibits.

5. DSC's cover letter to its "Claim for Breach" requested "an immediate final decision on this claim." The letter went on to say "In view of the past history, it would be reasonable to expect that your final decision on entitlement could be issued within sixty (60) days of your receipt of this claim." The letter concluded with the statement "we will proceed with the litigation at the conclusion of the sixty (60) day period in the event no final decision has been issued."

6. The Government received DSC's "Claim for Breach" on 3 October 1996. By letter dated 22 November 1996, the PCO advised DSC:

"Under the Contract Disputes Act of 1978 (CDA), all claims by a contractor against the Government seeking payment of a sum certain exceeding $100,000 must be certified in accordance with the Act (See 41 U.S.C. Section 605(c)(1)). You are hereby notified that your attempted certification of the subject claim is considered defective in accordance with the requirements of the CDA. In particular, your attempted certification is found to be defective for the following reasons:

"(1) The Certificate of Current Cost and Pricing Data provided with the claim fails to certify that the claim is made in good faith and;

"(2) The Certificate of Current Cost and Pricing Data provided with the claim fails to certify that the amount requested accurately reflects the contract adjustment for which you believe the Government is liable.

"You are requested to correct these defects in the attempted certification accompanying the subject claim. In accordance with the CDA, you are advised to submit a certification substantially similar to the following:

"'I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.'"

7. In the same letter, the PCO advised DSC that notwithstanding the defects in DSC's certification, he had nonetheless "begun reviewing and considering the subject claim." The PCO advised that a contracting officer decision on the subject claim "will be issued on or before July 11, 1997."

8. The PCO justified the 11 July 1997 decision date on the bases that DSC's "Claim for Breach" made allegations of the adequacy of the technical data package provided not only under the 1992 contract but with respect to "contracts that have been... issued and administered by other commands and contracting offices." In addition, DSC was said to have made "complex allegations regarding international markets, foreign policy and business forecasting." The PCO stated that he needed external technical analysis and support in reviewing DSC's "Claim for Breach," and many people with personal knowledge of the facts alleged were no longer employed by the Army.

9. By letter dated 25 November 1996, DSC forwarded a CDA claim certification "in the format requested." The certification was backdated to 30 September 1996.

10. In a letter dated 4 December 1996 to the PCO, DSC took strong exception to the projected 11 July 1997 decision date. DSC contended that the 11 July 1997 date, being "more than nine (9) months after receipt [of its 1 October 1996 'Claim for Breach'] was unreasonable" because "The substantive issues raised by the claim were raised by DSC throughout contract performance." DSC contended that "the Government has had ample time to render a final decision... [and] nine months after receipt, does not represent a good faith effort to resolve the Breach of Contract claim." It went on to say:

"Although wholly unwarranted ... DSC will extend the deadline for the issuance of the final decision until January 31, 1997. The extension is overly generous, and is without prejudice to the company's position that the final decision should already have been rendered."

11. No contracting officer decision was issued on 31 January 1997. On 1 February 1997, DSC filed with the Board its Notice of Appeal. The appeal was taken from

the "constructive denial of DSC's breach claim ... and, alternatively, for failure of the contracting officer to render a final decision within the period prescribed by the Contract Disputes Act of 1978." DSC tells us that it had advised the Government by "formal notification that the litigation would commence on 31 January 1997." Thereafter, the Board docketed DSC's appeal as ASBCA No. 50534.

12. On 5 March 1997, the Board received from DSC a 97-page complaint. On the same day, the Board received from the Government a motion to dismiss for lack of jurisdiction.

13. Attached to the Government's motion was an affidavit from the PCO elaborating on the reasons for establishing 11 July 1997 as the date on which he will issue a decision. The affidavit stated that the HYDRA 70 Rocket System was being procured for all three branches of the Department of Defense (Army, Navy and Air Force), and a "wide array of offices" within each branch had and still have significant involvement in the HYDRA 70 Program. In addition, several different offices (the Procuring Contracting Office, the Hydra Program Office and the Engineering Branch) of the Industrial Operation Command, Rock Island, Illinois, were involved in the contract. The PCO stated that he had requested each one of the affected offices to furnish him an initial response to the DSC claim by 4 April 1997. Based on these responses, the PCO planned to finish a draft contracting officer decision by 9 May 1977. He has established 13 June 1997 for the various offices to provide clarification and additional data to his draft decision. He will then "[C]onsolidate and finalize [his] response and issue a Final Decision on or before 11 July 1997." The PCO also tells us:

"Based on the schedule I established, with input on the schedule from field offices, I believe the schedule for issuing a Final Decision is reasonable. DSC raises serious allegations involving a large amount of money. Therefore, I believe it is especially important to provide a thoughtful Final Decision. Requiring the Government to render a decision prior to 11 July 1997 would seriously jeopardize the Government's ability to address each issue raised by DSC."

14. DSC opposed the Government's motion to dismiss and filed a reply, which was received by the Board on 4 April 1997.

DECISION

Since the claimed amount in this case exceeded $100,000, Section 6(c)(2) (41 U.S.C. § 605(c)(2)), gave the contracting officer 60 days after receipt of a submitted claim to either (A) issue a decision or (B) notify the contractor of the time within which a decision will be issued. 41 U.S.C. § 605(c)(2)(A) and (B). In this instance, the contracting officer did not choose to issue a decision within 60 days after he received DSC's "Claim for Breach." Instead, he chose to notify DSC within 60 days after he received the "Claim for Breach" that he would issue his decision by a date certain -11 July 1997. Agency boards and the Court of Federal Claims have held that as long as the contracting officer notified the contractor of a date certain on which a decision will be issued, he would have complied with the requirement of 41 U.S.C. § 605(c)(2)(B). Boeing Co. v. United States, 26 Cl. Ct. 257, 259 (1992) ("[if] the claim is substantial and will require a long period of time to address, then the contracting officer's only option is to fix a date far enough into the future to assure a complete evaluation."); Aerojet General Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.

Section 6(c)(3) of the CDA required:

"The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor."

Here, the claimed amount exceeded $71 million. The narrative portion of the claim alone exceeded 162 pages. Based on our review of the materials before us, and of the PCO's affidavit, we conclude that the PCO's established decision date of 11 July 1997 is reasonable for a substantial claim such as the one here.

Section 6(c)(4) of the CDA (41 U.S.C. § 605(c)(4)) provides that "A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer." Board Rule l(e) implements this section of the CDA. See, e.g., Brunswick Corp., ASBCA No. 44243-652, 93-1 BCA ¶ 25,300. We have determined that, at this juncture, there is no undue delay on the part of the PCO in issuing a decision on DSC's "Claim for Breach." Nor has DSC formally petitioned us pursuant to Rule l(e) to direct the PCO to issue a decision by a specified date.

DSC is not without remedy to proceed with litigation of its "Claim for Breach" at the appropriate time. Its right to do so, however, is prescribed by Section 6(c)(5) (41 U.S.C. § 605(c)(5)) of the CDA. That section of the law requires "failure by the contracting officer to issue a decision on a contract claim within the period required" (emphasis added). There has been no failure to issue a decision within the period required. Should the PCO fail to issue a decision as promised, DSC may then avail itself of the statutory remedy provided in Section 6(c)(5) (41. U.S.C. § 605(c)(5)) of the CDA.

Because the PCO has fully complied with the statutory duty imposed upon him by 41 U.S.C. § 605(c)(2), and because the time period the PCO sought to render a considered decision is reasonable, we hold that DSC's appeal, at this junction, is premature.

Therefore, we grant the Government's motion and dismiss this appeal for lack of jurisdiction.

FISHERMAN'S BOAT SHOP, INC.
ASBCA No. 50324
September 22, 1997

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant filed a notice of appeal from a contracting officer's final decision denying appellant's request for an equitable adjustment. Appellant filed a complaint. In addition to filing the answer, the Government filed a motion to dismiss, alleging appellant was untimely in its appeal. Appellant responded. We deny the motion.

STATEMENT OF FACTS FOR PURPOSE OF DECIDING THE MOTION

1. On 25 September 1995, the Government awarded appellant Contract No. DABT57-95-C-0099 (the contract) for dry-docking, cleaning, painting, and repairing U.S. Army National Guard vessel BCDK-6204. The contract was awarded at an estimated cost of $119,989.00.

2. Contract clause F.5, titled "Required Performance Period," required the contractor to pick-up the vessel within seven calendar days of notification that the vessel was available for pick-up, perform the work and redeliver the vessel within thirty days following the date of pick-up.

3. Pursuant to the above contract provision, the Government, on 3 October 1995, notified appellant that the vessel would be ready for pick up in the seven-day window beginning 23 October 1995. Appellant responded that it would pick up the vessel on 24 October 1995 at 1300.

4. On 16 October 1995, the Government canceled the vessel's availability for the seven-day period commencing 23 October 1995. The Government could not give a firm reschedule date; however, it stated that it anticipated availability beginning 8 November 1995.

5. Two days later, appellant wrote the Government concerning appellant's reservations about beginning performance on or about 8 November 1995. Appellant was concerned about the possibility of bad weather and the two national holidays which would occur during the 30-day performance period. Accordingly, appellant asked the Government if there were options other than beginning performance on 8 November 1995.

6. The Government formally notified appellant on 2 November 1995 that the vessel would be ready for pick up on 8 November 1995.

7. On the same day as the Government's notification, appellant wrote to the Government that it would pick up the vessel on 8 November 1995 at 1400 hours. Appellant also reiterated its concerns about the weather and the two national holidays. Due to bad weather, appellant did not pick up the vessel until 13 November 1995.

8. Based on the date appellant picked up the vessel, the Government, via bilateral modification P0002, established the performance period as 13 November through 12 December 1995.

9. Throughout the performance period, appellant experienced delays it attributed to bad weather. These delays resulted in an exchange of letters between the parties.

Appellant requested a contract extension and the Government sought confirmation of the bad weather.

10. Appellant completed performance on 23 January 1996. The original completion date was 12 December 1995.

11. On 27 January 1996, the Government formally responded to appellant's requests for contract extensions due to weather. After detailed review of the weather data for the period concerned, the Government granted a one day contract extension. Additionally, the Government requested appellant search its files to ascertain whether there were more excusable delays or the Government would seek to assess liquidated damages.

12. On 19 March 1996, the Government assessed $13,200.00 in liquidated damages. The Government gave appellant until 22 March 1996 to provide evidence of excusable delay or the Government would issue an unilateral modification decreasing the contract price by $13,200.00.

13. On 13 May 1996, appellant sent the Government a letter requesting forty additional days of performance time and an equitable adjustment of $90,470.15. The letter briefly reviewed the history of the contract to include a multitude of alleged problems caused by the Government's change of availability date. The letter concluded with the following paragraph:

> It is our desire is [sic] not to litigate but to settle this issue. FBS seeks an equitable adjustment not a Contracting Officer[']s Final Decision. Please respond as soon as possible and call me if you have any questions.

The letter also contained nine exhibits further explaining appellant's request for additional days and monetary compensation.

14. The Contracting Officer (CO) responded to appellant's 13 May 1996 letter on 12 June 1996. In her response, the CO rejected outright appellant's monetary request. In addition, after an examination of the weather data for the time period involved, the CO granted three additional days for severe weather and one additional day for the Thanksgiving Holiday, making a total of five days added to the performance period.

15. On 18 June 1996, appellant sent the Government a letter, rejecting, in its words, "[y]our offer to settle this matter by extending the performance period 4 (four) calendar days ..." Appellant then offered to accept receipt of the contract balance plus $55,636.50 to settle its request for equitable adjustment. In the last substantive paragraph of the letter appellant wrote:

> Since we at FBS are not professional claim prepares, in the event that our offer is unacceptable, we will turn this matter over to Mr. Terry Jenkins of Jenkins and Associates to handle this professionally. Mr. Jenkins is not an attorney and we do not wish to litigate this matter. Mr. Jenkins is a contracts management consultant that is well experienced in claim preparation/resolution and will be more able to convince you of the merits of our claim.

Appellant requested the Government respond to its (appellant's) letter by 25 June 1996, if at all possible.

16. The CO responded on 24 June 1996 to appellant's offer by facsimile transmission. The CO adopted her 12 June 1996 letter as a final decision and added the appropriate final decision language.

17. On 5 September 1996, appellant submitted under the authority of the Contract

Disputes Act of 1978, a certified claim for $169,199.00. The claim encompassed the earlier request for equitable adjustment and added new elements. Indeed, in the narrative portion of the claim appellant proclaimed, "[t]his Request for Equitable Adjustment is submitted as a new request and it is requested that the Contracting Officer give it prompt and fair consideration." . The claim was properly certified and explicitly requested a contracting officer's final decision. It was for a sum certain seeking an adjustment to the contract price because of alleged increased costs due to Government caused delay.

18. On 3 October 1996, the CO sent appellant a one sentence response which reads in full.

Your updated, certified claim for $169,199.00 has been received; however, the final Contracting Officer's decision of June 24, 1996, remains intact.

19. Appellant then filed an appeal dated 29 October 1996, which was docketed on 5 November 1996. In due course, appellant filed a complaint. Along with its answer, the Government filed this motion to dismiss, alleging a lack of timeliness. Appellant has responded.

DECISION

This motion squarely presents the issue of whether a contractor who submits a request for equitable adjustment which arguably comports with the requirements for a claim, but explicitly states that the contractor is not asking for a contracting officer's final decision qualifies as a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 - 613, as amended. The CDA states the following as it relates to a contractor's claim:

> (a) Contractor claims. All claims by a contractor against the government relating to a contract shall be made in writing and shall be submitted to the contracting officer for a decision…. The contracting officer shall issue his decision in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this act

41 U.S.C. § 605(a). Following receipt of the contracting officer's final decision, the contractor has ninety days to file an appeal with the agency board of contract appeals. 41. U.S.C. § 606. This requirement is statutory and cannot be waived. The Government argues that appellant's 13 May submission was in fact a claim; therefore, the ninety-day window began to run upon receipt of the purported 24 June 1996 final decision. According to the Government, the ninetieth day would have been 22 September 1996 and since appellant did not file its appeal until 29 October 1996, the appeal should be dismissed for lack of jurisdiction. The Government also argues that appellant's 5 September letter was merely an update of the 13 May submission. Thus the 5 September writing cannot be considered a new claim. Moreover, since appellant did not ask for reconsideration of the 24 June decision and the Government did not indicate it was in fact reconsidering the 24 June decision, the finality of the original ninety-day period was effective.

On the other hand, appellant maintains that the 13 May submission was never intended to be a CDA claim. Rather, it was an effort to resolve a dispute outside the constraints of the CDA. Accordingly, appellant asserts that a formal CDA claim was not submitted until 5 September. Further, appellant argues that the fact that the CO's letter of 3 October referred back to the Government's 24 June letter renders the 3 October letter an appealable final decision. Since appellant filed its notice of appeal on 29 October 1996, the argument continues, this Board has jurisdiction over the appeal as the jurisdictional

prerequisites have been met.

The CDA does not define the term claim. However, the Federal Acquisition Regulation (FAR) provides the following definition, in pertinent part:

> "Claim" as used in this subpart, 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 the contract ...

FAR 33.201. From the above definition, case law has developed three requirements for a valid CDA claim. The requirements are: (1) a written demand (2) seeking as a matter of right (3) the payment of money in a sum certain. See, e.g., *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995). In addition to the three requirements enunciated in the FAR, for a valid CDA claim to exist there must be a request for a contracting officer's final decision. "The law does not require an explicit demand or request for a contracting officer's decision; as long as what the contractor desires by its submissions is a final decision, the prong of the CDA claim test is met." *James M. Ellett Construction Company, Inc. v. United States*, 93 F.3d 1537, 1546 (Fed. Cir. 1996) (citation omitted); *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995).

Assuming, arguendo, that the 13 May submission constituted a written demand, seeking as matter of right, a sum certain in money, it still cannot be considered a formal claim because the contractor explicitly stated that it was not seeking a contracting officer's final decision. We stated in *Lerma Company and Associates*, ASBCA No. 34012, 87-3 BCA p 19,958 that "[w]hen the issue involves a contractor's claim, the contracting officer cannot issue a final decision on his own motion." Also, *Checker Moving*, ASBCA No. 32654, 87-1 BCA p 19,357. Other Boards have similarly held. *Bridgewater Construction Corporation*, VABCA Nos. 2866 et al, 90-2 BCA p 22,764 ("A contracting officer cannot 'jump the gun' and issue a final decision before the contractor has actually submitted ... a written claim."); *Norfolk Shipbuilding and Drydock Corporation*, DOT BCA 1936, 88-2 BCA p 20,674 (One purpose of the CDA is to induce resolution of disputes by negotiation rather than litigation and the premature issuance of a final decision, in the absence of a valid claim, thwarts that purpose).

Accordingly, we hold that the 13 May 1996 letter was not intended to be and was not a CDA claim. Therefore, the contracting officer's final decision of 24 June 1996 was a nullity and failed to trigger the ninety-day appeal period. Appellant submitted a valid claim with proper certification on 5 September 1996. The Government denied the claim on 3 October 1996. The fact that the 3 October 1996 letter did not include final decision language is not fatal because notice of appeal rights is for the contractor's benefit and the exclusion of a statement of those rights does not deprive the contractor of the right to appeal. *North America Corporation*, ASBCA No. 28140, 83-2 BCA p 16,801. Appellant filed its notice of appeal on 29 October 1996, well within the ninety-day window. All of the jurisdictional prerequisites have been met. This Board has jurisdiction.

CONCLUSION

The motion to dismiss is denied. Within thirty days of receipt of this opinion, the parties are ordered to submit a joint status report outlining how they wish to proceed with the appeal.

EDWARD R. ESTER AND LORRAINE ESTER
PSBCA No. 3051, 92-2 BCA ¶24,822

FINN, Administrative Judge:
Respondent has filed a Motion to Dismiss this appeal, alleging that the appeal was untimely filed. Appellants oppose the Motion.

Findings of Fact

1. On September 16, 1963, Respondent and Appellants' predecessor in interest entered into a lease agreement for the Bellingham, Washington, postal facility for a base term of 20 years with six five-year renewal options. Under the terms of the lease Appellants were required to maintain the premises in good repair and tenantable condition except for damage caused by the tenant.

2. Respondent awarded a contract to a third party in February 1990 in the amount of $3,639.54 for repair of the facility's HVAC and boiler equipment.

3. On August 20, 1990, Respondent advised Appellants by letter that Appellants were liable for the cost of the repairs plus an additional $150 administrative charge.

4. By final decision letter dated January 3,1991, the Contracting Officer advised Appellants that they were responsible for the repairs and that a total of $3,789.54 would be deducted from their rent under the lease. The decision advised Appellants of their appeal rights under the Contract Disputes Act of 1978.

5. In a letter dated January 22, 1991, Appellant, Edward R. Ester, wrote the Contracting Officer that "I cannot agree with the Contracting Officer's final decision..," asked that it be reconsidered, and further requested a meeting to discuss the matter.

6. The Contracting Officer responded by letter of February 21, 1991, that "I will be happy to discuss with you any relevant issues of concern you have on this matter, and to offer you an opportunity to show cause why the Postal Service should not deduct monies from your rent receipts ..." The Contracting Officer requested that Mr. Ester call him to schedule a meeting.

7. Mr. Ester thereupon called the Contracting Officer and a meeting was scheduled for March 1, 1991. During the telephone conversation Mr. Ester was led to believe by the Contracting Officer that the January 3, 1991, final decision would be reconsidered during the meeting.

8. The meeting was held as scheduled on March 1, 1991, and the Contracting Officer advised Mr. Ester that he would review the facts with reference to repairs to the facility's mechanical equipment and would send Mr. Ester a letter rendering his final decision.

9. In a letter to Appellants dated May 13, 1991, the Contracting Officer advised that he had determined Appellants responsible for the cost of repairs to the facility's mechanical system. The letter stated in this regard:

> It is our determination that you, the lessor, have overall responsibility for the maintenance of the air handling system, and that the information provided in our March 1 meeting was not sufficient to warrant further consideration concerning monies owed

> to the Postal Service. Therefore, the withholding of the $3,789.54 from rents due, and the final decision of the contracting officer, as detailed in our January 3, 1991 letter, remains as stated.

10. Appellants filed their notice of appeal with the Contracting Officer on May 30, 1991.

Decision

As the basis for its motion Respondent argues that Appellants did not timely file their appeal with this Board within the 90 day appeal period allowed by the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.,* citing *Cosmic Construction Co. v. United States,* 697 F.2d 1389 (Fed. Cir. 1982). *Cosmic* held that the appeal period of 90 days is part of a statute waiving sovereign immunity and must be strictly construed. Respondent contends that Appellants' notice of appeal of May 30, 1991, taken more than 90 days after the Contracting Officer's January 3, 1991, final decision, precludes this Board from taking jurisdiction over the appeal.

There is no merit to Respondent's position. As pointed out by Appellants, relying *on Johnson Controls, Inc.,* ASBCA No. 28340, 83-2 BCA ¶16,915, a Contracting Officer's action in reconsidering his final decision divests that decision of finality. Here Appellants in a letter dated January 22, 1991, emphatically indicated disagreement with the Contracting Officer's final decision and asked that it be reconsidered. The Contracting Officer's letter of response advised Appellants that he would "be happy to discuss" the issues with Appellants and "offer you an opportunity to show cause why the Postal Service should not deduct money... The most reasonable interpretation of the quoted language is that the Contracting Officer was willing to reconsider his final decision. Little doubt of that fact existed when Mr. Ester spoke with the Contracting Officer to schedule the March 1 meeting, as Mr. Ester at that time was led to believe that the final decision would be reconsidered during the meeting. At the meeting itself Mr. Ester was advised that all facts would be reviewed and Mr. Ester would be sent a final determination by the Contracting Officer. In fact, such final determination was issued on May 13, 1991.

Thus, having agreed to reconsider his final decision of January 22, 1991, the Contracting Officer in effect nullified that decision. Subsequently, as promised, the Contracting Officer issued another final decision on May 13, 1991. Although that decision made reference to the January 3, 1991, decision it constituted a new, binding, and appealable decision. *Johnson Controls, Inc., supra.* Appellants timely filed their Notice of Appeal on May 30, 1991.

Appellant’s appeal was timely taken. Accordingly, Respondent’s Motion to Dismiss is denied.

APPEAL OF ANLAGEN UND SANIERUNGSTECHNIK GMBH
97-2 BCA 29,168, ASBCA No. 49,869
July 25, 1997

This is an appeal of a deemed denial of a claim, which was originally submitted by Anlagen und Sanierungstechnik GmbH (AST) on 24 January 1989 and was recertified in an amount of DM 171,070.69 on 18 July 1990. Between 27 June 1991 and May 1996, when it filed this appeal, AST took no action on its claim. The Government has filed a summary judgment motion, contending that AST's appeal is barred by the doctrine of laches. AST opposes the motion. The Contract Disputes Act (CDA), 41 U.S.C. ss 601 et seq., as amended, is applicable; only issues of entitlement are before us for decision.

FACTUAL BACKGROUND

1. On or about 17 July 1986, the Department of the Army awarded Contract No. DAJA76-87-C-0461 to AST for the renovation of Building 3102 at Camp Pieri, Wiesbaden, Germany. The contract itself cannot now be located; therefore, we must derive the contractual price of DM 1,310,000 through reference to Modification No. 1

2. The parties executed four bilateral modifications to the contract. The first modification extended the contractual completion date to 31 March 1987 (R4, tab 2). Modification Nos. 2 and 3 changed the specifications and increased the contractual price by DM 97,998.40 and DM 229,965.00 respectively. Modification No. 3 also extended the contractual completion date to 1 June 1987. Through Modification No. 4, AST received DM 35,000 in satisfaction of a claim for equitable adjustment

3. On 16 March 1987, AST forwarded to the contracting officer an uncertified request for another contractual modification in a total amount of DM 129,894.25 In a letter dated 5 May 1987, the Army responded to AST's request. It asserted that the request was being evaluated. The Army also instructed AST to install the fire alarm system as specified in the contract and not as stated in the request for modification. AST acknowledged the Army's letter on 5 May 1987.

4. On 24 January 1989, AST submitted a revision of its 16 March 1987 claim in a total amount of DM 171,070.69. On 18 July 1990, AST recertified its claim. It also stated: "We request your final written decision on this claim within no later than 60 days of your receipt of this certification of the claim forwarded with this letter".

5. On 26 February 1991, AST's counsel forwarded a letter to the contracting officer in which he stated, in pertinent part: "AST has asked us to request from you a final decision in this matter or alternatively an opportunity to negotiate the claim to mutual [sic] agreed conclusion, either of which to take place no later than 15 March 1991"

6. On 2 May 1991, the contracting officer forwarded a technical evaluation of AST's claim to its counsel. On 10 June 1991, appellant's counsel wrote to the Army's counsel, in pertinent part, as follows:

> We are prepared to enter into binding negotiations with the appropriate Government representative... Should those negotiations, however, not eventuate or prove unproductive, we will be compelled to recommend the filing of appropriate papers to

pursue our client's remedies with the Board of Contract Appeals.

7. On 11 June 1991, the Army's counsel responded to AST's letter. He offered to meet with appellant's counsel to discuss the claim "on the 18th of June". The parties met on 18 June 1991 and 27 June 1991 but were unable to resolve this matter. Between 27 June 1991 and 21 May 1996, the record reveals no further discussion of the claim by the parties. On the latter date, AST filed a notice of appeal with this Board.

8. The Army attached to its summary judgment motion an affidavit signed by Mr. Matano Gracias, a contracting officer with the U.S. Army Contracting Command, Europe. He stated, in pertinent part, as follows:

> The Regional Contracting Officer Mainz-Kastel, which was responsible for administration of above-referenced contract DAJA76-86-C-0461, was closed in calendar year 1991.
>
> I have coordinated and made all the effort to locate any and all Government file(s) relevant to this dispute and have only been able to locate the file of one of the Contracting Officer's Representative [sic] for subject contract.
>
> I have also been unable to locate the (former) Government employees responsible for site inspection, administration and with first-hand knowledge of the facts surrounding the dispute under subject contract.

9. The Army attached a second affidavit from Mr. Gracias as part of its reply brief. He stated, in pertinent part:

> Due to massive reduction of U.S. forces in Germany, many buildings were returned to the German government. Old records stored in those buildings have been destroyed due to lack of space.

DECISION

As we stated in *Delco Systems Operations, Delco Electronics Corp*. ASBCA No. 37097, 90-3 BCA p 23,245 at 116,632: "Laches is an equitable doctrine under which relief is denied to one who unreasonably and inexcusably delays in the assertion of a claim, thereby causing injury or prejudice to the adverse party." The Federal Circuit has held that "[t]he elements necessary to invoke the doctrine of laches are unreasonable delay and resulting prejudice." *S.E.R., Jobs For Progress. Inc. v. United States*, 759 F.2d 1, 5, (Fed. Cir. 1985). Further, as this Board ruled in *Chimera Corp.*, ASBCA No. 18690, 76-1 BCA p 11,901 at 57,030: "[T]here is no presumption of prejudice" and the burden of proving prejudice from the late assertion of claims is on the party defending against such claims.

The Army has failed to meet its burden. Although it could have issued a final decision on AST's claim several years ago, it failed to do so. Therefore, its hands are not clean since it contributed to the circumstances, which led to AST's delay in appealing to the Board.

CONCLUSION

The motion is denied.

NAVCOM DEFENSE ELECTRONICS, INC.
v.
BALL CORPORATION

92 F.3d 877
United States Court of Appeals,
Ninth Circuit.

Decided Aug. 8, 1996.

Contractor on Air Force project brought suit to enjoin contractual arbitration of claims asserted by subcontractor. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., granted preliminary injunction and partial summary judgment, and subcontractor appealed. The Court of Appeals held that claims were subject to contractual arbitration and did not have to be submitted to contracting officer.

Affirmed in part, reversed in part, vacated in part, and remanded for entry of judgment for subcontractor.

This is an appeal from the district court's order granting summary judgment for NavCom and enjoining Ball from submitting its contract dispute with NavCom to arbitration. For the reasons set out below, we affirm the district court's denial of Ball's motion to dismiss, reverse the court's grant of summary judgment, vacate the order prohibiting arbitration, and remand for entry of an order consistent with this opinion.

I.

The Air Force awarded NavCom a contract to produce a radar altimeter system. NavCom subcontracted with Ball to design and manufacture antennas to be used as part of the system. The Air Force required that the antennas meet certain pass/fail criteria, including the "MIL-STD-810" salt fog test. NavCom developed the NavCom Salt Fog Test Procedure to ensure that its antennas met Air Force specifications, and the Air Force approved the test. The subcontract required Ball's antennas to pass the NavCom Salt Fog Test.

Ball asserted that NavCom's test procedures were more rigorous than those required by the Air Force, but eventually performed the test according to NavCom's procedure. NavCom claimed that the antennas failed, while Ball insisted that the antennas passed the Air Force's criteria. NavCom directed Ball to redesign the antennas.

Ball asked NavCom to pay an equitable adjustment for redesign costs in the amount of $1,467,949. Ball claimed its prototype antenna could meet Air Force pass/fail criteria and failed only because of the more stringent NavCom testing procedure. Ball also claimed NavCom required a redesign option that was more costly than other options.

The central question is whether the dispute between NavCom and Ball should have been submitted to an Air Force contracting officer or to arbitration. The Ball/NavCom contract required that the decision of a contracting officer about the prime contract would be binding on the two parties in disputes about the subcontract. In the same paragraph the contract provided that any dispute not settled by agreement of the parties would be submitted to arbitration.

NavCom informed Ball that it planned to submit a claim to the contracting officer as specified in the contract. The claim submitted by NavCom described the dispute between NavCom and Ball and then argued, ostensibly on behalf of Ball, that the Air Force should

be liable for increased costs because the Air Force's pass/fail criteria were ambiguous. Although Ball cooperated to at least some degree in drafting the claim (as required under the contract), Ball objected throughout the process to submission of the claim to the contracting officer. For instance, in a letter commenting on a draft version of the claim NavCom planned to submit, Ball wrote:

> Ball wishes to be on record that it has no claim against the Air Force and therefore does not endorse NavCom's statements in the draft letter that NavCom is "sponsoring" a claim "on behalf of Ball" pursuant to a "contractual obligation".... [I]f Ball was being sponsored, the effort was noticeably lacking in fervor; two, NavCom seems more intent on sidestepping or evading its liability to Ball by attempting to divert Ball's claims to the Air Force.

The Contracting Officer eventually denied the claim, finding that "Ball's argument that the MIL-STD-810 failure criteria are ambiguous is unfounded" and that the antennas had failed the test.

Just prior to the Contracting Officer's decision, Ball filed a demand for arbitration under the contract's arbitration provision. After initially participating, objecting to locale and choosing acceptable arbitrators, NavCom filed this suit in state court seeking to enjoin the arbitration. Ball removed the suit to federal court.

NavCom moved for a preliminary injunction prohibiting arbitration, and for partial summary judgment prohibiting arbitration and determining the subcontract required the disputed claim be resolved in the Court of Federal Claims where appeal of the contracting officer's decision was pending. Ball moved to dismiss for failure to state a claim.

The district court summarily granted NavCom's motion for a preliminary injunction and partial summary judgment and denied Ball's motion to dismiss. As clarified, the court's order enjoins Ball "from arbitrating any claim raised in its request for arbitration dated April 1, 1992, including, but not limited to, all claims or legal theories which refer or relate to Defendant's claim for an equitable adjustment in the amount of $1,467,949.00." The district court did not issue findings of fact or conclusions of law.

Ball appeals the district court's grant of summary judgment for NavCom, denial of Ball's motion to dismiss, and injunction prohibiting arbitration of Ball's claims, arguing that its claim against NavCom was not and could not be resolved by the contracting officer and that its dispute with NavCom was arbitrable under the contract.

II.

The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 ("CDA"), provides the statutory framework for resolving disputes between government contractors and the government. Section 605(a) provides that "[a]ll claims by a contractor against the government relating to a contract ... shall be submitted to the contracting officer for a decision," and § 601(a)(4) defines a "contractor" as "a party to a Government contract other than the Government." Under the CDA, contracting officers have jurisdiction only over claims by contractors against the government, not over claims brought directly by subcontractors. *Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed.Cir.1984)("hornbook rule" that subcontractors have no standing to enforce claims under CDA); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1548-49 (Fed.Cir.1983); *Clean Giant, Inc. v. United States*, 19 Cl.Ct. 390, 392 (1990); see also Senate Report No. 1118, 95th Cong., 2d Sess. 16-17, reprinted in 1978 U.S.Code Cong. & Ad.News 5235, 5250-51 (discussing exclusion of claims brought by subcontractors). A

subcontractor may assert a claim against the government only by having the prime contractor "sponsor" and certify the subcontractor's claim. *Erickson Air Crane*, 731 F.2d at 813; See Federal Acquisition Regulation 44.203(c); Major John J. Thrasher, "Subcontractor Dispute Remedies: Asserting Subcontractor Disputes against the Federal Government," 23 Pub. Cont. L.J. 39, 82-99 (1993). The contracting officer has no jurisdiction to resolve disputes between a subcontractor and the prime contractor. *U.S. West Communications Servs. v. United States*, 940 F.2d 622, 627 (Fed.Cir.1991)("A government contractor's dispute with its subcontractor was by definition specifically excluded from CDA coverage.").

III.

Whether Ball's claims could be submitted to the contracting officer depends upon whether they are claims against NavCom or against the Air Force. Ball has consistently alleged that NavCom, and not the Air Force, was responsible for the increased costs: Ball has contended that the NavCom Salt Fog Test procedure was too rigorous and the results were therefore invalid, and that the redesign of the antennas directed by NavCom was more expensive than other alternatives. These claims do not challenge Air Force conduct or suggest the Air Force was responsible for increased costs. They are claims by a subcontractor against a contractor, and the contracting officer therefore had no jurisdiction to resolve the dispute under the CDA.

NavCom's arguments to the contrary are unpersuasive. NavCom asserts that it did, in fact, submit Ball's claims to the contracting officer. However, Ball's allegations were neither presented to nor decided by the contracting officer. NavCom's claim did note that "[t]he language of MIL-STD-810 is overly restrictive," but Ball did not challenge the government's MIL-STD-810 pass/fail criteria but NavCom's test procedure. NavCom argued only that Ball and NavCom had arrived at different and reasonable interpretations of the Air Force's test criteria, and that because the redesign costs stemmed from ambiguity in the criteria which was attributable to the Air Force, the Air Force should pay the equitable adjustment. NavCom's claim that the pass/fail criteria were ambiguous simply did not address or include Ball's claims that NavCom's testing procedures were too rigorous or that NavCom demanded that Ball redesign the antenna in too costly a fashion. Nor did the contracting officer rule on Ball's claims; he found only that the "argument that the MIL-STD-810 failure criteria are ambiguous" - the theory advanced by NavCom, not Ball - was "unfounded."

Citing no authority, NavCom contends Ball's claims were claims against the government which NavCom could properly bring before the contracting officer if the claims could "be flowed up to the government so that ultimate financial responsibility will rest with that entity." This formulation begs the question it purports to answer - whether the claims allege government liability. In essence, NavCom contends that if it can transform Ball's claims into a claim against the government, no matter how distorted or unrelated to Ball's original claims, review by the contracting officer is Ball's sole avenue for relief and Ball is precluded from asserting its claims in any other forum. Neither the statute nor the contract contemplates that result.

NavCom points out that the subcontract provides that "if the face of this Purchase Order refers to a contract with the United States Government then ... any decision of the Contracting Officer under a Government prime contract, which relates

to this Purchase Order shall be conclusive and binding," and argues that because the subcontract does refer to a government contract and the contracting officer's decision relates to the subcontract, Ball is bound by that decision and barred from arbitrating its claims. This argument fails. The parties cannot by contract expand the contracting officer's jurisdiction beyond that granted by the CDA. As we have said, contracting officers have no jurisdiction over claims on disputes between the contractor and subcontractor. Moreover, the contracting officer decided only whether the Air Force was liable; that determination cannot bind the parties on the question of whether NavCom is liable to Ball. The extent to which Ball may be bound by the contracting officer's holdings on the issues he did decide - that the MIL-STD-810 was not ambiguous and that the antennas failed the MIL-STD-810 requirements - and the impact the contracting officer's findings may have on Ball's claims, can be determined in arbitration.

NavCom argues that the Court can supply missing words in the contract to carry out the intent of the parties, *Heidlebaugh v. Miller*, 126 Cal.App.2d 35, 38, 271 P.2d 557 (1954), and submitted evidence that but for a drafting error, the arbitration clause would have provided that "[a]ny dispute arising under this Purchase Order which is not covered by [the Contracting Officer provision], and which is not settled by agreement of the parties shall be decided by arbitration." This added language cuts against NavCom's position rather than supporting it - since the dispute between NavCom and Ball cannot be submitted to a contracting officer under the CDA, it is arbitrable under the contract. NavCom goes on to argue that the Court should give effect to the mutual intent of the parties, Cal. Civ. Code §§ 1636, and that the "main purpose" of the contract was to safeguard NavCom from inconsistent judgments. Even if NavCom had presented some evidence to support this theory, Ball could still arbitrate its claims against NavCom; were the arbitrator to find NavCom liable, there would be no inconsistency between findings that the Air Force is not liable but NavCom is because NavCom alone caused the additional costs.

We conclude that Ball's claims against NavCom are arbitrable under the contract.

IV.

Although Ball did not move for summary judgment below, we grant summary judgment for Ball, reverse the district court's grant of summary judgment for NavCom and vacate its order enjoining arbitration. See 10 Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2716 ("Summary judgment at the appellate level is proper even though the party who will prevail on the appeal did not move under Rule 56.")(citing International Longshoremen's Assn., AFL-CIO v. Seatrain Lines, Inc., 326 F.2d 916, 921 n. 2 (2d Cir.1964)); *Id.* § 2720.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, and REMANDED for entry of judgment for Ball. NavCom shall bear the costs on appeal.

ELLETT CONSTRUCTION COMPANY, INC. v. U.S.

93 F.3d 1537 (Fed. Cir. 1996)

Background

In July 1988, the Forest Service of the United States Department of Agriculture (agency) awarded Ellett a contract to construct a 2.7 mile logging road in the Siskiyou National Forest, Oregon. …

On July 28, 1988, the agency issued Ellett a partial notice to proceed, which authorized the construction of just 4,000 feet of the road, because of pending legislation to limit entry into the area. The agency then terminated the remainder of the contract for convenience on September 30, 1988.

By letter dated November 17, 1988, the stated purpose of which was "to file formal notice of claim pursuant to the Contract Disputes Act of 1978 [(CDA)]," Ellett sought to recover $545,157.19 from the agency. Ellett says this letter, like a termination settlement proposal, was intended to recover all money due under the contract. The contracting officer responded by letter of December 2, 1988, that FAR Part 49 governs "the settlement of termination proposals and requests for contract modification." The letter said Ellett needed to submit a settlement proposal on Standard Forms (SF) 1436 (Settlement Proposal (Total Cost Basis)) and 1439 (Schedule of Accounting Information), which were enclosed.

On March 3, 1989, Ellett submitted a settlement proposal on the required forms, requesting a net payment of $494,826. It admits that the amount sought in this request was largely duplicative of its November 17, 1988 submission, although different in some respects because of the requirements of the forms and unspecified intervening events. The parties then began to negotiate a mutually agreeable settlement.

In a January 12, 1990 letter to the contracting officer, Ellett observed that it had been "nearly 14 months" since the November 17, 1988 CDA "claim" and one year since the settlement proposal. Consequently, it said that unless the "outstanding claim" were resolved satisfactorily within thirty days, it would file suit in the United States Court of Federal Claims. The agency responded with a settlement offer of $120,649, which Ellett rejected in a March 31, 1990 letter, which also said that unless the agency agreed to a settlement of $250,000 within two weeks, it would file suit.

The government rejected the $250,000 settlement offer, and the contracting officer prepared a document styled "Contracting Officer's Findings and Determination," dated June 25, 1990. There he evaluated the termination settlement proposal and concluded that Ellett was entitled to termination costs of $416,144.01, less progress payments the agency had already made, for a net of $22,779.01.

On July 13, 1990, Ellett filed a complaint in the Court of Federal Claims, seeking $451,084 plus interest, costs, and attorneys fees. The government moved to dismiss for lack of subject matter jurisdiction because the November 17, 1988 letter did not qualify as a valid claim under the CDA, and even if it were a valid claim, it was not properly certified. The court agreed that the letter was not properly certified and dismissed the suit. We reversed.

On remand, the government renewed its motion to dismiss, arguing that Ellett had not yet submitted a claim to the contracting officer for purposes of the CDA. In ranting the motion, the court said Ellett had to establish that "(1) [it] asserted in writing and with sufficient specificity a right to additional compensation, (2) the government

disputed that right, and (3) [it] communicated [its] desire for a contracting officer decision." It also [stated] … that there must be a preexisting dispute for a submission to be a claim. The court held that because there was not an existing dispute on November 17, 1988, Ellett's letter of that date was not a "claim"; it was a "unilateral cost (i.e. settlement) proposal." The court also said that the November 17, 1988 letter did not request a final determination by the contracting officer, but was only an invitation to enter negotiations. It concluded that Ellett's March 3, 1989 termination settlement proposal was not a claim because it did not seek a final decision from the contracting officer. This appeal followed.

Discussion

… [F]or the court to have jurisdiction under the CDA, there must be both a valid claim, a term the act leaves undefined, and a contracting officer's final decision on that claim. Consequently, the controlling question here is whether Ellett submitted a proper claim upon which the contracting officer has issued a decision. Our answer is based on the FAR definition of a claim, the contract language, and the facts of the case.

Ellett argues first that its November 17, 1988 submission was a valid, nonroutine claim, which did not require a preexisting dispute. It also asserts that the contract and the FAR permitted it to appeal the contracting officer's determination on its termination settlement proposal. Because the contract required it to submit a termination settlement proposal on the forms prescribed by the FAR, we address Ellett's second argument first.

A. The Termination Settlement Proposal

Ellett does not contend that its March 1989 settlement proposal was a CDA claim. Rather, it argues simply that once the contracting officer reviewed the proposal and unilaterally determined that it was due a net termination settlement of $22,779.01, it was entitled, under the terms of its contract and the FAR, to appeal that determination directly to the court.

This argument is not enough, however, for us to conclude that the court had jurisdiction. Neither the parties nor the regulation writers can confer jurisdiction on the Court of Federal Claims. Congress granted the court jurisdiction only over an appeal from a contracting officer's decision on a valid claim.

Under the FAR, there are three requirements a nonroutine submission must meet to be a "claim." It must be: (1) a written demand or assertion, (2) seeking as a matter of right, (3) the payment of money in a sum certain. Ellett's contract required nothing more. A routine request for payment, on the other hand, must also be "in dispute" when submitted to meet the definition of a "claim."

Our threshold inquiry, therefore, is whether Ellett's termination settlement proposal was a routine submission. In that regard, a "demand for compensation for unforeseen or unintended circumstances cannot be characterized as 'routine.' "On the other hand, vouchers, invoices, and similar requests for payment are "submitted for work done or equipment delivered by the contractor in accordance with the expected or scheduled progression of contract performance."

Using these beacons as guides, 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. Such a demand, which occurs only in a fraction of government contracts is certainly less routine than a request for an equitable adjustment, several of which a contractor might submit on any one contract. Indeed, in concluding that a request for an equitable adjustment is not routine in [*Reflectone, Inc. v. Dalton*, 69 F.3d 1572 (Fed.Cir. 1995 (*en banc*))], we pointed to Supreme Court precedent equating a request for an equitable adjustment with an assertion of a breach of contract. That analogue is even more appropriate here, where, but for the convenience termination clause, the government's action would be a breach of contract, and it would be liable for resulting damages. A request for payment submitted after the government has terminated the contract during its performance is a far cry from a request submitted in accordance with the expected or scheduled progression of contract performance.

It is beyond serious dispute that the parties intended that Ellett construct the entire 2.7 mile logging road. Because of the unforeseen legislation, however, the government decided to invoke its right to terminate the contract. Ellett's demand for compensation arising from such circumstances can hardly be considered routine. If it were routine, like a voucher or invoice, there would be no need to negotiate. However, the FAR contemplates that only after the amount a contractor is owed because of a convenience termination is determined, whether by agreement, determination, or appeal, shall a contractor submit a voucher or invoice for that amount.

Relying on a dictionary, the government argues that a termination settlement proposal is a routine request for payment because the FAR and the contract establish procedures for submitting one. The government is correct that "routine" may be defined as "[i]n accordance with established procedure." The American Heritage Dictionary 1074 (2d ed. 1982). But, it is also defined as … "of a commonplace or repetitious character," Webster's New Collegiate Dictionary 1001 (150th anniversary ed. 1981). Once the government terminates for convenience, the procedures used to determine a contractor's recovery could be perceived as routine, in the sense that the same ones are followed each time. However, that does not make them routine in the overall scheme of the contract and the parties' expectations.

As we said in *Reflectone*, however, not every nonroutine submission constitutes a CDA claim. Besides meeting the FAR definition of a claim, the CDA also requires that all claims be submitted to the contracting officer for a decision. This does not require an explicit request for a final decision; "as long as what the contractor desires by its submissions is a final decision, that prong of the CDA claim test is met." Thus, "a request for a final decision can be implied from the context of the submission."

When a contractor submits a termination settlement proposal, it is for the purpose of negotiation, not for a contracting officer's decision. A settlement proposal is just that: a proposal. … Indeed, it is a proposal that Ellett contractually agreed to submit in the event of a convenience termination. The parties agreed that they would try to reach a mutually agreeable settlement. If they were unable to do so, however, it was agreed, consonant with the FAR's requirements that the contracting officer would issue a final decision, which Ellett could appeal to the court or to the Department of Agriculture Board of Contract Appeals. Consequently, while Ellett's termination settlement proposal met the FAR's definition of a claim, at the time of submission it was not a claim because it was not submitted to the contracting officer for a decision.

Once negotiations reached an impasse, the proposal, by the terms of the FAR and the contract, was submitted for decision; it became a claim. In other words, … a request that the contracting officer issue a decision in the event the parties were unable to agree on a settlement was implicit in Ellett's proposal. After ten months of fruitless negotiations, Ellett explicitly requested that the contracting officer settle its claim. This demand is tantamount to an express request for a contracting officer's decision. Hence, after the subsequent exchange of offers and counteroffers, the contracting officer settled Ellett's proposal by determination and Ellett filed suit.

That the termination settlement proposal would ripen into a claim requiring the contracting officer to issue a unilateral settlement determination was contemplated by the contract and the FAR. They provide explicitly that Ellett had the right to appeal the contracting officer's decision on its proposal. … The FAR implicitly includes termination settlement proposals within the operative definition of a claim to the extent they are not favorably resolved by a contracting officer's decision.

The government responds that Ellett's termination settlement proposal was not an appealable claim because once negotiations reached an impasse; Ellett was required to submit a new claim or convert its termination settlement proposal into a claim, detailing what issues were in dispute, an act it failed to perform. After negotiations reached an impasse, the contracting officer issued a unilateral decision on the settlement proposal pursuant to paragraph (f) of the termination for convenience clause. Ellett points out that under section (i) of that clause, "[t]he contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (d) [or] (f) ..."

The right of appeal in the Disputes clause provides that "[t]he Contracting Officer's decision [on a claim] shall be final unless the Contractor appeals or files a suit as provided in the Act." Under "the Act," a contractor may appeal a contracting officer's final decision to the appropriate agency board of contract appeals or to the Court of Federal Claims. …

Nor is there a requirement that the settlement proposal be converted into a claim. To the contrary, the FAR envisions a direct appeal of the contracting officer's determination. In the cover letter the contracting officer identified the settlement determination as the "final decision of the Contracting Officer," and provided the notice of appeal rights required by the FAR to be included in a contracting officer's final decision on a claim. As further evidence of Ellett's appeal rights, 48 C.F.R. § 49.109-7(g) instructs the contracting officer to "give effect to a decision of the [Court of Federal Claims] or a board of contract appeals, when necessary, by an appropriate modification to the contract."

Conclusion

Accordingly, the judgment of the United States Court of Federal Claims is reversed, and the case is remanded for further proceedings consistent with this opinion.

SIERRA ROCK V. REGENTS OF UNIVERSITY OF CALIFORNIA

EBCA No. C-9705223; 98-2 BCA 30,083,

RULING ON APPELLANT'S MOTION TO COMPEL DISCOVERY AND RESPONDENT'S CLAIM OF ATTORNEY-CLIENT PRIVILEGE

The Board, in a Post-Conference Order dated April 1, 1998, issued a ruling on Appellant's Motion to Compel Discovery. In that ruling, the Board, inter alia, agreed to review in camera documents, which Respondent had claimed were protected from discovery under the attorney- client or work product privileges. Appellant argued that Respondent was merely funneling documents through counsel to avoid subsequent disclosure. Respondent submitted 11 documents (and a number of duplicate copies) by barcode numbers, authors and recipients, asserting that the attorney-client/work product rule applied with little or no justification therefore. The Board, in a subsequent conference call with the parties, granted Respondent an additional 10 days in which to amend its submission with appropriate support for the privilege being claimed on each document. The amendment was filed on June 1, 1998.

Attorney-Client and Work Product Privilege

Although Respondent claims that all of the documents are protected under the "attorney- client/work product privilege", this is not one comprehensive privilege but two distinct privileges with different concepts. The attorney- client privilege is intended to encourage full and frank communications between counsel and clients by assuring clients that their disclosures will be held in confidence. Upjohn Co. v. United States, 449 U.S. 383 (1981). The work product privilege is designed to safeguard the fruits of counsel's trial preparation from discovery by the opposing parties. Amdahl Corporation, 85-2 BCA ¶ 18,054 (GSBCA).

Advice rendered by counsel in his day- to-day role as a business advisor is not protected by the attorney-client privilege, and documents prepared in the regular course of business, rather than for purposes of litigation, are not protected by the work product privilege. The determination as to whether a communication is protected is a question of fact, which must be answered on a case-by-case, communication-by- communication basis, and the burden is on the party asserting the privilege to provide facts in support of the claim. B. D. Click Company, Inc., 83-1 BCA ¶ 16,328 (ASBCA). As the attorney-client privilege is in derogation of the search for truth, the privilege must not be lightly created nor expansively construed. In the Matter of Walsh, 623 F.2d 489, 493 (1980), citing United States v. Nixon, 418 U.S. 683, 710 (1974).

The Court in Diversified Industries v. Meredith, 572 F.2d 596, 609 (CA 8th Cir. 1978)(en banc), applied the privilege to an employee's communication if "(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who because of the corporate structure need to know its contents". This approach emphasizes that the purpose of the communication is to secure legal advice, on a matter

within the employee's corporate duties, as opposed to routine submissions to counsel, and that the communication be disseminated to only those who have a need to know its contents.

We have not attempted to establish any one rule governing our review but will examine each document on a case-by-case basis, recognizing the goal of achieving a balance between the need for disclosure of all relevant information and the need to encourage free and open discussion by clients in the course of representation.

(1) Barcode No. 726218

This is a memo from the contracting officer on Appellant's contract sent to Respondent's attorney through her immediate supervisor seeking legal advice on an issue within her responsibilities as contracting officer. A copy was sent only to Mr. Barr, who is supervisor over her and over her immediate supervisor. We hold that the attorney-client privilege applies and the document is protected from discovery.

(2) Barcode No. 725242

This is a copy of an e-mail message sent to Carl Newton, field operations manager of the soil remediation project. The e-mail is a copy of a letter from Garry Allen to Respondent's attorney who specializes in environmental law, wherein Mr. Allen seeks legal advice on responding to a FOIA request made by Appellant's president. Mr. Allen was Respondent's project manager and named technical representative on Appellant's contract in November 1994 and had to respond to the FOIA request. We hold that the attorney-client privilege applies and the document is protected from discovery.

(3) Barcode No. 725241

This is a copy of a letter e-mailed from Respondent's attorney to Garry Allen, project manager, in response to Mr. Allen's request for legal advice (which was item #2 above). We hold that the attorney - client privilege applies and the document is protected from discovery.

(8) Barcode No. 726116

Memo from Mr. Delaney, procurement officer who was tasked to draft the procurement manager's decision regarding Appellant's dispute with Respondent, to the attorney assigned to review the draft. The memo was sent to update the attorney on facts pertaining to the dispute that she needed for her review. We hold that the attorney-client privilege applies and the document is protected from discovery. …

(10) Barcode No. 727015 (unredacted version) Barcode Nos. 727015.010 (first entry); 727015.035 (second entry); and 727015.004 (third entry) (redacted versions)

Three entries are redacted from Mr. Hunes' personal logbook. Mr. Hunes was the construction project manager. The University claims privilege only on the three redacted entries claiming that they represent conversations with DOE counsel. The first redacted entry (p. 53) is illegible on the original copy so we have no idea what the notation is. Without that, we hold that entry is not privileged. The second entry (p. 3) does not reveal a confidential communication where legal advice was sought. It lists the attorneys' names and a statement of fact. It is not a privileged communication. The third redacted entry

does contain legal advice given by an attorney and sought by Mr. Hunes in his capacity as construction project manager. Thus, the third entry that was redacted is an attorney-client communication protected from disclosure. We hold that the original documents or logbook pages must be produced, except the third entry (p. 25) is protected and may be redacted therefrom.

(12) Barcode No. 725152 (unredacted version Barcode No. 727008 (redacted version)

Copy of e-mail sent from Henry Hunes, construction project manager, to Garry Allen, project manager, copy to Jan Novak, the former field operations manager, and Carl Newton, the new field operations manager. Mr. Hunes provides his evaluation of Appellant's close-out proposal. The first paragraph details the legal opinion given to Mr. Hunes by the University attorney from whom he sought legal advice in his capacity as project manager. The persons copied on the document were employees who had a need to know its contents. The University asserts the first paragraph of the document only as protected under the attorney- client privilege. We hold that the first paragraph is protected from discovery and that the document in its redacted state should be produced (Barcode No. 727008).

(13) Barcode No. 727539 (unredacted version)

This is e-mail to Christine Othart, contracting officer, from Mr. Hunes, sending her a copy of his letter to Mr. Allen, which is item (12) above, with attached data. She had a need to know the contents. The same first paragraph claimed in (12) above is also being claimed as privileged here. We hold that the attorney-client privilege applies only to the first paragraph. The document, with the attached data, should be produced after redacting the first paragraph.

(15) Barcode No. 727005 (redacted version) Barcode No. 726108 (unredacted version)

Memo to the file by Mike Daly, who Mr. Barr assigned responsibility to negotiate Appellant's claim. The University asserts the attorney-client privilege on the last half of the second to the last sentence and on the entire last sentence of paragraph numbered (4) on page 004. The University asserts that this language reveals an attorney's directions and actions taken by Mr. Daly in reliance thereon. We hold that the language does not reveal a confidential communication between the attorney and Mr. Daly regarding an issue on which Mr. Daly sought advice and is not protected. It merely discusses the problem he was having obtaining legal coordination. The document shall be produced in its entirety, unredacted (Barcode No. 726108).

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APPEAL OF EAGLE MANAGEMENT, INC.
ASBCA No. 35,902, 90-1 BCA 22,513
November 30, 1989

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Eagle Management, Inc. (EMI) appeals the deemed denial of a claim for price adjustments under a mess attendant services contract.

FINDINGS OF FACT

A. Contract Award

1. Contract F38606-87-C-0003, a small business set-aside contract for mess attendant services at Myrtle Beach AFB, South Carolina, was awarded to EMI on 12 September 1986. The initial term of the contract was one year beginning 1 October 1986. The contract included options for two successive one-year terms after the initial term. The contract price was a fixed price per individual meal served. The total estimated price for the first year was $326,193.09.

2. The contract included among other general provisions the FAR 52.243-1 (Alternate II) clause entitled "CHANGES - FIXED PRICE (APR 1984)" and the FAR 52.245-2 clause entitled "GOVERNMENT PROPERTY (FIXED PRICE CONTRACTS) (APR 1984)."

3. EMI began performance as scheduled on 1 October 1986. The contract work consisted generally of preparing specified food items (but not cooking), serving the food, performing cashier services, and cleaning the mess hall facilities, equipment and utensils.

4. Detailed specifications of the services to be performed and the quality standards to be met in performance were set forth in the Performance Work Statement (PWS) of the contract and in the technical exhibits attached thereto. *****

29. Under the inspection and acceptance provisions of the contract, EMI's performance was subject to inspection by Government Quality Assurance Evaluators (QAE's). Performance deficiencies found by the QAE's could be the basis for a reduction in the contract price.

30. Paragraph 10 of Section H of the contract stated in relevant part:

> The Government shall not exercise any supervision or control over the Contractor's employees performing services under this contract. Such employees shall be accountable not to the Government, but solely to the Contractor, who in turn is responsible to the Government.

31. The mess hall superintendent for the Government was Senior Master Sergeant (SMSgt) Hubbard. SMSgt. Hubbard was also the chief QAE assigned to monitor EMI's performance.

32. SMSgt Hubbard and other QAE's under his supervision gave instructions directly to EMI's staff, without going to EMI's on-site manager, gave conflicting instructions, dictated specific personnel assignments, and otherwise interfered with, harassed and intimidated EMI's staff.

33. The interference, harassment and intimidation by the QAE's reduced the efficiency of EMI's employees in all aspects of the work including the cleaning of the additional GFE.

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RANCO CONSTRUCTION, INC., Appellant
v.
GENERAL SERVICES ADMINISTRATION, Respondent
GSBCA Nos. 12892-C, 11,923; 94-3 BCA ¶ 27,264

Before Board Judges DEVINE, BORWICK, and DeGRAFF.
DeGRAFF, Board Judge.

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1988), Ranco Construction, Inc. (Ranco), filed an application for an award of attorney fees and expenses incurred in litigating this appeal. The total amount sought by Ranco is $26,726.34. As explained below, the application is granted in part.

Background

We issued our merits decision in this appeal on January 31, 1994. Ranco Construction, Inc. v. General Services Administration, 94-2 BCA ¶ 26,678. In summary, the General Services Administration (GSA) terminated for default Ranco's right to perform a construction contract. In GSA's view, the termination was justified because Ranco was not prosecuting the work diligently so as to ensure that performance would be completed by the contract completion date. In our decision, we explained that GSA incorrectly determined the contract completion date and, as a result, GSA's reason for terminating Ranco's right to perform was not valid. We also considered whether Ranco expressly repudiated the contract by making a clear, unequivocal statement that it intended not to perform. We held that the record contained no evidence of such a statement. Finally, we considered whether Ranco repudiated the contract by failing to provide GSA with adequate assurance of full performance, in response to a reasonable request by GSA for such assurance. In our decision, we explained that failure to provide adequate assurance of performance can constitute repudiation if a contract is governed by the Uniform Commercial Code (UCC). Assuming that such a failure can constitute repudiation of a construction contract, we decided that GSA's request for assurance was unreasonable because it was based upon GSA's misapprehension of the contract completion date.

On June 29, 1994, Ranco filed its application for attorney fees and expenses. In its application, Ranco represents that, when it filed its appeal, it had a net worth less than $7 million and fewer than 500 employees. Ranco alleges that it prevailed in this appeal, and that GSA's position was not substantially justified. In its June 29 application, Ranco requests $20,452.50 in attorney fees (272.7 hours at $75 per hour) and $2,694.48 in expenses. The attorney hours include 39 hours concerning EAJA issues.

On August 1, 1994, GSA responded to Ranco's application. GSA does not contest Ranco's representations concerning its net worth and number of employees, and GSA agrees that Ranco prevailed in the appeal. GSA does not contest the number of hours that Ranco's attorney devoted to this case or the hourly rate charged by the attorney, and does not contest any of the expenses for which Ranco seeks reimbursement. GSA argues that its position in this litigation was substantially justified and, for this reason, Ranco is not entitled to any recovery. GSA asserts that Ranco's actions constituted an express repudiation of the contract, that GSA reasonably requested assurance that Ranco would perform, and that GSA's position concerning the contract completion date was reasonable.

On September 9, 1994, Ranco supplemented its application to request an additional $3,195 in attorney fees (42.6 hours at $75 per hour) and $9.36 in expenses. The attorney hours include 35.3 hours concerning EAJA issues. On September 23, 1994, GSA responded to Ranco's supplemental application. GSA asserts that the number of hours that Ranco's attorney devoted to EAJA issues was unreasonable. On October 19, 1994, Ranco filed a three-page reply to GSA's response. Ranco requests $375 for the time its attorney claims to have spent drafting this reply. Ranco's October 19 filing, which was not requested by the Board, does not state when or how this time was spent, and does not contain a certification as required by Rule 35.

Discussion

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) (1988). EAJA provides that a corporation is eligible for an award if, at the time the adversary adjudication was initiated, the corporation had a net worth not exceeding $7 million and had not more than 500 employees. 5 U.S.C. § 504(b)(a)(B).

Ranco is the prevailing party, it meets the eligibility criteria related to net worth and number of employees, and there are no special circumstances, which would make an award unjust. The only issues remaining are whether GSA's position was substantially justified and, if not, whether Ranco is entitled to recover the entire amount it seeks.

Substantial Justification

GSA bears the burden of establishing that its position was substantially justified. Kunz Construction Co. v. United States, 16 Cl. Ct. 431 (1989), aff'd, 899 F.2d 1227 (Fed. Cir. 1990). An agency's position is substantially justified if it is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person. "It Pierce v. Underwood, 487 U.S. 552, 565 (1988). Our appellate authority has directed us "to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." Chiu v United States, 948 F.2d 711, 715 (Fed. Cir. 1991).

GSA's position was not substantially justified, either in fact or in law. As explained in our merits decision, according to well-established case law, an express repudiation occurs if a party to a contract states positively, definitely, unconditionally, and unequivocally that it does not intend to perform. GSA did not present any facts to establish that Ranco expressly repudiated the contract. For this reason, GSA's position concerning express repudiation was not supported by either the facts or controlling legal principles.

GSA's argument that Ranco repudiated this construction contract by failing to provide GSA with adequate assurance of full performance in response to a reasonable request by GSA for such assurance is based upon a principle found in the UCC. However, in briefing the merits of this appeal, GSA did not explain why we should apply a UCC principle to a construction contract. Assuming that the UCC principle applies to this contract, GSA did not establish that its request for assurance was reasonable, given that it

was based upon GSA's misunderstanding of the contract completion date. GSA's position was not supported by either controlling law or the facts.

Finally, we do not agree with GSA that its argument concerning the contract completion date had any reasonable basis in fact or law. The solicitation, the notice to proceed, contract modification PA03, GSA's minutes of the preconstruction conference, and the GSA-approved progress schedule state that Ranco had 420 days to complete all of the work required by the contract. Contract modification PA05 states that Ranco was required to complete certain work within 300 days. This modification, which was never agreed to by Ranco, was described by GSA as a clarification, even though it is not consistent with the documents that preceded it. Given these facts, there was no reasonable basis for GSA's argument that Ranco was required to complete certain work within 300 days.

Because the position taken by GSA in this case was not substantially justified, Ranco is entitled to an award of reasonable fees and expenses. The question remains whether Ranco is entitled to recover the entire amount that it requests.

The Amount Of Ranco's Recovery

Ranco requests payment for $2,703.84 for expenses incurred in litigating this case. GSA does not assert that this request is unreasonable. We examined Ranco's request, and the amount is reasonable. Ranco is entitled to recover $2,703.84 for expenses.

In litigating this appeal, Ranco's attorney spent 241 hours not related to EAJA issues. These hours were spent drafting the complaint, conferring with Ranco, conducting discovery, preparing extensive pre-hearing submissions, preparing witnesses for depositions and for hearing, participating in a two-day hearing, performing legal research not related to EAJA, preparing comprehensive post-hearing briefs, and responding to GSA's motion for reconsideration. Ranco claims a total of $18,075 for the 241 hours (241 hours x $75 per hour), and GSA does not argue that Ranco's claim for these hours is unreasonable. Considering the amount of work that was performed and the quality of that work, this portion of Ranco's claim is reasonable. Ranco is entitled to recover $18,075 in attorney fees associated with non-EAJA issues.

Decision

The application for attorney fees and expenses is GRANTED.

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Department of the Army
Contract Adjustment Board (A.C.A.B.)

IN THE APPLICATION OF REUBEN WELLS
ACAB No. 1053
April 15, 1963

MEMORANDUM OF DECISION

1. This case, which was submitted to this Board by the Commanding General, Third United States Army, involves a request under Public Law 85-804 by Reuben Wells, Route #1, Hinesville, Georgia, (hereinafter referred to as the contractor) for an adjustment in the amount due the Government under a contract for the sale and removal of garbage. The garbage was to be used by the contractor for feeding hogs. The contractor specifically seeks to be relieved from payment of $1,216.42 for garbage collected during the months of November and December of 1962, but not utilized by the contractor as a result of circumstances described more fully in the succeeding paragraphs.

2. On 19 August 1960, the Property Disposal Contracting Officer, Fort Stewart, Georgia, entered into Contract No. DA(s) 09-076-AIII-574 with the contractor for the purchase and daily removal of garbage suitable for animal consumption generated at Fort Stewart for the period 1 September 1960 to 31 August 1963. The contract was awarded on the basis of average estimated quantities of 3,000 daily rations or approximately 90,000 rations per month. This figure was based upon the troop strength at Fort Stewart, which had averaged approximately 2100 to 2200 troops prior to the time of the contract award. The contract obligated the contractor to purchase all garbage generated at Fort Stewart and contained no provision for price adjustment in the event of contingencies affecting the estimated quantities.

3. Performance on the contract proceeded without difficulty with the troop strength at Fort Stewart remaining fairly constant until October 1962. With the advent of the Cuban crisis, Fort Stewart was used as a staging area. As a result, the troop strength rapidly increased to approximately 20,000 troops, more than nine times the previous average troop strength at Fort Stewart. In the months of November and December the rations issued were 410,478 and 235,334, respectively. The increased garbage generated required the daily pickup of ninety (55-gallon) drums instead of the normal three (55-gallon) drums. Even with the increased garbage the contractor continued performance on the contract and picked up all the garbage although this required the contractor to purchase an additional truck and hire additional personnel. The contractor also purchased 681 additional hogs to consume the excess garbage. Despite the efforts of the contractor, approximately two-thirds of the garbage received during November and December could not be consumed by the contractor's hogs and had to be buried. Throughout the period of the Cuban crisis the contractor had no means of anticipating the difficulties encountered because the actual personnel strength at Fort Stewart was classified information. Also unknown to the contractor was the duration of the additional units at Fort Stewart. After the conclusion of the crisis the contractor's position was further complicated by the sudden withdrawal of visiting units at Fort Stewart and the

return to normal troop strength. The resulting decrease in garbage generated left the contractor with a surplus of pigs necessitating the purchase of additional feed or sale of the pigs on a falling market.

4. Under the terms of Contract No. DA(s) 09-076-AIII-574, the payment to the Government for the garbage was to be made each month after a statement of account for deliveries made the preceding month. All payments were made when due by the contractor except for the months of November and December 1962, which were deferred pending the decision in this case. For these two months the amount due the Government was $1,824.64. The adjustment requested by the contractor is a reduction of this amount by two-thirds. This amount of $1,216.42 represents the actual cost of the garbage that was buried by the contractor during the Cuban crisis.

5. The Army Contract Adjustment Board has considered the circumstances in this case and is of the opinion that relief is warranted. The sudden and unusually large troop buildup and subsequent withdrawal of troops at Fort Stewart were circumstances, which were not anticipated by the parties when the contract was executed. In reaching the decision in this case the Board recognizes that continued performance worked an unusual hardship on the contractor. The efforts by the contractor under these adverse conditions during the crisis prevented inconvenience to the Government and interruption of the military mission. Had the contractor defaulted in the removal of garbage under the conditions then existing, a health and sanitation hazard could have resulted. In addition, any delay in obtaining other methods of disposal may have required military personnel, during a period of emergency, to devote time to garbage removal. Notwithstanding the contractual provision obligating the contractor to purchase all quantities of garbage, the Board finds that the unusual circumstances in this case and considerations of fairness require an adjustment in the contract. The Board further finds that the relief requested is fair and reasonable.

6. Accordingly, the Board authorizes the amendment of Contract No. DA(s) 09-076-AIII-574 to release the contractor from the payment of $1,216.42 owed the Government thereunder. The amendment should contain a provision releasing the Government from any liability that may have arisen from the circumstances considered in this request. The Board finds that the action authorized herein will facilitate the national defense.

PROBLEM #1

On September 10, Contracting Officer advised the contractor in a brief letter as follows: "The time for performance expired on August 29 without your having completed the work. Your right to proceed under this order is terminated. You are advised to remove your equipment from the job site immediately. Since you have not satisfactorily completed any work, no payments are due you. If you have any questions, please feel free to contact me (at specified number)." Thereafter contractor and contracting officer corresponded with the contracting officer advising on November 6 that she had made her final decision denying the claim. No other statements were made. Again, on February 6, the contracting officer wrote, "Your letter of February 2 contains no information that would cause me to change my final decision of November 6. T

Therefore, that decision stands. Contractor filed an appeal with the AGBCA on April 5. The Government moves to dismiss claiming the appeal as not timely. Discuss.

PROBLEM #2

In response to the contractor's formal claim in the amount of $427,000, the contracting officer, on the 60th day following receipt of the claim, advised the contractor in writing that due to the complexity of the claim, no decision would be forthcoming until the early March time frame (about five months later) and meeting that schedule was contingent upon the contractor's cooperating in submitting certain pricing data. The contractor filed an appeal with the Board of Contract Appeals, alleging the Government's response constituted a "deemed denial." Discuss.

PROBLEM #3

Unisys sought 65 documents during the discovery process. These documents consisted of inspection reports in which Government employees gave their candid assessments of the contracting offices general lack of proper oversight in the acquisition of spare parts for computer hardware and recommended certain corrective actions. The Government resisted Unisys' request, claiming "the above referenced documents, which contain predecisional analysis, advice, opinions, comments, conclusions and recommendations, consist in large part of notes taken by Office of Inspector General (OIG) inspectors of conversation they had with various NOAA officials as they were doing the field work which ultimately resulted in (a report). The credibility of the OIG and its ability to gather information depends on the OIG's ability to protect its sources of information... [S]taff members routinely tell the DOC employees with whom they meet during the course of inspection work that anything the employees tell the OIG will be confidential." The Government claims the documents are privileged. Are they?

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APPENDIX A

GLOSSARY OF LEGAL TERMS

ab initio ..... "from the beginning"

acceptance ..... assent to an offer by the one to whom the offer was made.

accord and satisfaction ..... agreement as to amount owed and payment of that amount.

ACO ..... Administrative Contracting Officer

action ex contractu ..... suit arising out of contract.

action ex delicto ..... suit arising independent of contract resulting from breach of a positive legal duty.

affirm ..... to uphold on appeal the lower court's ruling.

agent ..... one employed to transact business for another.

appellant ..... one who appeals a lower tibunal's decision to a higher tribunal.

appellee ..... on appeal, the party prevailing in the lower tribunal.

ASPA ..... Armed Services Procurement Act

audi alteram partem ..... understand both sides of the argument.

bailment contract ..... an agreement for the delivery of personal property in trust for a specific purpose, to be returned when the specific purpose is accomplished.

bilateral contract ..... one formed by a "promise for a promise."

breach of contract ..... failure to perform as agreed.

brief ..... written argument submitted on trial or appeal in support of pleadings.

burden of proof ..... the responsibility of providing allegations made.

case in point ..... a case with facts and issues similar to the one in question.

caveat emptor ..... let the buyer beware.

certiorari ..... an order by a superior court ordering up a court record of an inferior court.

change order ..... an order by one party to a contract, modifying it pursuant to authority contained in the contract.

CICA ..... Competition in Contracting Act

citation ..... the case number or volume and page number used to identify a case or statute.

civil law ..... law of the Roman Empire-Justinian "corpus juris civilis" 533 A.D.civil liability liability to be sued for infringing on the rights of other individuals.

COC ..... Certificate of Competency

Clear & Convincing ..... a standard of proof which will produce in the mind of the trier of fact a firm belief in the facts sought to be established. It is a higher standard than "preponderance" but less than "beyond a reasonable doubt."

common law ..... sometimes called the "unwritten law

consideration ..... something of value exchanged by the parties, making the contract enforceable.

contra proferentum ..... against the party who proffers or puts forward a thing.

contract damages ..... financial loss resulting from breach of contract.

counter-offer ..... a counter-proposal made by the offeree to the offeror.

counterclaim ..... a claim which the defendant makes against the plaintiff, usually a matter arising out of the same transaction which led to plaintiff's claim.

CPIF ..... Cost-Plus-Incentive-Fee

criminal liability ..... liability to prosecution for offenses against the public.

D & F ..... Determination and Findings

DFARS ..... Department of Defense Federal Acquisition Regulation Supplement.

danmum absque injuria ..... damage without the violation of a legal right.

decision ..... the ruling of the court on a motion or pleading.

defendant ..... one against whom a law suit is instituted.

de novo ..... a new hearing in which the judgment of the trial is suspended and the reviewing court gives a new determination of the case.

dictum ..... that part of a judge's opinion other than the ruling or findings.

e.g. ..... for example. (L. *exampli gratia)*

ejusdem generis ..... Where several items are listed as examples of matter included within the coverage of a statute, regulation, or contract, any other items included must be "of the same kind."

en banc ..... Fr. - "in bank" - wherein all judges are in attendance, as opposed to hearings by one judge of a court.

equity ..... that portion of remedial justice which is exclusively administered by a court of equity, as distinguished from court of common law. (Law and equity jurisdiction are now combined at the Federal level.)

estoppel ..... precludes a person from denying past actions or statements under certain circumstances.

et al ..... and others.

et seq.....and the following (L. *et sequitur*)

ex parte .....a legal proceeding where only one party is heard.

ex post facto.....“from past fact” - descriptive of laws given retroactive effect. May not be used to render illegal an act legal when performed.

executed contract.....a contract completely performed; also, a signed contract.

executory contract.....a contract not yet performed.

express authority.....authority expressly conferred upon an agent.

express contract.....a contract wherein there are express promises to do something or to refrain from doing something.

FAR .....Federal Acquisition Regulation

FMS.....Foreign Military Sales

FOIA.....Freedom of Information Act

FPASA.....Federal Property and Administrative Services Act

GAO .....General Accounting Office

GATT.....General Agreement on Trade and Tariffs

GFP .....Government Furnished Property

grantee .....one to whom title to real estate is conveyed.

grantor.....one who conveys title to real estate.

i.e.....that is. (L.*id est)*

ibid.....in the same place (L.*ibidem*)

implied authority .....authority incidental to express authority and necessary to the exercise of the authority actually granted.

implied in fact contract .....a contract existing by virtue of the actions of the parties rather than express promises.

improper venue .....suit brought in wrong territorial location, e.g., wrong county.

in pari materia .....descriptive of matters which are related and should be considered together; e.g. two statues bearing on the same situation.

incorporeal heriditament .....an intangible right collateral to tangible personal property or real estate; e.g., real estate rentals.

infra .....referenced hereafter.

journal entry .....the written, signed record of orders of the court.

laches.....common law defense barring actions not timely initiated.

lack of jurisdiction.....where the court is without authority to hear the case.

law ..... the whole body or system of rules of conduct, including both decisions of courts and legislative acts.

lessee ..... one to whom real estate is leased.

lessor ..... owner of real estate who leases same.

liquidated damages ..... damages established as to liability and amount

motion ..... the means by which a party requests a particular action by the court in the disposition of a suit.

mutuality of obligation ..... that element of a bilateral contract by virtue of which both of the parties are bound or neither is bound; a duty of each party to do something in consideration of the other party's act or promise.

nudum pactum ..... a naked promise--one not supported by a consideration and therefore unenforceable.

offer ..... a proposal by one person to another which is intended of itself to create legal relations on acceptance by the person to whom it is made.

offeree ..... one to whom an offer is made.

offeror ..... one making an offer.

past consideration ..... value received prior to the present contract -- generally insufficient to support a promise.

petition ..... the pleading by which a law suit is initiated.

plaintiff ..... one who institutes a law suit.

precedent ..... prior rulings in similar cases, used as authority for ruling in the case at the bar.

prima facie case ..... evidence sufficient to support a favorable verdict if not rebutted by the other side.

principal ..... adj.--most important, consequential or influential.

principal ..... one who employs an agent to transact business for him.

principle ..... n.--a fundamental law, doctrine or assumption.

privity of contract ..... The relationship between parties to contract.

quantum meruit ..... at common law, an action for the reasonable value of

quasi-contract ..... contract implied in law--a creation of the courts to prevent unjust enrichment of one party by another.

quid pro quo ..... "that for this"--descriptive of the requirement of consideration in contracts.

relator ..... one upon whose "relation" a quasi-criminal suit is instituted.

remand ..... to return a matter to a lower court with instructions to that court for further proceedings.

reply.....plaintiff's response to new matters raised in defendant's answer.

res gestae .....(law of torts)--peripheral matters closely connected with a transaction and necessary to a proper understanding of it.

res ipsa loquitur.....“the thing speaks for itself” -- (law of torts) descriptive of facts so self-evident as to make a *prima facie* case.

respondent .....the “accused” person in a quasi-criminal suit.

reverse .....to overturn or appeal the lower court's rulings.

set-off .....reduction of one demand by an opposite one, usually ascertained in amount and unrelated to the original claim.

specious .....adj.--having a false look of truth or genuineness.

stare decisis .....“let the decision stand.” The principle that prior decisions of court should stand as precedent for future guidance.

statute of frauds .....requires certain contracts to be in writing to be enforceable.

statute of limitation .....bars actions commenced beyond a statutory time limit.

supplemental agreement .....an agreement supplementing the principal contract.

supra .....referenced above.

syllabus .....editorial headnote to a reported case, giving the law of the case.

TAA .....Trade Agreement Act

tort .....a wrong committed against the person or property of another -- one of the two classes of civil actions, the other being contract actions.

trial *de novo*.....a new trial.

ultra vires contract.....a contract of a corporation which is not within the express or implied powers conferred upon the corporation by the instrument of its creation.

undisclosed principal.....a principal whose agent contracts in his own name, without disclosing

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APPENDIX B
SELECTED FAR EXCERPTS

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Subpart 42.15--Contractor Performance Information

42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. It implements Office of Federal Procurement Policy Letter 92-5, Past Performance Information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel the fee determinations.

42.1501 General.

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

42.1502 Policy.

(a) Except as provided in paragraph (b) of this section, agencies shall prepare an evaluation of contractor performance for each contract in excess of $1,000,000 (regardless of the date of contract award) and for each contract in excess of $100,000 beginning not later than January 1, 1998 (regardless of the date of contract award), at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year. This evaluation is generally for the entity, division, or unit that performed the contract. The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements.

(b) Agencies shall not evaluate performance for contracts awarded under Subparts 8.6 and 8.7. Agencies shall evaluate construction contractor performance and architect/engineer contractor performance in accordance with 36.201 and 36.604, respectively.

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service.

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked "Source Selection Information". The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the

requirements of this subpart. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized.

(c) Departments and agencies shall share past performance information with other departments and agencies when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

(d) Any past performance information systems, including automated systems, used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) The past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance.

52.211-11 Liquidated Damages--Supplies, Services, or Research and Development.

As prescribed in 11.504(a), the contracting officer may insert the following clause in solicitations and contracts when a fixed-price contract is contemplated for supplies, services, or research and development (see 11.502(b)):
Liquidated Damages--Supplies, Services, or Research and Development (Apr 1984)

(a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension, the Contractor shall, in place of actual damages, pay to the Government as fixed, agreed, and liquidated damages, for each calendar day of delay the sum of _____ [Contracting Officer insert amount].

(b) Alternatively, if delivery or performance is so delayed, the Government may terminate this contract in whole or in part under the Default--Fixed-Price Supply and Service clause in this contract and in that event, the Contractor shall be liable for fixed, agreed, and liquidated damages accruing until the time the Government may reasonably obtain delivery or performance of similar supplies or services. The liquidated damages shall be in addition to excess costs under the Termination clause.

(c) The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Default--Fixed-Price Supply and Service clause in this contract.

52.211-12 Liquidated Damages--Construction.

As prescribed in 11.504(b), the contracting officer may insert the following clause in solicitations and contracts for construction, except contracts on a cost-plus-fixed-fee basis (see 11.502(b)):

Liquidated Damages--Construction (Apr 1984)

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of _____ [Contracting Officer insert amount] for each day of delay.

(b) If the Government terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If the Government does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

(End of clause)

Alternate I (Apr 1984). If different completion dates are specified in the contract for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

52.212-1 Instructions to Offerors--Commercial Items.

As prescribed in 12.301(b)(1), insert the following provision:

Instructions to Offerors--Commercial Items (Jun 1997)

(a) Standard industrial classification (SIC) code and small business size standard. The SIC code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

(b) Submission of offers. Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF 1449, letterhead stationery, or as otherwise specified in the solicitation. As a minimum, offers must show--

(1) The solicitation number;
(2) The time specified in the solicitation for receipt of offers;
(3) The name, address, and telephone number of the offeror;
(4) A technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary;
(5) Terms of any express warranty;
(6) Price and any discount terms;
(7) "Remit to" address, if different than mailing address;
(8) A completed copy of the representations and certifications at FAR 52.212-3;
(9) Acknowledgment of Solicitation Amendments;
(10) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references (including contract numbers, points of contact with telephone numbers and other relevant information); and
(11) If the offer is not submitted on the SF 1449, include a statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation. Offers that fail to furnish required representations or information, or reject the terms and conditions of the solicitation may be excluded from consideration.

(c) Period for acceptance of offers. The offeror agrees to hold the prices in its offer firm for 30 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.
(d) Product samples. When required by the solicitation, product samples shall be submitted at or prior to the time specified for receipt of offers. Unless otherwise specified in this solicitation, these samples shall be submitted at no expense to the Government, and returned at the sender's request and expense, unless they are destroyed during preaward testing.

(e) Multiple offers. Offerors are encouraged to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.

(f) Late offers. Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers will not be considered.

(g) Contract award (not applicable to Invitation for Bids). The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

(h) Multiple awards. The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the Schedule, offers may not be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer.

(i) Availability of requirements documents cited in the solicitation. (1) The Index of Federal Specifications, Standards and Commercial Item Descriptions and the documents listed in it may be obtained from the:

General Services Administration
Federal Supply Service Bureau
Specifications Section, Suite 8100
470 L'Enfant Plaza, SW
Washington, DC 20407
((202) 619-8925).

(2) The DOD Index of Specifications and Standards (DODISS) and documents listed in it may be obtained from the:

Standardization Documents Desk
Building 4D, 700 Robbins Avenue
Philadelphia, PA 19111-5094
(Telephone (215) 697-2569).

(i) Automatic distribution may be obtained on a subscription basis.

(ii) Individual documents may be ordered from the Telespecs ordering system by touch-tone telephone. A customer number is required to use this service and can be obtained from the Standardization Documents Order Desk or the Special Assistance Desk (telephone (610) 607-2667 /2179).

(3) Nongovernment (voluntary) standards must be obtained from the organization responsible for their preparation, publication or maintenance.

52.212-2 Evaluation--Commercial Items

As prescribed in 12.301(c), the Contracting Officer may insert a provision substantially as follows:

Evaluation--Commercial Items (Oct 1995)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

_____

_____

_____

[Contracting Officer shall insert the significant evaluation factors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see FAR 15.605) and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.]

Technical and past performance, when combined, are _____ [Contracting Officer state, in accordance with FAR 15.605, the relative importance of all other evaluation factors, when combined, when compared to price.]
(b) Options. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

52.212-3 Offeror Representations and Certifications--Commercial Items.

As prescribed in 12.301(b)(2), insert the following provision:

Offeror Representations and Certifications--Commercial Items (Jan 1997)

(a) Definitions. As used in this provision:

"Emerging small business" means a small business concern whose size is no greater than 50 percent of the numerical size standard for the standard industrial classification code designated.

"Small business concern" means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR Part 121 and size standards in this solicitation.

"Small disadvantaged business concern" means a small business concern that--

(1) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business, having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals, and

(2) Has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization and which meets the requirements of 13 CFR Part 124.

52.212-4 Contract Terms and Conditions--Commercial Items.

As prescribed in 12.301(b)(3), insert the following clause:

Contract Terms and Conditions--Commercial Items (May 1997)

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its post-acceptance rights--

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) Assignment. The Contractor or its assignee's rights to be paid amounts due as a result of performance of this contract, may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) Definitions. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) Invoice. The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include--
(1) Name and address of the Contractor;
(2) Invoice date;
(3) Contract number, contract line item number and, if applicable, the order number;
(4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
(5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
(6) Terms of any prompt payment discount offered;
(7) Name and address of official to whom payment is to be sent; and
(8) Name, title, and phone number of person to be notified in event of defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Contractors are encouraged to assign an identification number to each invoice.

(h) Patent indemnity. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Unless otherwise provided by an addendum to this contract, the Government shall make payment in accordance with the clause at FAR 52.232-33, Mandatory Information for Electronic Funds Transfer Payment, which is incorporated herein by reference. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.
(j) Risk of loss. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) Taxes. The contract price includes all applicable Federal, State, and local taxes and duties.

(l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) Title. Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) Warranty. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) Limitation of liability. Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) Other compliances. The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) Compliance with laws unique to Government contracts. The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C 327, et seq., Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 251 related to whistle blower protections; and 49 U.S.C 40118, Fly American.

(s) Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.
(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause.
(3) The clause at 52.212-5.
(4) Addenda to this solicitation or contract, including any license agreements for computer software.
(5) Solicitation provisions if this is a solicitation.
(6) Other paragraphs of this clause.
(7) The Standard Form 1449.
(8) Other documents, exhibits, and attachments.
(9) The specification.

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items.

As prescribed in 12.301(b)(4), insert the following clause:

Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items (Aug 1996)

(a) The Contractor agrees to comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or executive orders applicable to acquisitions of commercial items:

(1) 52.222-3, Convict Labor (E.O. 11755); and

(2) 52.233-3, Protest after Award (31 U.S.C 3553).

(b) The Contractor agrees to comply with the FAR clauses in this paragraph (b) which the contracting officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(Contracting Officer shall check as appropriate.)

___ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

___ (2) 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity (41 U.S.C. 423).

___ (3) 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (15 U.S.C. 637 (d)(2) and (3)).

___ (4) 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (15 U.S.C. 637 (d)(4)).

___ (5) 52.219-14, Limitation on Subcontracting (15 U.S.C. 637(a)(14)).

___ (6) 52.222-26, Equal Opportunity (E.O. 11246).

___ (7) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 4212).

___ (8) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

___ (9) 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).

___ (10) 52.225-3, Buy American Act--Supplies (41 U.S.C. 10).

___ (11) 52.225-9, Buy American Act--Trade Agreements Act--Balance of Payments Program (41 U.S.C. 10, 19 U.S.C. 2501-2582).

___ (12) [Reserved]

___ (13) 52.225-18, European Union Sanction for End Products (E.O. 12849).

___ (14) 52.225-19, European Union Sanction for Services (E.O. 12849).

___ (15)(i) 52.225-21, Buy American Act--North American Free Trade Agreement Implementation Act--Balance of Payments Program (41 U.S.C 10, Pub. L. 103-187).

___ (ii) Alternate I of 52.225-21.

___ (16) 52.239-1, Privacy or Security Safeguards (5 U.S.C. 552a).

___ (17) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241).

(c) The Contractor agrees to comply with the FAR clauses in this paragraph (c), applicable to commercial services, which the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(Contracting Officer check as appropriate.)
___ (1) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.).

___ (2) 52.222-42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

___ (3) 52.222-43, Fair Labor Standards Act and Service Contract Act--Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

___ (4) 52.222-44, Fair Labor Standards Act and Service Contract Act--Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

___ (5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351, et seq.).

(d) Comptroller General Examination of Record. The Contractor agrees to comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records--Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c) or (d) of this clause, the Contractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under Part 15), in a subcontract for commercial items or commercial components--

(1) 52.222-26, Equal Opportunity (E.O. 11246);

(2) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a));

(3) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793); and

(4) 52.247-64, Preference for Privately-Owned U.S.- Flagged Commercial Vessels (46 U.S.C. 1241) (flow down not required for subcontracts awarded beginning May 1, 1996).

52.214-29 Order of Precedence--Sealed Bidding.

As prescribed in 14.201-7(d), insert the following clause:

Order of Precedence--Sealed Bidding (Jan 1986)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications);

(b) Representations and other instructions;

(c) Contract clauses;

(d) Other documents, exhibits, and attachments; and

(e) The specifications.

52.215-22 Price Reduction for Defective Cost or Pricing Data.

As prescribed in 15.804-8(a), insert the following clause:

Price Reduction for Defective Cost or Pricing Data (Oct 1995)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because--

(1) The Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data;

(2) A subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data; or

(3) Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

(c)(1) If the Contracting Officer determines under paragraph (a) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (c)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if--

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset shall not be allowed if--

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(d) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid--

(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or noncurrent.

52.215-23 Price Reduction for Defective Cost or Pricing Data--Modifications.

As prescribed in 15.804-8(b), insert the following clause:

Price Reduction for Defective Cost or Pricing Data--Modifications (Oct 1995)

(a) This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1), except that this clause does not apply to any modification if an exception under FAR 15.804-1 applies.

(b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the

Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if--

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset shall not be allowed if--

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid--

(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or noncurrent.

52.215-33 Order of Precedence.

As prescribed in 15.406-3(b), insert the following clause:

Order of Precedence (Jan 1986)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications).

(b) Representations and other instructions.

(c) Contract clauses.

(d) Other documents, exhibits, and attachments.

(e) The specifications.

52.222-21 Certification of Nonsegregated Facilities.

As prescribed in 22.810(a)(1), insert the following provision in solicitations when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the contract amount is expected to exceed $10,000:

Certification of Nonsegregated Facilities (Apr 1984)

(a) "Segregated facilities," as used in this provision, means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees, that are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin because of habit, local custom, or otherwise.

(b) By the submission of this offer, the offeror certifies that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained. The offeror agrees that a breach of this certification is a violation of the Equal Opportunity clause in the contract.

(c) The offeror further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will--

(1) Obtain identical certifications from proposed subcontractors before the award of subcontracts under which the subcontractor will be subject to the Equal Opportunity clause;

(2) Retain the certifications in the files; and

(3) Forward the following notice to the proposed subcontractors (except if the proposed subcontractors have submitted identical certifications for specific time periods):

Notice to Prospective Subcontractors of Requirement for Certifications of Nonsegregated Facilities.

A Certification of Nonsegregated Facilities must be submitted before the award of a subcontract under which the subcontractor will be subject to the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

52.222-26 Equal Opportunity.

As prescribed in 22.810(e), insert the following clause in solicitations and contracts (see 22.802) unless all of the terms of the clause are exempt from the requirements of E.O. 11246 (see 22.807(a)):

Equal Opportunity (Apr 1984)

(a) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of $10,000, the Contractor shall comply with subparagraphs (b)(1) through (11) below. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

(b) During performing this contract, the Contractor agrees as follows:

(1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.

(2) The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. This shall include, but not be limited to--

(i) Employment;

(ii) Upgrading;

(iii) Demotion;

(iv) Transfer;

(v) Recruitment or recruitment advertising;

(vi) Layoff or termination;

(vii) Rates of pay or other forms of compensation; and

(viii) Selection for training, including apprenticeship.

(3) The Contractor shall post in conspicuous places available to employees and applicants for employment the notices to be provided by the Contracting Officer that explain this clause.

(4) The Contractor shall, in all solicitations or advertisement for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(5) The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Contracting Officer advising the labor union or workers' representative of the Contractor's commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.

(6) The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.

(7) The Contractor shall furnish to the contracting agency all information required by Executive Order 11246, as amended, and by the rules, regulations, and orders of the Secretary of Labor. Standard Form 100 (EEO-1), or any successor form, is the prescribed form to be filed within 30 days following the award, unless filed within 12 months preceding the date of award.

(8) The Contractor shall permit access to its books, records, and accounts by the contracting agency or the Office of Federal Contract Compliance Programs (OFCCP) for the purposes of investigation to ascertain the Contractor's compliance with the applicable rules, regulations, and orders.

(9) If the OFCCP determines that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, the rules, regulations, and orders of the Secretary of Labor, or as otherwise provided by law.

(10) The Contractor shall include the terms and conditions of subparagraph (b)(1) through (11) of this clause in every subcontract or purchase order that is not exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order 11246, as amended, so that these terms and conditions will be binding upon each subcontractor or vendor.

(11) The Contractor shall take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

(c) Notwithstanding any other clause in this contract, disputes relative to this clause will be governed by the procedures in 41 CFR 60-1.1.

(End of clause)

Alternate I (Apr 1984). If one or more, but not all, of the terms of the clause are exempt from the requirements of E.O. 11246 (see 22.807(a)), the contracting officer shall add the following as a preamble to the clause:

Notice: The following terms of this clause are waived for this contract: _____ [Contracting Officer shall list terms].

52.227-1 Authorization and Consent.

As prescribed at 27.201-2(a), insert the following clause:

Authorization and Consent (Jul 1995)
(a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The Contractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all subcontracts at any tier for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed the simplified acquisition threshold); however, omission of this clause from any subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

(End of clause)

Alternate I (Apr 1984). The following is substituted for paragraph (a) of the clause:

(a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

Alternate II (Apr 1984). The following is substituted for paragraph (a) of the clause:

(a) The Government authorizes and consents to all use and manufacture in the performance of any order at any tier or subcontract at any tier placed under this contract for communication services and facilities for which rates, charges, and tariffs are not established by a government regulatory body, of any invention described in and covered by a United States patent--

(1) Embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with specifications or written provisions forming a part of this contract or with specific written instructions given by the Contracting Officer directing the manner of performance.

52.227-3 Patent Indemnity.

Insert the following clause as prescribed at 27.203-1(b), 27.203-2(a), or 27.203-4(a)(2) as applicable:

Patent Indemnity (Apr 1984)
(a) The Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work.

(b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to--

(1) An infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor;

(2) An infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance; or

(3) A claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of clause)

Alternate I (Apr 1984). The following paragraph (c) is added to the clause:

(c) This patent indemnification shall not apply to the following items:

_____

[Contracting Officer list and/or identify the items to be excluded from this indemnity.]

Alternate II (Apr 1984). The following paragraph (c) is added to the clause:

(c) This patent indemnification shall cover the following items:

_____

[List and/or identify the items to be included under this indemnity.]

Alternate III (Jul 1995). The following paragraph is added to the clause:

( ) As to subcontracts at any tier for communication service, this clause shall apply only to individual communication service authorizations over the simplified acquisition threshold issued under this contract and covering those communications services and facilities--

(1) That are or have been sold or offered for sale by the Contractor to the public,

(2) That can be provided over commercially available equipment, or

(3) That involve relatively minor modifications.

52.232-20 Limitation of Cost.

As prescribed in 32.705-2(a), insert the following clause in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, except those for consolidated facilities, facilities acquisition, or facilities use, whether or not the contract provides for payment of a fee. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. "Task Order" or other appropriate designation may be substituted for "Schedule" wherever that word appears in the clause.

Limitation of Cost (Apr 1984)

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that--

(1) The costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause--

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule or, (ii) if this is a cost-sharing contract, the estimated cost to the Government specified in the Schedule; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to the Government specified in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination.

(f) If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

52.232-23 Assignment of Claims.

As prescribed in 32.806(a)(1), insert the following clause:

Assignment of Claims (Jan 1986)

(a) The Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15 (hereafter referred to as "the Act"), may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence.

(b) Any assignment or reassignment authorized under the Act and this clause shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract.

(c) The Contractor shall not furnish or disclose to any assignee under this contract any classified document (including this contract) or information related to work under this contract until the Contracting Officer authorizes such action in writing.

(End of clause)

Alternate I (Apr 1984). If a no-setoff commitment is to be included in the contract (see 32.801 and 32.803(d)), add the following sentence at the end of paragraph (a) of the basic clause:

Unless otherwise stated in this contract, payments to an assignee of any amounts due or to become due under this contract shall not, to the extent specified in the Act, be subject to reduction or setoff.

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

Disputes (Oct 1995)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract

clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim--

(A) Exceeding $100,000; or

(B) Regardless of the amount claimed, when using--

(1) Arbitration conducted pursuant to 5 U.S.C. 575-580; or

(2) Any other alternative means of dispute resolution (ADR) technique that the agency elects to handle in accordance with the Administrative Dispute Resolution Act (ADRA).

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use ADR. If the Contractor refuses an offer for alternative disputes resolution, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the request. When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

(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). If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, 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.

52.242-14 Suspension of Work.

As prescribed in 42.1305(a), insert the following clause in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated:

Suspension of Work (Apr 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed--

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

52.242-15 Stop-Work Order.

As prescribed in 42.1305(b), insert the following clause. The "90-day" period stated in the clause may be reduced to less than 90 days.

Stop-Work Order (Aug 1989)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either--

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if--

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(End of clause)

Alternate I (Apr 1984). If this clause is inserted in a cost-reimbursement contract, substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Default, or the Termination for Convenience of the Government clause of this contract." In paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected" for the words "an equitable adjustment in the delivery schedule or contract price, or both."

52.242-17 Government Delay of Work.

As prescribed in 42.1305(d), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial items. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial items.

Government Delay of Work (Apr 1984)

(a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(b) A claim under this clause shall not be allowed--

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved; and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

52.243-1 Changes--Fixed-Price.

As prescribed in 43.205(a)(1), insert the following clause. The 30-day period may be varied according to agency procedures.

Changes--Fixed Price (Aug 1987)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) 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.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of clause)

Alternate I (Apr 1984). If the requirement is for services, other than architect-engineer or other professional services, and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc.).
(3) Place of performance of the services.

Alternate II (Apr 1984). If the requirement is for services (other than architect-engineer services, transportation, or research and development) and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

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

(3) Place of performance of the services.

(4) 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.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

Alternate III (Apr 1984). If the requirement is for architect-engineer or other professional services, substitute the following paragraph (a) for paragraph (a) of the basic clause and add the following paragraph (f):

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the services to be performed.

* * * * *

(f) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Contracting Officer.

Alternate IV (Apr 1984). If the requirement is for transportation services, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Specifications.

(2) Work or services.

(3) Place of origin.

(4) Place of delivery.

(5) Tonnage to be shipped.

(6) Amount of Government-furnished property.

Alternate V (Apr 1984). If the requirement is for research and development and it is desired to include the clause, substitute the following subparagraphs (a)(1) and (a)(3) and paragraph (b) for subparagraphs (a)(1) and (a)(3) and paragraph (b) of the basic clause:

(a) * * *

(1) Drawings, designs, or specifications.

* * * * *

(3) Place of inspection, delivery, or acceptance.

(b) If any such change causes an increase or decrease in the cost of, or time required for, performing this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in--

(1) The contract price, the time of performance, or both; and

(2) Other affected terms of the contract, and shall modify the contract accordingly.

52.243-2 Changes--Cost-Reimbursement.

As prescribed in 43.205(b)(1), insert the following clause. The 30-day period may be varied according to agency procedures.

Changes--Cost-Reimbursement (Aug 1987)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) 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.

(2) Method of shipment or packing.
(3) Place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or

otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the--

(1) Estimated cost, delivery or completion schedule, or both;

(2) Amount of any fixed fee; and

(3) Other affected terms and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or Limitation of Funds clause of this contract.

(End of clause)

Alternate I (Apr 1984). If the requirement is for services and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:
(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

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

(3) Place of performance of the services.

Alternate II (Apr 1984). If the requirement is for services and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

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

(3) Place of performance of the services.

(4) 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.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

Alternate III (Apr 1984). If the requirement is for construction, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the plans and specifications or instructions incorporated in the contract.

Alternate IV (Apr 1984). If a facilities contract is contemplated, substitute the following paragraphs (a) and (e) for paragraphs (a) and (e) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the facilities or work described in the schedule.

(e) Any related contract with the Contractor may be equitably adjusted if it provides for adjustment and is affected by a change ordered under this clause.

Alternate V (Apr 1984). If the requirement is for research and development, and it is desired to include the clause, substitute the following subparagraphs (a)(1) and (a)(3) for subparagraphs (a)(1) and (a)(3) of the basic clause:

(a) * * *

(1) Drawings, designs, or specifications.

* * * * *

(3) Place of inspection, delivery, or acceptance.

52.243-3 Changes--Time-and-Materials or Labor-Hours.

As prescribed in 43.205(c), insert the following clause. The 30-day period may be varied according to agency procedures.

Changes--Time-and-Materials or Labor-Hours (Aug 1987)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(4) Amount of Government-furnished property.
(b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the--

(1) Ceiling price;

(2) Hourly rates;
(3) Delivery schedule; and

(4) Other affected terms, and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

52.243-4 Changes.

As prescribed in 43.205(d), insert the following clause: The 30-day period may be varied according to agency procedures.

Changes (Aug 1987)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--

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

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

(3) In the Government-furnished facilities, equipment, materials, services, or site; or

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

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating--

(1) The date, circumstances, and source of the order; and

(2) That the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

52.245-2 Government Property (Fixed-Price Contracts).

As prescribed in 45.106(b)(1), insert the following clause:

Government Property (Fixed-Price Contracts) (Dec 1989)

(a) Government-furnished property. (1) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the Government-furnished property described in the Schedule or specifications together with any related data and information that the Contractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "Government-furnished property").

(2) The delivery or performance dates for this contract are based upon the expectation that Government-furnished property suitable for use (except for property furnished "as is") will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates.

(3) If Government-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt of it, notify the Contracting Officer, detailing the facts, and, as directed by the Contracting Officer and at Government expense, either repair, modify, return, or otherwise dispose of the property. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(4) If Government-furnished property is not delivered to the Contractor by the required time, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(b) Changes in Government-furnished property. (1) The Contracting Officer may, by written notice, (i) decrease the Government-furnished property provided or to be provided under this contract, or (ii) substitute other Government-furnished property for the property to be provided by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by such notice.

(2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Government has agreed in the Schedule to make the property available for performing this contract and there is any--
(i) Decrease or substitution in this property pursuant to subparagraph (b)(1) of this clause; or

(ii) Withdrawal of authority to use this property, if provided under any other contract or lease.

(c) Title in Government property. (1) The Government shall retain title to all Government-furnished property.

(2) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. However, special tooling accountable to this contract is subject to the provisions of the Special Tooling clause and is not subject to the provisions of this clause. Title to

Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to each item of facilities and special test equipment acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

(4) If this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost under this contract--

(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and

(ii) Title to all other material shall pass to and vest in the Government upon--

(A) Issuance of the material for use in contract performance;

(B) Commencement of processing of the material or its use in contract performance; or

(C) Reimbursement of the cost of the material by the Government, whichever occurs first.

(d) Use of Government property. The Government property shall be used only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.

(e) Property administration. (1) The Contractor shall be responsible and accountable for all Government property provided under this contract and shall comply with Federal Acquisition Regulation (FAR) Subpart 45.5, as in effect on the date of this contract.

(2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of Government property in accordance with sound industrial practice and the applicable provisions of Subpart 45.5 of the FAR.

(3) If damage occurs to Government property, the risk of which has been assumed by the Government under this contract, the Government shall replace the items or the Contractor shall make such repairs as the Government directs. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by the Contracting Officer. When any property for which the Government is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(4) The Contractor represents that the contract price does not include any amount for repairs or replacement for which the Government is responsible. Repair or replacement of property for which the Contractor is responsible shall be accomplished by the Contractor at its own expense.
(f) Access. The Government and all its designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.

(g) Risk of loss. Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, Government property upon its delivery to the Contractor or upon passage of title to the Government under paragraph (c) of this clause. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.

(h) Equitable adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate,

the Contracting Officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for--

(1) Any delay in delivery of Government-furnished property;

(2) Delivery of Government-furnished property in a condition not suitable for its intended use;

(3) A decrease in or substitution of Government-furnished property; or

(4) Failure to repair or replace Government property for which the Government is responsible.

(i) Final accounting and disposition of Government property. Upon completing this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of Government property (including any resulting scrap) not consumed in performing this contract or delivered to the Government. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the Government property as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to the Government as the Contracting Officer directs.

(j) Abandonment and restoration of Contractor's premises. Unless otherwise provided herein, the Government--

(1) May abandon any Government property in place, at which time all obligations of the Government regarding such abandoned property shall cease; and

(2) Has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if the Government-furnished property (listed in the Schedule or specifications) is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) Communications. All communications under this clause shall be in writing.

(l) Overseas contracts. If this contract is to be performed outside of the United States of America, its territories, or possessions, the words "Government" and "Government-furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government-furnished," respectively.

(End of clause)

Alternate I (Apr 1984). As prescribed in 45.106(b)(2), substitute the following paragraph (g) for paragraph (g) of the basic clause:
(g) Limited risk of loss. (1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of--

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)--

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage--

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of--

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making such equitable adjustment.

(8) The Contractor represents that it is not including in the price and agrees it will not hereafter include in any price to the Government any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged Government property, or shall otherwise credit the proceeds to equitably reimburse the Government, as directed by the Contracting Officer.

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

Alternate II (Jul 1985). As prescribed in 45.106(b)(3), substitute the following paragraphs (c) and (g) for paragraphs (c) and (g) of the basic clause:

(c) Title in Government property. (1) The Government shall retain title to all Government-furnished property.
(2) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to each item of facilities, special test equipment, and special tooling (other than that subject to a special tooling clause) acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences, or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

(4) Title to equipment (and other tangible personal property) purchased with funds available for research and having an acquisition cost of less than $5,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided, that the Contractor obtained the Contracting Officer's approval before each acquisition. Title to equipment purchased with funds available for research and having an acquisition cost of $5,000 or more shall vest as set forth in the contract. If title to equipment vests in the Contractor under this subparagraph (c)(4), the Contractor agrees that no charge will be made to the Government for any depreciation, amortization, or use under any existing or future Government contract or subcontract thereunder. The Contractor shall furnish the Contracting Officer a list of all equipment to which title is vested in the Contractor under this subparagraph (c)(4) within 10 days following the end of the calendar quarter during which it was received.

(5) Vesting title under this paragraph (c) is subject to civil rights legislation, 42 U.S.C. 2000d. Before title is vested any by signing this contract, the Contractor accepts and agrees that--

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to equipment).
* * * * *
(g) Limited risk of loss. (1) The term "Contractor's managerial personnel", as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of--

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant, laboratory, or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)--

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively

presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) Furthermore, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage--

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage, to the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of--

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price, and agrees it will not hereafter include in any price to the Government, any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, the Government property, the Contractor shall use the proceeds to repair, renovate, or

replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer.

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

52.245-19 Government Property Furnished "As Is."

As prescribed in 45.308-2, insert the following clause:

Government Property Furnished "As Is" (Apr 1984)

(a) The Government makes no warranty whatsoever with respect to Government property furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available on an "as is" basis. Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(c) If there is any change in the condition of Government property furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts and, as directed by the Contracting Officer, either (1) return such property at the Government's expense or otherwise dispose of the property or (2) effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with the procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of Government property furnished "as is" in a condition other than that in which it was originally offered.
(d) Except as otherwise provided in this clause, Government property furnished "as is" shall be governed by the Government Property clause of this contract.

52.246-2 Inspection of Supplies--Fixed-Price.

As prescribed in 46.302, insert the following clause:

Inspection of Supplies--Fixed-Price (Aug 1996)

(a) Definition. "Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If the Government performs inspection or test 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. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises; provided, that in case of rejection, the Government shall not be liable for any reduction in the value of inspection or test samples.

(e)(1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) The Contracting Officer may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i)(1) If this contract provides for the performance of Government quality assurance at source, and if requested by the Government, the Contractor shall furnish advance notification of the time--

(i) When Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract; and

(ii) When the supplies will be ready for Government inspection.

(2) The Government's request shall specify the period and method of the advance notification and the Government representative to whom it shall be furnished. Requests shall not require more than 2 workdays of advance notification if the Government representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, that the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(End of clause)

Alternate I (Jul 1985). If a fixed-price incentive contract is contemplated, substitute paragraphs (g), (h), and (l) below for paragraphs (g), (h), and (l) of the basic clause.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when required shall disclose the corrective action taken. Cost of removal, replacement, or correction shall be considered a cost incurred, or to be incurred, in the total final negotiated cost fixed under the incentive price revision clause. However, replacements or corrections by the Contractor after the establishment of the total final price shall be at no increase in the total final price.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and equitably reduce the target price or, if established, the total final price or (2) may terminate the contract for default. Unless the Contractor corrects or replaces the nonconforming supplies within the delivery schedule, the Contracting Officer may require their delivery and equitably reduce any target price or, if it is established, the total final contract price. Failure to agree upon an equitable price reduction shall be a dispute.

* * * * *

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in any target price or, if it is established, the total final price of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, that the Contracting Officer may require a reduction in any target price, or, if it is established, the total final price of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the total final price as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce any target price or, if it is established, the total final price of this contract.

Alternate II (Jul 1985). If a fixed-ceiling-price contract with retroactive price redetermination is contemplated, substitute paragraphs (g), (h), and (l) below for paragraphs (g), (h), and (l) of the basic clause:

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when required shall disclose the corrective action taken. Cost of removal, replacement, or correction shall be considered a cost incurred, or to be incurred, when redetermining the prices under the price redetermination clause. However, replacements or corrections by the Contractor after the establishment of the redetermined prices shall be at no increase in the redetermined price.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and equitably reduce the initial contract prices or, if established, the redetermined contract prices or (2) terminate the contract for default. Unless the Contractor corrects or replaces the nonconforming supplies within the delivery schedule, the Contracting Officer may require their delivery and equitably reduce the initial contract price or, if it is established, the redetermined contract prices. Failure to agree upon an equitable price reduction shall be a dispute.

* * * * *

(1) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in the initial contract prices, or, if it is established, the redetermined prices of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, that the Contracting Officer may require a reduction in the initial contract prices, or, if it is established, the redetermined prices of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the initial contract prices, or, if it is established, the redetermined prices of this contract, as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or

such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce the initial contract prices, or, if it is established, the redetermined prices of this contract.

52.246-21 Warranty of Construction.

As prescribed in 46.710(e)(1), the contracting officer may insert a clause substantially as follows in solicitations and contracts when a fixed-price construction contract (see 46.705(c)) is contemplated, and the use of a warranty clause has been approved under agency procedures:

Warranty of Construction (Mar 1994)

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (i) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of--

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall--

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government-furnished material or design.

(j) This warranty shall not limit the Government's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of clause)

Alternate I (Apr 1984). If the Government specifies in the contract the use of any equipment by "brand name and model," the contracting officer may add a paragraph substantially the same as the following paragraph (k) to the basic clause:

(k) Defects in design or manufacture of equipment specified by the Government on a "brand name and model" basis, shall not be included in this warranty. In this event, the Contractor shall require any subcontractors, manufacturers, or suppliers thereof to execute their warranties, in writing, directly to the Government.

52.249-1 Termination for Convenience of the Government (Fixed-Price) (Short Form).

As prescribed in 49.502(a)(1), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be $100,000 or less, except (a) if use of the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form) is appropriate (b), in contracts for research and development work with an educational or nonprofit institution on a no-profit basis, (c) in contracts for architect-engineer services, or (d) if one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate:

Termination for Convenience of the Government (Fixed-Price) (Short Form) (Apr 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with Part 49 of the Federal Acquisition Regulation in effect on the date of this contract.

(End of clause)

Alternate I (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements, designate the basic clause as paragraph (a) and add the following paragraph (b):

(b) Upon receipt of the termination notice, if title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of the contract, except for property that the Contractor (a) disposed of by bona fide sale or (b) removed from the site.

52.249-2 Termination for Convenience of the Government (Fixed-Price).

As prescribed in 49.502(b)(1)(i), insert the following clause:

Termination for Convenience of the Government (Fixed-Price) (Sep 1996)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government--

(i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and

(ii) The completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (b)(6) of this clause; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.
(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year

period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (f) or paragraph (g) of this clause, exclusive of costs shown in subparagraph (g)(3) of this clause, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be modified, and the Contractor paid the agreed amount. Paragraph (g) of this clause shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(g) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:
(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of--

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(2)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including--

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(h) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (g) of this clause, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

(i) The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e), (g), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the time provided in paragraph (e) or (l), respectively, and failed to request a time extension, there is no right of appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted--

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(l) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(m)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

(End of clause)

Alternate I (Sep 1996). If the contract is for construction, substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of--

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(1)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including--

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

Alternate II (Sep 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete subparagraph (m)(2) of the basic clause.

Alternate III (Sep 1996). If the contract is for construction and with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, substitute the following paragraph (g) for paragraph (g) of the basic clause. Subparagraph (m)(2) may be deleted from the basic clause if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate.
(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of--

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including--

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

52.249-6 Termination (Cost-Reimbursement).

As prescribed in 49.503(a)(1), insert the following clause:

Termination (Cost-Reimbursement) (Sep 1996)
(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part, if--

(1) The Contracting Officer determines that a termination is in the Government's interest; or

(2) The Contractor defaults in performing this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.

(b) The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying whether termination is for default of the Contractor or for convenience of the Government, the extent of termination, and the effective date. If, after termination for default, it is determined that the Contractor was not in default or that the Contractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of the Government.

(c) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause), except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts, the cost of which would be reimbursable in whole or in part, under this contract; approval or ratification will be final for purposes of this clause.

(6) Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to the Government--

(i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated;

(ii) The completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government; and

(iii) The jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this contract, the cost of which the Contractor has been or will be reimbursed under this contract.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (c)(6) of this clause; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(d) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(e) After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept the items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(f) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(g) Subject to paragraph (f) of this clause, the Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The contract shall be amended, and the Contractor paid the agreed amount.

(h) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor, and shall pay that amount, which shall include the following:

(1) All costs reimbursable under this contract, not previously paid, for the performance of this contract before the effective date of the termination, and those costs that may continue for a reasonable time with

the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue those costs as rapidly as practicable.

(2) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subparagraph (h)(1) of this clause.

(3) The reasonable costs of settlement of the work terminated, including--

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Contractor's termination settlement proposal may be included.

(4) A portion of the fee payable under the contract, determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee.
(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by the Government is to the total number of articles (or amount of services) of a like kind required by the contract.

(5) If the settlement includes only fee, it will be determined under subparagraph (h)(4) of this clause.

(i) The cost principles and procedures in Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (f), (h), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (f) and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (f), (h) or (l) of this clause, the Government shall pay the Contractor--

(1) The amount determined by the Contracting Officer if there is no right of appeal or if no timely appeal has been taken; or

(2) The amount finally determined on an appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted--

(1) All unliquidated advance or other payments to the Contractor, under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Contractor or sold under this clause and not recovered by or credited to the Government.

(l) The Contractor and Contracting Officer must agree to any equitable adjustment in fee for the continued portion of the contract when there is a partial termination. The Contracting Officer shall amend the contract to reflect the agreement.

(m)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) The provisions of this clause relating to fee are inapplicable if this contract does not include a fee.

(End of clause)

Alternate I (Sep 1996). If the contract is for construction, substitute the following subparagraph (h)(4) for subparagraph (h)(4) of the basic clause:

(4) A portion of the fee payable under the contract determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination settlement proposals, less previous payments for fee.
(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the actual work in place is to the total work in place required by the contract.

Alternate II (Sep 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete subparagraph (m)(2) from the basic clause.

Alternate III (Sep 1996). If the contract is for construction with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, the following subparagraph (h)(4) shall be substituted for subparagraph (h)(4) of the basic clause. Subparagraph (m)(2) may be deleted from the basic clause if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(4) A portion of the fee payable under the contract determined as follows:
(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination settlement proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the actual work in place is to the total work in place required by the contract.

Alternate IV (Sep 1996). If the contract is a time-and-material or labor-hour contract, substitute the following paragraphs (h) and (l) for paragraphs (h) and (l) of the basic clause:

(h) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor and shall pay the amount determined as follows:

(1) If the termination is for the convenience of the Government, include--

(i) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the Contractor;

(ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Contractor;

(iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination, if they are reasonably incurred after the effective date, with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these expenses as rapidly as practicable;

(iv) If not included in subdivision (h)(1)(i), (ii), or (iii) of this clause, the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract; and

(v) The reasonable costs of settlement of the work terminated, including--

(A) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(B) The termination and settlement of subcontracts (excluding the amounts of such settlements); and
(C) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

(2) If the termination is for default of the Contractor, include the amounts computed under subparagraph (h)(1) of this clause but omit--

(i) Any amount for preparation of the Contractor's termination settlement proposal; and
(ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by the Government.

* * * * *

(l) If the termination is partial, the Contractor may file with the Contracting Officer a proposal for an equitable adjustment of price(s) for the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination, unless extended in writing by the Contracting Officer.

Alternate V (Sep 1996). If the contract is a time-and-material or labor-hour contract with an agency of the U.S. Government or with State, local or foreign governments or their agencies, substitute the following paragraphs (h) and (l) for paragraphs (h) and (l) of the basic clause. Subparagraph (m)(2) may be deleted from the basic clause if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(h) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor and shall pay the amount determined as follows:

(1) If the termination is for the convenience of the Government, include--

(i) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the contractor;

(ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Contractor;

(iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination if they are reasonably incurred after the effective date, with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these expenses as rapidly as practicable;

(iv) If not included in subdivision (h)(1)(i), (ii), or (iii) of this clause, the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract; and

(v) The reasonable costs of settlement of the work terminated, including--

(A) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(B) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(C) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

(2) If the termination is for default of the Contractor, include the amounts computed under subparagraph (h)(1) of this clause but omit--

(i) Any amount for preparation of the Contractor's termination settlement proposal; and

(ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by the Government.
* * * * *

(l) If the termination is partial, the Contractor may file with the Contracting Officer a proposal for an equitable adjustment of the price(s) for the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination, unless extended in writing by the Contracting Officer.

52.249-8 Default (Fixed-Price Supply and Service).

As prescribed in 49.504(a)(1), insert the following clause:

Default (Fixed-Price Supply and Service) (Apr 1984)

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to--
(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) of this clause); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) of this clause, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) 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.

(End of clause)

Alternate I (Apr 1984). If the contract is for transportation or transportation-related services, delete paragraph (f) of the basic clause, redesignate the remaining paragraphs accordingly, and substitute the following paragraphs (a) and (e) for paragraphs (a) and (e) of the basic clause:

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to--

(i) Pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) of this clause); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (iii) of this clause, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(e) If this contract is terminated while the Contractor has possession of Government goods, the Contractor shall, upon direction of the Contracting Officer, protect and preserve the goods until surrendered to the Government or its agent. The Contractor and Contracting Officer shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be a dispute under the Disputes clause.

52.249-10 Default (Fixed-Price Construction).

As prescribed in 49.504(c)(1), insert the following clause:

Default (Fixed-Price Construction) (Apr 1984)

(a) If 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 this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include--

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,
(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) 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. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) 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.

(End of clause)

Alternate I (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) If 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 this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.
Alternate II (Apr 1984). If the contract is to be awarded during a period of national emergency, subparagraph (b)(1) below may be substituted for subparagraph (b)(1) of the basic clause:

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include--

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

Alternate III (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements and is to be awarded during a period of national emergency, substitute the following paragraph (a) for paragraph (a) of the basic clause. The following subparagraph (b)(1) may be substituted for subparagraph (b)(1) of the basic clause:

(a)(1) If 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 this contract, including any extension, or fails to complete the work within this time, the Government may,by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.
(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include--

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

252.228-7001 Ground and Flight Risk.

As prescribed in 228.370(b), use the following clause:

GROUND AND FLIGHT RISK (SEP 1996)

(a) Definitions.

As used in this clause--

(1) "Aircraft," unless otherwise provided in the Schedule, means--

(i) Aircraft to be delivered to the Government under this contract (either before or after Government acceptance), including complete aircraft and aircraft in the process of being manufactured, disassembled, or reassembled; provided that an engine, portion of a wing or a wing is attached to a fuselage of the aircraft; and

(ii) Aircraft, whether in a state of disassembly or reassembly, furnished by the Government to the Contractor under this contract, including all property installed, in the process of installation, or temporarily removed; provided that the aircraft and property are not covered by a separate bailment agreement.

(2) "Contractor's premises" means those premises designated in the Schedule or in writing by the Contracting Officer, and any other place the aircraft is moved for safeguarding.

(3) "Flight" means any flight demonstration, flight test, taxi test, or other flight made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the Contracting Officer.

(i) For land based aircraft, "flight" begins with the taxi roll from a flight line on the Contractor's premises and continues until the aircraft has completed the taxi roll in returning to a flight line on the Contractor's premises;

(ii) For seaplanes, "flight" begins with the launching from a ramp on the Contractor's premises and continues until the aircraft has completed its landing run and is beached at a ramp on the Contractor's premises;

(iii) For helicopters, "flight" begins upon engagement of the rotors for the purpose of take-off from the Contractor's premises and continues until the aircraft has returned to the ground on the Contractor's premises and the rotors are disengaged; and

(iv) For vertical take-off aircraft, "flight" begins upon disengagement from any launching platform or device on the Contractor's premises and continues until the aircraft has been engaged to any launching platform or device on the Contractor's premises;

(v) All aircraft off the Contractor's premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of this contract, or landings approved in writing by the Contracting Officer.

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Statutes

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5 U.S.C. § 504

EQUAL ACCESS TO JUSTICE ACT

5 U.S.C. § 504. Costs and fees of parties

(a)(1) An 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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.
(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct, which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefore. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.
(b)(1) For the purposes of this section--
(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);
(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;
(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and
(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.
(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.
(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.
(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.
(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.
(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information, which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.
(f) No award may be made under this section for costs, fees, or other expenses, which may be awarded under section 7430 of the Internal Revenue Code of 1986.

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5 U.S.C. § 552

FREEDOM OF INFORMATION ACT (FOIA)

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:
(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.
(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--
(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
(B) those statements of policy and interpretations, which have been adopted by the agency and are not published in the Federal Register;
(C) administrative staff manuals and instructions to staff that affect a member of the public;
(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
(E) a general index of the records referred to under subparagraph (D);
unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--
(i) it has been indexed and either made available or published as provided by this paragraph; or
(ii) the party has actual and timely notice of the terms thereof.
(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.
(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.
(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records, which are responsive to a request.
(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the

processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
(ii) Such agency regulations shall provide that--
(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--
(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.
(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.
(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, that the court's review of the matter shall be limited to the record before the agency.
(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).
(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.
[(D) Repealed. Pub. L. 98-620, Title IV, S 402(2), Nov. 8, 1984, 98 Stat. 3357]
(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and

recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.
(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.
(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.
(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--
(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination; and
(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.
(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--
(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.
(b) This section does not apply to matters that are--
(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) 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;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, 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, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.
Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions, which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information shall be indicated at the place in the record where such deletion is made.
(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--
(A) the investigation or proceeding involves a possible violation of criminal law; and
(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.
(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.
(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--
(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and
(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;
(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;
(D) the number of requests for records received by the agency and the number of requests, which the agency processed;
(E) the median number of days taken by the agency to process different types of requests;
(F) the total amount of fees collected by the agency for processing requests; and
(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.
(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.
(3) The Attorney General of the United States shall make each report, which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the

Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.
(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.
(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.
(f) For purposes of this section, the term--
(1) "agency" as defined in section 551(1) of this title includes 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; and
(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.
(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--
(1) an index of all major information systems of the agency;
(2) a description of major information and record locator systems maintained by the agency; and
(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

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10 U.S.C. § 2409

WHISTLEBLOWER PROTECTION

10 U.S.C. § 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) Prohibition of reprisals --An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).
(b) Investigation of complaints --A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of an agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.
(c) Remedy and enforcement authority.
(1) If the head of the agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the agency may take one or more of the following actions:
(A) Order the contractor to take affirmative action to abate the reprisal.
(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the

complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.
(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.
(3) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.
(d) Construction --Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.
(e) Definitions --In this section:
(1) The term "agency" means an agency named in section 2303 of this title.
(2) The term "head of an agency" has the meaning provided by section 2302(1) of this title.
(3) The term "contract" means a contract awarded by the head of an agency.
(4) The term "contractor" means a person awarded a contract with an agency.
(5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978.

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10 U.S.C. §§ 2801 - 2805, 2810, 2811, 2813

MILITARY CONSTRUCTION

10 U.S.C. § 2801. Scope of chapter; definitions

(a) The term "military construction" as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation.
(b) A military construction project includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility (or to produce such portion of a complete and usable facility or improvement as is specifically authorized by law).
(c) In this chapter:
(1) The term "facility" means a building, structure, or other improvement to real property.
(2) 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.
(3) The term "Secretary concerned" includes the Secretary of Defense with respect to matters concerning the Defense Agencies.
(4) The term "appropriate committees of Congress" means the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on National Security and the Committee on Appropriations of the House of Representatives and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.
(d) This chapter (other than sections 2830 and 2835) does not apply to the Coast Guard or to civil works projects of the Army Corps of Engineers.

§ 2802. Military construction projects

(a) The Secretary of Defense and the Secretaries of the military departments may carry out such military construction projects as are authorized by law.
(b) Authority provided by law to carry out a military construction project includes authority for--
(1) surveys and site preparation;
(2) acquisition, conversion, rehabilitation, and installation of facilities;
(3) acquisition and installation of equipment and appurtenances integral to the project;
(4) acquisition and installation of supporting facilities (including utilities) and appurtenances incident to the project; and
(5) planning, supervision, administration, and overhead incident to the project.

§ 2803. Emergency construction

(a) Subject to subjections (b) and (c), the Secretary concerned may carry out a military construction project not otherwise authorized by law if the Secretary determines (1) that the project is vital to the national security or to the protection of health, safety, or the quality of the environment, and (2) that the requirement for the project is so urgent that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or the protection of health, safety, or environmental quality, as the case may be.
(b) When a decision is made to carry out a military construction project under this section, the Secretary concerned shall submit a report in writing to the appropriate committees of Congress on that decision. Each such report shall include (1) the justification for the project and the current estimate of the cost of the project, (2) the justification for carrying out the project under this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees.
(c)(1) The maximum amount that the Secretary concerned may obligate in any fiscal year under this section is $30,000,000.
(2) A project carried out under this section shall be carried out within the total amount of funds appropriated for military construction that have not been obligated.

§ 2804. Contingency construction

(a) Within the amount appropriated for such purpose, the Secretary of Defense may carry out a military construction project not otherwise authorized by law, or may authorize the Secretary of a military department to carry out such a project, if the Secretary of Defense determines that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.
(b) When a decision is made to carry out a military construction project under this section, the Secretary of Defense shall submit a report in writing to the appropriate committees of Congress on that decision. Each such report shall include (1) the justification for the project and the current estimate of the cost of the project, and (2) the justification for carrying out the project under this section. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees.

§ 2805. Unspecified minor construction

(a)(1) Except as provided in paragraph (2), within an amount equal to 125 percent of the amount authorized by law for such purpose, the Secretary concerned may carry out minor military construction projects not otherwise authorized by law. A minor military construction project is a military construction project that has an approved cost equal to or less than $1,500,000. However, if the military construction project is intended solely to correct a deficiency that is life threatening, health threatening, or safety threatening, a minor military construction project may have an approved cost equal to or less than $3,000,000.
(2) A Secretary may not use more than $5,000,000 for exercise-related unspecified minor military construction projects coordinated or directed by the Joint Chiefs of Staff outside the United States during any fiscal year.

(b)(1) A minor military construction project costing more than $500,000 may not be carried out under this section unless approved in advance by the Secretary concerned.
(2) When a decision is made to carry out a minor military construction project to which paragraph (1) is applicable, the Secretary concerned shall notify in writing the appropriate committees of Congress of that decision, of the justification for the project, and of the estimated cost of the project. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by the committees.
[(3) Repealed. Pub. L. 101-510, Div. A, Title XIII, S 1301(16), Nov. 5, 1990, 104 Stat. 1668]
(c)(1) Except as provided in paragraph (2), the Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified military construction project costing not more than--
(A) $1,000,000, in the case of an unspecified military construction project intended solely to correct a deficiency that is life-threatening, health- threatening, or safety-threatening; or
(B) $500,000, in the case of any other unspecified military construction project.
(2) The authority provided in paragraph (1) may not be used with respect to any exercise-related unspecified military construction project coordinated or directed by the Joint Chiefs of Staff outside the United States.
(d) Military family housing projects for construction of new housing units may not be carried out under the authority of this section.

§ 2810. Construction projects for environmental response actions

(a) Subject to subsection (b), the Secretary of Defense may carry out a military construction project not otherwise authorized by law (or may authorize the Secretary of a military department to carry out such a project) if the Secretary of Defense determines that the project is necessary to carry out a response action under chapter 160 of this title or under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.).
(b)(1) When a decision is made to carry out a military construction project under this section, the Secretary of Defense shall submit a report in writing to the appropriate committees of Congress on that decision. Each such report shall include--
(A) the justification for the project and the current estimate of the cost of the project; and
(B) the justification for carrying out the project under this section.
(2) The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees.
(c) In this section, the term "response action" has the meaning given that term in section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601).

§ 2811. Repair of facilities

(a) Repairs using operations and maintenance funds --Using funds available to the Secretary concerned for operation and maintenance, the Secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility.
(b) Approval required for major repairs --A repair project costing more than $5,000,000 may not be carried out under this section unless approved in advance by the Secretary concerned. In determining the total cost of a repair project, the Secretary shall include all phases of a multi-year repair project to a single facility. In considering a repair project for approval, the Secretary shall ensure that the project is consistent with force structure plans, that repair of the facility is more cost effective than replacement, and that the project is an appropriate use of operation and maintenance funds.
(c) Prohibition on new construction or additions --Construction of new facilities or additions to existing facilities may not be carried out under the authority of this section.

§ 2813. Acquisition of existing facilities in lieu of authorized construction

(a) Acquisition authority --Using funds appropriated for a military construction project authorized by law for a military installation, the Secretary of the military department concerned may acquire an existing

facility (including the real property on which the facility is located) at or near the military installation instead of carrying out the authorized military construction project if the Secretary determines that--
(1) the acquisition of the facility satisfies the requirements of the military department concerned for the authorized military construction project; and
(2) it is in the best interests of the United States to acquire the facility instead of carrying out the authorized military construction project.
(b) Modification or conversion of acquired facility --(1) As part of the acquisition of an existing facility under subsection (a), the Secretary of the military department concerned may carry out such modifications, repairs, or conversions of the facility as the Secretary considers to be necessary so that the facility satisfies the requirements for which the military construction project was authorized.
(2) The costs of anticipated modifications, repairs, or conversions under paragraph (1) are required to remain within the authorized amount of the military construction project. The Secretary concerned shall consider such costs in determining whether the acquisition of an existing facility is--
(A) more cost effective than carrying out the authorized military construction project; and
(B) in the best interests of the United States.
(c) Notice and wait requirements --A contract may not be entered into for the acquisition of a facility under subsection (a) until the end of the 30-day period beginning on the date the Secretary concerned transmits to the appropriate committees of Congress a written notification of the determination to acquire an existing facility instead of carrying out the authorized military construction project. The notification shall include the reasons for acquiring the facility.

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15 U.S.C. §§ 631, 613a

AID TO SMALL BUSINESS

15 U.S.C.A. § 631. Declaration of policy

(a) Aid, counsel, assistance, etc., to small business concerns
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 be 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 over-all economy of the Nation.
(b) Assistance to compete in international markets
(1) It is the declared policy of the Congress that the Federal Government, through the Small Business Administration, acting in cooperation with the Department of Commerce and other relevant State and Federal agencies, should aid and assist small businesses, as defined under this chapter, to increase their ability to compete in international markets by--
(A) enhancing their ability to export;
(B) facilitating technology transfers;
(C) enhancing their ability to compete effectively and efficiently against imports;
(D) increasing the access of small businesses to long-term capital for the purchase of new plant and equipment used in the production of goods and services involved in international trade;
(E) disseminating information concerning State, Federal, and private programs and initiatives to enhance the ability of small businesses to compete in international markets; and
(F) ensuring that the interests of small businesses are adequately represented in bilateral and multilateral trade negotiations.

(2) The Congress recognizes that the Department of Commerce is the principal Federal agency for trade development and export promotion and that the Department of Commerce and the Small Business Administration work together to advance joint interests. It is the purpose of this chapter to enhance, not alter, their respective roles.
(c) Aid for agriculturally related industries ;financial assistance
It is the declared policy of the Congress that the Government, through the Small Business Administration, should aid and assist small business concerns which are engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries; and the financial assistance programs authorized by this chapter are also to be used to assist such concerns.
(d) Use of assistance programs to establish, preserve, and strengthen small business concerns
(1) The assistance programs authorized by sections 636(i) and 636(j) of this title are to be utilized to assist in the establishment, preservation, and strengthening of small business concerns and improve the managerial skills employed in such enterprises, with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals; and to mobilize for these objectives private as well as public managerial skills and resources.
(2)(A) With respect to the programs authorized by section 636(j) of this title, the Congress finds--
(i) that ownership and control of productive capital is concentrated in the economy of the United States and certain groups, therefore, own and control little productive capital;
(ii) that certain groups in the United States own and control little productive capital because they have limited opportunities for small business ownership;
(iii) that the broadening of small business ownership among groups that presently own and control little productive capital is essential to provide for the well-being of this Nation by promoting their increased participation in the free enterprise system of the United States;
(iv) that such development of business ownership among groups that presently own and control little productive capital will be greatly facilitated through the creation of a small business ownership development program, which shall provide services, including, but not limited to, financial, management, and technical assistance. [FN1]
(v) that the power to let Federal contracts pursuant to section 637(a) of this title can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital; and
(vi) that the procurement authority under section 637(a) of this title shall be used only as a tool for developing business ownership among groups that own and control little productive capital.
(B) It is therefore the purpose of the programs authorized by section 636(j)
of this title to--
(i) foster business ownership and development by individuals in groups that own and control little productive capital; and
(ii) promote the competitive viability of such firms in the marketplace by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.
(e) Assistance to victims of floods, etc., and those displaced as result of federally aided construction programs
Further, it is the declared policy of the Congress that the Government should aid and assist victims of floods and other catastrophes, and small-business concerns, which are displaced as a result of federally, aided construction programs.
(f) Findings ;purpose
(1) with respect to the Administration's business development programs the Congress finds--
(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;
(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;
(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and
(G) that such procurements also benefit the United States encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.
(2) It is therefore the purpose of section 637(a) of this title to--
(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;
(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and
(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.
(g) Assistance to disaster victims under disaster loan program
In administering the disaster loan program authorized by section 636 of this title, to the maximum extent possible, the Administration shall provide assistance and counseling to disaster victims in filing applications, providing information relevant to loan processing, and in loan closing and prompt disbursement of loan proceeds and shall give the disaster program a high priority in allocating funds for administrative expenses.
(h) Assistance to women owned business
(1) With respect to the programs and activities authorized by this chapter, the Congress finds that--
(A) women owned business has become a major contributor to the American economy by providing goods and services, revenues, and jobs;
(B) over the past two decades there have been substantial gains in the social and economic status of women as they have sought economic equality and independence;
(C) despite such progress, women, as a group, are subjected to discrimination in entrepreneurial endeavors due to their gender;
(D) such discrimination takes many overt and subtle forms adversely impacting the ability to raise or secure capital, to acquire managerial talents, and to capture market opportunities;
(E) it is in the national interest to expeditiously remove discriminatory barriers to the creation and development of small business concerns owned and controlled by women;
(F) the removal of such barriers is essential to provide a fair opportunity for full participation in the free enterprise system by women and to further increase the economic vitality of the Nation;
(G) increased numbers of small business concerns owned and controlled by women will directly benefit the United States Government by expanding the potential number of suppliers of goods and services to the Government; and
(H) programs and activities designed to assist small business concerns owned and controlled by women must be implemented in such a way as to remove such discriminatory barriers while not adversely affecting the rights of socially and economically disadvantaged individuals.
(2) It is, therefore, the purpose of those programs and activities conducted under the authority of this chapter that assist women entrepreneurs to--
(A) vigorously promote the legitimate interests of small business concerns owned and controlled by women;
(B) remove, insofar as possible, the discriminatory barriers that are encountered by women in accessing capital and other factors of production; and
(C) require that the Government engage in a systematic and sustained effort to identify, define and analyze those discriminatory barriers facing women and that such effort directly involve the participation of women business owners in the public/private sector partnership.
(i) Prohibition on the use of funds for individuals not lawfully within the United States

None of the funds made available pursuant to this chapter may be used to provide any direct benefit or assistance to any individual in the United States if the Administrator or the official to which the funds are made available receives notification that the individual is not lawfully within the United States.

631a. Congressional declaration of small business economic policy

(a) Foster small business
For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and coordinate all Federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses ;establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses ;reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.
(b) Capital availability to small business
Congress further declares that the Federal Government is committed to a policy of utilizing all reasonable means, consistent with the overall economic policy goals of the Nation and the preservation of the competitive free enterprise system of the Nation, to establish private sector incentives that will help assure that adequate capital at competitive prices is available to small businesses. To fulfill this policy, departments, agencies, and instrumentalities of the Federal Government shall use all reasonable means to coordinate, create, and sustain policies and programs which promote investment in small businesses, including those investments which expand employment opportunities and which foster the effective and efficient use of human and natural resources in the economy of the Nation.

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18 U.S.C. §§ 207 - 209

BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on all officers and employees of the executive branch and certain other agencies --
(1) Permanent restrictions on representation on particular matters --Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter--
(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) in which the person participated personally and substantially as such officer or employee, and
(C) which involved a specific party or specific parties at the time of such participation,
shall be punished as provided in section 216 of this title.
(2) Two-year restrictions concerning particular matters under official responsibility --Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
(C) which involved a specific party or specific parties at the time it was so pending,
shall be punished as provided in section 216 of this title.
(3) Clarification of restrictions --The restrictions contained in paragraphs (1) and (2) shall apply--
(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and
(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.
(b) One-year restrictions on aiding or advising --
(1) In general --Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.
(2) Definition --For purposes of this paragraph--
(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and
(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.
(c) One-year restrictions on certain senior personnel of the executive branch and independent agencies --
(1) Restrictions --In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.
(2) Persons to whom restrictions apply --(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))--
(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,
(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service,
(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or
(iv) employed in a position, which is held by an active duty commissioned officer of the uniformed

services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above.
(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.
(C) At the request of a department or agency, the Director of the Office of Government Ethics may waive the restrictions contained in paragraph (1) with respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that--
(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and
(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.
(d) Restrictions on very senior personnel of the executive branch and independent agencies --
(1) Restrictions --In addition to the restrictions set forth in subsections (a) and (b), any person who--
(A) serves in the position of Vice President of the United States,
(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or
(C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3, and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.
(2) Persons who may not be contacted --The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are--
(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and
(B) any person appointed to a position in the executive branch, which is listed in sections 5312, 5313, 5314, 5315, or, 5316 of title 5.
(e) Restrictions on Members of Congress and officers and employees of the legislative branch --
(1) Members of Congress and elected officers-- (A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.
(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress.
(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Congress in which the elected officer served.
(2) Personal staff-- (A) Any person who is an employee of a Senator or an employee of a Member of the House of Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.
(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:
(i) the Senator or Member of the House of Representatives for whom that person was an employee; and
(ii) any employee of that Senator or Member of the House of Representatives.

(3) Committee staff-- Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.
(4) Leadership staff --(A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.
(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:
(i) in the case of a former employee on the leadership staff of the House of Representatives, those persons are any Member of the leadership of the House of Representatives and any employee on the leadership staff of the House of Representatives; and
(ii) in the case of a former employee on the leadership staff of the Senate, those persons are any Member of the leadership of the Senate and any employee on the leadership staff of the Senate.
(5) Other legislative offices-- (A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of that person's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.
(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.
(6) Limitation on restrictions --(A) The restrictions contained in paragraphs (2), (3), and (4) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable for a Member of the House of Congress in which such employee was employed.
(B) The restrictions contained in paragraph (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the basic rate of pay payable for level 5 of the Senior Executive Service.
(7) Definitions--As used in this subsection--
(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;
(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;
(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;
(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, and an employee on the leadership staff of the Senate;
(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;
(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection;
(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;
(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);
(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;
(K) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress;
(L) the term "Member of the leadership of the House of Representatives" means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);
(M) the term "Member of the leadership of the Senate" means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).
(f) Restrictions relating to foreign entities --
(1) Restrictions --Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection--
(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or
(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties, shall be punished as provided in section 216 of this title.
(2) Special rule for Trade Representative --With respect to a person who is the United States Trade Representative or Deputy United States Trade Representative, the restrictions described in paragraph (1) shall apply to representing, aiding, or advising foreign entities at any time after the termination of that person's service as the United States Trade Representative.
(3) Definition --For purposes of this subsection, the term "foreign entity" means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.
(g) Special rules for detailees--For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.
(h) Designations of separate statutory agencies and bureaus --
(1) Designations --For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of

Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.
(2) Inapplicability of designations--No agency or bureau within the Executive Office of the President may be designated under paragraph (1) as a separate department or agency. No designation under paragraph (1) shall apply to persons referred to in subsection (c)(2)(A)(i) or (iii).
(i) Definitions--For purposes of this section--
(1) the term "officer or employee", when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include--
(A) in subsections (a), (c), and (d), the President and the Vice President; and
(B) in subsection (f), the President, the Vice President, and Members of Congress;
(2) the term "participated" means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action; and
(3) the term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.
(j) Exceptions--
(1) Official government duties--The restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government.
(2) State and local governments and institutions, hospitals, and organizations--The restrictions contained in subsections (c), (d), and (e) shall not apply to acts done in carrying out official duties as an employee of--
(A) an agency or instrumentality of a State or local government if the appearance, communication, or representation is on behalf of such government, or
(B) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.
(3) International organizations--The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.
(4) Special knowledge--The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.
(5) Exception for scientific or technological information --The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term "officer or employee" includes the Vice President.
(6) Exception for testimony--Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence--
(A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter; and
(B) a former officer or employee of the District of Columbia who is subject to the restrictions contained in

subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the District of Columbia) in that matter.
(7) Political parties and campaign committees-- (A) Except as provided in subparagraph (B), the restrictions contained in subsections (c), (d), and (e) shall not apply to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.
(B) Subparagraph (A) shall not apply to--
(i) any communication to, or appearance before, the Federal Election Commission by a former officer or employee of the Federal Election Commission; or
(ii) a communication or appearance made by a person who is subject to the restrictions contained in subsections (c), (d), or (e) if, at the time of the communication or appearance, the person is employed by a person or entity other than--
(I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or
(II) a person or entity who represents, aids, or advises only persons or entities described in sub clause (I).
(C) For purposes of this paragraph--
(i) the term "candidate" means any person who seeks nomination for election, or election, to Federal or State office or who has authorized others to explore on his or her behalf the possibility of seeking nomination for election, or election, to Federal or State office;
(ii) the term "authorized committee" means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination for election, or the election, of such candidate, or to explore the possibility of seeking nomination for election, or the election, of such candidate, except that a political committee that receives contributions or makes expenditures to promote more than 1 candidate may not be designated as an authorized committee for purposes of subparagraph (A);
(iii) the term "national committee" means the organization, which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level;
(iv) the term "national Federal campaign committee" means an organization that, by virtue of the bylaws of a political party, is established primarily for the purpose of providing assistance, at the national level, to candidates nominated by that party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;
(v) the term "State committee" means the organization, which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level;
(vi) the term "political party" means an association, committee, or organization that nominates a candidate for election to any Federal or State elected office whose name appears on the election ballot as the candidate of such association, committee, or organization; and
(vii) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.
(k)(1)(A) The President may grant a waiver of a restriction imposed by this section to any officer or employee described in paragraph (2) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Federal Government at any one time may have been granted waivers under this paragraph.
(B)(i) A waiver granted under this paragraph to any person shall apply only with respect to activities engaged in by that person after that person's Federal Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Federal Government employment began.
(ii) Notwithstanding clause (i), a waiver granted under this paragraph to any person who was an officer or employee of Lawrence Livermore National Laboratory, Los Alamos National Laboratory, or Sandia National Laboratory immediately before the person's Federal Government employment began shall apply to that person's employment by any such national laboratory after the person's employment by the Federal Government is terminated.
(2) Waivers under paragraph (1) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.
(3) A certification under paragraph (1) shall take effect upon its publication in the Federal Register and

shall identify--
(A) the officer or employee covered by the waiver by name and by position, and
(B) the reasons for granting the waiver.
A copy of the certification shall also be provided to the Director of the Office of Government Ethics.
(4) The President may not delegate the authority provided by this subsection.
(5)(A) Each person granted a waiver under this subsection shall prepare reports, in accordance with subparagraph (B), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in subparagraph (B), and if so, what those activities were.
(B) A report under subparagraph (A) shall cover each six-month period beginning on the date of the termination of the person's Federal Government employment (with respect to which the waiver under this subsection was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this paragraph shall be made available for public inspection and copying.
(C) If a person fails to file any report in accordance with subparagraphs (A) and (B), the President shall revoke the waiver and shall notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.
(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.
(E) As used in this subsection, the term "civil service" has the meaning given that term in section 2101 of title 5.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse,
minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--
Shall be subject to the penalties set forth in section 216 of this title.
(b) Subsection (a) shall not apply--
(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;
(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies:
(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or
(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights--

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,
(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or
(C) in an Indian claims fund held in trust or administered by the United States, if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.
(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.
(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).
(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.
(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall--
(A) list and describe exemptions; and
(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection--
Shall be subject to the penalties set forth in section 216 of this title.
(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.
(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.
(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.
(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: Provided, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty- five days.
(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from

an organization which is described in section 501(c) (3) of the Internal Revenue Code of 1954 and which is exempt from taxation under section 501(a) of such Code.

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18 U.S.C. § 287

FALSE CLAIMS ACT (CRIMINAL)

18 U.S.C. § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

[Note: Pub. L. 99-145, Title IX, s 931, Nov. 8, 1985, 99 Stat. 699, provided that:
"(a) Criminal Fines --Notwithstanding sections 287 and 3623 of title 18, United States Code [this section and section 3623 of this title], the maximum fine that may be imposed under such section for making or presenting any claim upon or against the United States related to a contract with the Department of Defense, knowing such claim to be false, fictitious, or fraudulent, is $1,000,000."]

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18 U.S.C. § 1001

FALSE STATEMENTS ACT

18 U.S.C. § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

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18 U.S.C. § 1031

MAJOR FRAUD ACT

18 U.S.C. § 1031. Major fraud against the United States

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent--
(1) to defraud the United States; or
(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.
(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and--
(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or
(2) the offense involves a conscious or reckless risk of serious personal injury.
(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.

(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).
(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including--
(1) the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant;
(2) whether the defendant previously has been fined for a similar offense; and
(3) any other pertinent equitable considerations.
(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law.
(g)(1) In special circumstances and in his or her sole discretion, the Attorney General is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section. The amount of such payment shall not exceed $250,000. Upon application by the Attorney General, the court may order that the Department shall be reimbursed for a payment from a criminal fine imposed under this section.
(2) An individual is not eligible for such a payment if--
(A) that individual is an officer or employee of a Government agency who furnishes information or renders service in the performance of official duties;
(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;
(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or
(D) that individual participated in the violation of this section with respect to which such payment would be made.
(3) The failure of the Attorney General to authorize a payment shall not be subject to judicial review.
(h) Any individual who--
(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and
(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

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18 U.S.C. § 1905

TRADE SECRETS ACT

18 U.S.C. § 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or

employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law ;shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

28 U.S.C. § 1346(b)

FEDERAL TORT CLAIMS ACT

28 U.S.C. § 1346. United States as defendant

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(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

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28 U.S.C. § 1491

TUCKER ACT

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have 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. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have 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.
(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

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28 U.S.C. § 1498

PATENT OR COPYRIGHT INFRINGEMENT

28 U.S.C. § 1498. Patent and copyright cases

(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 the 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, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.
The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.
A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government.
This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.
(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504(c) of title 17, United States Code: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: and provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.
Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.
(c) The provisions of this section shall not apply to any claim arising in a foreign country.
(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the

Government and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: and provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.
(e) Subsections (b) and (c) of this section apply to exclusive rights in mask works under chapter 9 of title 17 to the same extent as such subsections apply to copyrights.

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31 U.S.C. §§ 1341, 1342

MONEY AND FINANCE

31 U.S.C. § 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or
(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.
(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.
(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" 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. §§ 1511, 1512, 1515, 1517-1519

MONEY AND FINANCE

§ 1511. Definition and application

(a) In this subchapter, "appropriations" means--
(1) appropriated amounts;
(2) funds; and
(3) authority to make obligations by contract before appropriations.
(b) This subchapter does not apply to--
(1) amounts (except amounts for administrative expenses) available--
(A) for price support and surplus removal of agricultural commodities; and
(B) under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c);
(2) a corporation getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government; and
(3) the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that Office.

§ 1512. Apportionment and reserves

(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.
(b)(1) An appropriation subject to apportionment is apportioned by--
(A) months, calendar quarters, operating seasons, or other time periods;
(B) activities, functions, projects, or objects; or
(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.
(2) The official designated in section 1513 of this title to make apportionments shall apportion an appropriation under paragraph (1) of this subsection as the official considers appropriate. Except as specified by the official, an amount apportioned is available for obligation under the terms of the appropriation on a cumulative basis unless reapportioned.
(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only--
(A) to provide for contingencies;
(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
(C) as specifically provided by law.
(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in section 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress as provided in the Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.).
(d) An apportionment or a reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments.

§ 1515. Authorized apportionments necessitating deficiency or supplemental appropriations

(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates the need for a deficiency or supplemental appropriation to the extent necessary to permit payment of such pay increases as may be granted pursuant to law to civilian officers and employees (including prevailing rate employees whose pay is fixed and adjusted under subchapter IV of chapter 53 of title 5) and to retired and active military personnel.
(b)(1) Except as provided in subsection (a) of this section, an official may
make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of--
(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond administrative control; or
(B) an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts required to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.
(2) If an official making an apportionment decides that an apportionment would indicate a necessity for a deficiency or supplemental appropriation, the official shall submit immediately a detailed report of the facts to Congress. The report shall be referred to in submitting a proposed deficiency or supplemental appropriation.

§ 1517. Prohibited obligations and expenditures

(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding--
(1) an apportionment; or
(2) the amount permitted by regulations prescribed under section 1514(a) of this title.
(b) If an officer or employee of an executive agency or of the District of Columbia government violates subsection (a) of this section, the head of the executive agency or the Mayor of the District of Columbia, as the case may be,
shall report immediately to the President and Congress all relevant facts and a statement of actions taken.

§ 1518. Adverse personnel actions

An officer or employee of the United States Government or of the District of Columbia government violating section 1517(a) of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.

§ 1519. Criminal penalty

An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1517(a) of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

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31 U.S.C. §§ 3551 - 3556

PROCUREMENT PROTEST SYSTEM

31 U.S.C. § 3551. Definitions

In this subchapter:
(1) The term "protest" means a written objection by an interested party to any of the following:
(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

(B) The cancellation of such a solicitation or other request.
(C) An award or proposed award of such a contract.
(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
(2) The term "interested party", with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.
(3) The term "Federal agency" has the meaning given such term by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

§ 3552. Protests by interested parties concerning procurement actions

A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter.

§ 3553. Review of protests ;effect on contracts pending decision

(a) Under procedures prescribed under section 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.
(b)(1) Within one day after the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.
(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement--
(A) within 30 days after the date of the agency's receipt of that notice;
(B) if the Comptroller General, upon a showing by the Federal agency, determines (and states the reasons in writing) that the specific circumstances of the protest require a longer period, within the longer period determined by the Comptroller General; or
(C) in a case determined by the Comptroller General to be suitable for the express option under section 3554(a)(2) of this title, within 20 days after the date of the Federal agency's receipt of that determination.
(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under section 3554(a)(4) of this title.
(c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.
(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section)--
(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and
(B) after the Comptroller General is advised of that finding.
(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days after the making of such finding.
(d)(1) A contractor awarded a Federal agency contract may, during the period described in paragraph (4), begin performance of the contract and engage in any related activities that result in obligations being incurred by the United States under the contract unless the contracting officer responsible for the award of the contract withholds authorization to proceed with performance of the contract.
(2) The contracting officer may withhold an authorization to proceed with performance of the contract during the period described in paragraph (4) if the contracting officer determines in writing that--
(A) a protest is likely to be filed; and
(B) the immediate performance of the contract is not in the best interests of the United States.
(3)(A) If the Federal agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4)--

(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or
(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.
(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.
(C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)--
(i) upon a written finding that--
(I) performance of the contract is in the best interests of the United States; or
(II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and
(ii) after the Comptroller General is notified of that finding.
(4) The period referred to in paragraphs (2) and (3)(A), with respect to a contract, is the period beginning on the date of the contract award and ending on the later of--
(A) the date that is 10 days after the date of the contract award; or
(B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.
(e) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (c) and (d) of this section may not be delegated.
(f)(1) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive.
(2)(A) The Comptroller General may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to a party under paragraph (1), that prohibit or restrict the disclosure by the party of information described in subparagraph (B) that is contained in such a document.
(B) Information referred to in subparagraph (A) is procurement sensitive information, trade secrets, or other proprietary or confidential research, development, or commercial information.
(C) A protective order under this paragraph shall not be considered to authorize the withholding of any document or information from Congress or an executive agency.

§ 3554. Decisions on protests

(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 100 days after the date the protest is submitted to the Comptroller General.
(2) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 65 days after the date the protest is submitted.
(3) An amendment to a protest that adds a new ground of protest, if timely made, should be resolved, to the maximum extent practicable, within the time limit established under paragraph (1) of this subsection for final decision of the initial protest. If an amended protest cannot be resolved within such time limit, the Comptroller General may resolve the amended protest through the express option under paragraph (2) of this subsection.
(4) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.
(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency--

(A) refrain from exercising any of its options under the contract;
(B) recompete the contract immediately;
(C) issue a new solicitation;
(D) terminate the contract;
(E) award a contract consistent with the requirements of such statute and regulation;
(F) implement any combination of recommendations under clauses (A), (B), (C), (D), and (E); or
(G) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.
(2) If the head of the procuring activity responsible for a contract makes a finding under section 3553(d)(3)(C)(i)(I) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.
(3) If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period.
(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal
agency conducting the procurement pay to an appropriate interested party the costs of--
(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and
(B) bid and proposal preparation.
(2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid, pursuant to a recommendation made under the authority of paragraph (1)--
(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or
(B) costs for attorneys' fees that exceed $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.
(3) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency shall--
(A) pay the costs promptly; or
(B) if the Federal agency does not make such payment, promptly report to the Comptroller General the reasons for the failure to follow the Comptroller General's recommendation.
(4) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency and the interested party shall attempt to reach an agreement on the amount of the costs to be paid. If the Federal agency and the interested party are unable to agree on the amount to be paid, the Comptroller General may, upon the request of the interested party, recommend to the Federal agency the amount of the costs that the Federal agency should pay.
(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.
(e)(1) The Comptroller General shall report promptly to the Committee on Governmental Affairs and the Committee on Appropriations of the Senate and to the Committee on Government Reform and Oversight and the Committee on Appropriations of the House of Representatives any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General under subsection (b) or (c). The report shall include--
(A) a comprehensive review of the pertinent procurement, including the circumstances of the failure of the Federal agency to implement a recommendation of the Comptroller General; and
(B) a recommendation regarding whether, in order to correct an inequity or to preserve the integrity of the procurement process, the Congress should consider--
(i) private relief legislation;

(ii) legislative rescission or cancellation of funds;
(iii) further investigation by Congress; or
(iv) other action.
(2) Not later than January 31 of each year, the Comptroller General shall transmit to the Congress a report containing a summary of each instance in which a Federal agency did not fully implement a recommendation of the Comptroller General under subsection (b) or (c) during the preceding year. The report shall also describe each instance in which a final decision in a protest was not rendered within 100 days after the date the protest is submitted to the Comptroller General.

§ 3555. Regulations ;authority of Comptroller General to verify assertions

(a) The Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by section 3554(a)(2) of this title. Such procedures shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided for the filing.
(b) The procedures shall provide that, in the computation of any period described in this subchapter--
(1) the day of the act, event, or default from which the designated period of time begins to run not be included; and
(2) the last day after such act, event, or default be included, unless--
(A) such last day is a Saturday, a Sunday, or a legal holiday; or
(B) in the case of a filing of a paper at the General Accounting Office or a Federal agency, such last day is a day on which weather or other conditions cause the closing of the General Accounting Office or Federal agency, in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included.
(c) The Comptroller General may prescribe procedures for the electronic filing and dissemination of documents and information required under this subchapter. In prescribing such procedures, the Comptroller General shall consider the ability of all parties to achieve electronic access to such documents and records.
(d) The Comptroller General may use any authority available under chapter 7 of this title and this chapter to verify assertions made by parties in protests under this subchapter.

§ 3556. Nonexclusivity of remedies; matters included in agency record

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.

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31 U.S.C. §§ 3729 -3731

FALSE CLAIMS ACT (CIVIL)

31 U.S.C. § 3729. False claims

(a) Liability for certain acts --Any person who--
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;
the court may assess not less than 2 times the amount of damages, which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.
(b) Knowing and knowingly defined --For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--
(1) has actual knowledge of the information;
(2) acts in deliberate ignorance of the truth or falsity of the information; or
(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.
(c) Claim defined --For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.
(d) Exemption from disclosure --Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.
(e) Exclusion --This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) Responsibilities of the attorney general --The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.
(b) Actions by private persons.
(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules

of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--
(A) proceed with the action, in which case the action shall be conducted by the Government; or
(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.
(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.
(c) Rights of the parties to Qui Tam actions.
(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--
(i) limiting the number of witnesses the person may call;
(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person's cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.
(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.
(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.
(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has

become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.
(d) Award to Qui Tam plaintiff.
(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses, which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount, which the court decides, is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses, which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.
(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.
(e) Certain actions barred.
(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).
(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions, which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.
(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news

media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section, which is based on the information.
(f) Government not liable for certain expenses --The Government is not liable for expenses which a person incurs in bringing an action under this section.
(g) Fees and expenses to prevailing defendant --In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.
(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
(b) A civil action under section 3730 may not be brought--
(1) more than 6 years after the date on which the violation of section 3729 is committed, or
(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.
(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.
(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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31 U.S.C. §§ 3801 - 3808

PROGRAM FRAUD CIVIL REMEDIES ACT

31 U.S.C. § 3801. Definitions

(a) For purposes of this chapter--
(1) "authority" means--
(A) an executive department;
(B) a military department;
(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and
(D) the United States Postal Service;
(2) "authority head" means--

(A) the head of an authority; or
(B) an official or employee of the authority designated, in regulations promulgated by the head of the authority, to act on behalf of the head of the authority;
(3) "claim" means any request, demand, or submission--
(A) made to an authority for property, services, or money (including money representing grants, loans, insurance, or benefits);
(B) made to a recipient of property, services, or money from an authority or to a party to a contract with an authority--
(i) for property services if the United States--
(I) provided such property or services;
(II) provided any portion of the funds for the purchase of such property or services; or
(III) will reimburse such recipient or party for the purchase of such property or services; or
(ii) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States--
(I) provided any portion of the money requested or demanded; or
(II) will reimburse such recipient or party for any portion of the money paid on such request or demand; or
(C) made to an authority, which has the effect of decreasing an obligation to pay or account for property, services, or money, except that such term does not include any claim made in any return of tax imposed by the Internal Revenue Code of 1954;
(4) "investigating official" means an individual who--
(A)(i) in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, is the Inspector General of that authority or an officer or employee of such Office designated by the Inspector General;
(ii) in the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978 or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under section 3803(a)(1) of this title; or
(iii) in the case of a military department, is the Inspector General of the Department of Defense or an officer or employee of the Office of Inspector General of the Department of Defense who is designated by the Inspector General; and
(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule;
(5) "knows or has reason to know", for purposes of establishing liability under section 3802, means that a person, with respect to a claim or statement--
(A) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
(B) acts in deliberate ignorance of the truth or falsity of the claim or statement; or
(C) acts in reckless disregard of the truth or falsity of the claim or statement, and no proof of specific intent to defraud is required;
(6) "person" means any individual, partnership, corporation, association, or private organization;
(7) "presiding officer" means--
(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of title 5 apply, an administrative law judge appointed in the authority pursuant to section 3105 of such title or detailed to the authority pursuant to section 3344 of such title; or
(B) in the case of an authority to which the provisions of such subchapter do not apply, an officer or employee of the authority who--
(i) is selected under chapter 33 of title 5 pursuant to the competitive examination process applicable to administrative law judges;
(ii) is appointed by the authority head to conduct hearings under section 3803 of this title;
(iii) is assigned to cases in rotation so far as practicable;
(iv) may not perform duties inconsistent with the duties and responsibilities of a presiding officer;
(v) is entitled to pay prescribed by the Office of Personnel Management independently of ratings and recommendations made by the authority and in accordance with chapter 51 of such title and subchapter III of chapter 53 of such title;
(vi) is not subject to performance appraisal pursuant to chapter 43 of such title; and

(vii) may be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing by such Board;
(8) "reviewing official" means any officer or employee of an authority--
(A) who is designated by the authority head to make the determination required under section 3803(a)(2) of this title;
(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule; and
(C) who is--
(i) not subject to supervision by, or required to report to, the investigating official; and
(ii) not employed in the organizational unit of the authority in which the investigating official is employed; and
(9) "statement" means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made--
(A) with respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or
(B) with respect to (including relating to eligibility for)--
(i) a contract with, or a bid or proposal for a contract with; or
(ii) a grant, loan, or benefit from, an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit, except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1954.
(b) For purposes of paragraph (3) of subsection (a)--
(1) each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim;
(2) each claim for property, services, or money is subject to this chapter regardless of whether such property, services, or money is actually delivered or paid; and
(3) a claim shall be considered made, presented, or submitted to an authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.
(c) For purposes of paragraph (9) of subsection (a)--
(1) each written representation, certification, or affirmation constitutes a separate statement; and
(2) a statement shall be considered made, presented, or submitted to an authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

§ 3802. False claims and statements ;liability

(a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know--
(A) is false, fictitious, or fraudulent;
(B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;
(C) includes or is supported by any written statement that--
(i) omits a material fact;
(ii) is false, fictitious, or fraudulent as a result of such omission; and
(iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or
(D) is for payment for the provision of property or services which the person has not provided as claimed, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such claim. Except as provided in paragraph (3) of this subsection, such person shall also be subject to an assessment, in lieu of damages sustained by the United States

because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.
(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that--
(A) the person knows or has reason to know--
(i) asserts a material fact which is false, fictitious, or fraudulent; or
(ii)(I) omits a material fact; and
(II) is false, fictitious, or fraudulent as a result of such omission;
(B) in the case of a statement described in clause (ii) of subparagraph (A), is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and
(C) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such statement.
(3) An assessment shall not be made under the second sentence of paragraph (1) with respect to a claim if payment by the Government has not been made on such claim.
(b)(1) Except as provided in paragraphs (2) and (3) of this subsection--
(A) a determination under section 3803(a)(2) of this title that there is adequate evidence to believe that a person is liable under subsection (a) of this section; or
(B) a determination under section 3803 of this title that a person is liable under subsection (a) of this section, may provide the authority with grounds for commencing any administrative or contractual action against such person which is authorized by law and which is in addition to any action against such person under this chapter.
(2) A determination referred to in paragraph (1) of this subsection may be used by the authority, but shall not require such authority, to commence any administrative or contractual action which is authorized by law.
(3) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, a determination referred to in paragraph (1) of this subsection shall not be considered as a conclusive determination of such person's responsibility pursuant to Federal procurement laws and regulations.

§ 3803. Hearing and determinations

(a)(1) The investigating official of an authority may investigate allegations that a person is liable under section 3802 of this title and shall report the findings and conclusions of such investigation to the reviewing official of the authority. The preceding sentence does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General.
(2) If the reviewing official of an authority determines, based upon the report of the investigating official under paragraph (1) of this subsection, that there is adequate evidence to believe that a person is liable under section 3802 of this title, the reviewing official shall transmit to the Attorney General a written notice of the intention of such official to refer the allegations of such liability to a presiding officer of such authority. Such notice shall include--
(A) a statement of the reasons of the reviewing official for the referral of such allegations;
(B) a statement specifying the evidence, which supports such allegations;
(C) a description of the claims or statements for which liability under section 3802 of this title is alleged;
(D) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 3802 of this title; and
(E) a statement of any exculpatory or mitigating circumstances, which may relate to such claims or statements.
(b)(1) Within 90 days after receipt of a notice from a reviewing official under paragraph (2) of subsection (a), the Attorney General or an Assistant Attorney General designated by the Attorney General shall transmit a written statement to the reviewing official which specifies--
(A) that the Attorney General or such Assistant Attorney General approves or disapproves the referral to a presiding officer of the allegations of liability stated in such notice;
(B) in any case in which the referral of allegations is approved, that the initiation of a proceeding under this section with respect to such allegations is appropriate; and
(C) in any case in which the referral of allegations is disapproved, the reasons for such disapproval.

(2) A reviewing official may refer allegations of liability to a presiding officer only if the Attorney General or an Assistant Attorney General designated by the Attorney General approves the referral of such allegations in a written statement described in paragraph (1) of this subsection.
(3) If the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to an authority head a written finding that the continuation of any hearing under this section with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, such hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.
(c)(1) No allegations of liability under section 3802 of this title with respect to any claim made, presented, or submitted by any person shall be referred to a presiding officer under paragraph (2) of subsection (b) if the reviewing official determines that--
(A) an amount of money in excess of $150,000; or
(B) property or services with a value in excess of $150,000, is requested or demanded in violation of section 3802 of this title in such claim or in a group of related claims which are submitted at the time such claim is submitted.
(2)(A) Except as provided in subparagraph (B) of this paragraph, no allegations of liability against an individual under section 3802 of this title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual shall be referred to a presiding officer under paragraph (2) of subsection (b).
(B) Allegations of liability against an individual under section 3802 of this title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual may be referred to a presiding officer under paragraph (2) of subsection (b) if--
(i) such claim or statement is made by such individual in making application for such benefits;
(ii) such allegations relate to the eligibility of such individual to receive such benefits; and
(iii) with respect to such claim or statement, the individual--
(I) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
(II) acts in deliberate ignorance of the truth or falsity of the claim or statement; or
(III) acts in reckless disregard of the truth or falsity of the claim or statement.

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§ 3805. Judicial review

(a)(1) A determination by a reviewing official under section 3803 of this title shall be final and shall not be subject to judicial review.
(2) Unless a petition is filed under this section, a determination under section 3803 of this title that a person is liable under section 3802 of this title shall be final and shall not be subject to judicial review.
(b)(1)(A) Any person who has been determined to be liable under section 3802 of this title pursuant to section 3803 of this title may obtain review of such determination in--
(i) the United States district court for the district in which such person resides or transacts business;
(ii) the United States district court for the district in which the claim or statement upon which the determination of liability is based was made, presented, or submitted; or
(iii) the United States District Court for the District of Columbia.
(B) Such review may be obtained by filing in any such court a written petition that such determination be modified or set aside. Such petition shall be filed--
(i) only after such person has exhausted all administrative remedies under this chapter; and
(ii) within 60 days after the date on which the authority head sends such person a copy of the decision of such authority head under section 3803(i)(2) of this title.
(2) The clerk of the court shall transmit a copy of a petition filed under paragraph (1) of this subsection to the authority and to the Attorney General. Upon receipt of the copy of such petition, the authority shall transmit to the Attorney General the record in the proceeding resulting in the determination of liability under section 3802 of this title. Except as otherwise provided in this section, the district courts of the United States shall have jurisdiction to review the decision, findings, and determinations in issue and to affirm, modify, remand for further consideration, or set aside, in whole or in part, the decision, findings,

and determinations of the authority, and to enforce such decision, findings, and determinations to the extent that such decision, findings, and determinations are affirmed or modified.
(c) The decisions, findings, and determinations of the authority with respect to questions of fact shall be final and conclusive, and shall not be set aside unless such decisions, findings, and determinations are found by the court to be unsupported by substantial evidence. In concluding whether the decisions, findings, and determinations of an authority are unsupported by substantial evidence, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§ 3806. Collection of civil penalties and assessments

(a) The Attorney General shall be responsible for judicial enforcement of any civil penalty or assessment imposed pursuant to the provisions of this chapter.
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(f) The Attorney General shall have exclusive authority to compromise or settle any penalty or assessment the determination of which is the subject of a pending petition pursuant to section 3805 of this title or a pending action to recover such penalty or assessment pursuant to this section.

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§ 3808. Limitations

(a) A hearing under section 3803(d)(2) of this title with respect to a claim or statement shall be commenced within 6 years after the date on which such claim or statement is made, presented, or submitted.
(b) A civil action to recover a penalty or assessment under section 3806 of this title shall be commenced within 3 years after the date on which the determination of liability for such penalty or assessment becomes final.
(c) If at any time during the course of proceedings brought pursuant to this chapter the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that authority.

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35 U.S.C. §§ 100 - 102

PATENTS

35 U.S.C. § 100. Definitions

When used in this title unless the context otherwise indicates--
(a) The term "invention" means invention or discovery.
(b) The term "process" means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.
(c) The terms "United States" and "this country" mean the United States of America, its territories and possessions.
(d) The word "patentee" includes not only the patentee to whom the patent was issued but also the successors in title to the patentee.

§ 101. Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.

§ 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless--
(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or
(c) he has abandoned the invention, or
(d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or
(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent, or
(f) he did not himself invent the subject matter sought to be patented, or
(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

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40 U.S.C. § 270a

MILLER ACT

40 U.S.C. § 270a. Bonds of contractors for public buildings or works

(a) Type of bonds required
Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":
(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.
(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. The amount of the payment bond shall be equal to the total amount payable by the terms of the contract unless the contracting officer awarding the contract makes a written determination supported by specific findings that a payment bond in that amount is impractical, in which case the amount of the payment bond shall be set by the contracting officer. In no case shall the amount of the payment bond be less than the amount of the performance bond.
(b) Waiver of bonds for contracts performed in foreign countries
The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.
(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States, which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

40 U.S.C. § 276a

DAVIS-BACON ACT

40 U.S.C. § 276a. Rate of wages for laborers and mechanics

(a) The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.
(b) As used in sections 276a to 276a-5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include--
(1) the basic hourly rate of pay; and
(2) the amount of--
(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and
(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:
Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a-5 of this title and other Acts incorporating sections 276a to 276a-5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2). In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with

respect to him exceeds the prevailing wage applicable to him under sections 276a to 276a-5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

§ 276a-1. Termination of work on failure to pay agreed wages ;completion of work by Government

Every contract within the scope of sections 276a to 276a-5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

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§ 276a-5. Suspension of sections 276a to 276a-5 during emergency

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a-5 of this title.

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41 U.S.C. § 10a

BUY AMERICAN ACT

41 U.S.C. § 10a. American materials required for public use

Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 428 of this title.

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41 U.S.C. § 351

SERVICE CONTRACT ACT

41 U.S.C. § 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefore) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.
(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.
(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.
(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.
(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of Title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.
(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of Title 29.
(2) The provisions of sections 352 to 354 of this title shall be applicable to violations of this subsection.

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41 U.S.C. §§ 321, 322

THE ADMINISTRATIVE DISPUTES ACT OF 1954
(The Anti-Wunderlich Act)

41 U.S.C. § 321. Limitation of Pleading Contract Provisions Relating to Finality; Standards of Review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent, capricious, or arbitrary or so grossly erroneous as necessary to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

§ 322. Contract-Provisions Making Decisions Final on Questions of Law
No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, § 2, 68 Stat. 81.

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41 U.S.C. § 423

PROCUREMENT INTEGRITY

41 U.S.C. § 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information

(a) Prohibition on disclosing procurement information
(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.
(2) Paragraph (1) applies to any person who--
(A) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and
(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.
(b) Prohibition on obtaining procurement information
A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.
(c) Actions required of procurement officers when contacted by offerors regarding non-Federal employment
(1) If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall--
(A) promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and
(B)(i) reject the possibility of non-Federal employment; or
(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the official to resume participation in such procurement, in accordance with the requirements of section 208 of Title 18, and applicable agency regulations on the grounds that--
(I) the person is no longer a bidder or offeror in that Federal agency procurement; or
(II) all discussions with the bidder or offeror regarding possible non- Federal employment have terminated without an agreement or arrangement for employment.
(2) Each report required by this subsection shall be retained by the agency for not less than two years following the submission of the report. All such reports shall be made available to the public upon request, except that any part of a report that is exempt from the disclosure requirements of section 552 of Title 5, under subsection (b)(1) of such section may be withheld from disclosure to the public.
(3) An official who knowingly fails to comply with the requirements of this subsection shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.
(4) A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.
(d) Prohibition on former official's acceptance of compensation from contractor
(1) A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former official--

(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of $10,000,000;
(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000 awarded to that contractor; or
(C) personally made for the Federal agency--
(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of $10,000,000 to that contractor;
(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of $10,000,000;
(iii) a decision to approve issuance of a contract payment or payments in excess of $10,000,000 to that contractor; or
(iv) a decision to pay or settle a claim in excess of $10,000,000 with that contractor.
(2) Nothing in paragraph (1) may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.
(3) A former official who knowingly accepts compensation in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.
(4) A contractor who provides compensation to a former official knowing that
such compensation is accepted by the former official in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.
(5) Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.
(e) Penalties and administrative actions
(1) Criminal penalties
Whoever engages in conduct constituting a violation of subsection (a) or (b) of this section for the purpose of either--
(A) exchanging the information covered by such subsection for anything of value, or
(B) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract, shall be imprisoned for not more than 5 years or fined as provided under Title 18, or both.
(2) Civil penalties
The Attorney General may bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section. Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than $50,000 for each violation plus twice the amount of compensation, which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than $500,000 for each violation plus twice the amount of compensation, which the organization received or offered for the prohibited conduct.
(3) Administrative actions
(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section, the Federal agency shall consider taking one or more of the following actions, as appropriate:
(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.
(ii) Rescission of a contract with respect to which--
(I) the contractor or someone acting for the contractor has been convicted for an offense punishable under paragraph (1), or
(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.
(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of Title 5, or other applicable law or regulation.
(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.
(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), (c), or (d) of this section affects the present responsibility of a Government contractor or subcontractor.
(f) Definitions
As used in this section:
(1) The term "contractor bid or proposal information" means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:
(A) Cost or pricing data (as defined by section 2306a(h) of Title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section).
(B) Indirect costs and direct labor rates.
(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.
(D) Information marked by the contractor as "contractor bid or proposal information", in accordance with applicable law or regulation.
(2) The term "source selection information" means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:
(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.
(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.
(C) Source selection plans.
(D) Technical evaluation plans.
(E) Technical evaluations of proposals.
(F) Cost or price evaluations of proposals.
(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
(H) Rankings of bids, proposals, or competitors.
(I) The reports and evaluations of source selection panels, boards, or advisory councils.
(J) Other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.
(3) The term "Federal agency" has the meaning provided such term in section 472 of Title 40.
(4) The term "Federal agency procurement" means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.
(5) The term "contracting officer" means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.
(6) The term "protest" means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of Title 31.
(7) The term "official" means the following:
(A) An officer, as defined in section 2104 of Title 5.
(B) An employee, as defined in section 2105 of Title 5.
(C) A member of the uniformed services, as defined in section 2101(3) of Title 5.
(g) Limitation on protests
No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d) of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person

reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.
(h) Savings provisions
This section does not--
(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;
(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;
(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;
(4) prohibit individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;
(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;
(6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or
(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

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41 U.S.C. §§ 601 - 612

CONTRACT DISPUTES ACT OF 1978

41 U.S.C. § 601. Definitions

As used in this chapter--
(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;
(2) the term "executive agency" means an executive department as defined in section 101 of Title 5, an independent establishment as defined by section 104 of Title 5 (except that it shall not include the General Accounting Office): a military department as defined by section 102 of Title 5, and a wholly owned Government corporation as defined by section 9101(3) of Title 31, the United States Postal Service, and the Postal Rate Commission;
(3) The term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;
(4) the term "contractor" means a party to a Government contract other than the Government;
(5) The term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C.A. s 401 et seq.];
(6) The term "agency board" means an agency board of contract appeals established under section 607 of this title; and
(7) The term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

§ 602. Applicability of law

(a) Executive agency contracts
Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for--
(1) the procurement of property, other than real property in being;
(2) the procurement of services;
(3) the procurement of construction, alteration, repair or maintenance of real property; or,
(4) the disposal of personal property.
(b) Tennessee Valley Authority contracts
With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts, which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.
(c) Foreign government or international organization contracts
This chapter does not apply to a contract with a foreign government, or agency thereof, or intentional organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

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§ 604. Fraudulent claims

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. Liability under this subsection [FN1] shall be determined within six years of the commission of such misrepresentation of fact or fraud.

§ 605. Decision by contracting officer

(a) Contractor claims
All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The 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. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.
(b) Review ;performance of contract pending appeal
The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.
(c) Amount of claim ;certification ;notification ;time of issuance; presumption ;authorization of certifier

(1) A contracting officer shall issue a decision on any submitted claim of $100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.
(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000--
(A) issue a decision; or
(B) notify the contractor of the time within which a decision will be issued.
(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.
(4) A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.
(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.
(6) The contracting officer shall have no obligation to render a final decision on any claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.
(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.
(d) Alternative means of dispute resolution
Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of Title 5, or other mutually agreeable procedures, for resolving claims. In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. All provisions of subchapter IV of chapter 5 of Title 5 shall apply to such alternative means of dispute resolution.
(e) Cessation of authority in dispute resolution ;procedures regarding small business contractors
The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) of this section shall cease to be effective on October 1, 1999, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate. In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of Title 5, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

§ 607. Agency boards of contracts appeals

(a) Establishment ;consultation; Tennessee Valley Authority
(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.
(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.
(b) Appointment of members ;chairman ;compensation
(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. Compensation for the chairman, the vice chairman, and all other members of an agency board shall be determined under section 5372a of Title 5.
(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of Title 5 for each day they are engaged in the actual performance of their duties as members of the board.
(c) Appeals ;inter-agency arrangements
If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.
(d) Jurisdiction
Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.
(e) Decisions
An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.
(f) Accelerated appeal disposition
The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $100,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review
(1) The decision of an agency board of contract appeals shall be final, except that--
(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or
(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.
(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that--
(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or
(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of the decision in any case.
(3) An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 through 13 of Title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.
(h) Procedural guidelines
Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C.A. s 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

§ 608. Small claims

(a) Accelerated disposition of appeals
The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.
(b) Simplified rules of procedure
The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.
(c) Time of decision
Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.
(d) Finality of decision
A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.
(e) Effect of decision
Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.
(f) Review of requisite amount in controversy
The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

§ 609. Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing
(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of Title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.
(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.
(b) Finality of board decision
In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.
(c) Remand or retention of case
In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.
(d) Consolidation
If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.
(e) Judgments as to fewer than all claims
In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.
(f) Advisory opinions
(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.
(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.
(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.
(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.

§ 610. Subpoena, discovery, and deposition

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

§ 612. Payment of claims

(a) Judgments
Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.
(b) Monetary awards
Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.
(c) Reimbursement
Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.
(d) Tennessee Valley Authority
(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of Title 16.
(2) Notwithstanding the provisions of subsection (a) through (c) of this section, any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of Title 16.

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APPENDIX D
UCCD-1
TITLE
An ACT

To be known as the Uniform Commercial Code, Relating to Certain Commercial Transactions in or regarding Personal Property and Contracts and other Documents concerning them, including Sales, Commercial Paper, Bank Deposits and Collections, Letters of Credit, Bulk Transfers, Warehouse Receipts, Bills of Lading, other Documents of Title, Investment Securities, and Secured Transactions, including certain Sales of Accounts, Chattel Paper, and contract Rights; Providing for Public Notice to Third Parties in Certain Circumstances; Regulating Procedure, Evidence and Damages in Certain Court Actions Involving such Transactions, Contracts or Documents; to Make Uniform the Law with Respect Thereto; and Repealing Inconsistent Legislation.

ARTICLE 1 GENERAL PROVISIONS

PART I SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

§ 1-101. Short Title
This Act shall be known and may be cited as Uniform Commercial Code.

§ 1-102. Purposes; Rules of Construction; Variation by Agreement
(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
(2) Underlying purposes and policies of this Act are
(a) to simplify, clarify and modernize the law governing commercial transactions;
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdictions.
(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).
(5) In this Act unless the context otherwise requires
(a) words in the singular number include the plural, and in the plural include the singular;
(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

§ 1-103. Supplementary General Principles of Law Applicable
Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

§ 1-104. Construction Against Implicit Repeal
This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

§ 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law
(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.
(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:
Rights of creditors against sold goods Section 202,
Applicability of the Article on Bank Deposits and collections. Section 4-102.
Bulk transfers subject to the Article on Bulk Transfer. Section 6-102.
Applicability of the Article on Investment Securities. Section 8-106.
Perfection provisions of the Article on Secured Transactions. Section 9-103.

§ 1-106. Remedies to Be Liberally Administered
(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may
be had except as specifically provided in this Act or by other rule of law.
(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

§ 1-107. Waiver or Renunciation of Claim or Right After Breach
Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

§ 1-108. Severability
If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act, which can be given effect without the invalid provision, or application, and to this end the provisions of this Act are declared to be severable.

§ 1-109. Section Captions
Section captions are part of this Act.

PART 2 GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 1-201. General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:
(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.
(2) "Aggrieved party" means a party entitled to resort to a remedy.
(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare "Contract.").
(4) "Bank" means any person engaged in the business of banking.
(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or endorsed in blank.
(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation,
and includes an air consignment note or air waybill.
(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.
(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.
(11) "Contract" means the total legal obligation, which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement.")
(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.
(13) ' Defendant includes a person the position of defendant in a cross-action or counterclaim.
14) 'Delivery' with respect to instruments, documents of title, chattel paper or certificated securities means voluntary transfer of possession.
(15) "Document of title includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession, which are either identified or are fungible portions of an identified mass.
(16) "Fault" means wrongful act, omission or breach.
(17) "Fungible" · with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods, which are not fungible, shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.
(I8) "Genuine" means free of forgery or counterfeiting.
(19) "Good faith" means honesty in fact in the conduct or transaction concerned.
(20) "Holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued or endorsed to him or to his order or to bearer or in blank.
(21) To "honor" is to pay or to accept and pay, or where a credit so engages, to purchase or discount a draft complying with the terms of the credit.
(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.
(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.
(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.
(25) A person has "notice" of a fact when

(a) he has actual knowledge of it; or
(b) he has received a notice or notification of it; or
(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has, engaged in a transaction or made an agreement within this Act.

(30) "Person" includes an individual or an organization (See Section 1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property! or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts or chattel paper, which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 is not a "security interest," but a buyer may also acquire a "security interest by complying with Article 9. Unless a lease or consignment is intended as security reservation of title thereunder is not a "security interest but a consignment is in any event subject to the provisions on consignment sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the Owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement, which relates to a particular matter.

(43) "Unauthorized" signature or endorsement means one made without actual, implied or apparent authority and includes a forgery.
(44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3-303, 4-08 and 4-209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties in collection; or
(b) as security for or in total or partial satisfaction of a preexisting claim; or
(c) by accepting delivery pursuant to a preexisting contract for purchase; or
(d) generally, in return for any consideration sufficient to support a simple contract.

(45)"Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.
(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

§ 1-202. Prima Facie Evidence of Third Party Documents

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be *prima facie* evidence of its own authenticity and genuineness and the facts stated in the document by the third party.

§ 1-203. Obligation of Good Faith

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

§ 1-204. Time; Reasonable Time; "Seasonably"

(1) Whenever this Act requires any action to be taken within a reasonable time, any time, which is not manifestly unreasonable, may be fixed by agreement.
(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.
(3) An action is taken "seasonably" when it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

§ 1-205. Course of Dealing and Usage of Trade

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

§ 1-206. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered
(1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.
(2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2-201) nor of securities (Section 8-319) nor to security agreements (Section 9-203).

§ 1-207. Performance or Acceptance Under Reservation of Rights
A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.

§ 1-208. Option to Accelerate at Will
A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems
himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

§ 1-209. Subordinated Obligations
An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.

Note: *This new section is proposed as an optional provision to make it clear that a subordination agreement does not create a security interest unless so intended.*

ARTICLE 2 SALES

PART 1 SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

§ 2-101. Short Title
This Article shall be known and may be cited as Uniform Commercial Code-Sales

§ 2-102. Scope; Certain Security and Other Transactions Excluded From This Article
Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

§ 2-103. Definitions and Index of Definitions
(1) In this Article, unless the context otherwise requires,
(a) "Buyer" means a person who buys or contracts to buy goods.
(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
(c) "Receipt" of goods means taking physical possession of them.
(d) "Seller" means a person who sells or contracts to sell goods....

§ 2-104. Definitions: Merchant, Between Merchants; "Financing Agency"
(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
(2) "Financing agency means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the

seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).
(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

§ 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit"
(l) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
(2) Goods must be both existing and identified before any interest in them can pass. Goods, which are not both existing and identified, are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.
(3) There may be a sale of a part interest in existing identified goods.
(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.
(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.
(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

§ 2-106. Definitions: "Contract"; "Agreement"; "Con-tract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation"
(1) In this Article unless the context otherwise requires, 'contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.
(2) Goods or conduct, including any part of a performance, are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.
(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged by any right based on prior breach or performance survives.
(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

§ 2-107. Goods to Be Severed From Realty: Recording
(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.
(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

PART 2 FORM, FORMATION AND READJUSTMENT OF CONTRACT

§ 2-201. Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec 2-606).

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

§ 2-203. Seals Inoperative

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

§ 2-204. Formation in General

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

§ 2-205. Firm Offers

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

§ 2-206. Offer and Acceptance in Formation of Contract

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

§ 2-207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 2-208. Course of Performance or Practical Construction

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

§ 2-209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions .

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

§ 2-210. Delegation of Performance; Assignment of Rights

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed, all rights of either seller or buyer can be assigned except here the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignors due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and, unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609).

PART 3 GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

§ 2-301. General Obligations of Parties

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

§ 2-302. Unconscionable Contractor Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 2-303. Allocation or Division of Risks

Where this Article allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden.

§ 2-304. Price Payable in Money, Goods, Realty, or Otherwise

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this Article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

§ 2-305. Open Price Term

(1) The parties, if they so intend, can conclude a contract for sale even though the price is not settled. In such a case, the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party, the other may at his option treat the contract as canceled or himself fix a reasonable price.
(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed, there is no contract. In such a case, the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account

§ 2-306 Output, Requirements and Exclusive Dealings
(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes, unless otherwise agreed, an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

§ 2-307 Delivery in Single Lot or Several Lots
Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender; but where the circumstances give either party the right to make or demand delivery in lots, the price if it can be apportioned may be demanded for each lot

§ 2-308 Absence of Specified Place for Delivery
Unless otherwise agreed
(a) the place for deliver of goods in the seller's place of business or, if he has none, his residence; but
(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
(c) documents of title may be delivered through customary banking channels.

§ 2-309. Absence of Specific Time Provisions; Notice of Termination
(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.
(2) Where the contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time; but unless otherwise agreed may be terminated at any time by either party.
(3) Termination of a contract by one party, except on the happening of an agreed event, requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

§ 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation
Unless otherwise agreed
(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
(b) if the seller is authorized to send the goods, he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and
(c) if delivery is authorized and made by way of documents of buyer is to receive the documents regardless of where the goods are to be received; and
(d) where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

§ 2-311. Options and Cooperation Respecting Performance
(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-201) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of

the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness .
(2) Unless otherwise agreed, specifications relating to assortment of the goods are at the buyer's option and, except as otherwise provided in subsections (1) (c) and (3) of Section 2-319, specifications or arrangements relating to shipment are at the seller's option.
(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and
(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement
(1) Subject to subsection (2), there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and
(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third party by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample
(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. Implied Warranty; Merchantability; Usage of Trade
(1) Unless excluded or modified (Section 2- 316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run within the variations permitted by the agreement of even kind quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3) to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined goods or the sample or model as fully as he desired or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719)

§ 2-317 Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant In ascertaining that intention the following rules apply

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2-318. Third Party Beneficiaries of Warranties Express or Implied

Note: If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)

Alternative A

A seller's warranty whether express or implied extends to an natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warrant whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

§ 2-319. F.O.B . and F.A.S . Terms

(1) Unless otherwise agreed, the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel, the buyer must name the vessel and, in an appropriate case, the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed, the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1) (a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B., the loading berth of the vessel and in an appropriate case, its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S., unless otherwise agreed, the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents

§ 2-320. C.I.F. and C. & F. Terms

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to (a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed, the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F., unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2-321. C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of Condition on Arrival

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality of the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed, where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost, delivery of the documents and payment are due when the goods should have arrived.

§ 2-322. Delivery "Ex-Ship"

(1) Unless otherwise agreed, a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged

(2) Under such a term, unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

§ 2-323. Form of Bill of Lading Required in Overseas Shipment; "Overseas"

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed, if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-0); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of the trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

§ 2-324. "No Arrival, No Sale" Term

Under a term "no arrival, no sale or terms of like meaning, unless otherwise agreed,

a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival, but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613).

§ 2-325. "Letter of Credit" Term; "Confirmed Credit"

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.
(3) Unless otherwise agreed, the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

§ 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors
(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a "sale on approval" if the goods are delivered primarily for use, and
(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.
(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
(c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2-202).

§ 2-327. Special Incidents of Sale on Approval and Sale or Return
(1) Under a sale on approval, unless otherwise agreed

(a) although the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance; and
(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and
(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return, unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and(b) the return is at the buyer's risk and expense.

§ 2-328. Sale by Auction
(1) In a sale by auction, if goods are put up in lots each lot is the subject of a separate sale.
(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid, the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.
(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract

his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.
(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply! to any bid at a forced sale.

PART 4 TITLE, CREDITORS AND GOOD FAITH PURCHASERS

§ 2-401. Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:
(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

(a) if the contract requires or authorities the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed, where deliver is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

§ 2-402. Rights of Seller's Creditors Against Sold Goods

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).
(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.
(3) Nothing in this Article shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the Article on Secured Transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would, apart from this Article, constitute the transaction a fraudulent transfer or voidable preference.

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with

voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase, the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale" or

(d) the delivery was procured through fraud punish-able as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

PART 5 PERFORMANCE

§ 2-501. Insurable Interest in Goods; Manner of Identification of Goods

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs

(a) when the contract is made, if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived, if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him; and where the identification is by the seller alone, he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

§ 2-502. Buyer's Right to Goods on Seller's Insolvency

(1) Subject to subsection (2), and even though the goods have not been shipped, a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may, on making and keeping good a tender of any unpaid portion of their price, recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer, he acquires the right to recover the goods only if they conform to the contract for sale.

§ 2-503. Manner of Seller's Tender of Delivery

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and, if it is of goods, they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed, the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment, tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination, tender requires that he comply with subsection (1) and also, in any appropriate case, tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

§ 2-504. Shipment by Seller

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then, unless otherwise agreed, he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

§ 2-505. Seller's Shipment Under Reservation

(1) Where the seller has identified goods to the contract by or before shipment

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2-507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

§ 2-506. Rights of Financing Agency

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase, and in addition to its own rights under the draft and any document of title securing it, any rights of the shipper in the goods, including the right to stop delivery and the shipper's right to have the draft honored by the buyer

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

§ 2-507. Effect of Seller's Tender; Delivery on Condition
(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them Tender entitles the seller to acceptance of the goods and to payment according to the contract.
(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

§ 2-508. Cure by Seller of Improper Tender or Delivery; Replacement
(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be accept-able with or without money allowance, the seller may, if he seasonably notifies the buyer, have a further reasonable time to substitute a conforming tender.

§ 2-509. Risk of Loss in the Absence of Breach
(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.
(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2327) and on effect of breach on risk of loss (Section 2-510).

§ 2-510. Effect of Breach on Risk of Loss
(I) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection, the risk of their loss remains on the seller until cure or acceptance.
(2) Where the buyer rightfully revokes acceptance, he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.
(3) Where the buyer, as to conforming goods already identified to the contract for sale, repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

§ 2-511. Tender of Payment by Buyer; Payment by Check
(1) Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete any delivery.
(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.
(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

§ 2-512. Payment by Buyer Before Inspection

(1) Where the contract requires payment before inspection, nonconformity of the goods does not excuse the buyer from so making payment unless

(a) the nonconformity appears without inspection; or

(b) despite tender of the required documents, the circumstances would justify injunction against honor under the provisions of this Act (Section 5-114).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

§ 2-513. Buyer's Right to Inspection of Goods

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection .

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but, unless otherwise expressly agreed, it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition, failure of which avoids the contract.

§ 2-514. When Documents Deliverable on Acceptance; When on Payment

Unless otherwise agreed, documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment .

§ 2-515. Preserving Evidence of Goods in Dispute

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other, and for the purpose of ascertaining the facts and preserving evidence, has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

PART 6 BREACH, REPUDIATION AND EXCUSE

§ 2-601. Buyer's Rights on Improper Delivery

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

§ 2-602. Manner and Effect of Rightful Rejection

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2-603 and 2604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2703).

§ 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection, d merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or, if there is none, to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section, the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

§ 2-604. Buyer's Options as to Salvage or Rightfully Rejected Goods

Subject to the provisions of the immediately preceding section on perishables, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

§ 2-605. Waiver of Buyer's Objections by Failure to Particularize

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents .

§ 2-606. What Constitutes Acceptance of Goods

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's owner-ship; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

§ 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312), the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312).

§ 2-608. Revocation of Acceptance in Whole or in Part

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

§ 2-609. Right to Adequate Assurance of Performance

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return.

(2) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand, failure to provide within a reasonable time, not exceeding thirty days, such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

§ 2-610. Anticipatory Repudiation

When either party repudiates the contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

§ 2-611. Retraction of Anticipatory Repudiation

(1) Until the repudiating party's next performance is due, he can retract his repudiation unless the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final.
(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).
(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

§ 2-612. "Installment Contract"; Breach
(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure, the buyer must accept that installment.
(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

§ 2-613. Casualty to Identified Goods
Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then
(a) if the loss is total the contract is avoided; and
(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

§ 2-614 . Substituted Performance
(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If de-livery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

§ 2-615. Excuse by Failure of Presupposed Conditions
Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable .

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

§ 2-616. Procedure on Notice Claiming Excuse

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section, he may by written notification to the seller as to any delivery concerned; and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution .

(2) If, after receipt of such notification from the seller, the buyer fails so to modify the contract within a reasonable time not exceeding thirty days, the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except insofar as the seller has assumed a greater obligation under the preceding section.

PART 7 REMEDIES

§ 2-701. Remedies for Breach of Collateral Contracts Not Impaired

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this Article.

§ 2-702. Seller's Remedies on Discovery of Buyer's Insolvency

(1) Where the seller discovers the buyer to be insolvent, he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

§ 2-703. Seller's Remedies in General

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided section 2-705);

(c) proceed under the next section respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (Section 2-706);

(e) recover damages for nonacceptance (Section 2-708) or in a proper case the price (Section 2-709);

(f) cancel.

§ 2-704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

§ 2-705. Seller's Stoppage of Delivery in Transit or Otherwise

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer, the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)

(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller, but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods, the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

§ 2-706. Seller's Resale Including Contract for Resale

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed, resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale, the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711.)

§ 2-707. "Person in the Position of a Seller"

(1) A "person in the position of a seller" includes, as against a principal, an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2-705) and resell (Section 2-706) and recover incidental damages (Section 2-710).

§ 2-708. Seller's Damages for Nonacceptance or Repudiation

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

§ 2-709. Action for the Price

(1) When the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due(or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section.

§ 2-710. Seller's Incidental Damages

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody (if goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.

§ 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this Article (Section 2-713).

(2) Where the seller fails to deliver or repudiates, the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance, a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

§ 2-712. "Cover"; Buyer's Procurement of Substitute Goods

(1) After a breach within the preceding section, the buyer may "cover" by making in good faith and without unreason-able delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

§ 2-713. Buyer's Damages for Nondelivery or Repudiation

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

§ 2-714. Buyer's Damages for Breach in Regard to Accepted Goods

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607), he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

§ 2-715. Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the sellers breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise: and

(b) injury to person or property proximately resulting from any breach of warranty.

§ 2-716. Buyer's Right to Specific Performance or Replevin

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

§ 2-717. Deduction of Damages From the Price

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

§2-718. Liquidation or Limitation of Damages; Deposits

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated dam-ages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1) or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods, their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

§ 2-719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

§ 2-720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

§ 2-721. Remedies for Fraud

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

§ 2-722. Who Can Sue Third Parties for Injury to Goods

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted, a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

§ 2-723. Proof of Market Price: Time and Place

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this Article is not readily available, the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

§ 2-724. Admissibility of Market Quotations

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

§ 2-725. Statute of Limitations in Contracts for Sale

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement, the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach, such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action, which have accrued before this Act becomes effective.

APPENDIX E

CODE OF FEDERAL REGULATIONS
TITLE 4 - ACCOUNTS
CHAPTER I - GENERAL ACCOUNTING OFFICE
SUBCHAPTER B - GENERAL PROCEDURES
PART 21 - BID PROTEST REGULATIONS

§ 21.0 Definitions.

(a) Interested party means 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.

(b) Intervenor means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

(c) Federal agency means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.

(d) Contracting agency means a Federal agency which has awarded or proposes to award a contract under a protested procurement.

(e) Days are calendar days. In computing any period of time described in Subchapter V, Chapter 35 of Title 31, United States Code, including those described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the General Accounting Office (GAO), or another Federal agency where a submission is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open.

(f) Adverse agency action is any action or inaction by a contracting agency which is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.

(g) A document is filed on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day. A document may be filed by hand delivery, mail, or commercial carrier; parties wishing to file a document by facsimile transmission or other electronic means must ensure that the necessary equipment is operational at GAO's Procurement Law Control Group.

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§ 21.1 Filing a protest.

(a) An interested party may protest a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.

(b) Protests must be in writing and addressed as follows: General Counsel, General Accounting Office, 441 G Street, NW., Washington, DC 20548, Attention: Procurement Law Control Group.

(c) A protest filed with GAO shall:

(1) Include the name, address, and telephone and facsimile numbers of the protester,

(2) Be signed by the protester or its representative,

(3) Identify the contracting agency and the solicitation and/or contract number,

(4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,

(5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,

(6) Set forth all information establishing the timeliness of the protest,

(7) Specifically request a ruling by the Comptroller General of the United States, and

(8) State the form of relief requested.

(d) In addition, a protest filed with GAO may:

(1) Request a protective order,

(2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and

(3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.

(e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the contracting agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a complete copy of the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

(f) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and the protester must file a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

(h) Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding procedures for filing and handling the information.

(i) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

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§ 21.2 Time for filing.

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

(2) Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (a)(2) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

(b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.

(c) GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

§ 21.3 Notice of protest, submission of agency report, and time for filing of comments on report.

(a) GAO shall notify the contracting agency by telephone within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly send a written confirmation to the contracting agency and an acknowledgment to the protester. The contracting agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a reasonable prospect of receiving an award. The contracting agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall furnish copies of all protest communications to the contracting agency and to other participating parties. All protest communications shall be sent by means reasonably calculated to effect expeditious delivery.

(b) A contracting agency or intervenor which believes that the protest or specific protest allegations should be dismissed before submission of an agency report should file a request for dismissal as soon as practicable.

(c) The contracting agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has previously furnished or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and GAO a list of those documents, or portions of documents, which the agency has released to the protester or intends to produce in its report, and of the documents which the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(d) The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, the contracting agency may request that the protester produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Subject to any protective order issued in the protest pursuant to § 21.4, the contracting agency shall simultaneously furnish a copy of the report to the protester and any intervenors. The copy of the report filed with GAO shall list the parties who have been furnished copies of the report. Where a protester does not have counsel admitted to a protective order and documents are withheld from the protester in accordance with this part, the agency shall provide documents adequate to inform the protester of the basis of the agency's position.

(f) The contracting agency may request an extension of time for the submission of the list of documents to be provided by the agency pursuant to § 21.3(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis.

(g) The protester may request additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by GAO, any request for additional documents must be filed with GAO and the contracting agency not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The contracting agency shall provide the requested documents, or portions of documents, and a list to GAO and the other parties within 2 days or explain why it is not required to produce the documents.

(h) Upon the request of a party, GAO will decide whether the contracting agency must provide any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate.

(i) Comments on the agency report shall be filed with GAO within 10 days after receipt of the report, with

a copy provided to the contracting agency and other participating parties. The protest shall be dismissed unless the protester files comments or a written statement requesting that the case be decided on the existing record, or requests an extension of time within the 10-day period. Unless otherwise advised by the protester, GAO will assume the protester received the agency report by the due date specified in the acknowledgment of protest furnished by GAO. Upon a showing that the specific circumstances of a protest require a period longer than 10 days for the submission of comments, GAO will set a new date for the submission of comments. Extensions will be granted on a case-by-case basis.

(j) GAO may request or permit the submission of additional statements by the parties and by other parties not participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties shall not submit any additional statements unless the statements are specifically requested by GAO or submitted after permission has been granted by GAO.

§ 21.4 Protective orders.

(a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report which would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

(d) Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO.

§ 21.5 Protest issues not for consideration.

GAO shall summarily dismiss a protest or specific protest allegations that do not state a valid basis for protest, are untimely (unless considered pursuant to § 21.2(c)), or are not properly before GAO. A protest or specific protest allegations may be dismissed any time sufficient information is obtained by GAO warranting dismissal. Where an entire protest is dismissed, no agency report shall be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases which shall be dismissed are the following:

(a) Contract administration. The administration of an existing contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 601-613.

(b) Small Business Administration issues.

(1) Small business size standards and standard industrial classification. Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification may be reviewed solely by the Small Business Administration. 15 U.S.C. 637(b)(6).

(2) Small Business Certificate of Competency Program. Any referral made to the Small Business Administration pursuant to sec. 8(b)(7) of the Small Business Act, or any issuance of, or refusal to issue, a certificate of competency under that section will not be reviewed by GAO absent a showing of possible bad faith on the part of government officials or a failure to consider vital information bearing on the firm's responsibility. 15 U.S.C. 637(b)(7).

(3) Procurements under sec. 8(a) of the Small Business Act. Under that section, since contracts are entered into with the Small Business Administration at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the Small Business Administration, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

(c) Affirmative determination of responsibility by the contracting officer. 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 government officials or that definitive responsibility criteria in the solicitation were not met.

(d) Procurement integrity. For any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 423, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation. The provision in paragraph (d) of § 21.5 will apply not later than January 1, 1997.

(e) Protests not filed either in GAO or the contracting agency within the time limits set forth in § 21.2.

(f) Protests which lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or which fail to clearly state legally sufficient grounds of protest as required by § 21.1(f).

(g) Procurements by agencies other than Federal agencies as defined by sec. 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 472. Protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities are beyond GAO's bid protest jurisdiction as established in 31 U.S.C. 3551-3556.

(h) Subcontract protests. GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has requested in writing that subcontract protests be decided pursuant to § 21.13.

§ 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the contracting agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d).

§ 21.7 Hearings.

(a) At the request of a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.

(b) Prior to the hearing, GAO may hold a pre-hearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify.

(c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily will be conducted at GAO in Washington, DC, hearings may, at the discretion of GAO, be conducted at other locations, or by telephone.

(d) All parties participating in the protest shall be invited to attend the hearing. Others may be permitted

to attend as observers and may participate as allowed by GAO's hearing official. In order to prevent the improper disclosure of protected information at the hearing, GAO's hearing official may restrict attendance during all or part of the proceeding.

(e) Hearings shall normally be recorded and/or transcribed. If a recording and/or transcript is made, any party may obtain copies at its own expense.

(f) If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.

(g) If a hearing is held, no separate comments on the agency report should be submitted unless specifically requested by GAO. Each party shall file with GAO, within 5 days after the hearing was held or as specified by GAO, a single document expressing any comments on both the hearing and agency report, with copies furnished to the other parties. By the due date, if the protester has not filed comments or a written statement requesting that the case be decided on the existing record, GAO shall dismiss the protest.

(h) In post-hearing comments, the parties should reference all testimony and admissions in the hearing record that they consider relevant, providing specific citations to the testimony and admissions referenced.

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§ 21.8 Remedies.

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the contracting agency implement any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

(3) Recompete the contract;

(4) Issue a new solicitation;

(5) Award a contract consistent with statute and regulation; or

(6) Such other recommendation(s) as GAO determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the contracting agency's mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the contracting agency pay the protester the costs of:

(1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and

(2) Bid and proposal preparation.

(e) If the contracting agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid within 15 days after being advised that the contracting agency has decided to take corrective action. The protester shall furnish a copy of its request to the contracting agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

(f)(1) If GAO recommends that the contracting agency pay the protester the costs of filing and pursuing

the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(2) The contracting agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed. If the protester and the contracting agency cannot reach agreement within a reasonable time, GAO may, upon request of the protester, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. 3554(c). In such cases, GAO may also recommend that the contracting agency pay the protester the costs of pursuing the claim for costs before GAO.

(3) The contracting agency shall notify GAO within 60 days after GAO recommends the amount of costs the agency should pay the protester of the action taken by the agency in response to the recommendation.

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§ 21.9 Time for decision by GAO.

(a) GAO shall issue a decision on a protest within 100 days after it is filed.

(b) In protests where GAO uses the express option procedures in § 21.10, GAO shall issue a decision on a protest within 65 days after it is filed.

(c) GAO, to the maximum extent practicable, shall resolve a timely supplemental protest adding one or more new grounds to an existing protest, or a timely amended protest, within the time limit established in paragraph (a) of this section for decision on the initial protest. If a supplemental or an amended protest cannot be resolved within that time limit, GAO may resolve the supplemental or amended protest using the express option procedures in § 21.10.

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§ 21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.

(a) At the request of a party or on its own initiative, GAO may decide a protest using an express option.

(b) The express option will be adopted at the discretion of GAO and only in those cases suitable for resolution within 65 days.

(c) Requests for the express option shall be in writing and received in GAO not later than 5 days after the protest or supplemental/amended protest is filed. GAO will promptly notify the parties whether the case will be handled using the express option.

(d) When the express option is used, the following schedule applies instead of those deadlines in § 21.3 and § 21.7:

(1) The contracting agency shall file a complete report with GAO and the parties within 20 days after it receives notice from GAO that the express option will be used.

(2) Comments on the agency report shall be filed with GAO and the other parties within 5 days after receipt of the report.

(3) If a hearing is held, no separate comments on the agency report under paragraph (d)(2) of this section should be submitted unless specifically requested by GAO. Consolidated comments on the agency report and hearing shall be filed within 5 days after the hearing was held or as specified by GAO.

(4) Where circumstances demonstrate that a case is no longer suitable for resolution using the express option, GAO shall establish a new schedule for submissions by the parties.

(e) GAO may use flexible alternative procedures to promptly and fairly resolve a protest, including establishing an accelerated schedule and/or issuing a summary decision.

(f) GAO may conduct status and other conferences by telephone or in person with all parties participating in a protest to promote the expeditious development and resolution of the protest.

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§ 21.11 Effect of judicial proceedings.

(a) A protester must immediately advise GAO of any court proceeding which involves the subject matter of a pending protest and must file with GAO copies of all relevant court documents.

(b) GAO will dismiss any protest where the matter involved is the subject of litigation before a court of competent jurisdiction, or where the matter involved has been decided on the merits by a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court. In these cases, unless a different schedule is established, the times provided in this part for filing the agency report (§ 21.3(c)), filing comments on the report (§ 21.3(i)), holding a hearing and filing comments (§ 21.7), and issuing a decision (§ 21.9) shall apply.

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§ 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, the head of the contracting activity responsible for the protested procurement, and the senior procurement executive of each Federal agency involved; a copy shall also be made available to the public. A copy of a decision containing protected information shall be provided only to the contracting agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

(b) Decisions are available from GAO by electronic means.

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§ 21.13 Nonstatutory protests.

(a) GAO will consider protests concerning awards of subcontracts by or for a Federal agency, sales by a Federal agency, or procurements by agencies of the government other than Federal agencies as defined in § 21.0(c) if the agency involved has agreed in writing to have protests decided by GAO.

(b) The provisions of this part shall apply to nonstatutory protests except for the provision of § 21.8(d) pertaining to recommendations for the payment of costs. The provision for the withholding of award and the suspension of contract performance, 31 U.S.C. 3553(c) and (d), also does not apply to nonstatutory protests.

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§ 21.14 Request for reconsideration.

(a) The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) A request for reconsideration of a bid protest decision shall be filed, with copies to the parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. The filing of a request for reconsideration does not require the withholding of award and the suspension of contract performance under 31 U.S.C. 3553(c) and (d).

APPENDIX F
JOINT ETHICS REGULATION
DoD 5500.7-R

CHAPTER 12 – ETHICAL CONDUCT

Section 5. Ethical Values.

(a) General. Ethics are standards by which one should act based on values. Values are core beliefs such as duty, honor, and integrity that motivate attitudes and actions. Not all values are ethical values (integrity is; happiness is not). Ethical values relate to what is right and wrong, and thus take precedence over non-ethical values when making ethical decisions. DoD employees should carefully consider ethical values when making decisions as part of official duties.

(b) Primary Ethical Values--(1) Honesty. Being truthful, straightforward and candid are aspects of honesty.

(i) Truthfulness is required. Deceptions are easily uncovered and usually are. Lies erode credibility and undermine public confidence. Untruths told for seemingly altruistic reasons (to prevent hurt feelings, to promote good will, etc.) are nonetheless resented by the recipients.

(ii) Straightforwardness adds frankness to truthfulness and is usually necessary to promote public confidence and to ensure effective, efficient conduct of Federal Government operations. Truths that are presented in such a way as to lead recipients to confusion, misinterpretation or inaccurate conclusions are not productive. Such indirect deceptions can promote ill-will and erode openness, especially when there is an expectation of frankness.

(iii) Candor is the forthright offering of unrequested information. It is necessary in accordance with the gravity of the situation and the nature of the relationships. Candor is required when a reasonable person would feel betrayed if the information were withheld. In some circumstances, silence is dishonest, yet in other circumstances, disclosing information would be wrong and perhaps unlawful.

(2) Integrity. Being faithful to one's convictions is part of integrity. Following principles, acting with honor, maintaining independent judgment and performing duties with impartiality help to maintain integrity and avoid conflicts of interest and hypocrisy.

(3) Loyalty. There are many synonyms for loyalty: fidelity, faithfulness, allegiance, devotion and fealty. Loyalty is the bond that holds the nation and the Federal Government together and the balm against dissension and conflict. It is not blind obedience or unquestioning acceptance of the status quo. Loyalty requires careful balancing among various interests, values and institutions in the interest of harmony and cohesion.

(4) Accountability. DoD employees are required to accept responsibility for their decisions and the resulting consequences. This includes avoiding even the appearance of impropriety because appearances affect public confidence. Accountability promotes careful, well thought-out decision-making and limits thoughtless action.

(5) Fairness. Open-mindedness and impartiality are important aspects of fairness. DoD employees must be committed to justice in the performance of their official duties. Decisions must not be arbitrary, capricious or biased. Individuals must be treated equally and with tolerance.

(6) Caring. Compassion is an essential element of good government. Courtesy and kindness, both to those we serve and to those we work with, help to ensure that individuals are not treated solely as a means to an end. Caring for others is the counterbalance against the temptation to pursue the mission at any cost.

(7) Respect. To treat people with dignity, to honor privacy and to allow self-determination are critical in a government of diverse people. Lack of respect leads to a breakdown of loyalty and honesty within a government and brings chaos to the international community.

(8) Promise keeping. No government can function for long if its commitments are not kept. DoD employees are obligated to keep their promises in order to promote trust and cooperation. Because of the importance of promise keeping, it is critical that DoD employees only make commitments that are within their authority.

(9) Responsible citizenship. It is the civil duty of every citizen, and especially DoD employees, to exercise discretion. Public servants are expected to engage personal judgment in the performance of official duties within the limits of their authority so that the will of the people is respected in accordance with democratic principals. Just must be pursued and injustice must be challenged through accepted means.

(10) Pursuit of excellence. In public service, competence is only the starting point. DoD employees are expected to set an example of superior diligence and commitment. They are expected to be all they can be and to strive beyond mediocrity.

Section 6. Ethical Decision-Making.

(a) General. Virtually everyone in Federal Government service makes job-related decisions. Some of these decisions may seem more important than others, but all should be preceded by a consideration of ethical ramifications. In some cases, the ethical element of decision-making will go no further than to consciously acknowledge that there are no significant ethical ramifications to consider. In other cases, in-depth ethical analysis is called for in addition to application of ethics rules. The following plan for decision-making ensures careful review of ethical consequences when there are alternative solutions that seem proper under existing laws and regulations. DoD employees should consider incorporating the following plan in official decisionmaking.

(b) Ethical Decision-Making Plan.

(1) Define the problem. Proceed from a general statement of the problem to specific statements of the decisions to be made. As you take the following steps, such as identifying goals and naming stakeholders new problems or needed decisions may become apparent. Be willing to add these to your problem list as you go.

(2) Identify the goal(s). Proceed from a general statement of an end result both long term and short term. Be prepared to add to this list as you take the following steps. Goals are something to strive toward. They are statements of the best possible results.

The very best is not always achieved for everyone. Many problems do not allow for "win/win" outcomes. Be prepared to fall somewhat short of some goals for the sake of ethics and other considerations.

(3) List applicable law or regulations. Laws and regulations are basic constraints within which official decisions are made. Until all relevant laws and regulations are considered, ethical decision-making is impossible. Although it is conceivable that an ethical decision could violate a law or regulation, such circumstances are rare.

(4) List the ethical values at stake. Listing the ethical values at stake can awaken you to problems and goals that you may not have otherwise considered. It may alert you to stakeholders you may not have recognized. Listing the values reminds you of your commitment to them at a time when stress of the problem may cause you to forget.

(5) Name all the stakeholders. A stakeholder is anyone who is likely to be affected by a decision. Many stakeholders will be apparent because of the previous steps you already followed. More will occur to you as you give the matter a few minutes of thought. Do not forget to include yourself and the people who may depend on you for support, both at work and at home. As you list the stakeholders, try to note the way your decision could affect them. In other words, name what is at stake for the stakeholder.

(6) Gather additional information. This step is frequently overlooked. The stress from the problem urges speedy solutions. However, hasty decisions usually create problems of their own. Take the time to gather all necessary information. Ask questions, demand proof when appropriate, check your assumptions.

(7) State all feasible solutions. By this time, some feasible solutions will have presented themselves. Others may be found by sharing the lists and information you have pulled together and "brain storming." As you state the feasible solutions, note which stakeholders could be affected and what might be gained or lost.

(8) Eliminate unethical options. There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages. Eliminate the unethical solutions.

(9) Rank remaining solutions. Other solutions may not be clearly unethical but may be questionable. You may have to rely on intuition or "gut feelings" to weed out these solutions. Put these possible solutions at the bottom of your list. Rank the remaining solutions, which are all ethical ones, in order of how close they bring you to your goal and solve the problem.

(10) Commit to and implement the best ethical solution. Commitment and implementation are vital to the ethical decision-making process. Determining which solution is the best ethical one is a meaningless exercise unless implementation of the ethical solution follows. If the right decision is not implemented, the door is left wide open for others to implement unethical solutions.

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APPENDIX G

SUGGESTIONS FOR SUCCESSFUL CONTRACTING OFFICER'S FINAL DECISIONS PRELIMINARY REVIEW

1. Read the contractor's request for a Contracting Officer's Final Decision. If you do not understand what relief the contractor is requesting, ask the contractor to clarify its request in writing. The Contracting Officer's request for clarification should be made in writing to the contractor and should be done as soon as possible after receipt of the request for a Final Decision.
2. In the event the Final Decision deals with a technical issue, give a copy of the request for a CO's Final Decision to your technical personnel. They should be able to assist you in addressing the technical issues.

WRITING THE DECISION

3. Within the contractor's address block, address the final decision to the individual who submitted the claim to Contracting Officer and who signed the claim.
4. In the subject line, put the words "Contracting Officer's Final Decision".
5. If the contractor has not submitted a written request for a "Contracting Officer's Final Decision," refer to the request as a "request for an equitable adjustment," etc. You might want to note within such correspondence with the contractor, in a closing paragraph, that this is not a Final Decision, as one was not requested.
6. Do not state the ultimate outcome of your decision within the first paragraph of the Contracting Officer's Final Decision.
7. Within the initial paragraphs of the Contracting Officer's Final Decision, provide a short history of the claim or request for a CO's Final Decision. In writing this section be sure to include the date the Decision was requested and the subject matter of the request. Also, refer to the documentation which accompanied the request for a CO's Final Decision, by name and date.
8. In the event the CO had to request documentation from the contractor in order to evaluate the request for the Final Decision, state that fact and that the material was considered in making the decision. In the event the contractor failed to provide requested documentation, cite that fact.
9. Do not wait until the 50th day after receiving the request from the contractor, before requesting any additional documentation you will need. If you know you are going to need more information from the contractor, request it within 5 to 10 days after receipt of the request for a Final Decision.
10. If possible, place the Contracting Officer's ultimate decision in the paragraph immediately prior to the contractor's appeal rights. This could cause the contractor to read the decision and understand the problems with his position.
11. In the event 50 or more days pass and the contractor fails to supply requested documentation, or supplies information that is irrelevant to the claim, try to issue a decision as close to the 60 day deadline as possible. You have the right to deny a contractor's claim based upon its failure to document or substantiate the claim.

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APPENDIX H

SUGGESTIONS FOR SUCCESSFUL ASSEMBLY OF THE RULE 4 FILE DOCUMENTS TO INCLUDE

1. Documents to be included in the Rule 4 file include the contract in its entirety, and all documents related to the dispute, which are not proprietary in nature, protected by attorney-client privilege, or protected by another privilege or law. Any drawings should be put into enclosures and inserted under a tab for each drawing in the Rule 4 File.
2. Privileged or otherwise protected documents should be placed in a separate Trial Attorney Notebook, to be used only by the Government Trial Attorney.
3. In addition to documents from the contract file, you may want to consider materials from Government engineers and inspectors. In delay cases, excerpts from logbooks should be included in the Rule 4 File.

ASSEMBLY

4. All copies should be single-sided. BCA Judges have a strong preference for single-sided copies in the Rule 4 File. One ASBCA Judge ordered a Contracting Officer at the beginning of a trial to re-copy the Rule 4 File (which had double-sided copies) into single-sided copies.
5. The Rule 4 documents should be put in three ring binders. Other types of binders have a tendency to fall apart.
6. All documents should be tabbed, and the tab numbers or letters noted within the index.
7. Large documents such as contracts and drawings should be divided and sub-tabbed, in order that sections may be easily found. These sub-sections should be identified and noted in the index. They can be numbered as 1a, 1b, 1c, 2a, 2b, etc.
8. The tabs should be numbered in such a way that tab 1 is in the front of the file, and other numbers follow sequentially.
9. Prior to sending a Rule 4 File for review to your agency trial attorney, fax a copy of the proposed index (with subdivisions) to that person. On occasion, privileged documents are mistakenly designated for inclusion in the Rule 4 File. It is easier to remove them prior to Rule 4 File assembly; this can also help eliminate the need for many revisions to the file prior to shipment to the Board and to the contractor's attorney.
10. Make two extra copies of the Rule 4 File. This will enable you to be prepared for the trial. One can be used on the witness stand, and potential witnesses can use the other for review during the course of the trial.

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APPENDIX I

ADR CASE EVALUATION WORKSHEET

Contract _____

Date of Request For Final Decision _____

Date of Final Decision _____

The purpose of these guidelines is to assist in evaluating each proposed contracting officer's final decision for its potential resolution through the use of ADR. You will need to carefully weigh the pros and cons of using ADR on a case by case basis, remembering that FAR 33.204 encourages the use of ADR to the maximum extent possible.

1. FACTORS FAVORING THE USE OF ADR:

(a) The law of determinative legal issues is well settled.

(b) The dispute is primarily factual.

(c) The position of each side has merit, but they may be overstated.

(d) No further discovery is required -- or limited expedited discovery will suffice -- for each side to assess its strengths and weaknesses.

(e) The risk of an adverse precedent should be avoided.

(f) A speedy resolution is desirable.

(g) The case lends itself to settlement before a board or court decision.

(h) A strong presentation will give one side or the other a more realistic attitude about the case.

(i) Trial preparation could be costly and protracted.

(j) A mediator could help diffuse the emotion or hostility which may inhibit an appropriate settlement of the dispute.

(k) The evaluation of a neutral advisor could help break the stalemate.

(l) Neither side really wants to litigate.

2. FACTORS AGAINST THE USE OF ADR:

(a) If the answer to any of the following is "yes", then ADR may not be appropriate**:**

i. Is the dispute primarily over issues of law?

ii. Is a decision with precedential value needed?

iii. Is a significant policy question involved?

iv. Is a full public record of the proceeding important?

v. Would the outcome significantly affect non-parties?

vi. Would the costs of using an ADR procedure probably be greater (in time and money) than the costs of pursuing litigation?

vii. Does the case involve a willful or criminal violation of the law?

(b) Other factors against the use of ADR:

i. The case can be dismissed in a motion for summary judgment.

ii. There is no bona fide dispute; the other side's case is without merit.

iii. The advantage of delay runs heavily in favor of one side.

iv. The other side has no motivation to settle (e.g., expectations of a large judgment, highly emotional stake in being vindicated).

v. More time must elapse before each side's position and settlement possibilities can all be evaluated.

vi. There is a need for continuing Board or Court supervision of one of the parties.

vii. The other side may not be forthright in its ADR presentation.