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4TH INSTALLATION CONTRACTING COURSE

Contract Law Division
The Judge Advocate General's School
United States Army
Charlottesville, Virginia

JA 510

SEP 91

CONTRIBUTORS

LTC John T. Jones, Jr.
Chief, Contract Law Division

LTC Jose Aguirre
Chief, Contract Law Division, Emeritus

MAJ Harry L. Dorsey
Senior Instructor, Contract Law Division

MAJ Michael A. Killham
Instructor, Contract Law Division

MAJ Bobby D. Melvin, Jr.
Instructor, Contract Law Division

MAJ Michael K. Cameron
Instructor, Contract Law Division

MAJ Anthony M. Helm
Instructor, Contract Law Division

Mrs. Mary D. Bell-Bailey
Secretary, Contract Law Division

MAJ Mark J. Connor
Instructor, Administrative and Civil Law Division

Mr. Byrd Eastham
Illustrator

SSG Mark L. Moore
Ms. Michele D. Warner
Reproduction

Our predecessors on the Faculty of the Contract Law Division

4TH INSTALLATION CONTRACTING COURSE

23 - 27 SEPTEMBER 1991

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
DEPARTMENT OF THE ARMY

CONTRACT LAW DIVISION

BIOGRAPHIES OF INSTRUCTORS

LIEUTENANT COLONEL JOHN T. JONES, JR., JA, Chief, Contract Law Division. B.E., Magna Cum Laude, Vanderbilt University, 1973; J.D., With High Honors, George Washington University, 1978; LL.M., Government Procurement Law, With Highest Honors, George Washington University, 1986; The Judge Advocate General's School Basic Course, 1978; The Judge Advocate General's School Graduate Course, 1982; Defense Systems Management College Program Managers Course, 1985; U.S. Army Command and General Staff Course, 1989. Career Highlights: Deputy Staff Judge Advocate, U.S. Army Strategic Defense Command, Huntsville, Alabama, 1986-1989; Assistant to the General Counsel, Department of the Army, Washington, D.C., 1986; Trial Attorney, Contract Appeals Division, U.S. Army Legal Services Agency, Falls Church, Virginia, 1982-1986; Chief Trial Counsel, Hanau Legal Center, 3d Armored Division, Hanau, Germany, 1979-1981; Trial Defense Counsel, U.S. Army Berlin, Berlin, Germany, 1978-1979; Platoon Leader, 4th Engineer Battalion, 4th Infantry Division (Mech), Fort Carson, Colorado, 1974-1975. Member of the Bar of Virginia; admitted to practice before the U.S. Claims Court, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.

MAJOR HARRY L. DORSEY, JA, Senior Instructor, Contract Law Division. A.B., Wheeling College, 1973; J.D., Duquesne University, 1977; The Judge Advocate General's School Basic Course, 1978; The Judge Advocate General's School Graduate Course, 1984. Career Highlights: Branch Chief, Adversary Proceedings Division, U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, 1989-1990; Contract Law Attorney-Advisor, Procurement Law Division, U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, 1987-1989; Litigation Attorney, General Litigation Branch, Litigation Division, Office of The Judge Advocate General, Washington, D.C., 1984-1987; Contract Law Attorney-Advisor, U.S. Army Contracting Agency, Europe, Frankfurt, Federal Republic of Germany, 1980-1983; Legal Assistance Officer, Contract Law Advisor, 9th Infantry Division, Fort Lewis, Washington,

1978-1980. Member of the Bar of Pennsylvania; admitted to practice before the U.S. Court of Military Appeals, the U.S. Claims Court, and the U.S. Supreme Court.

MAJOR MICHAEL A. KILLHAM, JA, Instructor, Contract Law Division. B.S., United States Military Academy, 1975; J.D., Notre Dame Law School, 1982; The Judge Advocate General's School Basic Course, 1982; LL.M., Military Law, The Judge Advocate General's School, 1988. Career Highlights: Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1988-1991; Chief, Criminal Law Division and Officer in Charge, Merril Barracks Branch Office, 1st Armored Division Staff Judge Advocate Office, Ansbach, Germany, 1984-1987; Trial Counsel, 3rd Infantry Division, Wurzburg, Federal Republic of Germany, 1983-1984; Chief, Legal Assistance Branch, Office of the Staff Judge Advocate, Fort Devens, Massachusetts, 1982; Platoon Leader, S-3 Air, Company Executive Officer, 1st Battalion, 505th Infantry/3d Brigade, 82nd Airborne Division, Fort Bragg, North Carolina, 1976-1979. Member of the Bars of Indiana and Nebraska; admitted to practice before the Army Court of Military Review, the U.S. Claims Court and the Court of Appeals for the Federal Circuit.

MAJOR BOBBY D. MELVIN, JA, Instructor, Contract Law Division. B.S., United States Military Academy, 1976; J.D., University of Cincinnati College of Law, 1982; The Judge Advocate General's School Basic Course, 1982; LL.M., Military Law, The Judge Advocate General's School, 1987. Career Highlights: Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1987-1991; Chief, Administrative Law Division, Officer in Charge, Ansbach Branch Office, 1st Armored Division Staff Judge Advocate Office, Ansbach, Federal Republic of Germany, 1982-1986; Platoon Leader, S-3 Air, 1st Battalion, 21st Infantry, 25th Infantry Division, Schofield Barracks, Hawaii, 1977-1979. Member of the Bars of Ohio and Georgia; admitted to practice before the Army Court of Military Review and the U.S. Claims Court.

MAJOR MICHAEL K. CAMERON, JA, Instructor, Contract Law Division. B.A., Washington and Lee University, 1978; J.D., Wake Forest University, 1981; The Judge Advocate General's School Basic Course, 1981; LL.M., Military Law, The Judge Advocate General's School, 1989. Career Highlights: Chief, Nonresident Instruction Division, The Judge Advocate General's School, 1989-1990; Special Assistant U.S. Attorney, U.S. Attorney's Office, Detroit, Michigan, 1987-1988; Administrative Law Attorney, Contract Law Attorney, Senior Counsel Civil Law, XVIII Airborne Corps, Fort Bragg, North Carolina, 1984-1987; Senior Defense Counsel, Tague, Korea, 1983-1984; Trial Attorney, Fort Dix, New Jersey, 1981-1983. Member of the Bar of North Carolina; admitted to practice before the Army Court of Military Review, the U.S. District Court for the Eastern District of Michigan, and the U.S. Supreme Court.

MAJOR ANTHONY M. HELM, JA, Instructor, Contract Law Division. B.S., California State University, Stanislaus, 1978; J.D., University of Arizona, 1981; The Judge Advocate General's School Basic Course, 1982; LL.M., Military Law, The Judge Advocate General's School, 1990. Career Highlights: Chief, Administrative Law, National Training Center, Fort Irwin, California, 1985-1989; Senior Defense Counsel, Fort Leavenworth, Kansas 1984-1985; Assistant Command Judge Advocate, Trial Defense Counsel, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, 1982-1984; Mandarin Chinese Language Specialist, USAF Security Service (Okinawa, Thailand), 1970-1974. Member of the Bar of Arizona; admitted to practice before the Army Court of Military Review and the U.S. Supreme Court.

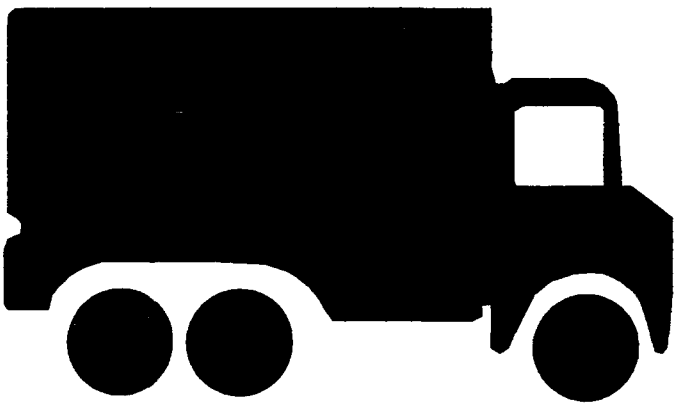
THE ADJUNCT FACULTY

INDIVIDUAL MOBILIZATION AUGMENTEE

LIEUTENANT COLONEL GLENN E. MONROE (USAR), Partner, Bryan, Cave, McPheeters & McRoberts, Phoenix, Arizona. B.A., Muskingum College, 1967; J.D., Cum Laude, Ohio State University College of Law, 1974; LL.M., University of Virginia School of Law, 1979. Career Highlights: Assistant Professor, Mathematics and English, L'Ecole St. Martin de France, Pontoise, France, 1967-1968; Chief, Military Intelligence, 122d Aviation Company, Hanau, Germany, 1970-1971; Trial Counsel, Office of the Staff Judge Advocate, Fort Knox, Kentucky, 1972-1974; Chief, Career Management Office, The Judge Advocate General's School, Reserve Affairs Department, 1974-1976; Assistant Professor, University of Virginia School of Law, Charlottesville, Virginia, 1978-1979; Instructor, Contract Law Division, The Judge Advocate General's School, 1976-1979; Trial Attorney, Office of the Chief Trial Attorney, Department of the Army, Falls Church, Virginia 1979-1980; Adjunct Professor, George Mason University School of Law, spring 1987 semester. Member of the Bars of the District of Columbia, Supreme Court of Ohio, Supreme Court of Arizona, Supreme Court of the United States, Court of Appeals, District of Columbia, United States Court of Military Appeals, United States Claims Court, United States Tax Court, American Bar Association, Federal Bar Association, Judge Advocates Association, Paulding County Bar Association.

CHAPTER 1

DRAFTING SPECIFICATIONS



CHAPTER 1

DRAFTING SPECIFICATIONS AND STATEMENTS OF WORK

CHAPTER 1

DRAFTING SPECIFICATIONS AND STATEMENTS OF WORK

I. **INTRODUCTION.**

II. **ANALYZING THE WORK.**

A. Requirements Analysis.

1. Define Agency Needs.

a. Define needs in relation to agency mission.

b. Identify existing capabilities, deficiencies, and opportunities.

2. Identify Alternatives to Meet Needs.

3. Requirements Analysis and Flowdown.

a. Define significant overall requirements.

b. Subdivide requirements and allocate to different elements of work.

LTC John T. Jones, Jr.
Installation Contracting Course
September 1991

B. Breaking Down the Work.

Develop a work breakdown structure by taking the overall description of work and subdividing into principle elements. Then take each principle element and further subdivide the work into smaller work packages. Further subdivide until you reach a level where discrete work packages are suitable for specification drafting, management, pricing, etc.

C. Identifying Interfaces.

1. Problems arise at interfaces.

2. Examine each work package to identify interfaces between work packages, organizations, equipment, systems, etc.

3. Describe the interface and assign control responsibilities.

D. Identify Performance Validation Methods.

1. Identify the key, measurable requirements.

2. Identify the method for evaluating these key requirements.

III. SPECIFICATION AND SOW DRAFTING.

A. Goals of Contract Drafting.

1. Description of expected performance.

a. Used by contractor to price the work.

b. Used by government to monitor performance.

2. Allocation of Risk

3. Promotion of Competition.

B. Describing Requirements.

1. A statement of work (SOW) contains tasking statements.

2. Specifications contain specific performance requirements and are referenced in the scope of work.

a. Design Specifications.

(1) Used primarily where the government needs to specify the method of performing the desired work.

(2) Interface Control Documents.

b. Performance Specifications.

(1) Specify minimum mandatory, desired, and maximum allowable values.

(2) Specified level of performance should be significant and measurable.

c. Functional Specifications.

(1) Specifies functions, not levels of performance or specific designs.

(2) Allows the broadest range of alternative solutions.

(3) Requires fleshing out by technical proposal to completely describe the required performance.

d. Hybrid Specifications.

(1) As a practical matter, all specifications are combinations of the three types.

(2) You must analyze each individual part of a specification to determine which is the appropriate type.

3. Integrating Specifications and Scopes of Work.

4. Specification Sources.

a. Government.

b. Industry.

c. Unique.

C. Organization.

1. Format.

a. Scope.

b. Applicable Documents.

c. Requirements.

2. Organizing the Requirements Section.

a. Chronological order.

b. Use the work breakdown structure developed for the contract.

c. By organizational structure of the performing organizations.

D. Drafting Requirements.

1. Language.

a. Write dumb.

b. Use an active voice.

c. State an objective requirement or product, the criteria for measuring completion, and the conditions under which the contractor will perform the requirement.

d. Use work words (disassemble, inspect, repair, reassemble).

2. Using Existing Documents as Examples.

a. Old Contracts, Specs, and SOWs.

b. Using materials acquired during market research.

c. Commercial/industrial standards.

3. Tailoring.

a. Matching the SOW/Specification with the contract type and acquisition method.

(1) Fixed price contracts.

(2) Cost reimbursement contracts.

(3) Sealed bid acquisitions.

(4) Negotiated acquisitions based on best value.

b. Examine each provision to see if it is necessary for your needs.

4. Mandatory, Desirable, or Alternative Features.

5. Acquiring Information.

   a. Data and reports are very expensive.

   b. Data is described on a contract data requirements list.

   c. Beware of someone whose job is reviewing reports setting the requirements for those reports.

6. Flexibility.

   a. New requirements are time consuming to compete and expensive to acquire noncompetitively.

   b. Include pre-priced mechanisms to meet changing needs and likely contingencies.

E. Review.

1. Internal Boards. Instead of reviewing a specification serially, have all interested offices send a knowledgeable representative to meeting of all such representative and thrash out concerns collectively. This is much quicker and more effective.

2. External Review. Gaining the comments of a knowledgeable person from another installation will often identify obvious but overlooked errors.

3. Draft Requests for Proposals. Let industry review and provide comments.

IV. COMMON ERRORS.

A. Redundancy.

State a requirement once, then refer to the statement of the requirement when needed elsewhere.

B. Consistency Errors.

1. Within the contract.

Ensure that all parts of the contract (e.g., specifications, scope of work, general provisions, etc.) use consistent terms and complementary provisions. Provisions should not conflict. Identify conflicts by reading from front to back at one sitting.

2. Within the Document.

Use one term consistently when referring to one thing.

C. Language Errors.

1. Ambiguous language.

a. Perform the task bimonthly.

b. The task will be performed.

2. Vague terms.

a. As required or as necessary. Requiring a task without providing criteria specifying when performance is necessary.

b. Assist, as directed, or on call. Implying government control during performance without specifying limits on the government's control.

3. Undefined terms. The specification or SOW should define terms which have both a technical and a general meaning.

D. Failure to Tailor or Update.

Many documents contain references which are wholely inappropriate for your installation. Similarly, many documents are constantly undergoing revision. Update the reference to the version actually desired.

E. Ignoring Problems.

If the last acquisition resulted in claims, litigation, protests, etc., revise the SOW and specifications to eliminate the cause of the dispute.

F. Omissions.

Failure to methodically analyze the work in detail makes omissions much more likely.

G. Regulations as Specifications.

Internal agency regulations are intended as guidance for government employees, not tasking statements for contractors. Therefore, never use internal agency regulations as a requirement without extensive tailoring.

V. CONCLUSION.

CHAPTER 2

STATE TAXATION

CHAPTER 2

STATE TAXATION

Distinguished Guest Speaker

Mr. Larry R. Rowe
Chief, Tax and Property Law Team
Contract Law Division
Office of the Judge Advocate General
U.S. Army

Biographical Sketch
Larry R. Rowe

Current Position:

Chief, Tax and Property Law Team, Contract Law Division, Office of The Judge Advocate General of the Army

Education:

B.A. and J.D. (Oklahoma Law Review and Order of the Coif) University of Oklahoma, LL.M. International Law, Kings College, University of London, candidate for LL.M. Taxation, George Washington University.

Experience:

Oklahoma Attorney General's Office
Private practice, Gable Gotwals, Tulsa
Judge Advocate General's Corps, U.S. Navy
- Great Lakes, Il
- Republic of Vietnam
- Treasure Island, CA
- USS Forrestal
- London, England
- Elk Hills, CA
- Washington, D.C.

Department of Energy, Office of General Counsel, General Litigation

Mr. Larry R. Rowe and
MAJ John Albanese
Aug 1991

Tax and Property
Law Team (703)
693-4071; DSN
223-4071; FAX
(703) 695-8019

STATE AND LOCAL TAXATION

I. THE UNITED STATES IS IMMUNE FROM DIRECT STATE AND LOCAL TAXATION UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION. HOWEVER, THE UNITED STATES IS NOT IMMUNE FROM INDIRECT TAXATION, E.G. THERE IS NOTHING UNCONSTITUTIONAL ABOUT REIMBURSING CONTRACTORS THE COSTS ASSOCIATED WITH THEIR PAYMENT OF STATE AND LOCAL TAXES.

II. HOW DO YOU IDENTIFY AN INDIRECT TAX FROM A DIRECT TAX?

A. There is little to be gained from making a detailed Constitutional law inquiry into whether a tax is of the indirect variety. Looking at McCulloch v. Maryland will be of little help.

B. Instead, determine where the Legal Incidence falls. ("Legal Incidence" is term of art.) Alabama v. King & Boozer, 314 U.S. 1 (1941); First Agricultural National Bank v. State Tax Comm., 392 U.S. 339 (1968); U.S. v. State Tax Comm. of Mississippi, 421 U.S. 599 (1975).

1. Does the legal incidence of the tax fall on the vendor or on the vendee?

2. THE RULE. If the legal incidence falls on the vendor in a situation where the United States is making the purchase and is, therefore, the vendee, the tax is an indirect tax to which the United States has no constitutional immunity and must pay the tax as an indirect cost of doing business.

3. THE RULE. If the legal incidence falls on the vendee, the tax is a direct tax from which the United States is immune under the Supremacy Clause of the Constitution.

4. Nevertheless, check the particular States statutes. The United States may be immune from indirect taxation on the basis of immunity contained in State statute.

C. But how do you determine where the legal incidence of a state tax falls?

1. Read the particular state statute that levies the tax. On whom does the statute say the tax is levied? This is critical! Look at attached examples:

   a. Vendor tax - Virginia sales tax statute.

   b. Vendee tax - Ohio sales tax statute.

2. Then, see The Rule above.

III. PROPERTY OR AD VALOREM TAXES

A. No state or local tax may be levied directly on United States property. United States v. Allegheny County, 322 U.S. 174 (1944)

B. But, property tax may be imposed on contractors leasing or "using" United States property. United States v. City of Detroit, 355 US. 466 (1958).

1. Military Leasing Act - 10 U.S.C. 2667 - Real and personal property leased under this authority subject to state and local tax.

2. State must have proper statute. Cannot tax under ordinary, garden-variety ad valorem statute. United States v. Colorado, 627 F.2d 217 (10th Cir. 1980), aff'd w/o opinion sub. nom. Jefferson County v. United States, 450 U.S. 901 (1981); United States v. Anderson County, 761 F.2d 1169 (6th Cir. 1983), cert. denied 474 U.S. 919 (1985).

3. Watch this in third party financing arrangements.

IV. NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFI's)

Entitled to same rights, privileges and immunities in regard to state and local taxes as the United States. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942); United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975).

V. GOVERNMENT CONTRACTORS AND THE INCORPORATION OF THE "TAX" FACTOR INTO GOVERNMENT CONTRACTS

A. The first question you, the lawyer, must ask: What kind of contract is it?

1. If fixed price, end of discussion. FAR Clause 52.229-3 provides that the contract price included all applicable Federal, State, and local taxes.

2. If cost plus, state and local taxes are reimbursable costs. One notable exception to this rule is that Federal income taxes are not an allowable cost to the contractor. FAR 31.205-41.

B. Contractors are not agents or instrumentalities of the United States and generally must pay state and local sales taxes on their purchases.

1. The fact that the United States reimburses contractors for their costs, including state and local sales taxes, does not entitle them to Federal immunity from taxation. United States v. New Mexico, 455 U.S. 720 (1982).

2. A federal agency may not designate a contractor as a"purchasing agent" to avoid state and local taxes. FAR 29.303; DFARS 229.303(a)(1). In any event, specific congressional authorization is probably required to designated a contractor as an "agent." United States v. New Mexico, Id.

VI. TAX DISCRIMINATION AGAINST THE UNITED STATES AND ITS CONTRACTORS

A. The Golden Rule - A state must do unto the United States as it does unto itself, its political subdivisions, and their contractors.

B. Phillips Chemical Co. v. Dumas School District, 361 U.S. 376, 385 (1960), "[I]t does not seem too much to require that the states treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself."

1. What is discrimination against the United States? Usually, federal contractors are the ones discriminated against rather than the United States itself.

a. Look at the decision in United States v. Manassas, 830 F.2d. 530 (4th Cir. 1987), aff'd sub.nom. Manassas v. United States, 485 U.S. 1017 (1988) (attached). Notice that the Virginia statute exempted the Virginia Port Authority's contractors from the tax involved in that case but did not exempt United States contractors from the tax.

b. That is discrimination against the United State and those with whom it does business. Moses Lake Homes, Inc. v. Grant Lake, 365 U.S. 744 (1961).

2. If you look carefully at a state's tax statute, you frequently can find instances where the state favors it own contractors or those of its political subdivisions but does not likewise favor the United States or its contractors.

3. If you find such a statute, that discrimination alone is reason enough to instruct your cost plus contractors not to pay the tax.

4. Look at the attached messages HQDA-KLT has sent alerting to discriminatory state taxes.

    a. West Virginia
    b. Louisiana
    c. Oklahoma
    d. Virginia
    e. Hawaii

5. Do not confuse this Supremacy Clause discrimination with Equal Protection Clause and the Commerce Clause discrimination. They are not the same.
The discrimination standard: Whether the inconsistent tax treatment is directly related to and justified by significant differences between the two classes, that is state contractors versus federal contractors.

6. The legal underpinning for this Supremacy Clause discrimination was reaffirmed in Davis v. Michigan, 489 U.S. 809 (1989) (attached).

VII. EFFECT OF EXCLUSIVE JURISDICTION ON TAX ISSUES

A. Did the state reserve the right to tax within the area when it granted exclusive jurisdiction to the United States? Dig out the state statute conveying the property to the United States.

B. If the state did not reserve the right to tax within the area (and assuming the United States accepted exclusive legislative jurisdiction), private property located therein is not taxable by it or its political subdivisions. Surplus Trading Co. V. Cook, 281 U.S. 647 (1930).

C. Exceptions. Waivers of sovereign immunity by the United States. For example:

    1. The Buck Act, 4 U.S.C. 104-107. Waiver of immunity from taxation with regards to some limited forms of taxation.

        a. 4 U.S.C. 104- Motor fuel taxes.

b. 4 U.S.C. 105- Sales and/or use taxes. These are specifically made applicable to exclusive jurisdiction areas by the Buck Act except on transactions by the United States, nonappropriated fund instrumentalities and authorized purchasers. If CA contractor is involved in either purchases, sales, and/or use the taxes apply.

c. 4 U.S.C. 106- Income taxes.

d. 4 U.S.C. 107- United States, its instrumentalities, and authorized purchases therefrom specifically excepted from taxation. Nonappropriated fund instrumentalities enjoy rights, privileges and immunities of United States. CA CONTRACTORS DO NOT! Leading cases:

(1) Standard Oil Co. v. Johnson, 316 U.S. 481 (1942).

(2) United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975).

(3) Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964).

2. Military Leasing Act- 10 U.S.C. 2667 - Real or personal property leased under this authority may be subject to state and local tax.

3. Federal Home Loan Bank Act- 12 U.S.C. 1433- Real property of the bank is subject to state and local tax.

4. Federal Credit Union Act- 12 U.S.C. 1768- Any real or tangible personal property of a federal credit union is subject to state and local tax.

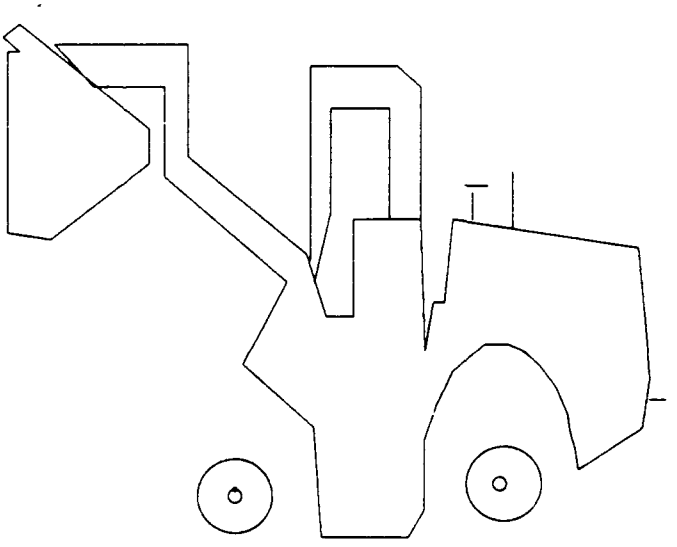
5. Federal Reserve Bank Act- 12 U.S.C. 531- State and local taxes may be levied upon the real estate of any Federal Reserve Bank.

6. Federal Property and Administrative Services Act-40 U.S.C. 602(d). Any interest in real property acquired under the act is subject to state and local tax until title to it passes to the United States.

D. Question: What about third party financed construction which appear to be so popular today (e.g. guest houses/hotels)? The potential tax liabilities of those contractors is very large! In the past when the U.S. Government built and operated these activities it did not have to factor in the costs associated with state and local taxation.

CHAPTER 3

JOB ORDER CONTRACTING



CHAPTER 3

JOB ORDER CONTRACTS

Distinguished Guest Speaker

Mr. Howard Goldman
Counsel, U.S. Army Engineering and Housing
Support Center, Fort Belvoir, Virginia

BIOGRAPHY

HOWARD GOLDMAN

Howard Goldman currently serves as Counsel to the U.S. Army Engineering and Housing Support Center (USAEHSC) located at the Humphreys Engineer Center, Fort Belvoir, Virginia.

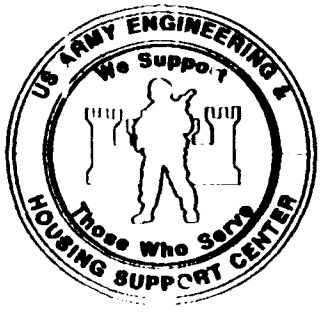
Mr. Goldman has spent his entire professional legal career with the Corps of Engineers. He served as an Assistant District Counsel in the New York District of the Corps from 1977 to 1985. He was the senior procurement attorney for the military construction and civil works mission of the New York District covering the Northeast United States and several OCONUS locations. From 1985 until mid-1989 he served as Assistant Counsel for the Humphreys Engineer Center Support Activity. He provided legal support to the research and development efforts of the Engineer Topographic Laboratories and the emerging legal needs of USAEHSC which was established in October 1987 as a product of the Goldwater-Nichols DoD Reorganization Act. In mid-1989 he was assigned to USAEHSC as full-time counsel.

As Counsel to USAEHSC he provides legal advice on the multi-billion dollar real property maintenance activities of the Army that are executed by the Directorates of Engineering and Housing at Army installations around the world. In that role he also serves as Counsel to the Deputy Army Power Procurement Officer and reviews utility contracts awarded at Army installations. Currently, he is actively involved in the development of Directorates of Public Works in the Department of the Army.

Mr. Goldman received a B.A. from the State University of New York at Stony Brook (Phi Beta Kappa) and a law degree from the New York University School of Law. He is admitted to practice law in New York. He is a member of the New York State and Federal Bar Associations. He is married and has two children.

JOC

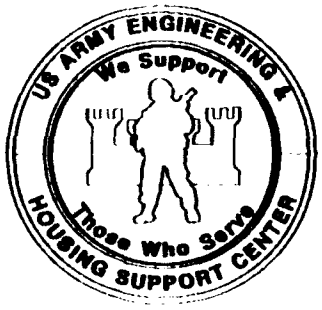
Job Order Contracting



JOC

What is a JOC?

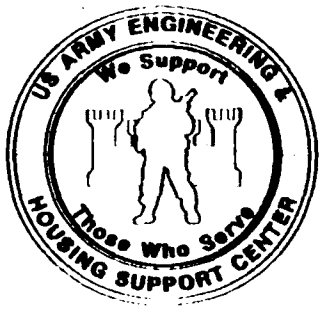
A competitively bid, indefinite delivery construction contract emphasizing construction management by prime contractor.



JOC

Why does the Army need JOC?

- *Lengthy acquisition process*
- *Decreasing Engineer and Contracting staffs*
- *Inability to react to installation needs*
- *Need to encourage responsive, quality contractors*



JOC

Goal

To increase the responsiveness of RPMA support to the installation by decreasing the engineering and contracting lead-time without sacrificing cost, quality or administrative control.

JOC

History of JOC

- *Originated in NATO/SHAPE Headquarters early 80's*
- *USACE proposed 3 year test in '85*
- *Test approved by ASA(I&L)*
- *JOC Execution Guide developed*
- *GAO approves JOC concept B-222337, July 22, 1986*
- *Test undertaken at 8 installations*
- *Army-wide implementation approved by ASA(I,L&E) & ASA(RDA) - 1988*

JOC

History of JOC, con't

- *AAA Audit initiated - 1988*
- *Technical proponency transferred to EHSC*
- *Army-wide implementation continues including OCONUS*
- *AAA Report finalized - 1989*
- *SARDA issues AFARS guidance - 1990 AL 90-12; AL 90-13*
- *USACE continues dialogue with SARDA*
- *EHSC issues JOC Planning & Execution Guide - 1990*

JOC

How does JOC work?

- Three part bid package
  - -Detailed construction specifications
  - -Unit price book w/ engineering tasks
  - -Contract clauses and special provisions
- Offerors bid two coefficients
  - -Normal working hours
  - -Other than normal working hours
- No fixed quantities
- Contract amount is a range
  - -Modest guaranteed minimum for base and option years

JOC

Basis of Award

- *Evaluation factors for award*
  - *-Management ability*
  - *-Subcontracting support capability*
  - *-Price*
  - *-Contractor's experience*
  - *-Technical staff capability*
- *Factors listed above are in descending order of importance*

JOC

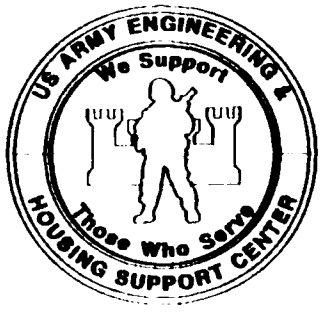
Contract Execution

- *Joint review of the Scope of Work on site*
  - *-Contractor uses Unit Price Data x Quantities x Coefficient*
  - *-Prepares incidental drawings/plans*
- *Engineer review of contractor's proposal*
  - *-Unspecified items of work negotiated*
  - *-Project duration evaluated*
- *Contractor issued a "Delivery Order" against the JOC*
  - *-Constitutes a notice to proceed*
- *Inspection and acceptance same as Fixed-Price Contracts*
- *Contractor supplies "As-Builts"*

JOC

Advantages

- *More responsive*
- *Reduced work on engineer staff*
- *Enhanced quality control*
- *Less costly*
- *Increased small business participation*
- *More professional job*
- *More sensible programming of funds*
- *Reduces contract administration overhead*
- *Reduces BMAR*



JOC

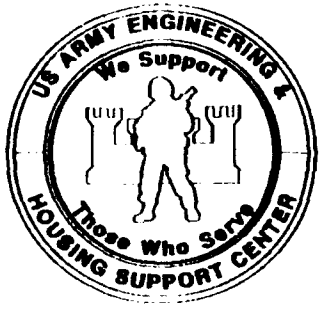
Engineering Project Cycle

Project Scope Developed and Refined	1 - 7 Days
Design Decision	1 - 3 Days
Development of a Design Concept	1 - 3 Months
Proponent Review of the Design Concept	1 - 3 Weeks
Design Phase	1 - 3 Months
Final Design Review	1 - 3 Weeks
Preparation of Bid Package	2 - 4 Weeks
Advertisement	70 - 90 Days
Bid Opening and Award	1 - 2 Weeks
Preconstruction Conference	1 - 2 Weeks
Work Started	3 - 4 Weeks
	6.5 - 13.5 Months

JOC

Test Results - Time

Delivery order size	Number of job orders in sample	Average days per delivery order
Small		
JOC	190	42
Non-JOC	29	33
Medium		
JOC	84	52
Non-JOC	45	193
Large		
JOC	19	68
Non-JOC	13	279



JOC

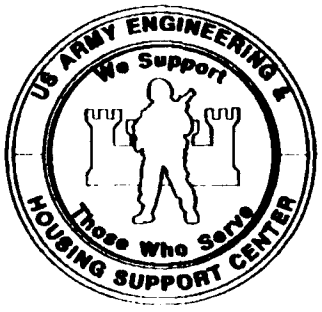
JOC Concerns

- *District or DOC contract*
- *Non-prepriced items*
- *Adding new unit price book items*
- *Contract administration*
- *Internal controls*
- *Ordering officer limits*
- *Staffing*

JOC

Current Contracts

Command	Contract	Contract District	Support DOC
TRADOC	15	10	5
AMC	16	12	4
FORSCOM	5	3	2
USARPAC	2	2	-
USMA	1	1	-
HSC	1	-	1
OCONUS	28	28	-
MDW	1	1	-
ISC	1	1	-
DLA	1	-	1
Total	71	58	13



JOC

Sample JOC Parameters

	Min	Max	Coefficients	Sm Bus
Ft. Lee	$300K	$3 Mil	1.27/1.32	yes
Ft. Ord	$500K	$12 Mil	1.12/1.35	yes
Ft. Bragg	$1.5 Mil	$15 Mil	1.19/1.35	no
Redstone	$1 Mil	$10 Mil	1.13/1.19	no
Ft. Benning	$200K	$2 Mil	1.25/1.35	yes
WSMR	$100K	$7 Mil	1.18/1.28	yes
			1.31/1.41	
Picatinny	$500K	$3 Mil	1.19/1.27	no
Ft. Sill	$250K	$10 Mil	1.27/1.47	yes

JOC

AAA Audit Report Findings
SW 90 - 202

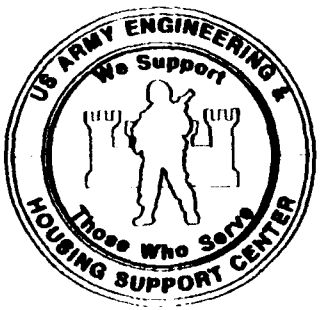
"JOC is an excellent technique for accomplishing needed maintenance and repair and minor construction projects ... Use of the technique can significantly reduce the time and effort needed to get work accomplished by contract."

However . . .

JOC

AAA Audit Report Findings, con't

- Lack of DA policy guidance on JOC
- Lack of DA procurement guidance
- Existing guidance was not followed
- JOC Delivery Order execution policy was inadequate
- Non-prepriced items exceeded established limits
- Prepriced/non-prepriced items didn't always represent contractor incurred costs
- Unit price books require continual updating



JOC

SARDA AFARS Guidance (1990)

- Option year coefficients
- Bond premiums line item
- "Overtime" coefficients
- Use of JOC - HCA or designee
- Acquisition plans
- Independent Government Estimate
- DO Limit of $125K - emergency/urgent
- Non-prepriced NTE 10% of prepriced
- Non-prepriced can't use coefficient

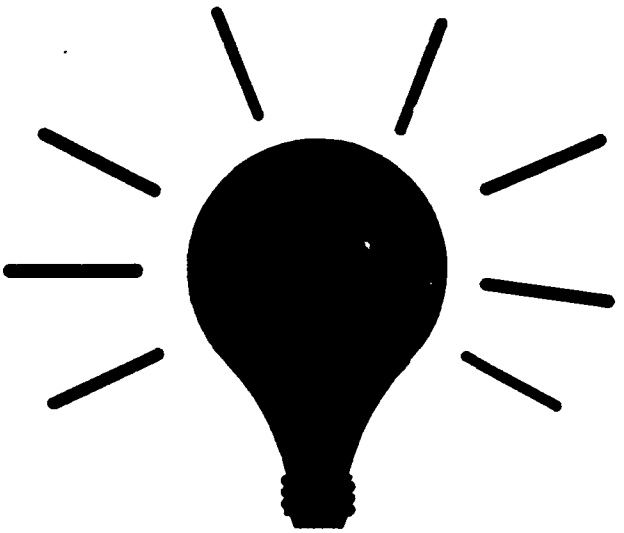
JOC

SARDA AFARS Guidance, con't

- End of year "dumping"
- DOs independently reviewed
- Ordering officers
  - -Appointment not required
  - -Required training
  - -$25K/$1K limits w/o HCA approval
  - -No DO changes
  - -CO approval to negotiate DOs >$25K

CHAPTER 4

SETTLEMENT
AND
ALTERNATIVE DISPUTE RESOLUTION



CHAPTER 4

SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 4

SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

I. INTRODUCTION.

A. Settlement Goals.

1. Pay no more than the claim is worth.

2. Pay as little as the contractor is willing to take.

3. Remember the old Wall Street adage that "bulls make money, bears make money, but pigs get stuck."

B. General Rule. It is a mistake to always settle, and it is a mistake to never settle.

II. SETTLEMENT -- SOME CONSIDERATIONS.

A. Accord and Satisfaction. Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865 (Fed. Cir. 1987); John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991).

1. This is the goal of settlement negotiations.

MAJ Anthony M. Helm
4th Installation Contracting Course
August 1991

2. An accord is an agreement. One party agrees to provide or perform something that was not originally required, and another party agrees to accept performance to satisfy an existing claim.

3. Satisfaction is the discharge of an obligation by payment or performance.

4. The elements of accord and satisfaction are:

   a. Proper subject matter;

   b. Competent parties;

   c. Meeting of the minds; and

   d. Consideration.

B. Settlement Policies. FAR 33.204; DFARS 233.204.

1. Contracting officers should attempt to resolve all issues by mutual agreement at their levels, without litigation.

2. Before issuing a decision on a claim, contracting officers should consider whether informal discussions between individuals who have not participated substantially in the dispute would facilitate settlement.

3. Before entering into negotiations, contracting officers should obtain information concerning other claims filed by the contractor with other activities.

4. Contracting officers should conduct settlement negotiations using the "team concept." NAPS 33.9002(h).

C. Settlement Authority.

1. Only contracting officers may settle claims arising under or related to a contract. FAR 33.210. But see 28 U.S.C. § 516 (conduct of litigation to which the U.S. is a party is reserved to the Department of Justice).

2. Limitations on authority.

a. A contracting officer cannot settle claims or disputes involving penalties or forfeitures assessed by another federal agency. 41 U.S.C. § 605(a).

b. A contracting officer cannot settle, compromise, or otherwise adjust any claim involving fraud. Id.

c. A contracting officer cannot adjust prices under shipbuilding contracts for any amount set forth in a claim arising out of events that occurred more than 18 months before submission of the claim. 10 U.S.C. § 2405; DFARS 233.210 & 243.7001.

d. **Query: What if a contracting officer acts outside his authority?** Kasel Manufacturing Co., ASBCA No. 26975, 89-1 BCA ¶ 21,464; A-1 Garbage Disposal & Trash Service, ASBCA No. 30623, 89-1 BCA ¶ 21,323.

3. Authority of the Trial Attorney.

a. A trial attorney has no inherent authority to settle claims. J. H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909.

b. The Chief Trial Attorney (CTA) of the Army can conclude settlement agreements subject to approval by the contracting officer, Head of the Contracting Activity (HCA), or the Assistant Secretary of the Army (ASA(RDA)). The contracting officer must consult the CTA before making a settlement offer or accepting an offer to settle a claim docketed with ASBCA. AFARS 33.212-90.

c. In the Navy, the contracting officer must concur with a trial attorney's decision to abandon or substantially modify any aspect of the Navy's case. The contracting officer must approve all final settlement agreements. NAPS 33.9002 (g) and (h).

D. General Considerations. As you decide whether to settle a case, consider the following factors:

1. Entitlement of contractor to some recovery;

2. Contractor assets, if any;

3. The amount in controversy;

4. The cost of defending the claim;

5. Maintaining credibility in the presence of a continuing relationship;

6. The interest of a third party such as a subcontractor, trustee in bankruptcy, Department of Justice (fraud coordination of remedies);

7. The presence of a government claim or counterclaim, and the willingness of parties to settle all claims;

8. The emotions of the parties;

9. Interest/attorney's fees (substantial justification for government's trial and settlement positions);

10. The organizational complexities of the government and the contractor (approval levels);

11. The extent to which the judge investigates the case before trial and clearly signals his position on the current state of the proof; and

12. Making bad la .

III. THE SETTLEMENT PROCESS.

A. "Do's and Don't's" of Negotiations.

1. The negotiator should use a checklist. Armed Services Pricing Manual (ASPM) Vol. 1, Chapter 8, (1986).

2. Be prepared. Know both sides of the table.

3. Maintain a written record of the negotiations.

4. Continually verify the information presented and received and the assumptions upon which the negotiation is based.

5. Never walk out of a negotiation unless you are prepared to terminate it.

6. Quit while you're ahead.

7. Negotiate in good faith and don't be hostile.

B. Computing the Settlement Amount.

1. Sources to consult when determining settlement amount.

a. Independent government estimate (IGE).

b. DCAA audit report.

c. Government Litigation Estimate.

2. Other Factors To Consider When Computing Amount.

a. Probability of success.

b. Amount of the claim.

c. Litigation costs to the government and contractor.

C. Settlement Timing.

1. Advantages of early settlement.

a. The contractor may not know full strength of its claim.

b. The contractor may not have retained counsel, so recovery of legal fees is not a consideration.

c. The government has not expended a large amount of resources or time.

d. The contractor may not be entrenched in its position.

2. Advantages of late settlement.

a. You may have detailed knowledge of the strengths and weaknesses of the positions.

b. The probability of success in litigation is easier to determine or may be reasonably calculated.

c. Discovery may reveal "fat" in the claim.

d. The government attorney has performed a detailed analysis of the facts and issues.

3. General rule: Settle when most advantageous to the government.

IV. DOCUMENTING THE NEGOTIATIONS AND SETTLEMENT.

A. Negotiation Documentation.

1. Detailed notes may avoid disputes over the terms of the agreement.

2. Focus upon agreements made and areas still disputed.

B. Use of a Memorandum of Understanding.

1. Memorialize areas of agreement.

2. State unresolved issues, commitments for further action, and the agenda for future negotiations.

3. If settlement is not reached, neither the memorandum, nor evidence of conduct or statements made during negotiations is admissible to prove entitlement or quantum. Federal Rule of Evidence (FRE) 408. See United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982); Abundis v. United States, 15 Cl.Ct. 619 (1988). Compare Int'l Gunnery Range Svcs., Inc., ASBCA No. 34152, 90-1 BCA ¶ 22,601 with Charles G. Williams Constr., Inc., ASBCA No. 39493, 90-1 BCA ¶ 22,592.

4. A memorandum of understanding may be sufficient to establish an accord which binds the contractor despite the lack of an executed SF 30. See Robinson Contracting Co. v. United States, 16 Cl. Ct. 676 (1989).

C. Settlement Documentation.

1. Written supplemental agreements or contract modifications are required. Standard Form (SF) 30; FAR 43.301; Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865 (Fed.Cir. 1987); Robinson Contracting Co. v. United States, supra (memo of understanding demonstrated accord); Christopher D. Constantinidis Constr. Co., ASBCA Nos. 34393, 34394, 90-1 BCA ¶ 22,267; Kasel Manufacturing Co., ASBCA No. 26975, 89-1 BCA ¶ 21,464.

2. Scope of the release. Supplemental agreements containing a release of claims should only be made after a contractor has presented all elements for which it claims an equitable adjustment is due. FAR 43.204(c).

3. A bilateral release agreement is generally an accord as to all subsequently asserted claims covered by its terms. B.D. Collins Constr. Co., ASBCA No. 42131, 91-2 BCA ¶ 24,021.

a. The circumstances of the signing of the release will be reviewed to discern the true intent of the parties. Hibbitts Constr. Co., ASBCA No. 37070, 90-1 BCA ¶ 22,598; JDV Constr., Inc., ASBCA No. 37937, 89-3 BCA ¶ 22,012.

b. Price adjustment modifications are narrowly construed. Saudi Tarmac Co. and Tarmac Overseas, Ltd., ENG BCA No. 4841, 89-3 BCA ¶ 22,132; Wright Assoc., Inc., ASBCA No. 33721, 87-3 BCA ¶ 20,056.

c. A release will not bar a claim where continued consideration of the claim indicates that the release did not constitute abandonment of the claim. Hibbitts Constr. Co., supra; C & W Electric Company, ASBCA No. 34236, 88-2 BCA ¶ 20,624.

d. A release based on mutual mistake, obvious unilateral mistake, fraud, or duress is unenforceable. Mingus Constructors, Inc. v. United States, 812 F.2d 1387 (Fed.Cir. 1987); Ben White Co., ASBCA No. 36496, 91-1 BCA 23,401 (continuation of debarment proceedings after settlement did not violate agreement).

e. Contract time extension, though negotiated and agreed to, may not bar subsequent price adjustment claim based upon the same circumstances. Middlesex Contractors & Riggers, Inc., IBCA No. 1964, 89-1 BCA ¶ 21,557; Kurtz & Root Co., ASBCA 17146, 74-1 BCA ¶ 10,943.

4. Effect of a general release. If a contractor executes a general release upon contract completion, the release ordinarily bars subsequent unexcepted claims. Woodington Corp., ASBCA No. 40607, 91-2 BCA ¶ 23,863 (reservation of claims too broad); Newport Constr., Inc., DOT BCA No. 2262, 91-1 BCA ¶ 23,366 (subcontractor claim barred).

5. Effect of final payment. Claims asserted after final payment are barred if the contract so specifies. American Western Corp. v. United States, 730 F.2d 1486 (Fed. Cir. 1986); Design and Production, Inc. v. United States, 18 Cl.Ct. 168 (1989).

V. ALTERNATIVE DISPUTE RESOLUTION (ADR).

A. Elements of ADR.

1. A dispute;

2. A voluntary election to engage in an alternative to formal litigation;

3. An agreement on technique and terms to be used; and

4. Participation by senior officials, neutral advisors, mediators, or arbitrators. In some cases a judge may participate to facilitate a settlement.

B. Defense Advisory Panel On Government-Industry Relations (DAPGIR). In January 1990, this panel made the following findings and recommendation:

1. More disputes should be resolved at the contracting officer level;

2. Contract disputes are too frequently resolved through litigation;

3. There is a lack of DoD policy concerning alternative dispute resolution (ADR), and parties are frequently unaware of its benefits; and

4. The DFARS should formalize the use of ADR procedures.

C. The Administrative Dispute Resolution Act. Pub. L. No. 101-552, 104 Stat. 2736 (1990).

1. In November 1990, Congress amended the Contract Disputes Act by authorizing the use of "any alternative means of dispute resolution" or "other mutually agreeable procedures." 41 U.S.C. § 605(d) (West Supp. 1991).

2. The lawmakers also amended the Administrative Procedures Act (APA) to provide specific ADR guidance and procedures. 5 U.S.C. §§ 581-593.

3. In addition to various ADR methods employed in the past, the Act authorizes arbitration. 5 U.S.C. § 585. An arbitration award is not binding, however, because the agency head may vacate it before it becomes final. 5 U.S.C. § 590(c). If the agency head vacates an award, the agency head shall grant attorney fees and expenses. 5 U.S.C. § 590(g). The act of vacating an award is not subject to judicial review. 5 U.S.C. § 591(b)(2).

4. If the agency head vacates an award, the agency head shall award attorney fees and expenses to a party to the arbitration.

5. An agency "shall consider not using" ADR if:

   a. Precedent is needed;

   b. Significant questions of government policy are involved;

   c. The matter significantly affects non-parties;

   d. A full public record is needed; or

   e. The agency requires continuing jurisdiction over the matter and the authority to alter the disposition in light of changed circumstances.

D. Current DoD Practices.

1. Corps of Engineers.

   a. Minitrials.

b. "Partnering."

2. U.S. Army Information Systems Selection and Acquisition Agency (ISSAA).

3. Army Materiel Command (AMC) Protest Program.

a. Encourages contractors to seek redress at the agency-level and before protesting to an external forum.

b. AMC Command Counsel is the Protest Decision Authority.

c. Counsel must issue a decision within 20 working days, and the decision is binding.

4. Armed Services and Engineer Boards of Contract Appeals.

a. Summary binding proceedings.

b. Settlement judges.

E. Will ADR Have a Fair Trial ?

1. Acceptance of ADR will depend on the extent to which agency policy encourages its use. At least one agency has contracted for a study of ADR methods. See National Academy of Conciliators, B-241529, February 19, 1991, 91-1 CPD ¶ 181.

2. The future of ADR may also be viewed in relation to its advantages and disadvantages.

a. Advantages of ADR.

(1) ADR is noncoercive.

(2) ADR is flexible.

(3) ADR affords an opportunity for expeditious and cost effective dispute resolution.

b. Disadvantages/criticisms of ADR.

(1) ADR cannot be used for all disputes.

(2) ADR lacks precedential value.

(3) Some perceive that proposing ADR is a sign of a weak case.

(4) ADR may result in a duplication of expense if settlement is not reached.

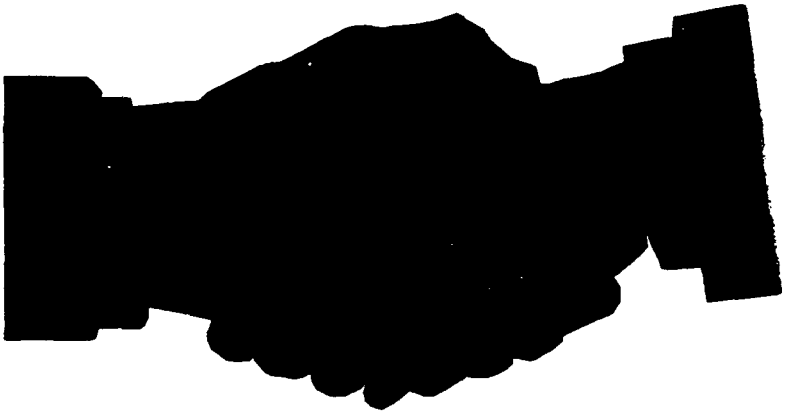
(5) Contractors may be reluctant to adopt arbitration as an ADR method since it is "non-binding."

(6) Commands may be reluctant to use ADR because it usually means the contractor will get something.

VI. CONCLUSION.

CHAPTER 5

TRUTH IN NEGOTIATIONS



CHAPTER 5

TRUTH IN NEGOTIATIONS

CHAPTER 5

TRUTH IN NEGOTIATIONS

I. INTRODUCTION - THE TRUTH IN NEGOTIATIONS ACT (TINA). Pub. L. No. 87-653; 10 U.S.C. § 2306a.

A. Background and History.

1. 1950--GAO discovers overpricing.

2. 1959--DoD regulation requires certificate of current pricing data.

3. 1961--DoD regulation adds price reduction clause.

4. 1962--TINA passed.

B. Definition of Cost or Pricing Data. FAR 15.801.

1. Cost or pricing data are factual, not judgmental, and are therefore verifiable.

2. Facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly.

LTC Glenn E. Monroe
4th Installation Course
August 1991

C. Defective Pricing Not Synonymous with Criminal Conduct.

II. GOVERNMENT RIGHT TO EXAMINE CONTRACTOR'S BOOKS AND RECORDS.

A. Contracting Agency's Right.

1. Statutory basis. 10 U.S.C. § 2306a(f); 10 U.S.C. § 2313a.

a. Section 2306a(f) permits any authorized representative of the head of an agency who is a government employee or a member of the armed services to examine all records of a contractor or subcontractor related to:

(1) The proposal for the contract or subcontract.

(2) The discussions conducted on the proposal.

(3) The pricing of the contract or subcontract.

(4) The performance of the contract or subcontract.

b. The Section 2306a(f) audit right exists for the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted.

c. Section 2313a permits DoD, NASA, and the Coast Guard, acting through an authorized representative, to inspect the plant and records of a contractor or subcontractor in connection with cost or cost-plus-fixed-fee contracts.

2. Contract audit clauses. FAR 52.214-26 (Sealed Bidding), 52.215-2 (Negotiation).

a. The Audit-Sealed Bidding clause permits the contracting officer or a representative who is an employee of the government to audit "cost or pricing data" submitted in connection with a modification of a contract.

b. The Audit-Sealed Bidding clause gives the agency the right to examine and audit all books, records, documents and other data (including computations and projections) relating to negotiating, pricing, or performing a modification.

c. The Audit-Negotiation clause gives the contracting officer or a representative who is an employee of the government the right to examine and audit all books, records, documents and other data (including computations and projections) relating to proposing, negotiating, pricing, or performing a contract or a modification to ensure compliance with TINA.

d. The Audit-Negotiation clause also gives the contracting officer or representatives of the Contracting Officer the right to examine and audit books, records, documents, and other evidence and accounting practices and procedures with respect to cost-based contracts for verification of a contractor's claimed costs.

3. Subpoena power. 10 U.S.C. § 2313(d).

a. The Director, Defense Contract Audit Agency (DCAA), may require by subpoena the production of books, documents, papers, or records of a contractor, access to which is granted the Secretary of Defense by section 2306a(f) or by section 2313a of Title 10.

b. DCAA acts as a representative of the contracting officer under the FAR audit clauses.

c. The subpoena power extends to the production of books, documents, papers, and records of a contractor or subcontractor that directly pertains to and involves transactions relating to the contract or subcontract.

4. Scope of agency's right.

a. DCAA's subpoena power does not extend to a contractor's internal audit reports. United States v. Newport News Shipping and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988) (Newport News I).

(1) Internal audits are not related to a particular contract.

(2) Internal audits contain a contractor's audit staff's subjective evaluations.

(3) DCAA's subpoena is aimed at obtaining objective data upon which a contractor's specific costs charged to government can be evaluated.

b. DCAA's subpoena power does extend to a contractor's federal income tax returns and other financial data. United States v. Newport News Shipping and Dry Dock Co., 862 F.2d 464 (4th Cir. 1988) (Newport News II).

(1) DCAA's subpoena power is not limited to records relating to a contractor's pricing practices.

(2) DCAA's subpoena power also extends to objective factual records relating to overhead costs which may be passed onto the government.

c. DCAA's subpoena power does extend to a company's estimates and projections of future labor rates and expenditures. United States v. Newport News Shipping and Dry Dock Co.; 737 F. Supp. 897 (E.D. Va. 1989) (Newport News III), 900 F.2d 257 (4th Cir. 1990) (unpublished opinion affirming district court decision).

(1) The Audit-Negotiation clause (FAR 52.215-2) expressly includes computations and projections in the list of materials to which DCAA has access.

(2) The contractor acknowledged that it had routinely disclosed information in the form of estimates and projections to allow DCAA to evaluate cost or pricing data.

B. General Accounting Office's Right.

1. Statutory basis. 10 U.S.C. § 2313(b); 41 U.S.C. § 254.

a. Both statutes give the Comptroller General and his representatives the right to examine a contractor's or subcontractor's books and records related to any contract awarded using other than sealed bidding procedures.

b. The Comptroller General's right applies to any books, documents, papers or other records that directly pertain (Title 10 provision) to and involve transactions related to the contract. The Title 41 provision states that this right applies to records that are directly pertinent.

2. Audit clauses. FAR 52.215-1.

a. This clause applies to all negotiated contracts exceeding $10,000.

b. This clause gives the Comptroller General the right to examine and audit any directly pertinent books, documents, papers, or other records involving transactions related to the contract.

c. A prime contractor must include a clause in first-tier subcontracts granting GAO similar audit rights.

3. Subpoena power. 31 U.S.C. § 716.

a. Section 716 gives the Comptroller General the power to subpoena records of a person to which the Comptroller General has access to by law or by agreement.

b. The Comptroller General may enforce his subpoena through action in a U.S. district court. United States v. McDonnell-Douglas Corporation, 751 F.2d 220 (8th Cir. 1984).

4. Scope of the General Accounting Office's right.

a. The term "contract" as used in the statute embraces not only the specific terms and conditions of a contract, but also the general subject matter. Hewlett-Packard Company v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).

b. The Comptroller General's audit right is very broad with respect to cost-based contracts. With respect to fixed-price contracts, the books or records must bear directly on the question of whether the government paid a fair price for the goods or services. See generally Bowsher v. Merck & Company, 460 U.S. 824 (1983).

C. Inspector General's Right.

1. Statutory basis. 5 U.S.C. App. § 6(a)(1) & (4).

a. The Inspector General of an agency has the right to examine all records, reports, audits, reviews, documents, papers and recommendations or other material that relate to programs and operations over which that agency has responsibility.

b. This statutory right has no contractual implementation.

2. Subpoena power. 5 U.S.C. App. § 6(a)(1) & (4).

a. An Inspector General may subpoena all data and documentary evidence necessary in the performance of its function.

b. The subpoena may be enforced through action in a U.S. district court.

3. Scope of Inspector General's audit right. The scope of the Inspector General's audit right is extremely broad and includes internal audit reports. United States v. Westinghouse Electric Corp., 788 F.2d 164 (3d Cir. 1986).

D. Time Limitation on Government Right to Examine Contractor's Books and Records. The government's audit rights exist generally for three years after final payment.

E. Obstruction of Federal Audit. 18 U.S.C. § 1516.

1. The statute does not increase or enhance the government's audit rights.

2. The statute makes it a crime for anyone to influence, obstruct, or impede a Federal auditor (full or part-time government or contractual employee) with the intent to deceive or defraud the government.

III. REQUIREMENT FOR THE SUBMISSION OF COST OR PRICING DATA. 10 U.S.C. § 2306a(f); FAR 15.804-2.

A. Mandatory. Pub. L. No. 101-501, § 803; Pub. L. No. 102-25; FAR 15.804-2(a)(1); see also 5 December 1990 memorandum from E. R. Spector, Deputy Assistant Secretary of Defense for Procurement, authorizing a deviation to apply new threshold in all regulatory guidance and clauses.

1. Award of a negotiated contract expected to exceed $500,000 entered into after December 5, 1990.

2. Pricing of any prime contract change involving a price adjustment expected to exceed $500,000 of a prime contract entered into after December 5, 1990.

3. Award of any subcontract expected to exceed $500,000 of a prime contract entered into after December 5, 1990.

4. Pricing of any subcontract change involving a price adjustment expected to exceed $500,000 of a prime contract entered into after December 5, 1990.

B. Nonmandatory. Pub. L. No. 101-501, § 803; FAR 15.804-2(a)(2); 5 December 1990 memorandum from E. R. Spector, Deputy Assistant Secretary of Defense for Procurement, authorizing a deviation to apply new threshold in all regulatory guidance and clauses.

1. A contracting officer may require the submission of cost or pricing data for pricing actions over $25,000 but less than $500,000.

2. Regulatory guidance merely states that there should be few instances which justify the requirement for certified cost or pricing data for action.

3. The 5 December 1990 DoD memorandum states that a contracting officer should consider the submission of cost or pricing data if the offeror, contractor, or subcontractor:

a. Has recently used fraudulent cost estimating or fraudulent cost accounting practices in performance of government contracts;

b. Currently has significant deficiencies in such estimating systems; or

c. Has been the subject of recent recurring and significant findings of defective pricing.

4. The data required shall be limited to that necessary to determine the reasonableness of the price.

C. Prohibition. When awarding a contract for less that $25,000, the contracting officer shall not require certified cost or pricing data. FAR 15.804-2(a)(2).

D. Certified Cost or Pricing Data. When required, certified cost or pricing data are comprised of two elements (FAR 15.804-2(b)):

1. Cost or pricing data; and

2. A Certificate of Current Cost or Pricing Data certifying that to the best of the contractor's knowledge and belief, the cost or pricing data were accurate, complete, and current <u>as of the date of final agreement on price</u>.

IV. EXEMPTIONS TO THE REQUIREMENT FOR THE SUBMISSION OF COST AND PRICING DATA. 10 U.S.C. § 2306(f)(3); FAR 15.804-3.

A. Adequate Price Competition. FAR 15.804-3(b)(1); Ramal Industries, Inc., B-224375, October 6, 1986, 86-2 CPD ¶ 397.

1. Price competition exists if:

a. Offers are solicited.

b. Two or more responsible offerors submit responsive offers.

c. Offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

2. A price is "based on" adequate price competition:

a. If it results directly from price competition; or

b. If price analysis alone clearly shows the price is reasonable in comparison with current or recent prices for similar items in comparable quantities, terms, and conditions under contracts that resulted from adequate price competition.

3. Where there is a reasonable expectation of adequate price competition, a contracting officer should rarely have a need to require the submission or certification of cost or pricing data. DFARS 215.804-3.

4. Adequate price competition may exist for any contract, even though price is not the primary evaluation factor, provided that price is a substantial factor in the source selection criteria. DFARS 215.804-3; SerAir, B-189884, April 22, 1988, 78-2 CPD ¶ 223.

5. If price competition exists, the contracting officer presumes it is adequate unless:

   a. One or more known and qualified offerors unreasonably denied opportunity to compete;

   b. Low offeror practically immune from competition; or

   c. There is a finding made at one level above the contracting officer that the lowest price is unreasonable.

B. Established Catalog or Market Price. FAR 15.804-3(c).

1. Prices are, or are based on, established catalog prices or established market prices of commercial items sold in substantial quantities to the general public.

2. Prices must be based on similar items.

3. Overcoming the exemption:

   a. The contracting officer makes a written finding that the price is not reasonable.

   b. This finding is approved at a level above the contracting officer.

C. Prices Set by Law or Regulation. FAR 15.804-3(d) (utilities or commissions).

D. Agency Waiver. The agency head may waive the requirement for the submission of certified cost or pricing data by written justification. FAR 15.804-3(i).

E. Procedure for Claiming an Exemption for Established Catalog or Market Price and for Prices Set by Law or Regulation. FAR 15.804-3(e), (f).

1. The contractor's request is submitted to the contracting officer on Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data.

2. The contracting officer must verify that requirements for an exemption are met.

3. The chief of a contracting office may authorize individual or class exemptions in exceptional cases.

4. The contracting officer must conduct a price analysis to determine the reasonableness of the price.

F. Improperly Granted Exemptions Void. Procurement officials may not waive the statutory requirement to furnish cost or pricing data. M-R-S Manufacturing Co. v. U.S., 203 Ct. Cl. 551, 492 F.2d 835 (1974).

V. DEFINITION OF COST OR PRICING DATA.

A. Definition of Cost or Pricing Data.

1. Statutory Definition: "Cost or pricing data" means all facts that, as of the date of agreement on the price of a contract (or a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgement is derived (emphasis added). 10 U.S.C. § 2306a(g).

2. Regulatory definition: "Cost or pricing data" means all facts as of the time of price agreement that prudent buyers or sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. FAR 15.801.

3. Examples of cost or pricing data. FAR 15.801.

   a. Vendor quotations.

   b. Nonrecurring costs.

   c. Information on changes in production methods and in production or purchasing volume.

   d. Data supporting projections of business prospects and objectives and related operations costs.

   e. Unit-cost trends such as those associated with labor efficiency.

   f. Make-or-buy decisions.

   g. Estimated resources to attain business goals.

h. Information on management decisions that could have a significant bearing on costs.

B. Fact versus Judgment.

1. Fact versus judgment distinction is often difficult to make. Millipore Corporation, GSBCA No. 9453, 91-1 BCA ¶ 23,345; Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489; Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195; Boeing Military Airplane Co., ASBCA No. 33168, 87-2 BCA ¶ 19,714; Grumman Aerospace Corp., ASBCA No. 27476, 86-3 BCA ¶ 19,091; Bell & Howell Company, ASBCA No. 11999, 68-1 BCA ¶ 6993.

a. Judgmental information is not required to be certified, but it may be required to be disclosed.

b. Intertwined judgments difficult area--facts and data so intertwined with judgments that judgmental information should be disclosed to make the facts and data meaningful.

c. Discussion of case examples.

2. Historical subcontractor and vendor pricing information are cost or pricing data. Grumman Aerospace Corporation, ASBCA Nos. 35188, 35189, 90-2 BCA ¶ 22,842; see also Memorandum from E. R. Spector, Deputy Assistant Secretary of Defense for Procurement, "Contractor Cost Estimating Systems," (April 6, 1989).

   a. This type of information is often called decrement history/factors: historical percentage reduction obtained by a prime contractor from its subcontractors' initial prices.

   b. The contracting officer should insist on receiving such information.

   c. A price reduction should be taken if the contractor fails to submit decrement history, or submits defective decrement history.

C. Cost or Pricing Data must be Significant Data.

1. The data must be disclosed if a reasonable person (prudent buyers and sellers) would expect it to be significant to the price negotiations. Plessey Industries, Inc., ASBCA No. 16720, 74-1 BCA ¶ 10,603.

2. Prior purchases of similar items are significant data. Kisco Company, ASBCA No. 18432, 76-2 ¶ 12,147; Hardie-Tynes Manufacturing, Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.

3. The duty to disclose extends not only to data which a contractor knows it will use, but also to data that the contractor may use. If a reasonable person would consider the data in determining cost or price, the data is significant and must be disclosed. Hardie-Tynes Manufacturing, Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.

4. The amount of the overpricing is not determinative of whether the informatior is significant. Kaiser Aerospace & Electronics Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489 (overpricing constituted two-tenths of one percent of total price); Conrac Corporation v. United States, 214 Ct. Cl. 561, 558 F.2d 994 (1977) (overpricing constituted one-tenth of one percent of the total price).

VI. THE SUBMISSION OF COST OR PRICING DATA.

A. Procedural Requirements for the Submission of the Data.

1. Cost or pricing data must be submitted on Standard Form 1411, Contract Pricing Proposal Cover Sheet. FAR 15.804-6(b); FAR Table 15-2.

2. The submission should be made to the contracting officer, or his/her authorized representative. The Singer Company, Librascope Division v. United States, 217 Ct. Cl. 225, 576 F.2d 905 (1978); Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489.

3. Cost or pricing data may be submitted physically or by specific identification in writing. FAR 15.804-1(a).

4. If data is "identified," the submission should answer the following questions (Armed Services Pricing Manual, para. 3-35):

   a. What is it?

   b. Where is it?

   c. How was it used?

   d. What does it represent?

B. Adequate Disclosure of Cost or Pricing Data.

1. The contractor must provide or identify all cost or pricing data reasonably available at the time of agreement on price. FAR 15.804-4(c).

   a. The contractor is required to update previous submissions.

b. The contractor's duty to provide updated data is not limited to the personal knowledge of its negotiators if the undisclosed facts are known to its management.

c. Data within the contractor's or subcontractor's organization on matters significant to contractor management and to the government are considered to be readily available. FAR 15.804-4(c).

2. Merely making records available is not sufficient; the contractor must advise the government of the kind and content of the cost or pricing data and its bearing on the contractor's proposal. FAR 15.804-6(d); M-R-S Manufacturing Co.v. United States, 203 Ct. Cl. 551, 492 F.2d 835 (1974)].

3. The contractor must provide a reasonable explanation of the data, unless its significance is self-evident. Knowledge by the other party of the data's existence is no defense if a reasonable explanation is necessary to appreciate the data's significance to the negotiations. Grumman Aerospace Corporation, ASBCA Nos. 35188, 35189, 90-2 BCA ¶ 22,842; Boeing Company, ASBCA No. 32753, 90-1 BCA ¶ 22,270, mot. for recon. denied, 90-1 BCA ¶ 22,426.

VII. CERTIFICATION OF DATA.

A. Failure to Submit Certificate. The contractor's liability is not affected by its failure to provide a certificate. 10 U.S.C. § 2306a(e)(2); S.T. Research Corp., ASBCA No. 29070, 84-3 BCA ¶ 17,568

B. Due Date for Certification. Certification is due as soon as practicable after price agreement is reached. FAR 15.804-4(a); S.T. Research Corp., supra.

C. Waiver of Certification Requirement. The certification requirement may be waived if award is based on adequate price competition, established catalog or market prices, or prices set by law or regulation. FAR 15.804-4(e).

D. Submission of Additional Cost or Pricing Data. Action to take upon submission of additional cost or pricing data. Memorandum from E. R. Spector, Deputy Assistant Secretary of Defense for Procurement, "Contractor Delays in Submitting Certificates of Current Cost or Pricing Data," (June 7, 1989).

1. Obtain a statement from the contractor summarizing the impact of the additional data.

2. Reduce the price if the data indicates that the negotiated price was increased by any significant amount.

3. Price negotiation memorandum should list the data, and identify the extent to which such data was relied upon to establish a fair and reasonable price.

VIII. **FRAUD INDICATORS. DOD IG'S HANDBOOK ON INDICATORS OF FRAUD IN DOD PROCUREMENT, NO 4075-1H, JUNE 1987.**

A. High incidence of persistent defective pricing.

B. Continued failure to correct know system deficiencies.

C. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.

D. Failure to make complete disclosure of data known to responsible personnel.

E. Protracted delay in updating cost or pricing data to preclude possible price reduction.

F. Repeated denial by responsible contractor employees of the existence of historical records that are subsequently found.

G. Repeated utilization of unqualified personnel to develop cost or pricing data used in estimating process.

IX. CONTRACTUAL REMEDIES.

A. Contract Price Reduction. FAR 15804-7; FAR 52.215-22, 52.215-23.

1. The government is entitled to a reduction in the contract price (including profit or fee) for any significant amount by which the price was increased because of defective cost or pricing data. 10 U.S.C. § 2306a(d)(1)(A).

2. Amount of reduction: any significant amount by which the price was increased. FAR 15.804-7(b); Unisys Corporation v. United States, 888 F.2d 841 (Fed. Cir. 1989); Kaiser Aerospace & Electronics Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489; Etowah Manufacturing Co., ASBCA No. 27267, 88-3 BCA ¶ 21,054].

B. Government's Burden of Proof.

1. The information fits the definition of cost or pricing data and it existed before the agreement on price.

2. The data was reasonably available before agreement on price.

3. The data submitted by the contractor was not accurate, complete, or current.

4. The government relied on the defective data.

5. The government's reliance on the defective data caused an increase in the contract price.

C. Defenses to a Price Reduction.

1. The information at issue was not cost or pricing data.

2. The government did not rely on the defective data.

3. The price offered by the contractor was a "floor" below which the contractor would not have gone.

D. Not Defenses to a Price Reduction.

1. The contractor is a sole source. 10 U.S.C. § 2306a(d)(3)(A)(i).

2. The contractor was in a superior bargaining position. 10 U.S.C. § 2306a(d)(3)(A)(ii).

3. The contracting officer should have known that the data was defective. 10 U.S.C. § 2306a(d)(3)(B); FMC Corporation, ASBCA No. 30069, 87-1 BCA ¶ 19,544.

4. The contract price was based on total cost. 10 U.S.C. § 2306a(d)(3)(C).

5. The contractor or subcontractor did not submit a certificate of current cost or pricing data. 10 U.S.C. § 2306a(d)(3)(D).

E. Offsets. 10 U.S.C. § 2306a(d)(4)A)(B); FAR 15.804-7(b)(4), (b)(5), (b)(6).

1. The contractor is entitled to a credit for any understated cost or pricing data up to the amount of the government claim for overstated cost or pricing data arising out of the same transaction.

2. The offsets do not need to be in same cost grouping.

3. The contractor must prove that the higher cost or pricing data existed prior to the date of agreement on price and that the data were not submitted.

4. The contractor is not entitled to an offset if:

a. The contractor knew that its cost or pricing data were understated at the time it executed its certificate.

b. The government proves that submission of such data would not have resulted in an increase in the price in the amount to be offset.

X. JUDICIAL REMEDIES.

A. Criminal.

1. False Claims. 18 U.S.C. § 287.

2. False Statements. 18 U.S.C. § 1001.

3. The Major Fraud Act. 18 U.S.C. § 1031.

B. Civil.

1. False Claims. 10 U.S.C. §§ 3729-3733.

2. The Program Fraud Civil Remedies Act of 1986. 31 U.S.C. §§ 3801-3812; DOD Dir. No. 5505.5 (Aug. 30, 1988).

XI. ADMINISTRATIVE REMEDIES.

A. Suspension and Debarment. FAR Subpart 9.4; DFARS Subpart 209.4.

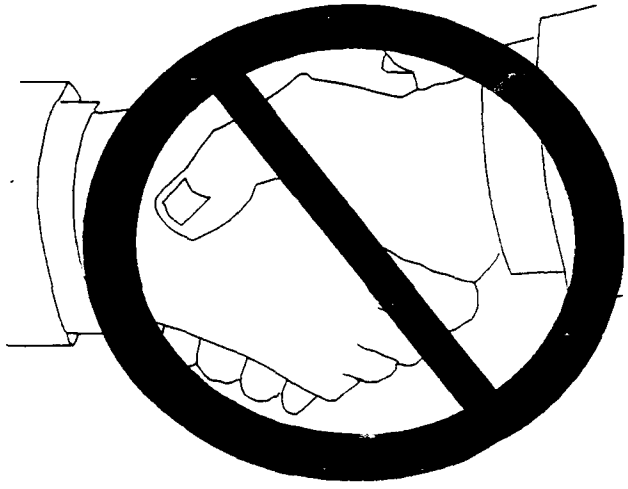
B. Cancellation of the Contract. 10 U.S.C. § 218; FAR Subpart 3.7.

C. Termination of the Contract. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff'd, 757 F.2d 1273 (Fed. Cir. 1985.

XII. CONCLUSION.

CHAPTER 6

NEW
BID
RULES



CHAPTER 6

NEW BID PROTEST RULES

Distinguished Guest Speaker

Mr. Steven L. Schooner
Trial Attorney, Claims Court Section
Commercial Litigation Branch
Civil Division, Department of Justice

STEVEN L. SCHOONER

Steven Schooner is a trial attorney in the Claims Court section of the Department of Justice, Civil Division, Commercial Litigation Branch. Before joining the Justice Department, Mr. Schooner practiced government contract law at a private firm and served as a Commissioner at the Armed Services Board of Contract Appeals (on active duty in the Army Judge Advocate General's Corps). Mr. Schooner earned his bachelor's degree from Rice University, a Juris Doctor from the College of William & Mary, and a Master of Laws in Government Procurement Law (with highest honors) from George Washington University. He is a Certified Professional Contract Manager (CPCM) and a member of the American Arbitration Association Panel of Arbitrators, Virginia and District of Columbia Bars, the American Bar Association Public Contract Law Section, the Federal Bar Association, and the National Contract Management Association.

Mr. Schooner has written and lectured on various issues including the Federal Acquisition Regulation, practice before the Boards of Contract Appeals, impossibility of performance, the Davis-Bacon Act, the Buy-American Act, recovery of attorney's fees, interorganizational transfers, parallel proceedings, terminations, public contract law research, source selection, environmental issues, architect-engineer liability, and copyright. Mr. Schooner serves as an associate editor of the Public Contract Law Journal.

BID PROTESTS:
GENERAL ACCOUNTING OFFICE:
NEW PROCEDURES FOR 1991

I. The New Rules Generally

A. References

1. 4 C.F.R. 21 (April 1, 1991).

2. Bid Protests at GAO: A Descriptive Guide (GAO, 4th ed. 1991). Order from:

   U.S. General Accounting Office
   P.O. Box 6015
   Gaithersburg, MD 20877

   or by calling (202) 275-6241. The first five copies are free; additional copies are $2 each.

3. Dorsey, Contract Law Note: GAO Revises Bid Protest Rules, June 1991 Army Lawyer 44-47.

4. 55 Fed. Cont. Rep. 115 (BNA February 4, 1991); 55 Fed. Cont. Rep. 467 (BNA April 15, 1991); 55 Fed. Cont. Rep. 677 (BNA May 20, 1991).

B. The Major Changes

1. Hearing Procedures

2. Production of Document and Protective Orders

3. Attorney's Fees

4. The Timeliness Issue: Permitting Prompt Dismissal of Protests With Jurisdictional/Procedural Defects

   "It is the protestor's obligation to include in its protest all the information needed to demonstrate its timeliness and protestors will not be permitted to introduce for the first time in a request for reconsideration filed pursuant to § 21.12 the information upon which the timeliness of the protest relies." 4 C.F.R. 21.2(b)

II. Hearing Procedures

A. A single "hearing" procedure replaces the choice between "informal" and "fact-finding" conferences. 4 C.F.R. 21.5.

B. GAO may hold a pre-hearing conference. 4 C.F.R. 21.5(b).

C. In addition to hearings in Washington, D.C., the GAO may hold hearings at "other appropriate locations." 4 C.F.R. 21.5(c).

D. Who may attend? 4 C.F.R. 21.5(d), (e), (g).

1. All interested parties.

2. Other participants in the procurement may attend as observers; may participate only to the extent allowed by GAO.

3. GAO may restrict attendance if privileged information is to be disclosed.

4. Parties must be represented by **individuals who are knowledgeable about the subject matter of the protest.** GAO may:

a. designate representatives to attend hearings;

b. question these representatives; and

c. draw negative inferences if parties fail to comply.

E. Hearings will be recorded and/or transcribed. 4 C.F.R. 21.5(f).

F. Advance text of the GAO Bid Protest Hearing Guidelines published. 55 Fed. Cont. Rep. 490 (BNA April 15, 1991).

III. Production of Documents and Protective Orders

A. The protestor and all interested parties receive a copy of the agency report. 4 C.F.R. 21.3(c).

B. Any party may request a protective order limiting the release of particular documents to counsel for the protestor and the interested parties. 4 C.F.R. 21.3(d).

1. Information must be privileged or the release of the information would result in a competitive advantage.

2. Objections to coverage by the protective order must be filed within 2 days; rebuttals must be filed within 1 day after receipt of a copy of the request.

3. Terms of the protective order **shall** be established prior to the agency report due date.

4. Access requires an application certifying that the individual is not involved in competitive decisionmaking in connection with federal procurements **and** a detailed written statement in support. (Not applicable to agency employees.)

C. Violation of the protective order may result in sanctions, including referral to appropriate bar associations and restricting practice before the GAO. Also, the injured party shall be entitled to legal or equitable remedies. 4 C.F.R. 21.3(d)(5).

D. Failure by the agency to provide documents may permit the GAO, pursuant to 4 C.F.R. 21.3(i),to:

1. provide the documents to the party;

2. obtain the documents pursuant to 7 U.S.C. § 31;

3. draw unfavorable inferences;

4. bar responses to certain arguments or bases of protest by the agency; or

5. impose sanctions.

E. Model GAO Protective Orders and notification letters have been published: 55 Fed. Cont. Rep. 699 (BNA May 20, 1991); 55 Fed. Cont. Rep. 492 (BNA April 15, 1991).

IV. Attorney's Fees

A. References

1. 4 C.F.R. 21.6(d), (e), and (f).

2. United States v. Instruments, S.A., No. 91-1574 (D.C. D.C.).

3. Amendment to S.1507.

4. 56 Fed. Cont. Rep. 54 (BNA July 8, 1991); 56 Fed. Cont. Rep. 105 (BNA July 22, 1991); 56 Fed. Cont. Rep. 169, 194 (BNA August 5, 1991); 56 Fed. Cont. Rep. 300 (BNA August 26, 1991).

B. Protestors may recover attorney's fees and protest costs if:

1. GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation; or

2. The agency takes corrective action in response to a protest.

C. Procedures for determining attorney's fees and costs.

1. The protestor and the agency **shall** attempt to reach agreement on the amount.

2. Protestors must submit claims for costs to the CO within 60 days of receipt of the GAO decision or declaration of entitlement to costs.

3. Protestors must detail and certify time expended and costs incurred.

4. CO must render decision as soon as practicable.

5. GAO determines amount (including costs of pursuing costs claim) if parties cannot agree.

D. The Attorney's Fee Debate

1. A proposed amendment to the FAR would treat GAO awards of protest costs as "advisory recommendations."

2. The Department of Justice filed suit in federal court seeking a declaratory judgment that the statute that allows GAO to award fees and costs to protestors, 31 U.S.C. § 3354(c), is an unconstitutional violation of the separation of power doctrine.

3. Recall Ameron (challenging the ability of the GAO to stay the award of contract by an executive agency) which the Government withdrew after the Supreme Court granted certiorari.

4. The Attorney General refused to testify before the House Judiciary Committee. Representative Jack Brooks threatens to cut the Department of Justice's Appropriation.

5. Senator Carl Levin's amendment to modify the CICA passes the Senate.

V. The 1990 Statistics

A. More Protestors Are Winning

Bad News: Compared to FY 1989, the number of protests sustained rose (90 to 115), but, more significantly, the protestor effectiveness rate increased from 25 percent to 35 percent.

Good News: GAO's caseload decreased by 140 protests (2,957 in FY 1989 compared to 2,817 in FY 1990).

For The Record: DOD protests are more likely to be resolved without the need for a decision than were protests filed against civilian agencies. The difference is reflected in the higher sustain (but lower effectiveness) rates for protests concerning civilian agencies.

B. GAO's FY 1990 Statistics: See 55 Fed. Cont. Rep. 309, 327 (BNA March 11, 1991).

1. GAO considers a protest **sustained** if the protest is decided by GAO on its merits. (Dismissed cases are not decisions on the merits.)

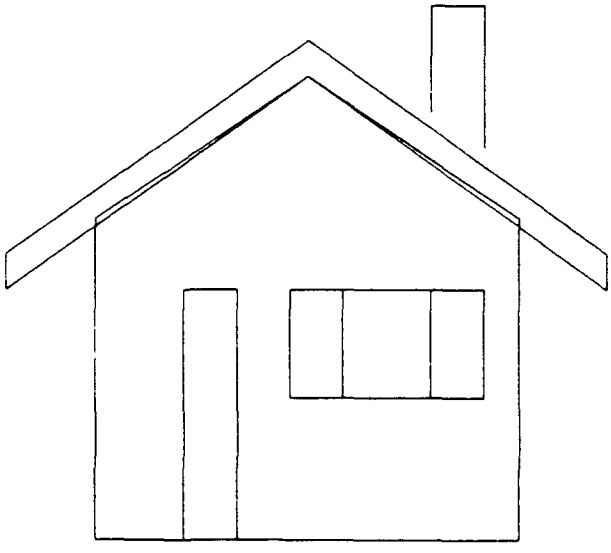
2. GAO uses the term **effectiveness rate** to reflect the probability that any protest filed resulted in voluntary corrective action by the agency or in a GAO decision sustaining the protest.

3. The Bottom Line

	Total Protests	Merits Decision	Protests Sustained	Percentage Sustained	Effective Rate
All Protests	2507	856	115	13.43	35.15
DOD	1672	568	68	11.97	35.85
Army	527	165	18	10.90	34.41
Navy	481	178	20	11.23	37.16
Air Force	372	134	19	14.17	34.52
Marine Corps	20	6	0	0	30.00
Other DOD	45	16	2	12.50	39.59
Treasury	21	11	4	36.36	61.90
EPA	16	9	0	0	6.25
Civilian	831	288	47	16.31	33.99

CHAPTER 7

CONSTRUCTION FUNDING: FAMILY HOUSING



Chapter 7

CONSTRUCTION FUNDING: FAMILY HOUSING

CHAPTER 7

CONSTRUCTION FUNDING: FAMILY HOUSING

I. **REFERENCES.**

A. 10 U.S.C. §§ 2821-2832 (West 1983 & Supp. 1991) (Military Construction Codification Act).

B. AR 210-50, Housing Management (24 April 1990).

C. AR 210-13, General/Flag Officer's Quarters and Installation Commander's Quarters Management (31 May 1991).

D. AR 420-10, Management of Installation Directorates of Engineering and Housing (3 August 1987).

E. Air Force Reg. 172-1, Volume 1, USAF Budget and Procedures (Dec. 1986), ch. 21.

F. Army Reg. 37-1, Army Accounting and Fund Control (1 Oct. 1989).

G. Air Force Reg. 86-1, Volume 1, Programming Civil Engineer Resources--Appropriated Fund Resources (May 1984), ch. 5.

H. SECNAVINST 11013.13E, Unspecified Minor Construction, Emergency Construction, and Restoration or Replacement of Facilities Damaged or Destroyed (14 Oct. 1983).

I. OPNAVINST 11010.20E, Facilities Projects Manual (9 July 1985).

J. Munns, An Analysis of the Military Construction Codification Act, The Army Lawyer, Nov. 1987.

MAJ Michael K. Cameron
4th Installation Contracting Course
September 1991

Chapter 7

II. INTRODUCTION.

III. HOUSING PROGRAMS APPROPRIATIONS.

A. Operation and Maintenance.

B. Military Construction (MILCON) Act.

1. Military Construction.

2. Family Housing.

a. Is a self-contained, life-cycle facilities appropriations.

b. Funds are fenced.

(1) Exceptions:

(a) For projects where both family housing and non-family housing facilities are substantially benefitted, costs of maintenance and repair will be pro-rated.

(2) For projects that essentially support either family housing or non-family housing facilities, maintenance and repair costs should be charged entirely to either Family Housing or Operations and Maintenance as appropriate.

IV. IMPROVEMENTS TO FAMILY HOUSING.

A. Types of Work on Family Housing. AR 210-50, Glossary, Section II.

1. Maintenance is work required to preserve or maintain a real property facility in such a condition that it may be effectively used for its designated functional purpose.

2. Repair is the restoration of a real property facility to such a condition that it may be effectively used for its designated functional purpose.

a. Includes the overhaul, replacement, or reprocessing of parts and materials that have been damaged by action of the elements or wear and tear in use.

b. Includes fixing or replacing failed or failing components of a facility or its systems to meet current Army standards and building/safety codes.

c. Caveat: Replacement of a complete real property facility that has been damaged or destroyed is construction.

3. Construction is the erection, installation or assembly of a new facility. AR 210-50, Glossary. Construction includes:

a. New construction - the erection, installation, or assembly of a new family housing unit.

b. Improvement - an alteration, addition, expansion, extension, conversion, or replacement of an existing family housing unit.

c. NOTE: Minor improvements made within the cost limitations of Family Housing O&MA Program are called "Incidental Improvements."

B. Funding of Work on Family Housing. AR 210-50, para. 2-4.

1. Congress provides funds for the operation, maintenance, repair, and construction of military family housing in the annual Military Construction Appropriation Act (MCAA).

2. Funds for family housing are allocated to a single DoD Military Housing Management Account. Upon receipt of the funds, DoD further allocates funds to each military service.

3. In the Army, the family housing account is broken down in three programs: Debt Payment; Construction; and Operation and Maintenance. Military Construction Appropriations Act, 1991, Pub. L. 101-519, 104 Stat. 2243 (5 November 1990).

C. Maintenance and Repair - Family Housing Operation and Maintenance program (O&MA Funds).

1. Approval: Before maintenance or repair work can be accomplished on family housing, the project for a designated housing area must be approved. Approval authorities are [AR 210-50, Appendix B]:

a. Installation Commander - as delegated by the MACOM.

b. MACOM:

- Less than $1,000,000 per project.

- MACOM approval is subject to an administrative limit of 50% of dwelling unit (DU).

c. HQDA:

- Projects over $1,000,000.

- Not to exceed 50% of the replacement cost of the affected DU.

2. Statutory limitation - concurrent projects: If improvements (construction), including incidental improvements, are accomplished concurrently with maintenance and repair, the total cost of all work for an individual dwelling unit will not exceed $50,000. National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, § 2812, 104 Stat. 1788 (5 November 1990), amending 10 U.S.C. § 2825(b)(1); AR 210-50, paras. 7-21 and 11-8 ($40,000).

a. The statutory limit is applicable to <u>all</u> family quarters.

b. The statutory limit is effective throughout execution of the improvement and maintenance/repair project, even if the project crosses fiscal years.

c. This limitation does not apply to repair or restoration of a dwelling unit damaged by fire, flood, or other disaster.

d. To ensure that the statutory limit is not exceeded, any maintenance and/or repair project having a cost approaching or exceeding $50,000 per dwelling unit must be examined to ascertain that no construction work is included.

e. Exceptions - The statutory limit on concurrent construction and repair/maintenance projects does not apply to:

- Repair work which could not reasonably be discovered prior to construction.

- Repair of building components such as subflooring and roof sheathing, or equipment which fails during the construction period.

f. Concurrent improvement (construction) and maintenance/repair projects that will exceed the $50,000 statutory limit must be submitted to OASA for approval.

3. Administrative limitation: The cost for all major maintenance/repair projects, including concurrent incidental improvements (construction), is limited to $15,000 per dwelling unit per fiscal year. AR 210-50, para. 7-19.

a. This limitation includes:

- All non-routine maintenance/repair and incidental improvements done within the dwelling unit's 5-foot building line.

- In buildings with more than one dwelling unit, work performed in common use areas or on structural components that are within the 5-foot building line is prorated to each dwelling unit.

b. This limitation excludes:

- Routine day-to-day maintenance and repairs.

- Work performed during change of occupancy.

- Self-help supplies.

c. Work that will exceed the $15,000 per dwelling unit per fiscal limit must be submitted to USAEHSC (CEHSC-FB) for approval.

d. MACOM approval of projects for restoration of dwelling units damaged by fire, flood, or other disaster is also administratively limited to $15,000 per dwelling unit.

D. Incidental Improvements. AR 210-50, para 7-21.

1. Incidental improvements, which are construction, may be funded with Operation and Maintenance Family Housing Funds, unless the statutory or administrative limitation applies.

2. Statutory limit - When incidental improvements are accomplished concurrently with maintenance and repair work, the total cost will not exceed $50,000 per dwelling unit.

3. Administrative limitations - The total cost for incidental improvements within a fiscal year that can be approved at MACOM level or below are:

a. $3,000 for any one dwelling unit.

b. $200,000 for a single incidental improvement project.

c. Approval authorities for incidental improvement projects are:

- Installation Commander - as delegated.

- MACOM - less than $3,000 per dwelling per fiscal year and for projects less than $200,000.

- OASA - more than $3,000 per dwelling unit per fiscal year and projects exceeding $200,000, as delegated.

E. New Construction. AR 210-50, para 11-7.

1. Projects for construction of new family housing quarters are submitted to Congress in annual budget request.

a. MACOM, DA, and DoD approval are required.

b. Congressional line item authorization and appropriation of funds is required.

2. Military Construction, Army (MCA) funds are appropriated by Congress to fund family housing projects that it has approved by budgetary line item.

F. Improvements (Construction) to Family Housing - Line Item Authorization. AR 210-50, para. 11-8.

1. Improvements exceeding cost limitations under the Family Housing O&M Program ($50,000 per dwelling unit) will be programmed and budgeted under Construction Funds.

a. MACOM, DA, and DoD approval are required.

b. Congressional line item authorization and appropriation of funds are required.

2. Improvements that are less than $50,000 per dwelling unit are submitted to OASA for approval.

3. Approval levels for projects apply only to the funded costs.

G. Operations.

1. The operations portion of the Family Housing Operation and Maintenance Program provides administrative and support-type services.

2. Examples:

a. Refuse collection and disposal.

b. Custodial and entomology services.

c. Snow removal

d. Maintenance and repair of furnishings owned by the government.

e. Utilities services such as electricity, water, gas, and sewage collection and disposal.

3. Administrative limit: For General Officer's Quarters, the total of all operation and maintenance obligations is limited to $25,000 (absolute) per dwelling unit per fiscal year, unless additional expenditures are specifically reported to and approved by Congress. AR 210-13, para. 5-9(a).

4. Approval levels:

   a. MACOM - For General Officer's Quarters, operations and maintenance costs less than $25,000 per dwelling unit per fiscal year.

   b. Other family housing - no limit.

V. GENERAL/FLAG OFFICER QUARTERS (GFOQ) AND INSTALLATION COMMANDER QUARTERS (ICQ) - AR 210-13.

A. Background.

1. Many GFOQ and ICQ are older and larger than the vast majority of family housing units. Many are also historic and/or architecturally significant. These factors tend to make these units the most expensive to operate and maintain.

2. Reports on the cost of GFOQ are closely scrutinized.

3. The DoD and Congressional scrutiny results in part from past practices by some commands of spending large sums on GFOQ to satisfy the personal tastes of the occupants.

B. General Policies.

1. "Prudent landlord" concept applies.

2. Work not specifically required will be avoided.

3. Operation and Maintenance (O&M) costs will be monitored.

4. Economic analysis (EA) should used in determining alternatives and when any of the following factors apply:

   a. Average annual O&M costs over 3 consecutive fiscal year period exceeds $25,000;

   b. All identified M&R costs are expected to exceed $25,000 in a fiscal year;

   c. Housing revitalization or improvement requirements exceed $50,000 in a single fiscal year.

5. All dwelling units will compete equally for maintenance, repair, and services.

C. Limitations. AR 210-13, para. 5-9.

1. The total of obligations funded with Operations and Maintenance Family Housing funds on each GFOQ is limited to $25,000 (absolute) per fiscal year without prior Congressional approval.

2. Major maintenance and repair ICQ projects within the building's 5-foot line are limited to $15,000 per dwelling unit per fiscal year without OASA approval.

   a. Major maintenance and repair is work other than minor maintenance and repair (see below). It also includes all incidental improvements.

   b. Minor maintenance and repair excludes any improvement work and includes all normal day-to-day maintenance and repair (service calls, job orders, preventive maintenance, recurring work) and the routine work done during change of occupancy. It also includes self-help supplies.

3. Incidental improvements are limited to $3,000 per dwelling unit per fiscal year without OASA approval. AR 210-13, Table 5-1.

D. Furnishings for GFOQ/ICQ.

1. Cost limitations:

   a. Carpets/Rugs: Authorized for entertainment areas of GFOQ and housing occupied by installation commanders in the rank of colonel. Wall-to-wall carpeting may only be installed in other living areas as a primary floor finish when economic analysis demonstrates that such carpeting is the most economical primary floor finish.

b. Draperies: Authorized for entertainment areas of GFOQ and housing occupied by installation commanders in the rank of colonel. Must be a neutral shade.

2. Approval Authorities:

a. For rugs/carpets and draperies that are 10 or more years old - Installation Commander.

b. For rugs/carpets and draperies that are less than 10 years old - MACOM.

E. Responsibilities of Occupants of GFOQ/ICQ (Colonel and Above).

1. Occupants must be aware of contents of AR 210-13.

2. Occupants must be generally familiar with the operations, maintenance, and improvements costs for the assigned dwelling, associated other real property, and designated grounds.

3. Occupants must personally sign any request for:

a. Incidental improvements.

b. Maintenance and repair work, excluding emergency work.

c. Services in excess of the installation's normal operations for dwelling units, such as a request for trash pickup three times weekly when the standard is twice weekly.

4. Occupants must be familiar with cost limitations and approval authority levels.

5. Occupants must not request expenditures to satisfy personal taste or for compatibility with personal furnishings.

6. Occupants must be familiar with the maintenance, repair, and improvement work planned and programmed for assigned quarters.

7. Occupants must personally review the annual Operations and Maintenance budget estimate, the quarterly Operations and Maintenance report, and the annual management report for the assigned quarters (GFOQ only).

F. Installation Commander's Responsibilities.

1. The Installation Commander must provide a copy of AR 210-13 to occupants of GFOQ and ICQ in grade of Colonel or above.

2. The Installation Commander must develop and submit an annual Operations and Maintenance budget estimate for each set of GFOQ.

3. The Installation Commander must ensure the development and maintenance of comprehensive plans for the operations, maintenance, repair and improvement of each set of GFOQ in the installation's inventory consistent with prudent management practices.

4. The Installation Commander must provide the quarterly Operations and Maintenance report to occupants of each set of GFOQ and ICQ for their personal review.

5. The Installation Commander must maintain permanent GFOQ and ICQ files to include a listing of occupants by name with periods of occupancy and cost records.

VI. Conclusion.

CHAPTER 8

LABOR LAW UPDATE

CHAPTER 8

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Distinguished Guest Speaker

MAJ John S. Albanese
Deputy Labor Advisor
Tax and Property Law Attorney Advisor
Contract Law Division
Office of The Judge Advocate General
U.S. Army

24 September 1991

BIOGRAPHICAL SKETCH

JOHN S. ALBANESE, MAJOR, JA

CURRENT DUTY ASSIGNMENT: Deputy Labor Advisor and Tax/Property Law Attorney-Advisor, Contract Law Division, Office of The Judge Advocate General, Department of the Army, Washington, DC.

EDUCATION: LL.M., Government Procurement Law, George Washington University, 1989; J.D., Hofstra University School of Law, 1977; B.B.A., Hofstra University, 1974.

CAREER HIGHLIGHTS: Legal Counsel, U.S. Army Information Systems Selection & Acquisition Agency, 1989-1991; Legal Advisor to the Defense Attache, U.S. Embassy, Paris, 1985-1988; Chief, Commissions Branch, U.S. Army Claims Service, Europe, 1984-1985; Litigation Attorney, Civilian Personnel Branch, Litigation Division, Office of the Judge Advocate General, 1980-1983.

LABOR STANDARDS
and
INDUSTRIAL LABOR RELATIONS

September 1991

INTRODUCTION

This presentation of contract labor issues addresses two distinct areas of labor law. Part One of the outline focuses on the area of contract labor standards. It also reviews current developments and recurring problems in the area. The bulk of any contract's price is made up of labor costs. On a service contract, 80% to 90% of the contract price will be for labor. As much as 60% of a construction contract's price is labor. Notwithstanding the importance of labor rates on contracts, the Army continues to experience difficulties in properly applying for labor rates and complying with labor standards laws.

Part Two focuses on the law and policy to apply whenever private sector unions seek to enter on Army installations and exercise rights afforded under the National labor Relations Act. Because the Army now performs many former in-house functions through service contracts, private sector unions have targeted our contractor work forces for organizational efforts. For the most part, these union efforts have been successful, and private sector unions have become a frequent source of concern for Army contracting officers. Discussed are the rules for union activities on Army installations and the policy considerations which should be addressed whenever the installation is confronted with union activities.

PART ONE

LABOR STANDARDS

FEDERAL CONTRACT LABOR STANDARDS

I. INTRODUCTION:

A. Labor costs form the bulk of contract costs. More than 80% of service contract costs are directly attributable to labor costs. Costs or construction and supply contracts vary between 30% and 70% of contract costs depending upon construction project or commodity to be supplied.

B. Failure to apply proper labor standards law or proper wage determination may disrupt the procurement and require resolicitation [Comp. Gen. Dec. No. B-176763 (11 Apr 73); Page Airways,Inc., 71-1 BCA 8707 (ASBCA 1971); International Union of Operating Engineers, Local 627 v. Arthurs, 480 F2d 603 (10th Cir. 1973); WestByrd, Comp. Gen. Dec. No. B-237515 (7 Feb 90)].

C. The contracting agency may be required to correct improper application of labor standards laws or wage rates [29 C.F.R. 4.5(c)(2); B.B. Saxon Company, Comp. Gen. Dec. B-190505, 78-1 CPD 410 (1 Jun 1978); 29 C.F.R. 1.6(f); Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981)].

D. Clumsy contract labor standards administration can result in claims against the government and delays in contract performance arising from labor disputes.

II. **THE CONTRACTS ATTORNEY'S ROLE:** Contracts attorneys need to consider labor issues throughout the procurement process if they are to assist the contracting officer.

A. Contract Formation: When reviewing the solicitation file, the contracts attorney should ensure the solicitation contains:

1. The proper labor standards statutes/clauses;

2. The proper wage determinations;

3. Necessary notices to the Department of Labor and unions.

B. Contract Administration: During contract administration, the contracts attorney should assist the contracting officer in enforcing and complying with labor laws. Normal administration difficulties include:

1. Construction contracts - compliance reviews and investigations.

2. Service Contracts - annual wage determinations/ referral of suspected violations to Department of Labor.

3. All contracts - contractor claims for reimbursement of labor costs and conformance actions.

4. All contracts - compliance with other labor laws, union organizational campaigns, union representation activities on the installation.

III. WHICH LABOR STANDARDS LAW APPLIES - A SUGGESTED ANALYTICAL APPROACH:

A. Primary Labor Standards Laws affecting Government contracts are:

1. Walsh-Healey Public Contracts Act (WHPCA), 41 U.S.C. 35-45 & FAR Subpart 22.6.

a. Application

(1) Contracts for manufacture or furnishing of equipment...(Not rental of real or personal property).

(2) In any amount exceeding $10,000.

b. Department of Labor no longer issues WHPCA wage rates. Fair Labor Standards Act (FLSA) minimum rates apply. Primary impact of WHPCA is the "regular dealer/manufacturer" rule for contractor qualification.

2. Davis-Bacon Act (DBA), 40 U.S.C. 276a through 276a-5; FAR Subpart 22.4.

a. Application: Contracts in excess of $2,000 involving construction, alteration, or repair (including painting and decorating) of public buildings or public works within the U.S.

b. Provides only for "prevailing rate" minimum wages and fringes. Rates published as "General Wage Determinations" or, when not available, "Project Wage Determinations" issued to cover a specific project.

c. Overtime pay requirement: Contract Work Hours and Safety Standards Act (also FLSA); FAR Subpart 22.3.

d. Enforcement/Payroll submission: Copeland (Anti-Kickback) Act. The contracting agency shares enforcement responsibility with the Department of Labor.

3. Service Contract Act (SCA), 41 U.S.C. 351-358; FAR 22.10

a. Application to government contracts which are "principally for services" and are to be performed with service employees. Service contracts in excess of $2,500 must contain an SCA wage determination [41 U.S.C. 351(a)(1)].

b. SCA provides for "prevailing rates" and "collectively bargained rates"

c. Overtime requirements imposed by Contract Work Hours and Safety Standards Act

d. No contracting agency affirmative enforcement obligations comparable to DBA/Copeland Act. Suspected violations referred to Department of Labor.

B. Analyzing the work to be performed under the Contract: Although the labor standards laws are said to apply to contracts, the laws actually apply to the work to be performed under the contract. The contracts attorney must analyze the work and not apply labor standards laws based upon the type or form of the contract. More than one labor standards law may apply in a single contract.

1. SCA: The SCA is an "all or nothing" labor standards law. Accordingly the contracts attorney should consider SCA application first.

   a. Is the contract "principally for services" (i.e. Are services the primary contract requirement)?

   b. If the contract is not principally for services, the SCA does not apply at all. The SCA does not apply to individual contract service requirements on a contract which is not "principally for services" [FAR 22.1003].

2. WHPCA: Whether the SCA applies or not, the contracts attorney must determine if the WHPCA applies to the contract work, alone or in conjunction with the SCA. Accordingly the Contracts attorney should next consider whether:

   a. The total contract price exceeds, or is expected to exceed $10,000, and

   b. The contract requires the contractor to manufacture or furnish materials, supplies, articles or equipment. [See FAR 22.601-22.604].

c. If the SCA does not apply, and the above application standards are met, WHPCA will apply to all work under the contract (except construction work requirements-See DBA discussion below).

d. If the SCA does apply, but, if, as a matter of convenience, the government combined service and supply requirements, the SCA will apply to service requirements and WHPCA will apply to supply requirements [29 C.F.R. 4.117 & 4.132].

3. DBA: Whether the SCA or the WHPCA apply at all, some or all of the contract work may be covered by the DBA. The contracts attorney must analyze the contract requirements to identify foreseeable construction/repair work.

a. If: Neither the SCA nor the WHPCA apply; the contract exceeds $2,000; and the work involves construction, alteration or repair (including painting and decorating), the DBA applies to all work on the contract [FAR 22.402(a) and 22.400-22.401].

NOTE DBA will apply to manufacture and fabrication of construction materials at the "site of work" -- NOT WHPCA [See FAR 22.402(a)(iii) and 22.402(a)(2)(i)].

b. If either the SCA or the WHPCA apply, the DBA will still apply to "substantial" and "segregable" construction work performed under a non-construction contract [FAR 22.402(b)]. The DBA does not cover "incidental" construction work [FAR 22.402(b)(2)(i)].

4. Special Situation: Installation Support Contracts

Questions often arise concerning the application of both the Service Contract Act (SCA) and the Davis-Bacon Act (DBA) to installation support contracts. Although installation support contracts are principally for services, they often involve some repair and painting work which may be subject to the DBA. Until clarification is published in the DFARS, the following guidelines should be followed in those instances where a contract service call or work order requires construction trades skills (i.e., carpenter, plumber, painter, etc.), but it is unclear whether the work required is SCA maintenance or DBA painting/repairs:

(a) Apply both the SCA and the DBA to installation support contracts if the contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting, or repair work, and the aggregate dollar value of such construction work exceeds or is expected to exceed $2,000.00.

(b) Individual service calls or work orders which require a total of 32 or more man-hours to perform should be considered repair work subject to the DBA. Conversely, individual service calls or work orders which require less than 32 man-hours to perform should be considered maintenance subject to the SCA. Also, painting work of 200 square feet or more to be performed under an individual service call or work order should be considered subject to the DBA regardless of the total man-hours required.

5. Note: The above analysis must be applied with judgment. Federal labor standards laws are complex and very fact specific. Contracts attorneys should address labor standards application in every review to avoid unnecessary and disruptive bid protests.

IV. SPECIAL PROBLEMS - CURRENT ISSUES

A. SCA Section 4(c) requirements: Service unions are finding government service contractors a vulnerable organizational target. Section 4(c) contains special protections for union rates. The contracts attorney should review each solicitation for services with Section 4(c) in mind.

1. Has K.O. determined if Section 4(c) applies? [FAR 22.1008-3].

2. If 4(c) does apply, was the 30-days written notice of procurement dates forwarded to union and contractor? [FAR 22.1010].

3. Was an SF 98/98A forwarded to DOL between 120-60 days prior to the earliest procurement date? [FAR 22.1008-7].

4. If the above notices are properly forwarded, the government may reject late collective bargaining agreements (CBAs). However, if the notices are faulty, the union and the contractor can demand retroactive incorporation of a late CBA. [FAR 22.1012-3(c)].

B. SCA - Contingency Clauses in CBAs: Many unions and contractors are including contingency clauses in CBAs to obtain advance funding of labor costs. The contracts attorney should review CBAs to ensure there is a binding contractor obligation to pay the bargained wage rates. CBAs with contingency clauses remove the contractor's incentive to temper labor costs.

1. EXAMPLE CONTINGENCY CLAUSE:

"The employer shall be excused from paying the wages and fringe benefits set out in this agreement until the Department of Labor issues a wage determination approving the rates and the contracting officer incorporates the wage determination into the contract between the government and the employer."

2. CBAs with contingency clauses should <u>not</u> be incorporated into the solicitation or contract. The contracts attorney should immediately contact the Army Labor Advisor (DSN 223-4071) [FAR 22.1013].

C. DBA Application to Installation Support Contracts. See Discussion in Part III.B.4, above, and DRAFT DFARS 222.402(b), attached.

D. Statutory/Regulatory Changes and Department of Labor (DOL) Rulings:

1. Davis-Bacon Act Helper regulations:

(a) In December 1990, DOL issued regulations permitting the use of "helper" classifications on federal construction projects (55 Fed. Reg. 50148, 4 Dec 90).

(b) FAR changes implementing the new helper rules have been prepared by the Joint Labor/EEO Committee and are before the FAR Council for approval. Publication of the new regulations will be made through a Federal Acquisition Circular (FAC). However, release of the FAC has been delayed by Congressional action. On 7 March 1991, the House passed a supplemental appropriations bill containing a prohibition against funding for the regulation change (HR 1281). It is unclear whether this prohibition will still be effective in FY 1992. Contracting officers should not attempt to implement the helper regulations until authorized through a FAC notice.

(c) If implemented, the FAR revisions will permit use of lower paid helpers to perform unskilled and semi-skilled work on construction contracts. DOL predicts significant cost savings through the use of lower paid workers. Because the Davis-Bacon Act also applies to construction and repair work done on service and supply contracts, the advantages of a lower paid classification will also result in cost savings on non-construction contracts.

2. Fair Labor Standards Act (FLSA) Amendments of 1989 (P.L. 101-157):

(a) The FLSA Amendments increased the federal minimum wage to $4.25, effective 1 April 1991.

(b) Many DOL wage determinations under both the Davis-Bacon Act and the Service Contract Act have not been updated to reflect this change. In some cases, the wage determinations may contain wage rates set below the FLSA $4.25 minimum rate. Under no circumstances do these DOL wage determinations authorize contractors to pay employees at a rate which is less than the statutory minimum wage.

(c) In the event Contracting Officers receive a wage determination containing wage rates set below the minimum wage, they should inform contractors that the wage determination does not authorize a failure to comply with the FLSA minimum wage (See FAR 22.1002-4).

V. Continuing problems under the Service Contract Act:

A. Contracting officer failure to submit a proper and timely request for wage rates: The government may not award a service contract on which 5 or more employees will work without an "appropriate wage determination" as determined by DOL [29 C.F.R. 4.4(f) citing 29 U.S.C. 358(5)]. Accordingly, contracting officers must stop the practice of using a wage determination from another contract or proceeding to award without a DOL wage determination issued on an SF 98 pertaining to the procurement in question. (The "appropriate wage determination" is the wage determination indicated in the DOL Return of Notice block on the SF 98). Contract attorneys should address the following requirements when reviewing the solicitation:

1. Check for Collective Bargaining Agreements: In every recurring procurement of services, the contracting officer must determine whether some or all of the incumbent contractor's employees have their wages and fringe benefits set in a collective bargaining agreement (CBA) (See FAR 22.1008-3). If a CBA applies to the incumbent contractor's work force, the CBA sets the minimum rates for the successor contract period by operation of law [29 U.S.C. 353(c); 29 C.F.R. 4.163(b)]. Furthermore, the contracting officer must give the union and the contractor written notice of the relevant procurement dates [FAR 22.1010].

2. Prepare the SF 98/98A Properly (CBA): If the incumbent contractor's work force is covered by a CBA, the classifications described in the SF 98/98A must reflect CBA classifications. A copy of the current CBA must be attached to the SF 98/98A submitted to DOL [See FAR 22.1008-2(a) and instructions on SF 98].

3. Prepare the SF 98/98A Properly (non CBA): If the incumbent contractor's work force is not covered by a CBA or if there is no predecessor contract, the SF 98/98A must be completed using the Service Contract Act Directory of Occupations. In the unusual circumstance that the Directory does not have a classification whose core duties cover a class of workers anticipated on the contract, the Contracting Officer must attach a job description to the SF 98 covering the unlisted classification [FAR 22.1008-1 & 22.1008-2]. A new Directory, with updated classifications, is due to be printed this Fall.

4. Submit SF 98/98A in Time To Get A Timely Wage Determination: Between 120 and 60 days before issuance of the solicitation (30 days if the requirement is unknown and nonrecurring), the Contracting Officer must submit an SF 98/98A to DOL [FAR 22.1008-7]. Since DOL takes approximately 90-110 days to issue a wage determination, it is unwise for the Contracting Officer to wait until 60 days prior to issuing the solicitation. All SF 98s for recurring requirements should be forwarded to DOL 120 days prior to issuing the solicitation (or the exercise of an option in an option contract).

5. Contracting Officer failure to follow the above rules has repeatedly resulted in DOL issuing late wage determinations and procurements being delayed. If contract attorneys check for compliance with these labor standards procedures, installations will have fewer instances of delayed procurements and added costs arising from DOL orders to incorporate retroactively different wage rates than those competed in the solicitation.

VI. **Change in DA Labor Advisor:** MAJ G. Allan Sirmans has assumed the duties of DA Labor Advisor. He is being assisted in these duties by MAJ John Albanese. Questions concerning industrial labor relations and contract labor standards application should be referred to the Labor Advisor at DSN 223-4071 or COMM (703) 693-4071. The FAX number is DSN 225-8019 or COMM (703) 695-8019.

PART TWO

INDUSTRIAL LABOR RELATIONS

EXERCISE OF PROTECTED RIGHTS ON MILITARY INSTALLATIONS BY GOVERNMENT CONTRACTORS AND CONTRACTOR EMPLOYEES

The National Labor Relations Act [29 U.S.C. 151-168 (1982); 49 Stat. 449 (1935), as amended].

A. The Act governs all aspects of labor management relations between government contractors and their employees. Section 7 delineates the rights employees enjoy under the Act. It provides as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such may be affected by an agreement requiring membership in a labor organization as a condition of employment."

B. This outline briefly addresses the basic law which controls how these rights may be exercised on military installations.

C. Below are terms which have unique meanings in the labor relations context. An understanding of these terms is necessary in addressing the rights and obligations of the employees, the employer (the government contractor), and the property owner (the Army) under Section 7 of the NLRA:

1. "Organizational activities": Efforts to organize the employees and gain recognition of the union as the employees' collective bargaining agent. Both employees and non-employee organizers may engage in organizational activities; however non-employee organizers have fewer rights of access to employer premises than do the employee organizers.

2. "Non-employee organizers": Union representatives engaged in organizational activities for a union. The organizers' goal is to persuade a majority of the employees to sign authorization cards and vote for the union as their collective bargaining agent.

3. "Authorization cards": Forms, signed by individual employees, which indicate the employees authorize the union to act in their behalf as a collective bargaining agent. The union uses the authorization cards to support a petition for an election or to persuade the employer to recognize the union without an election.

4. "Solicitation": Oral discussions among nonaligned employees and organizers (other employees or non-employee union representatives) directed toward obtaining majority support for the organizing union. [NOTE: The NLRB treats distribution and recovery of authorization cards as "solicitation," not "distribution."]

5. "Distribution": The passing out of leaflets or other literature in furtherance of the organizational campaign. Note below that employers may place greater restrictions on "distribution" than they can on solicitation.

6. "Recognized bargaining agent": If the campaign to organize the employees is successful (usually through an NLRB election and certification but voluntary recognition by the contractor is possible), the union is "recognized" and assumes greater rights and responsibilities as the employees' bargaining agent. The increase in union rights and obligations results in a corresponding limitation on the power of the property owner/Army to limit access to the business premises/installation.

7. "Collective bargaining" and "Representational activities": Activities of the recognized bargaining agent to negotiate terms and conditions of employment and represent employees in contesting management actions through grievance procedures. The union has a legal right and duty (Duty of Fair Representation) to perform these functions responsibly and fairly for all members of the bargaining unit. Army interference with union collective bargaining and representation can result in picketing, slowdowns, strikes, and charges against the Army and the contractor.

II. **Army Policy on Installation Access - Para. 5-6, AR 210-10**

A. Installation commanders may admit labor representatives during working hours to military installations on which private contractor employees are engaged in Government contract work if:

1. Presence and activities will not interfere with the progress of contract work.

2. Entry will not violate pertinent safety or security regulations.

B. Labor representatives are prohibited from engaging in organizational activities, collective bargaining discussions, or other matters not directly related to the Government contract.

1. Installation commanders may authorize distribution of organizational material and authorization cards provided such distribution does not-

a. Occur in working areas or during working times.

b. Interfere with contract performance.

c. Interfere with the efficient operation of the installation.

d. Violate safety or security considerations.

2. Contractor employees are authorized to distribute organizational literature and authorization cards under the conditions noted in a. above. ** [See Note below].

**Note: The AR fails to make the proper distinction between "distribution" and "solicitation" as it pertains to authorization cards and contractor employees. The exchange of authorization cards is "solicitation." Solicitation by employees may be prohibited only during working times. Solicitation by employees is permissible in work areas during non-work times. Republic Aviation v. NLRB, 324 U.S. 263 (1945).

C. Only the installation commander or a contracting officer may deny access to a labor representative.

1. Denial of access to a labor representative must be reported to: DA Labor Advisor, Office of the Assistant Secretary of the Army (RDA), Washington, D.C. 20310-0103 [DSN 223-4071].

2. As a practical matter, the installation should coordinate with the Labor Advisor prior to excluding a union representative. Whenever a union representative is denied access to the installation, the Labor Advisor will contact the national level union headquarters and inform them of the reason for the denial of access.

D. Close coordination with the local labor counselor or judge advocate is encouraged.

III. **Army Policy contrasted with current case law.**

A. Non-employee distribution on the installation [N.L.R.B. V. Babcock & Wilcox Company, 351 U.S. 105 (1956)]

1. Installation commanders may prohibit non-employee distribution (referred to as labor representatives in AR 210-10) on the installation if:

a. The contractor's employees are otherwise reasonably accessible.

b. The policy is not discriminatory (i.e. other non-employee groups are generally not allowed to distribute on the installation.

(1) Note: Some disparate treatment is permitted (e.g., charitable distribution).

(2) Note: If employees are not reasonably accessible off the installation, the installation's property interest will likely fail.

Recent NLRB decisions interject a balancing approach to Babcock and Wilcox.

NLRB will balance the nature of the right the non-employee organizers are attempting to exercise against the non-employer's (Army's) property interest. Jean Country, 291 N.L.R.B. No. 4 (1988).

If the organizers are attempting to exercise a Section 7 right and there is no alternative place reasonably available for the exercise of the right, the statutory right will overcome the property interest.

EXAMPLE: Certain employees of ABC Full Food Service, Inc. seek to organize and obtain recognition of Local 1 of the Laborers' International, AFL-CIO. Non-employee organizers from the AFL-CIO arrive on the scene. ABC refuses to permit distribution of literature in the parking lot outside the dining hall which ABC operates.

AFL-CIO organizers ask KO permission to distribute in the parking lot. ABC demands the KO deny access, claiming the debate among the employees would disrupt contract performance and leaflets will litter the area. The organizers have no other reasonably available means to contact the nonaligned employees.

RESOLUTION: Although AR 210-10 gives authority to deny access to Army property, the KO and installation commander should grant access. If the Army was a private property owner, the NLRB would permit access because there were no other reasonable alternatives available to the union and employees for the exercise of Section 7 rights. The possibility of disruption and littering would be insufficient to outweigh the statutory rights sought to be exercised.

B. Employee "solicitation" and "distribution" on the installation.

1. Solicitation (including distribution and recovery of authorization cards).

a. Case law permits employees to solicit during non-work time, in work and non-work areas, unless production or discipline considerations outweigh the exercise of this right. Essex International, Inc. 211 NLRB 749 (1974); Republic Aviation Corp v. NLRB, 324 US 793 (1945).

(1) Note: Solicitation during work time is prohibited.

(2) Note: All employees involved must be in a non-work status. Thus, working employees may not be solicited.

b. The employer must clearly communicate rules prohibiting solicitation to the employees.

2. Distribution of literature.

a. Case law permits employees to distribute literature during non-work time, in non-work areas.

b Distribution can be prohibited in work areas during work and non-work time.

3. Hospital exception (not mentioned in AR 210-10)

   a. Distribution and solicitation can be prohibited in immediate patient care areas at all times.

   b. Distribution and solicitation are permissible in lobbies, gift shops, and cafeterias during non-work time. NLRB v. Baptist Hospital, Inc., 442 US 773 (1979).

4. Employee organizational "discussions" can not be restricted unless production or discipline issues necessitate the restriction.

5. Off-duty employees (not mentioned in AR 210-10).

   a. Off-duty employees can be denied access to the employer's premises if the rule:

      (1) Limits access solely with respect to the interior of the work-site and other working areas.

      (2) Is clearly disseminated to all employees.

      (3) Applies to access to the work-site for any purpose and not just for union activity.

   b. Unless justified by business reasons, a rule which denies off-duty employees access to outside non-work areas is invalid. Tri-County Medical Center, 222 NLRB 1089 (1976)

6. All rules noted above must be applied in a manner which does not discriminate against union solicitation and distribution or in favor of one union. NLRB v. Stone Spinning Co, 336 U.S. 226 (1949); Restaurant Corp of America v. NLRB, 827 F. 2d 799 (D.C.Cir 1987).

IV. General Comments and Suggested Approach to Union Activities on Army Installations

A. Things to remember:

1. Neutrality [FAR 22.101-1(b)]: The employees are the contractor's employees, not Army employees. Consequently, the Army may not dictate conditions of employment, has no authority to resolve employment issues, and should not become embroiled in a dispute between the contractor and its employees or their union.

EXAMPLE: At an Army installation in a "Right to Work" state, a union gained recognition through an election. The union and contractor negotiated a collective bargaining agreement (CBA) which contained a "security clause." The security clause required employees to join the union within 30 days of employment and pay the equivalent of union dues. The contractor operated a large mess facility.

Certain contractor employees (the minority who had voted against the union) complained to the KO that they were being unfairly required to join the union. The KO referred the employees to the IG who informed the employees they were not required to join the union because a union security clause was not valid in a "Right to Work" state. Neither the IG nor the KO contacted the installation Labor Counselor or the DA Labor Advisor. The installation contract attorney agreed with the IG "...that the union would not be permitted to abuse our people (former government employees whose function had been contracted out)."

The national union contacted the DA Labor Advisor and threatened to strike the mess hall during a morning meal (heaviest customer usage period), picket all gates of the installation, refuse to comply with any reserved gate plan because the Army was the wrongdoer/targeted entity, and require the contractor to fire the employees who refused to join the union.

RESOLUTION: The IG, KO, and contract attorney were wrong in their evaluation of the validity of

the security clause. Because the work site was on a federal enclave, the security clause was valid, and the contractor was obligated under the CBA to fire any employees who refused to join the union. Lord v. Local Union No. 2088, IBEW, AFL-CIO, 646 F.2d 1057 (5th Cir., 1981). The IG had to contact each of the complaining employees and correct the previous incorrect advice. The Labor Advisor informed the national union that the Army would cease its interference with the collective bargaining relationship and internal union affairs.

WHAT SHOULD HAVE BEEN DONE: The KO should have informed the complaining employees that the Army was neutral in matters between any contractor, its employees, and their union. The employees must resolve their dispute under the CBA or submit their complaints to federal agencies charged with enforcing labor and union oversight laws (i.e. the NLRB or DOL). KOs should only entertain employee complaints concerning contractor failure to pay prevailing rates under the contract wage determination. The KO should refer such complaints to DOL if the wage rates are set under the Service Contract Act. The KO may investigate labor standards complaints if the labor rates are set under the Davis-Bacon Act (See FAR 22.406-1, 22.406-7 through 22.406-12).

2. Section 7 Rights Accompany the Contractor Employees onto the Installation: Contractor employees do not loose their statutory rights merely because they are working on a military installation. Unless the installation has a strong security reason for preventing union activities, the Army should take no action pertaining to contractor employee affairs. If the Army does act it becomes the agent of the contractor and may be the target of union retaliation (i.e. pickets). Any costs imposed upon the contractor for Army labor law violations may be claimed against the government.

EXAMPLE: Union officials were meeting with a motor pool contractor's employees in a recognized

break area while the employees were off-duty (i.e. non-work time in a non-work area). The union reps were explaining to employees the provisions of the new CBA. A contractor representative complained to the motor officer about the presence of non-employees in the motor pool. The motor officer directed the meeting to cease and ordered the union reps from the premises. (NOTE: The contractor could not have lawfully ordered the meeting to stop or directed the union reps to leave. Instead he duped the Army official into acting in his behalf.)

RESOLUTION: Because the meetings were in furtherance of the union's representational duty and there was no violation of installation security or safety rules, the KO informed the union that the Army had no objection to the union reps being in the motor pool. The motor officer's order was rescinded.

WHAT SHOULD HAVE BEEN DONE: The motor officer should have satisfied himself that the meeting did not violate safety or security rules. Once done, the motor officer should have told the contractor that:

(1) The Army had no reason to do anything;

(2) If anything was to be done, the contractor must do it himself in accordance with applicable labor laws;

(3) The Army expects continued performance, and the contractor would be held accountable for reasonably avoidable delays arising from labor disputes caused by his failure to comply with labor laws (FAR 22.101-2(b)).

B. Suggested response to union activity on the installation:

1. Whenever a union representative requests access, such access should be granted unless the installation has strong safety or security reasons for denying access. To grant access under Army terms, the installation should do the following:

a. Invite the union requesting access to a meeting with the KO and contract attorney. At the meeting give the union a letter informing the union that:

(1) The Army is neutral in all matters involving contractor employee labor relations;

(2) Union officials must comply with installation regulations while on the premises. Any union representative who violated installation safety and security regulations could be denied further access;

(3) Any disputes between the contractor and the union must be resolved through normal industrial labor relations channels. The Army cannot act as a mediator in the disagreement. The Army has no interest except continued contract performance and compliance with installation regulations.

(4) As enclosures, the letter should contain copies of:

a) the installation security and safety rules and any unique requirements, such as installation traffic regulations;

b) paragraphs 5-6 though 5-11, AR 210-10;

c) the installation reserved gate plan to be used in the case of picketing at the installation.

b. The union should be given the name and telephone number of an installation official to be contacted if the union has any further questions or if the union believes Army officials have wrongfully interfered with union activities. (Most installations designate the installation Labor Counselor.)

c. The KO should also give the contractor a copy of the letter to the union with all enclosures.

2. TALK TO THE UNION. Courtesy counts in any contacts with unions. Even if the union is wrong, labor disputes can hurt Army operations. If talking politely over a cup of coffee will calm people down, do it. Never reject a union request out-of-hand. Compromises and accommodation are the unions' stock-in-trade. Almost any problem can be resolved with discussions.

3. Call the DA Labor Advisor for assistance whenever conflict with a private sector union appears possible [DSN 223-4071].

DRAFT

DFARS 222.402

(b)(3) Application of the Davis-Bacon Act (DBA) To Installation Support Contracts Otherwise Covered by the Service Contract Act (SCA).

(i) Contracting Officers shall apply both the SCA and the DBA to installation support contracts if-

(A) the contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting or repair work, and

(B) the aggregate dollar value of such construction work exceeds or is expected to exceed $2,000.

(ii) SCA Coverage Under the Contract: Contract installation support requirements, such as plant operation and installation services (i.e. custodial, snow removal, entomology services, etc.) are subject to the SCA. Contracting officers shall apply SCA clauses and minimum wage and fringe benefit requirements to all contract service calls or work orders for such maintenance and support work.

(iii) DBA Coverage Under the Contract: Contract construction, alteration, renovation, painting and repair requirements (i.e. roof reshingling, building structural repair, paving repairs, etc.) are subject to the DBA. Contracting Officers shall apply DBA clauses and minimum wage requirements to all contract service calls or work orders for construction, alteration, renovation, painting or repairs to buildings or other works.

(iv) Repairs versus Maintenance: Some contract work may be characterized as either DBA painting/repairs or SCA maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the DBA or the SCA. In those instances where a contract service call or work order requires construction trades skills (i.e. carpenter, plumber, painter, etc.), but it is unclear whether the work required is SCA maintenance or DBA painting/repairs, the contracting officer shall apply the following rules:

(A) Individual service calls or work orders which will require a total of 32 or more man-hours to perform shall be considered to be repair work subject to the DBA.

(B) Individual service calls or work orders which will require less than 32 man-hours to perform shall be considered to be maintenance subject to the SCA.

(C) Painting work of 200 square feet or more to be performed under an individual service call or work order shall be considered to be subject to the DBA regardless of the total man-hours required.

(v) The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where requirements can be identified. Otherwise, the determination shall be made at the time the service or work order is issued against the contract. The service or work order shall identify the labor standards law and contract wage determination which will apply to the work required.

(vi) Contracting officers may not avoid application of the DBA by splitting individual tasks between work orders or contracts.

DFARS 222.1003

Application of the Davis-Bacon Act (DBA) To Installation Support Contracts Otherwise Covered by the Service Contract Act (SCA).
See DFARS 222.402(b)(3)

CHAPTER 9

THIRD PARTY FINANCING

CHAPTER 9

THIRD PARTY CONTRACTING

Distinguished Guest Speaker

Mr. Michael J. Adams
Assistant Chief Counsel for Procurement
Office of the Chief Counsel
U.S. Army Corps of Engineers

MICHAEL J. ADAMS

Michael J. Adams is the Assistant Chief Counsel for Procurement in the Office of the Chief Counsel, United States Army Corps of Engineers, Washington, D.C.

Mr. Adams graduated from Holy Cross College in Worcester, Massachusetts in 1968 with a Bachelor of Arts degree in Sociology. After completing his military service in the U.S. Army, he received his Juris Doctor degree from Fordham University Law School in New York in 1973.

Mr. Adams is the senior legal advisor in the Corps of Engineers on procurement law. He is actively involved in managing the Corps' bid protest program, and the principal legal advisor for the third party contracting initiatives of the Corps. Prior to joining the Chief Counsel's staff in 1982, Mr. Adams served as the Corps' New York District Counsel.

Mr. Adams is a member of the New York State Bar.

Third Party Contracting

Characteristics

- Contractor Design
- Contractor Construction
- Contractor Ownership
- Contractor Operation
- Contractor Maintenance
- Long-Term Contract
- Private Financing
- Annual Payments by Government

- 801 & 802 Family Housing
- Long-Term Facilities Contracts
- Energy Production Facilities

801 Family Housing

Current Status

Installation	Units Completed	Under Construction
Fort Bliss, TX	300	0
Fort Bragg, NC	0	250
Fort Drum, NY	2000	0
Fort Hood, TX	300	0
Fort McCoy, WI	0	80
Fort Polk, LA	600	0
Fort Stewart, GA	0	200
Fort Wainwright, AK	550	0
TOTALS	3750	530

Authorized

Installation	Units
Military District of Washington	1250
Oahu, CFHO, HI	500
Walter Reed Army Medical Center	440
TOTAL	2190

Leasing of Military Family Housing

- 801 Housing
- 1984 Military Construction Authorization Act (10 USC 2828(g))
- Contract for the Lease of Family Housing Units
- Constructed or Rehabilitated to Residential Use On or Near a Military Installation

- Obligation to Make Payments is Subject to Availability of Appropriations
- Contract Term - 25 Years
- Escalation of Total Rent
- Rent Collection and Maintenance May be Provided by Government
- Economic Analysis to Congress

- Contract May Provide for Contractor to Operate and Maintain Facilities
- Units Assigned to Soldiers
- Units Constructed to DOD Specs

802 Family Housing

Current Status

Installation	Awarded	Authorized
Fort Campbell, KY	300	
Fort Hood, TX	500	
Fort Rucker, AL	300	
Oahu CFHO, HI	276	724
TOTAL	1376	724

Military Housing Rental Guarantee Program

- 802 Housing
- 1984 Military Construction Authorization Act (10 USC 2821 note)
- Agreement to Assure Occupancy of Rental Housing

- Constructed or Rehabilitated to Residential Use on Private or Government Land
- Units Leased Directly to Soldiers
- Units Constructed to DOD Specs or Local Building Codes
- Agreement May Not Assure More Than 97 Percent Occupancy

- Obligation to Make Payments is Subject to Availability of Appropriations
- Contract Term - 20 Years
- Right of First Refusal to Acquire Title
- Triple Net Lease
- DOD Guidance
  -Government Maintenance
  -Off-post
  -Land Option
- Economic Analysis to Congress

Housing Issues

- Davis-Bacon Act
- DOD Guidance
  - Maintenance
  - Off-post
- Validation of Deficits

Long-Term Facilities Contracts

Long-Term Facilities Contracts

- 1986 Military Construction Authorization Act (10 USC 2809)
- Contracts for Construction, Management and Operation of a Facility
- Competitive Procedures
- 32 Year Contract Period
- Obligation to Make Payments Subject to Availability of Appropriations
- Economic Analysis to Congress

Specific Activities and Services:

- Child Care Services
- Utilities, Including Potable and Waste Water Treatment Services
- Depot Supply Activities
- Troop Housing

- Transient Quarters
- Hospital or Medical Facilities
- Other Logistic and Administrative Services, Other Than Depot Maintenance
- 5 Contracts Per Year (Except Child Care Services and Utilities)

Current Projects

- Laundry - Fort Jackson, SC
- Wastewater Treatment Plant - Redstone Arsenal, AL
- Consolidated Maintenance Facility - Fort Polk, LA
- Incinerator and Landfill Upgrade Fort Lewis, WA

2809 Issues

- Construction of Facility
- Applicability of OMB Circular A-76
- Applicability of Davis-Bacon Act

Energy Production Facilities

Contracts for Energy or Fuel

- Military Construction Codification Act (10 USC 2394)
- Contracts for Provision and Operation of Energy Production Facilities
- Purchase of Energy Produced From Such Facilities
- 30 Year Contract Period

- On Government or Private Property
- Contract Approval by Secretary of Defense
- Costs of Contract May Be Paid From Annual Appropriations
- COCO Heat Plant - Fort Drum

2394 Issues

- Applicability of Davis-Bacon Act
- Model Contract

Third Party Contracting - Questions

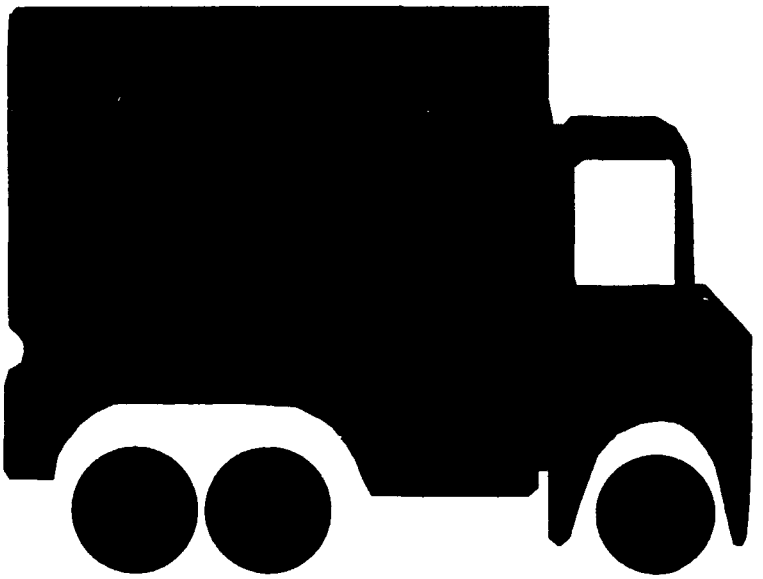
- Cheaper?
- Faster?
- Easier?
- Quality?

Problems

- OMB Scoring Policy
- Lack of Ultimate Ownership
- Long Term Commitments
- Risk of Mortgaging the Future
- Minimum Guidance
- Combination of Facilities and Services

CHAPTER 10

SPECIFICATION PREPARATION

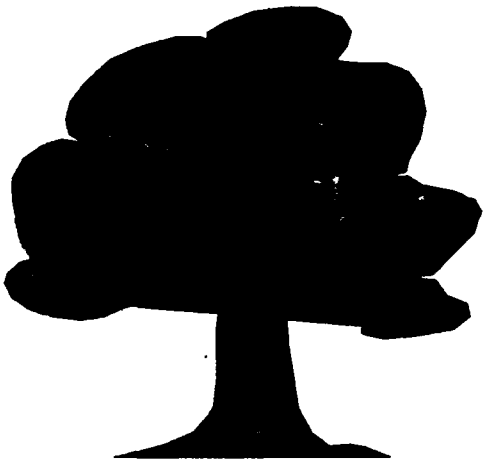


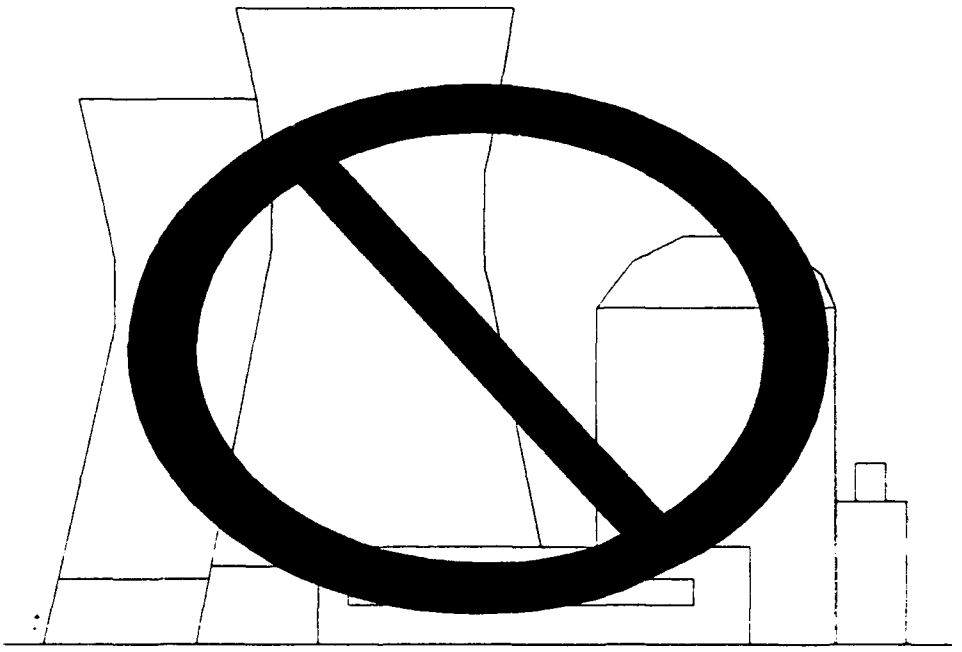
CHAPTER 10

SPECIFICATON PROBLEM

Problem to be distributed.

CHAPTER 11
ENVIRONMENTAL LAW





CHAPTER 11

ENVIRONMENTAL LAW

CHAPTER 11

ENVIRONMENTAL LAW

I. INTRODUCTION.

A. Congress on Contractors.

> I'm from Muskogee, OK[lahoma]. Mr and Mrs. Smith live on 14th Street in Muskogee, OK. What they are going to read tomorrow about Tucson is this. They are going to read that Hughes Aircraft improperly disposed of hazardous waste [at the Air Force's Plant #44] that they [Hughes] were under contract to dispose of] with the Air Force. But the Air Force has decided that they [the Air Force] is [sic] going to pay for it [the cost of the cleanup required as a result of Hughes' improper disposal]. Not only are they going to pay for it, they're going to pay them [Hughes] a profit for cleaning it up. And so, Hughes Aircraft is not [even] being slapped on the wrist, is not being held accountable like Mr. and Mrs. Smith on 14th Street may be if they dump something [hazardous] in their backyard . . . . And what am I going to tell them why [sic] there are two sets of standards, one for government contractors and one for the public? What am I going to tell them? What do you want me to tell them?
>
> Hearings on Hazardous Waste Problems at Department of Defense Facilities before the Environment, Energy, and Natural Resources Subcomm. of the House Comm. on Government Operations, 100th Cong., 2nd Sess. 91 (1987) (statement of Rep. Mike Synar).

MAJ Mark Connor
4th Installation Contracting Course
September 1991

B. Environmental Provisions in The Federal Acquisition Regulations (FAR).

1. FAR 23.103 -- Policy.

a. Executive agencies will conduct their acquisition activities in a manner that will result in effective enforcement of the Clean Air and Clean Water Acts.

b. Generally, executive agencies will not enter into, renew, or extend contracts with firms proposing to use facilities listed by EPA as violating the Clean Air or Clean Water Act.

2. FAR 52.223-3 -- Hazardous Material Identification and Material Safety Data.

-- Requires contractors to comply with all laws and regulations dealing with handling and record keeping requirements associated with hazardous materials.

3. FAR 31.205-15 -- Environmental Costs (proposed?).

-- As originally proposed, only those environmental costs incurred at "a facility owned or operated by a department, agency, or instrumentality of the United States Government" would be allowable. The original proposal was withdrawn under ferocious attack from contractors. Chances of it being resubmitted for consideration soon are uncertain.

II. OVERVIEW OF ENVIRONMENTAL REGULATORY SCHEMES.

A. Resource use -- Primary statute: the National Environmental Policy Act -- 42 U.S.C. §§ 4321-4370a.

1. Applies when major federal action(s) "significantly affect the quality of the human environment."

   a. Not a pollution control law, but a decision-making process.

   b. Can require documentation of the environmental consequences (e.g., an Environmental Impact Statement).

2. Particular areas of concern.

   a. Special resources.

      (1) Endangered and threatened species.

      (2) Preservation of historic structures.

      (3) Archeological and cultural sites.

      (4) Coastal areas.

   b. Projects.

      (1) Construction.

      (2) Unit reconfigurration.

      (3) New and enlarged aviation operations.

3. Generally, there are no "regulators"--we are responsible for identifying when the law applies.

   -- Enforced by citizen suits when people (or groups) don't like what we plan to do.

B. Protection of Endangered Plants and Wildlife -- The Endangered Species Act (ESA) -- 16 U.S.C. §§ 1531-1544.

1. The ESA requires Federal agencies to take actions to conserve and restore endangered and threatened species. Among the ESA's prohibitions are the:

   a. "Taking" of any endangered fish or wildlife species; and

   b. Removal or destruction of any endangered plant species. 16 U.S.C. § 1538 (1988).

2. Installations are increasingly having to cope with the presence of endangered species (e.g., the desert tortoise at Fort Irwin and the red cockaded woodpecker at Fort Bragg).

3. On 10 August 1990, the 8th Circuit Court of Appeals held that all U.S. agencies must consult with the Department of Interior whenever their actions adversely affect an endangered species, even if the agencies' actions take place outside the U.S. Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990).

4. Citing our obligation to conserve endangered species, environmentalists are trying to establish endangered species on non-native federal installations.

C. Air Pollution -- The Clean Air Act -- 42 U.S.C. §§7401-7642.

1. Regulated by the states.

   -- Permits generally are required to operate pollution sources -- all states will have permitting systems within 3 years.

2. (1) Problem areas.

a. Faulty exhaust stack control equipment.

b. Failure to notify regulators of asbestos removal projects and building renovation.

c. Painting operations.

d. Training activities.

D. Water pollution -- Clean Water Act -- 33 U.S.C §§ 1251-1387.

1. Mostly regulated by the states.

a. All "point sources" of water pollution discharged into the "navigable waters of the United States" must be permitted.

b. GAO issued a report several years ago showing that federal waste treatment plants are twice as likely to violate water pollution laws as plants owned by private industry. Primary problems were found to be:

(1) Inadequate program to detect problems in a timely fashion.

(2) Inadequately trained personnel.

(3) Inadequate maintenance.

(4) Inadequate supervisory emphasis on the need to ensure compliance.

c. Additional problem: accidental spills.

2. Wetlands preservation is regulated by the CWA. See 33 U.S.C. § 1344. This area is receiving increasing attention from EPA, complicating our efforts to construct new facilities.

E. Hazardous waste -- Resource Conservation and Recovery Act -- 42 U.S.C. §§ 6901-6901i.

1. Two key areas of concern.

a. Handling and disposal of hazardous waste generated by current activities.

b. Cleanup of old hazardous waste disposal sites.

2. Mostly regulated by the states.

a. We must obtain a permit for many of our hazardous waste activities.

(1) Motor pool operations.

(2) DRMO operations.

(3) Industrial operations.

(4) Building maintenance.

b. Problem areas.

(1) Improper disposal of hazardous waste (by DOD personnel and by contractors).

(2) Improper storage of hazardous waste.

(a) Retain too long at the installation, thus becoming a "storage facility."

(b) Inadequate safety at storage sites.

(c) Improper segregation of various forms of hazardous waste.

(3) Incomplete documentation and contingency plans.

F. Environmental Restoration -- Comprehensive Environmental Response, Compensation and Liability Act -- 42 U.S.C. §§ 9601-9675.

1. Facts triggering a clean-up requirement, 42 U.S.C. § 9604(a).

a. Any release or substantial threat of a release into the environment of a hazardous substance.

b. Release or substantial threat of release into the environment of any pollutant or contaminant which presents an imminent and substantial danger to the public health or welfare.

2. CERCLA is a federal program run by the EPA. Many states have their own programs for hazardous waste sites (mini-Superfunds), however, and they may also use RCRA permitting authority to regulate clean-ups at facilities with current hazardous waste operations.

3. Financial Liability, CERCLA § 107 (42 U.S.C. § 9607).

a. Scope of liability; responsible parties can be required to pay:

(1) All costs of removal and remedial action incurred by the U.S. government, or a state, or an Indian tribe, which are not inconsistent with the National Contingency Plan (40 C.F.R. Part 300).

(2) Any necessary response costs, consistent with the NCP, incurred by any other person.

(3) Damages for injury to, destruction of, or loss of natural resources.

(4) Costs of any health assessment or health effects study carried out under 42 U.S.C. § 9604(i).

b. Who is liable? "responsible parties" include:

(1) The current owner and operator of the facility.

(2) Any person who at the time of disposal of any hazardous substance owned or operated the facility.

(3) Any person who by contractual agreement or otherwise arranged for disposal, treatment, or transportation for disposal or treatment, of hazardous substances owned or possessed by such person or by any other party or entity, if the hazardous substances are at the facility.

(4) Any person who accepted any hazardous substances for transport to the disposal or treatment facility, if such person selected the facility.

III. PERSONAL LIABILITY.

A. Potential Problems for Federal Supervisors and Their Subordinates.

1. Civil fines and damages.

a. Criminal prosecution.

b. Aberdeen.

c. Ft. Drum.

d. Ft. Meade.

e. Critical habitat investigation.

f. Sentencing under the new Federal Guidelines.

(1) United States v. Mills, No. 88 Crim. 03100 (N.D. Fla. April 17, 1989).

(2) United States v. Pozsgai, No. 88 Crim. 0450 (E.D. Pa. July 13, 1989).

B. Legal Representation.

1. Federal prosecution--representation by Department of Justice (DOJ) very unlikely.

2. State prosecution--representation by DOJ is possible if no federal laws or policies have been violated (but note that for the most part federal law says that the Army must comply with state law).

C. Immunity.

1. Federal prosecution--there is no official immunity.

2. State prosecution--official immunity is possible if the federal agent is performing a necessary and proper federal function in a manner that does not violate federal law.

IV. FINES, PENALTIES, AND PERMIT FEES VS. TAXES.

A. FAR 31.205-15 -- Fines and Penalties.

1. Fines and penalties are generally not allowable costs.

2. The exception is when the contractor can demonstrate that the fine or penalty was incurred as a result of written instructions from the contracting officer or as a result of a specific contractual provision

B. FAR 31.205-41 -- Taxes.

1. In general, taxes are allowable costs.

2. Taxes for which an exemption is available directly to the contractor or based on an exemption afforded the government are not allowable.

C. The Effect of Goodyear Atomic v. Miller, 486 U.S. 174 (1988). --

> **"[A] federally owned facility performing a federal function is shielded from direct state regulation even though the federal function is performed by a private contractor, unless Congress clearly authorizes such regulation."**

D. Federal Enforcement of Environmental Statutes.

1. EPA can not assess penalties against federal agencies.

2. EPA can and does assess penalties against federal contractors.

   -- Between 1983 and March 1989, nine DOD contractors at GOCO facilities were assessed fines totaling in excess of $1,500,000 for violations of RCRA.

E. State Enforcement of Environmental Statutes.

1. As a legal matter, the issue of whether or not a state can fine a federal agency is controlled by the applicable waiver of federal supremacy.

2. Do we pay state assessed penalties? Current DOD policy.

   a. Clean Water Act penalties--no.

      (1) McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) (Clean Water Act waiver (33 U.S.C. § 1323) does not waive sovereign immunity for a citizen suit seeking civil penalties against the Air Force for violations of the Act).

(2) California v. Dep't of the Navy, 845 F.2d 222 (9th Cir. 1988) (CWA waiver of immunity does not subject Federal agencies to fines imposed under state law, and State clean water law does not have the status of Federal law).

(3) But note Ohio v. U.S. Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990) (CWA waiver does subject Federal agencies to fines imposed under State law).

b. Clean Air Act penalties--in a state of flux.

(1) DOJ Natural Resources and Environment Division, Environmental Defense Section, opines that the CAA does not waive immunity from such penalties.

(2) But note Comp. Gen. decision B-194508, 58 Comp. Gen. 677 (1979) (appropriated funds may be used to pay penalties for Clean Air Act violations).

(3) Ohio v. Air Force, 17 Envtl. L. Rep. (Envtl. L. Inst.) 2120 (S.D. Ohio Mar. 31, 1987) (the Air Force must pay State administrative penalties for violations of State clean air rules).

c. Hazardous waste penalties under RCRA--no.

(1) Meyer v. Coast Guard, 644 F. Supp. 221 (E.D. N.C. 1986) (Federal agency not liable for civil penalties assessed by a State for RCRA violations).

(2) McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) (RCRA does not waive sovereign immunity for a citizen suit seeking civil penalties for violations of the Act).

(3) Mitzelfelt v. Dep't of Air Force, 903 F.2d 1293 (10th Cir. 1990) (no clear intention evidenced by Congress to waive sovereign immunity).

(4) Legislative history--see 122 Cong. Rec. 32,613.

(5) Cf. California v. Walters, 751 F.2d 977, 979 (9th Cir. 1985) (RCRA waiver (42 U.S.C. § 6961) does not waive Federal sovereign immunity for criminal sanctions imposed by a State).

(6) Cf. Florida Dep't of Envir. Regulation v. Silvex, 606 F. Supp. 159, 161 (M.D. Fla. 1985) (RCRA does not waive federal sovereign immunity for a State law creating a damages remedy for violations).

(7) Cf. Smalls v. U.S. EPA, 683 F. Supp. 120 (E.D. Pa. 1988) (in a Federal Tort Claims Act case the court observed that "42 U.S.C. § 6961 provides only for injunctive relief").

(8) But note Ohio v. U.S. Dept. of Energy, 904 F.2d 1058 (6th Cir. 1990) (RCRA sovereign immunity waiver subjects Federal agencies to fines imposed by State law).

(9) The future? H.R. 2194 and S. 596.

F. Permit Fees.

1. Policy.

a. The federal government pays "reasonable fees" for state and local environmental permits.

b. See, e.g., Comp. Gen. decision B-193379, 58 Comp. Gen. 244 (1979) (Mathes Air Force Base must pay fee in accordance with local ordinance for operation of a boiler, gasoline storage tanks, and a spray paint operation).

c. Sovereignty has not been waived for state taxation, however.

d. "Excessive" environmental permit and operating fees may be disguised taxes.

2. Fee or Tax - An Analytic Approach.

a. A fee is an amount which, if calculated correctly, allows an agency to recover a reasonable approximation of the costs it incurs in acting on a license request and providing a benefit or a service. A tax is an enforced contribution to provide for the general support for the government. See National Cable Television Assoc. v. United States, 415 U.S. 336 (1973). See also National Cable Television Assoc. v. FCC, 554 F.2d 1094 (D.C. Cir. 1976)

b. Massachusetts v. United States, 435 U.S. 444, 464-67 (1978) (federal aircraft "tax" is really a users' fee that can be levied against state-owned aircraft without violating constitutional proscriptions against federal taxation of states). The case uses a 3-pronged test.

(1) Is the fee imposed in a nondiscriminatory manner? E.g, are local governmental entities exempted?

--Theory: a tax can be discriminatory, but a valid permit fee or user fee cannot.

(2) Is the fee a fair approximation of the cost of the benefit received directly by the permittee? The "benefit" is generally the overhead expense for operating the permit system and the compliance inspections that may be conducted.

(3) Is the fee structured to produce revenues that will exceed the total cost to the state of the "benefits" it confers?

c. Application: United States v. Maine, 524 F. Supp. 1056 (D. Me. 1981) (state law requiring consumer credit agencies to pay a fee held invalid as applied to a federal credit union that was exempt from state taxation).

d. Exception -- State permits issued under the new Clean Air Act. Section 502 of the new CAA (Pub. L. No. 101-549) requires payment of all fees and charges used to defray the cost of a state's air pollution regulatory program. This language substantially modifies the "benefits" analysis under Massachusetts v. United States; states will now be able to collect fees even if corresponding benefits are not received by the installation.

3. Some portion of excessive fees are payable.

a. Request relevant data from the state (e.g., program costs, revenues generated, use of funds received).

b. Review legislative history of statute that creates the fee requirement--what is the purpose of the fee?

c. Coordinate with similar facilities in the state.

V. INDEMNIFICATION.

A. Context of the Problem.

1. The Resource Conservation and Recovery Act (RCRA) makes generators of hazardous waste strictly liable for cleanup actions that arise from the "management" of the hazardous wastes.

   a. Liability exists in perpetuity.

   b. Liability is joint and several for generators, some transporters, and treatment/storage/disposal facility owners.

   c. Hold-harmless clauses are enforceable, but generators cannot escape their liability to 3d parties.

2. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund) makes generators strictly liable for cleanup costs at leaking abandoned hazardous waste sites where their hazardous waste is located.

   -- The liability scheme is the same as that created under RCRA.

3. Insurance for CERCLA-type claims is difficult to obtain.

   -- Recently, contractors have found that the insurance for environmental tort or cleanup costs is unavailable at any price. As the operating contractor at the Army's Radford AAP noted, "[t]his lack of insurance is not limited to releases of materials that are toxic, nuclear, or hazardous, but extends to the environmental consequences of the releases of <u>all</u> chemicals, constituents, wastes, or materials." (emphasis added)

B. Indemnity Claims Under Existing Contracts.

1. Contractors have advanced a number of claims for indemnity relating to environmental matters. See, e.g., Johns-Manville Corp. v. United States, 12 Cl. Ct. 1 (1987).

   a. Express and implied contractual provisions for indemnity.

   b. Breaches of implied warranties and implied duties (e.g, an implied warranty that performance in accordance with specifications will not increase the contractor's cost of performance).

   c. Contract reformation based on unforeseeable future risks.

   d. "Takings" argument based on the 5th Amendment.

2. Cases may turn on express or implied provisions for indemnity.

   a. A claim based on a provision (typically, an implied provision) for indemnity usually will fail because of the Anti-deficiency Act.

   b. However, a claim cast as a breach of a duty under the contract might allow a contractor to recover upon showing that the breach increased the "cost of contract performance."

3. In Atlas Corp. v. United States, 15 Cl. Ct. 681 (1988), aff'd, 895 F.2d 745 (Fed. Cir. 1990), the Claims Court made it clear that in that forum contractor's claims for remediation costs will not succeed unless:

   a. Some statute or regulation mandates payment; or

b. A contract clause can be reasonably interpreted to require payment by the government; or

c. Facts can be proven relating to the execution of the contract from which it can be implied that the government actually agreed to pay for such costs.

C. Indemnity Provisions in New Contracts That Require Use of Hazardous Materials or Generation of Hazardous Waste.

1. Policy: does the government want to indemnify contractors for hazardous waste liabilities?

a. Fixed-price contracts.

(1) Indemnification makes some sense if the government will have joint and several liability for cleanup costs.

(a) Joint and several liability could arise where the government retained title to the raw materials used to manufacture the product for the government and the production process inherently generated hazardous wastes. See United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (1989).

(b) The Aceto theory was recently asserted in United States v. Occidental Chemical, No. 79-990C (W.D.N.Y). Occidental made munitions for the Army during World War II. Wastes from these production activities were disposed of at the Love Canal site.

(2) If the government will not be liable for cleanup costs, indemnity is clearly inappropriate unless absolutely necessary to induce contractors to offer to perform.

b. Cost-reimbursement contracts.

(1) As a practical matter, hazardous waste cleanup liability is a cost of doing business; therefore, indemnity provisions are not unreasonable.

(2) There is, however, no legal requirement to include indemnity provisions in government contracts.

(3) Note that indemnity is provided for when a contract includes the "Insurance Liability to Third Persons" clause, but it limited to the availability of appropriated funds at the time the contingency occurs. FAR 52.228-7(d).

2. Law: <u>can</u> we indemnify contractors?

a. Generally speaking, the Anti-deficiency Act precludes open-ended indemnity provisions. 31 U.S.C. § 1341.

b. There are two major exceptions to the rule against open-ended indemnification.

(1) 10 U.S.C. § 2354 allows indemnity in Military R & D contracts.

(a) Covers "unusually hazardous" activities that could result in death, bodily injury, or property damage.

(b) Implementing regulations are at DOD FAR Supplement 35.070 and 35.071.

(2) Public Law 85-804 (50 U.S.C.A. §§ 1431-1435) allows indemnity in some other cases. The law provides in relevant part that:

"The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government to enter into contracts or into amendments of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modifications of contracts, whenever he deems that such action would facilitate the national defense."

(a) The Executive Order that implements Pub. L. 85-804 speaks of indemnification for nuclear and "unusually hazardous" risks. See E.O. 10789, 23 C.F.R. 8897 (1958), as amended by E.O. 11051, 27 C.F.R. 9683 (1962); E.O. 11382, 32 C.F.R. 13755 (1971); & E.O. 12148, 44 C.F.R. 43239 (1979). See FAR 50.403 for contracting officer procedures.

(b) Does "unusually hazardous" risk includes catastrophic uninsurable loss? The Dep't of Transportation has granted indemnity on this basis. See Smith, Government Indemnification of Contractors: How Far Can You Go Under Public Law 85-804? 18 Nat. Cont. Mgt. J. 1, 9-10 (1984).

(c) Must all activities indemnified for be "unusually hazardous?"

3. Indemnity for what types of liabilities?

a. Strict liability--yes.

b. Negligence--perhaps, depending on the facts of the case.

c. Willful misconduct--not if by company principals, unless, the principals' action was directed by the contracting officer.

d. Fines and penalties--

(1) Criminal--no.

(2) Civil--???

D. Indemnity in Contracts for Hazardous Waste Management.

1. "Management" means transportation, storage, treatment, or disposal of hazardous waste.

2. In these contracts, the contractor should be expected to indemnify the government for cleanup costs and other third-party claims.

--E.g. An Army installation which had a contractor remove asbestos from some of its facilities received notices of seven violations for failing to comply with the state's air regulations. Four of those violations were for failing to notify or for incorrectly notifying the state of the times and places at which removal would occur. The state also indicated its intent to assess $70,000 in penalties, $10,000 for each violation. The contract should have required the contractor to indemnify the United States for any fines or penalties assessed against it by a state for failure to make the required notifications.

VI. SPECIFIC ENVIRONMENTAL CONTRACTING CONSIDERATIONS.

A. Emergency Environmental Services.

1. Emergencies <u>will</u> happen.
   - a. Sewage treatment plant overloads.
   - b. Water system contamination.
   - c. Release of hazardous substances.
     - (1) Fires.
     - (2) Explosions.
     - (3) Spills and leaks.

2. Procurement preparation.
   - a. Identify emergency risks and needed services.
   - b. Identify potential contractors to provide needed services.
   - c. Prepare model "statement of work" provisions and emergency funding authorities.
   - d. Develop/supplement an emergency procurement SOP.

3. Work documentation plan.
   - a. Need for the plan.
     - (1) Ensure the government is not overcharged.
     - (2) Create evidence to facilitate recovery from responsible third parties.
   - b. Establish work-monitoring responsibilities.

c. Develop work-monitoring SOP and daily reporting format.

(1) It's a chronology of events and decisions.

(2) Use a CQ log format and approach.

(3) What to note.

(a) Site conditions and weather.

(b) Arrival and departure of all personnel and equipment at the work site.

(c) Contractor work plans.
-- authorized.
-- accomplished.

(d) Materials used.

(e) Personal protective gear used.
--type.
--number of employees using gear.
--length of time used.

(f) Summaries of conversations, authorizations, necessary future coordinations.

B. Recycled Goods And Materials.

1. Citations.

a. 42 U.S.C. § 6962.

b. 40 C.F.R. Part 247 and 249.

2. Statutory Scheme.

a. EPA establishes guidelines for use of recycled materials. 42 U.S.C. § 6962(e).

b. Once the guideline is promulgated, federal agencies will procure such items composed of the highest percentage of recycled materials that is practical (in procurement of items exceeding $10,000 in cost), unless . . .

(1) Satisfactory levels of competition cannot be maintained, or

(2) The items are not available in a reasonable amount of time, or

(3) The items fail to meet the performance standards, or

(4) The items are available only at an unreasonable price.

42 U.S.C. § 6962(c)(1).

c. Procuring agencies "shall develop an affirmative procurement program which will ensure that items composed of recovered materials will be purchased to the maximum extent practicable." 42 U.S.C. § 6962(i).

d. Guidelines issued so far.

(1) Concrete and concrete products.
(2) Tires.
(3) Paper products.
(4) Petroleum and lubricants.
(5) Building insulation products.

e. Contract specifications shall not exclude use of recovered materials nor require that items be manufactured from virgin materials. 42 U.S.C. § 6962(d)(1).

C. Pursue Procurement Strategies Which Minimize Environmental Risks.

1. Practice Hazard Minimization in procuring goods and services.

   a. Draft contract specifications to require use of non-toxic or non-hazardous materials wherever possible.
   b. Employ a lifecyle analysis in evaluating what items to purchase -- items made with environmentally safe materials may cost more initially but may also cost significantly less to operate and dispose of.

2. Pay Extra Attention to the Contracting of Waste Disposal.

   a. Be sure the waste to be disposed of is thoroughly described in the contract and that the contractor acknowledges that he has been informed of the nature and constituents of the waste.

   b. Know what state and federal permits are required for a waste disposal facility to handle the type of waste being disposed of by your facility.

   c. Require the contractor to notify the government if it:

      (1) Is cited as being in violation of federal, state, or local waste disposal regulations.

      (2) Loses its authority to haul or dispose of waste under federal or state law.

   d. Specify that the contractor has no authority to dispose of government waste in absence of the necessary regulatory authorizations.

e. Require the contractor to submit copies of any necessary licenses or permits as part of their bid.

f. Require the waste disposal contractor to indemnify the United States.

VII. LEARN FROM PAST MISTAKES.

A. The Disappearing Post Office.

1. The Presidio of San Francisco received special funds to construct new buildings, the first of which was to be a post office.

2. The project was environmentally flawed in several respects.

   a. An environmental assessment was prepared, but it had major deficiencies.

   b. Construction may have violated a federal law that preserved the construction site as part of the Golden Gate National Recreation Area.

3. Construction proceeded to about the half-way point before the Sierra Club sued for an injunction.

4. The federal district court enjoined construction until the environmental problems could be addressed. In the meantime, authorization to spend the money expired.

5. Teaching points.

   a. Pay attention to environmental documentation when reviewing contract actions.

   b. Ensure a representative of the local command reviews the documentation for completeness, etc.

B. Just Give Me the Contract.

1. The Presidio of Monterey and the Naval Post-Graduate School sought to procure "solid waste" (i.e., trash) collection services by issuing an invitation for bids.

2. The City of Monterey had enacted an ordinance that designated Monterey City Disposal Services, Inc., (MCDS) as the exclusive agent for trash collection within city limits, and MCDS demanded that it be awarded the contracts on a sole-source basis.

3. Based on the language of the Resource Conservation and Recovery Act (at 42 U.S.C. § 6961), both the GAO and the 9th Circuit ruled that we must award the contract to MCDS on a sole-source basis. See Monterey City Disposal Service, Inc., 64 Comp. Gen. 813 (1985) and Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988).

   a. The GAO has refined its approach in these situations if a "major installation" is involved. See Solano Garbage Company, 66 Comp. Gen. 237 (1987) and the denial of Solano's request for reconsideration (B-225397.2 & B-225398.2 (1987).

   b. Solano was recently upheld in another case arising in California, Waste Management of North America, Inc., B-241067 (1991).

4. Teaching point: environmental statutes can be surprisingly intrusive into the way that federal agencies procure goods and services.

C. Two Bites at the Government's Apple.

1. The installation's GOCO waste water treatment plant discharged into a creek that experienced a large fish-kill, and the state sought to fine the installation for causing the problem.

2. Installation personnel negotiated an alternative remedy by promising to spend more money for an on-post environmental enhancement project.

3. The state then imposed a fine against our operating contractor for the kill. The contractor paid the fine and then sought reimbursement from the government for this cost.

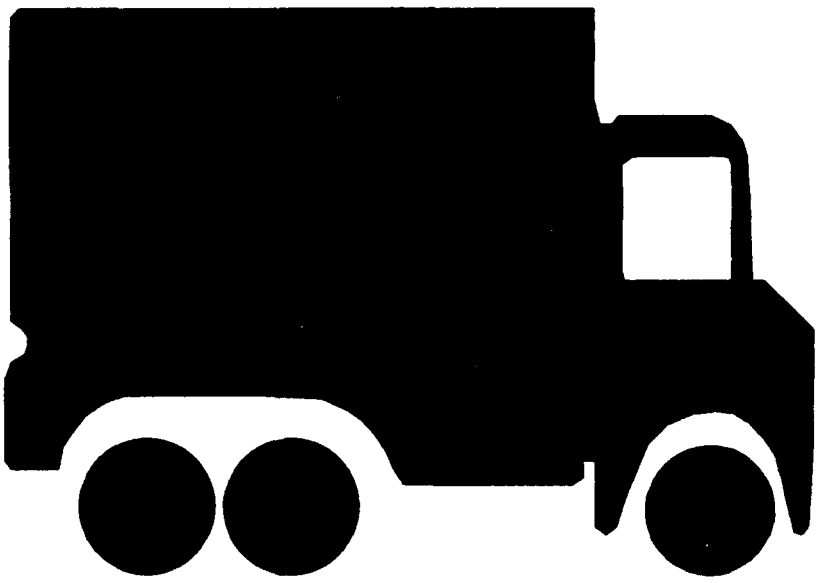
4. Teaching point.

-- Consider the contractor's interests and liabilities when negotiating environmental remedies.

VIII. CONCLUSION.

CHAPTER 12

DRAFTING EVALUATION FACTORS



CHAPTER 12

DRAFTING EVALUATION FACTORS

CHAPTER 12

DRAFTING EVALUATION FACTORS

I. **INTRODUCTION.**

II. **REFERENCES.**

A. FAR 15.605.

B. DOD Directive 4105.62 Selection of Contractual Sources for Major Defense Systems.

C. Army FAR Supplement Manual No. 1, Formal Source Selection Procedures for Army Systems Acquisition, 1 March 1991.

D. DA Pamphlet 25-6-1, Army Acquisition Planning for Information Systems, 1 July 1991.

E. U.S. Army Materiel Command Pamphlet 715-3, Vol 1, 8 Jan 1987.

F. Air Force FAR Supplement Appendix AA.

III. **TERMINOLOGY.**

A. Evaluation Factors.

1. FAR 15.605 requires the disclosure of evaluation factors and subfactors in the solicitation. This implies that factors are the highest or most general items to be evaluated.

MAJ Harry L. Dorsey
4th Installation Contracting Course
September 1991

2. The Army and the Air Force use somewhat different terminology to identify the hierarch of items to be evaluated.

a. In Army acquisitions, the highest level of consideration in the hierarchy of evaluation criteria is referred to as an "Area." The next highest level of criteria is referred to as an "Element." AFARS Manual No. 1, para. 6-11

b. "Factors" and "Subfactors" are the levels <u>below</u> "Elements."

c. The Air Force uses the terms "Area," "Item," "Factor," and "Subfactor." AFFARS App. AA, para 2-8(b)(2).

B. Evaluation Criteria.

a. Evaluation Criteria are items that will be qualitatively or quantitatively assessed by the government to identify strengths, weaknesses, and risk in offerors' proposals.

b. Evaluation criteria and subcriteria must be sufficiently detailed to allow identification of advantages, disadvantages and risks in offerors' proposals. AFARS 15.605(a).

c. Evaluation criteria are **WHAT** the government will evaluate.

d. Evaluation Criteria are indicators that the government believes will best allow prediction of future performance.

e. The Air Force uses three types of criteria: Cost, Specific, and Assessment criteria. AFFARS App. AA, para 2-8(b).

(1) Cost criteria relate to cost or price and may include cost realism and life cycle costs. AFFARS App. AA, para. 2-8(b).

(2) Specific criteria relate to program characteristics. Generally, these criteria are technical and management criteria. Examples might include technical, logistics, design approach, manufacturing technology, test, and management. AFFARS App. AA, para. 2-8(b)(2).

(3) Assessment criteria are related to the proposal or the offeror's abilities, e.g., soundness of design, understanding of the requirement, and past performance. AFFARS App. AA, para. 2-8(b)(3).

C. Evaluation Standards.

1. An evaluation standard is a guide for measuring how well an offeror's proposal meets the government's evaluation criteria.

2. Evaluation Standards describe **HOW** the government will evaluate the proposal.

3. Evaluation standards may be either quantitative or qualitative. AFARS Manual No. 1, para. 6-11(c).

a. Quantitative Standards. AFARS Manual No. 1, para. 6-11(c).

(1) An evaluation standard is quantitative when there is a quantifiable, stated requirement, e.g., the truck must have a 10 ton capacity. In this instance, if an offeror proposes a 1 ton or a 20 ton truck, the standard is not met. Note: This is an area where unreasonable restrictions on competition are frequent.

(2) An quantitative evaluation standard may also be relative when there is a range of acceptable approaches to the requirement, e.g., the radio must broadcast its signal at least 75, but no more than 100 miles.

(3) An quantitative evaluation standard may be open ended, e.g., the computer must process at least 1 million instructions per second (MIPS). This standard should be coupled with information indicating what value the government will place on proposals exceeding this standard.

(4) Examples of quantitative standards are: size, weight, speed, schedule, cost, data rights, facilities, and personnel.

(5) In Air Force terminology, these quantifiable criteria are likely to be specific criteria.

b. Qualitative Standards.

(1) A qualitative standard is subjectively assessed.

(2) For example, if understanding of the requirement is an evaluation criteria:

(a) The offeror's design could be evaluated for compliance with the mandatory requirements of the specification, compatibility with other components,training requirements, response to government directed changes, logistic support requirements,and human engineering.

(b) How well the proposal does these things is for the evaluators to determine.

IV. BASIC PRINCIPLES.

A. Rules of Thumb.

1. More is not always better. Too many evaluation areas or elements will dilute the amount of meaningful information the government receives.

2. Do not ask for information or data in the proposals that will not be evaluated.

3. Never evaluate criteria (or elements, factors, or subfactors) that were not disclosed in the solicitation.

B. Statutory Provisions.[1]

1. 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a(b) provide that each solicitation for competitive proposals shall at a minimum include --

(A) a statement of --

(i) all significant factors (and significant subfactors) which the head of the agency reasonably expects to consider in evaluating .... competitive proposals (including cost or price, cost- or price-related factors, and noncost- or nonprice-related factors); and

(ii) the relative importance assigned to each of those factors (and subfactors);

2. Further, 10 U.S.C. § 2305(a)(3) (no civilian equivalent) provides:

In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, and prior experience of the offeror).

[1]This language was effective for those solicitations issued on or after 5 March 1991. The National Defense Authorization Act for 1991/1992, Pub. L. 101-510, § 802, 104 Stat. 1589 (1990). Competitions based on Requests For Proposals issued before that date are processed under prior law.

3. Evaluation of cost or price.

a. Failure to consider cost or price violates statute, 10 U.S.C. § 2305(a); regulation, FAR 15.605(b); and GAO decision, Spectron, Inc., B-172261, 51 Comp. Gen. 153 (1971).

b. Firm-Fixed-Price Contracts. The offeror's proposed price is the probable cost. Litton Systems, Inc., et al., B-215106, September 18, 1984, 63 Comp. Gen. 585, 84-2 CPD ¶ 317; Ball Technical Products Group, B-224394, October 17, 1986, 86-2 CPD ¶ 465. Adjustments to the fixed price should be based on other identifiable costs to the government, i.e., in-house costs, life cycle costs.

c. Cost Reimbursement Contracts. Probable costs, not proposed costs, are evaluated. FAR 15.605(d); Kinton, Inc., B-228260.2, February 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112. The reason is that the government will pay the costs actually incurred, not those costs estimated by the contractor. This rule is intended to minimize the tendency of offerors to engage in lying contests. Probable cost is the offeror's proposed cost adjusted for cost realism. SRS Technologies, Inc., B-238403, May 17, 1990, 69 Comp. Gen. 459, 90-1 CPD ¶ 484 (probable cost analysis looks at cost of performing using proposer's technical approach to work, not agency's approach). However, it is improper for an agency to award based on probable costs without a detailed cost analysis or discussions with the offeror. Kinton, Inc., B-228260.2, February 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112.

d. Cost becomes more important as the technical differences between proposals becomes smaller.

e. Life cycle costs may be evaluated.

C. FAR Guidance.

1. The evaluation factors used to evaluate proposals are tailored for each solicitation. FAR 15.605(a); AFFARS App. AA, para. 2-8(b)(1).

2. Cost must be evaluated. FAR 15.605(b), Cost, however, is not scored or rated. AFARS 15.608((a)(1); AFFARS App. AA, para. 3-4(d)(1).

3. Disclose all significant evaluation criteria.

a. 10 U.S.C. § 2305 requires that all significant evaluation factors and subfactors be disclosed. See also 41 U.S.C. § 253a; FAR 15.605(e) (which requires that all significant subfactors be disclosed). The strengthening of this provision in 1990 may result in modification of previous GAO decisions in this area.

b. Previously, the GAO, as a general rule, did not require a contracting agency to specifically identify the subfactors comprising the evaluation criteria if the subfactors were reasonably related to the

stated criteria, and were of relatively equal importance. High-Point Schaer, B-242616, May 28, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 509 (RFP did not disclose the relative importance of cost and technical areas; GAO presumes that they had approximately equal importance); Bell & Howell Corp., B-196165, July 20, 1981, 81-2 CPD ¶ 49; Washington Occupational Health Association, Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567. The GAO, however, also held that reasonably related subfactors must be disclosed if significant. Devres, Inc., B-224017, December 8, 1986, 66 Comp. Gen. 121, 86-2 CPD ¶ 652 (subfactors of greater weight than many of the factors should have been disclosed).

c. The GSBCA strictly requires disclosure of all significant factors and subfactors. Compuware Corp., GSBCA No. 8869-P, 87-2 BCA ¶ 19,781 (use of topics addressed as specific subfactors, changing the emphasis of the evaluation).

d. The relative importance of all evaluation factors and subfactors, i.e., technical, management, and cost factors, must be disclosed.

(1) Disclosure may be made by:

(a) Providing percentage or numerical weights in the RFP.

(b) Providing an algebraic paragraph.

(c) Listing in descending order of importance.

(d) Using a narrative statement.

(2) Numerical weights, if used to score proposals, need not be disclosed. FAR 15.605(e); Textron - Diehl Track Co., B-230608, B-230609, July 6, 1988, 88-2 CPD ¶ 12. Nor must the agency disclose the precise evaluation scheme. C3, Inc., B-241983.2, March 13, 1991, 91-1 CPD ¶ 279 (RFP did not specify how much extra evaluation credit proposer would receive for proposing better than minimal solution; held, fact that some uncertainty in disclosure is permissible).

(3) For DoD major systems, the numerical weights shall not be disclosed. DoD Directive 4105.62, Selection of Contractual Sources for Major Defense Systems (9 September 1985).

(4) The GAO, in the past, has presumed all factors equal when no order of importance was stated in the RFP. Litton Systems, Inc., Electron Tube Division, B-215106, September 18, 1984, 63 Comp. Gen. 585, 84-2 CPD ¶ 317; University Research Corp., B-196246, January 28, 1981, 81-1 CPD ¶ 50. The better practice is to expressly state the relative importance intended. Rely on the "presumed equal" line of cases only where you have failed to state the relative importance.

c. The Cost/Technical Tradeoff.

(1) As part of a statement of relative importance, the RFP should state how cost and technical merit will be weighed in the selection for award. AFARS 15.605(d) recommends either:

(a) Lowest priced technically acceptable offer, or

(b) An acceptable offer, the price of which is not the lowest, but which is sufficiently more advantageous than the lower priced offers so as to justify the payment of the additional price.

(2) Following the suggested language is not a panacea. See Jack Faucett Associates, B-236396, November 9, 1989, 89-2 CPD ¶ 449 (AFARS language ambiguous when combined with other provisions in the RFP); Planning Research Corp., B-237201, B-237201.3, January 30, 1990, 90-1 CPD ¶ 131 (did the trade off change based on whether award on initial proposals made - GAO held that was not what language meant); National Test Pilot School, B-237503, February 27, 1990, 90-1 CPD ¶ 238 (award to the low cost technically acceptable proposal inconsistent with statement that technical criteria were more important than cost).

4. Evaluation of Technical and Management Factors (Quality).

a. Quality shall also be addressed in every source selection. FAR 15.205(b); DFARS 215.605(e).

(1) Quality in both the FAR and in 10 U.S.C. § 2305(a)(3) means evaluation factors other than price or cost, i.e. technical, management, past performance, logistics, and training.

(2) May quality have no importance? Prior to the 1990 amendments, quality could have no importance. In Kilgore Corp., B-235813.2, November 7, 1989, 69 Comp. Gen. 59, 89-2 CPD ¶ 434, aff'g 89-1 CPD ¶ 576, the GAO interpreted the previous language in 10 U.S.C. § 2305(a)(3) and FAR 15.605(b) as not requiring "quality" to be an evaluation factor in every negotiated procurement. The GAO held that the statute and regulation merely require disclosure of the relative importance, if any, attached to quality factors. The amended language in 10 U.S.C. § 2305(a)(2)(A)(i) may easily be interpreted as reversing the GAO's decision in Kilgore Corp.

b. Guidance on particular non-cost evaluation factors is provided by agency supplements and other regulations.

(1) For example, AFARS 15.605, and AFARS Manual No.1 provide additional guidance to Army personnel. See also, NAPS 15.605; AFFARS Appendix AA, Formal

Source Selection for Major Acquisitions; AMC Pam 715-3, Source Selection; DOD Directive 4105.62, Selection of Contractual Sources for Major Defense Systems.

(2) The evaluation factors should address all portions of the work being acquired. Julie Research Laboratories, Inc., GSBCA No. 8919-P, 87-2 BCA ¶ 19,919.

(3) An example of evaluation factors is set forth in Appendix 12-A.

V. PRACTICAL CONSIDERATIONS.

A. Understand the Acquisition.

1. Understanding the technical and contracting objectives of the acquisition is essential to the intelligent drafting of evaluation criteria.

2. Evaluation criteria should be carefully chosen to include only those items that will allow the government to identify important differences between the approaches taken by various offerors.

a. Evaluate only those criteria that will have significant impact on the source selection decision.

b. Evaluate discriminators.

(1) Discriminators are those aspects of a proposal on which the offerors are likely to have different approaches.

(a) The focus should be on those items that will best predict successful completion of the contract.

(b) Don't assume that only competent firms will submit proposals. There must be enough basic data in the evaluation criteria to identify and eliminate those firms with no real chance for award or successful completion of the contract.

(2) Do not evaluate those items that the government will control. For example, do not evaluate the content of a training program if the government dictates the content of the course.

c. All criteria and subcriteria must be included in the solicitation.

d. Lower levels of detail (e.g., elements and subelements) used by evaluators need not be disclosed in the solicitation, but must be rationally related to the disclosed criteria and subcriteria.

B. Understand the Stage of Development of the Program.

1. In early stages of program development, the technical aspects of offerors' proposals are more important. Accordingly, they should be more closely examined.

2. After the technology has matured, cost control, production methodology, quality control, and other criteria become more important that the technical approach.

C. Incorporating Evaluation Criteria into the Solicitation.

1. Evaluation criteria are included in Section M of the Solicitation.

2. Evaluation criteria are also included in the Source Selection Plan.

a. Consistency between the solicitation, evaluation plan, and the actual evaluation is essential.

b. Consistency is <u>best</u> achieved through verbatim repetition of the evaluation factors from the solicitation in the Source Selection Plan.

3. Careful consideration should be given to the type of information the government wishes to receive to allow it to evaluate the offerors' proposals.

   a. This information should be included in Section L of the solicitation, Instructions to Offerors.

   b. There must be consistency between the type of information requested in Section L of the solicitation and the evaluation criteria set forth in Section M. For example, if the government considers that the qualification of the offerors' proposed personnel is of great importance and this element of the management area will be evaluated pursuant to Section M, Section L should direct the offerors to submit detailed information on their proposed personnel.

4. Problem Evaluation Criteria.

   a. Options.

      (1) The evaluation criteria should clearly address all options being evaluated. A solicitation which fails to state whether options will be evaluated is defective. Golden North Van Lines, Inc., B-238874, 69 Comp. Gen. 610, July 17, 1990, 90-2 CPD ¶ 44 (applying rule to an IFB). See FAR Subpart 17.2 for guidance on options; Temps & Co., B-221846, June 9, 1986, 65 Comp. Gen. 640, 86-1 CPD ¶ 535 (IFB failed to state whether options would be evaluated). Do not evaluate options if the solicitation states that options will not be evaluated; N-K Construction Co., Inc.,

B-224534, February 19, 1987), 87-1 CPD ¶ 188 (IFB stated that option price would not be evaluated).

(2) Evaluation of options at the time of the award is required in order for the option to be exercised without a J&A. FAR 17.207(f).

b. Key Personnel. In services contracts, the personnel used by a contractor are very important. Therefore, the evaluation criteria should include an evaluation of the personnel proposed, including: their education, training, experience, amount of time committed to perform the contract, the likelihood that a proposed new hire will agree to work on the contract, impact on other contracts, etc. The proposal preparation instructions should request resumes, hiring or employment agreements, and proposed responsibilities.

c. Past Performance. In all contracts, the previous performance, or lack thereof, is an important predictor of successful completion of the solicited work. The evaluation criteria should include consideration of past performance on similar contracts, and problems on previous government contracts, e.g., defaults and overruns. Planning Research Corp., GSBCA No. 10697-P, 91-2 BCA ¶ 23,881, 1991 BPD ¶ 82, fn. 11 (contract constantly tied up in litigation will not be performed in an adequate manner). If the government intends to use any sources of information, it should specify them in the solicitation. See NASCO Aircraft Brake, Inc., B-237860, March 26, 1990, 90-1 CPD

¶ 330 (protest filed after award untimely since request for BAFO told contract that "Blue Ribbon Program" would be used to evaluate past performance).

VI. PRACTICAL EXERCISE.

A. Drafting Evaluation Criteria.

1. Refuse collection and disposal

2. Spare Circuit Card for guidance system in missile

3. X-Ray machine for hospital

B. Drafting Evaluation Standards.

1. Key Personnel

2. Lithium batteries

3. Individual wrist watch mounted computer for global positioning and fire control.

VII. CONCLUSION.

Appendix 12-A: Sample Evaluation Factors.

Chapter 12

APPENDIX 12-A

SAMPLE EVALUATION FACTORS

SECTION M. EVALUATION FACTORS FOR AWARD

M-1. The government will award to the offeror whose proposal is most advantageous to the government considering the evaluation criteria set forth below.

M-2. Evaluation Criteria.

a. Technical Area.

(1) Widget Design Element. The government will evaluate the design of the proposed widget for compliance with the specifications set forth in Section C.

(2) Widget Reliability and Maintainability Element. The government will evaluate the proposed widget for reliability. Reliability demonstrated through testing is preferred over reliability predicted through analysis. The maintainability of the widget, including ease of repair, use of readily available commercial parts, adequate repair manuals, etc., shall be evaluated.

(3) Key Personnel Element - The education, experience, and availability of the proposer's key personnel shall be evaluated. Key personnel are those personnel defined in clause H-24, Key Personnel.

b. Management Criteria.

(1) Quality Element. The proposer's quality control program shall be evaluated to determine compliance with MIL-I-45208A and the likelihood that the system will ensure acceptable widgets.

(2) Capability Element. The proposal will be evaluated on the resources available to perform the

contract, including production facilities, financial resources, adequate staffing, etc.

c. Past Performance Criterion.

The offeror will be evaluated on past performance in supplying similar widgets, and past performance on other government contracts.

d. Risk Criterion.

The offeror's proposal will be evaluated on the risks for on time delivery of conforming widgets.

e. Price.

Only firm-fixed-prices are acceptable. The proposed price will be adjusted for the following price related factors: rental charges for government property, government inspection costs, and transportation charges.

M-3. Relative Importance of Evaluation Criteria.

The technical criteria are more important than management criteria, past performance, and risk combined. The technical criteria are in descending order of importance. The management criteria are of equal importance. The management criteria, combined, are of equal importance with past performance and risk, individually.

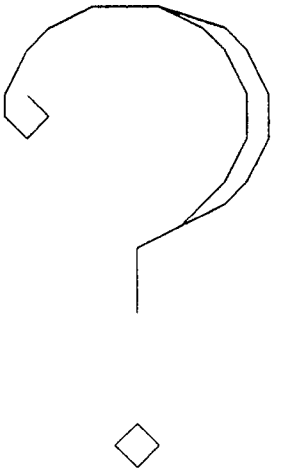
Price, adjusted for price-related criteria, is of equal importance with the non-cost criteria.

M-4. Selection for Award.

The government will award to the offeror whose proposal provides the best value to the government. The government may award to an offeror whose proposal is sufficiently more advantageous than lower priced proposals so as to justify payment of the higher price.

CHAPTER 13

CONTRACT PROBLEMS



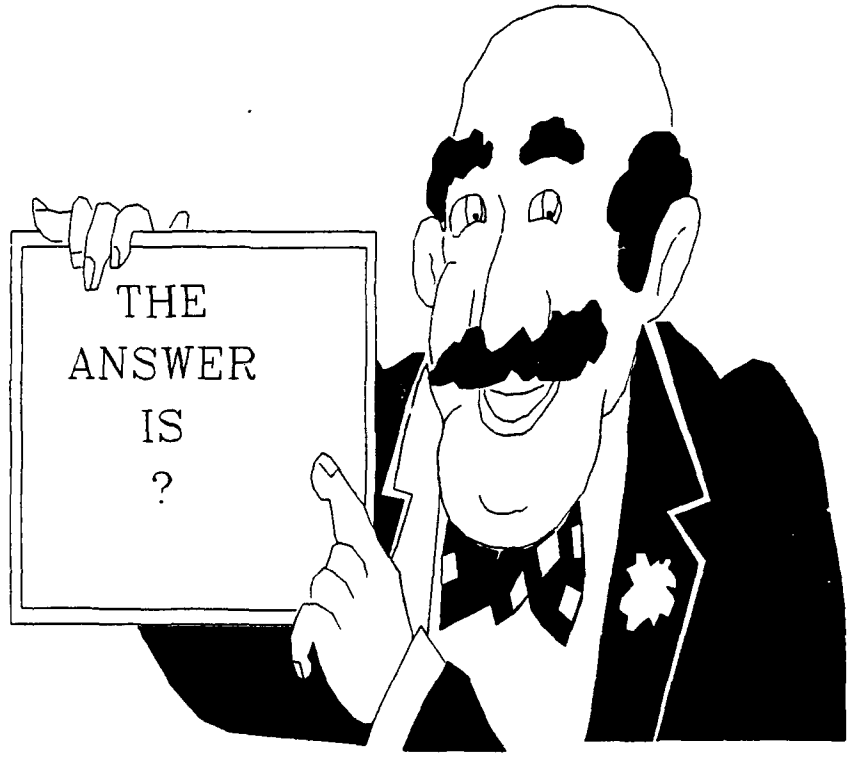
CHAPTER 13

CONTRACT PROBLEMS

Problems to be distributed.

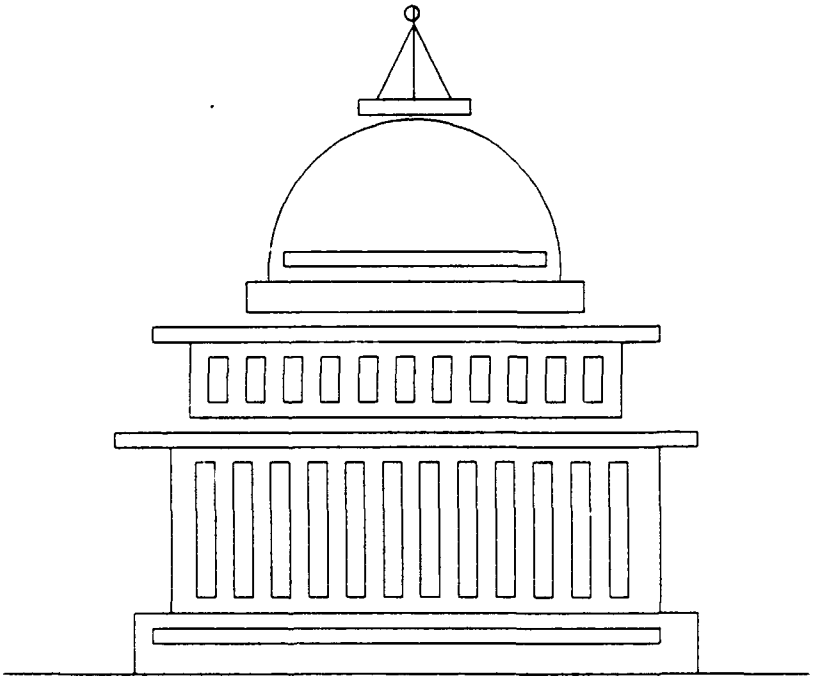
CHAPTER 14

CONTRACT PROBLEMS REVIEW



CHAPTER 15

BASE CLOSURE



CHAPTER 15

BASE CLOSURE

Distinguished Guest Speaker

MAJ Horst G. Greczmiel
Compliance and Policy Branch
Environmental Law Division
Office of the Judge Advocate General
U.S. Army

MAJOR HORST G. GRECZMIEL

MAJ GRECZMIEL, currently assigned as an environmental attorney in the Compliance and Policy Branch, Environmental Law Division, OTJAG. He is a 1974 graduate of Lafayette College, and received his Juris Doctor from Rutgers-Camden School of Law in 1977. In 1978, after admission to the bars of New Jersey and Pennsylvania, MAJ Greczmiel entered active duty in the Judge Advocate General's Corps.

Past assignments include Legal Assistance Officer, Trial Counsel and Defense Counsel at Fort Campbell, Kentucky; Chief, Military Justice and Chief, Administrative Law at Fort Belvoir, Virginia; and Chief, NATO-SOFA Claims, U.S. Army Europe. He is a 1985 graduate of the Judge Advocate Officer Graduate Course and received a Master of Law in Environmental Law from the George Washington University National Law Center in 1989.

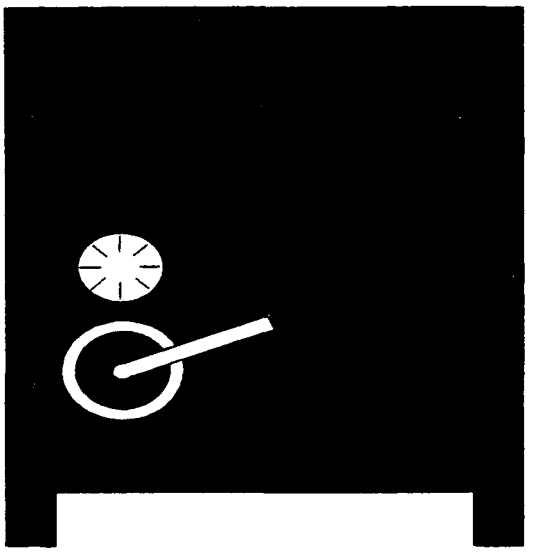
CHAPTER 15

BASE CLOSURE

Outline to be distributed prior to class.

CHAPTER 16

COMMERCIAL ACTIVITIES UPDATE



CHAPTER 16

COMMERCIAL ACTIVITIES PROGRAM UPDATE

CHAPTER 16

COMMERCIAL ACTIVITIES PROGRAM UPDATE

I. INTRODUCTION.

II. STATUS OF REFERENCE MATERIALS.

A. OMB Circular A-76 (4 Aug. 1983), and Supplement, OMB Cir. A-76 (Policy Implementation, Writing and Administering Performance Work Statements, Management Study Guide, and Cost Comparison Handbook). Both are in need of revision, but promised drafts for comments have not yet been published.

B. DoD Directive 4100.15, "Commercial Activities Program" (10 March 1989), and DoD Instruction 4100.33, "Commercial Activities Program Procedures," (9 Sept. 1985); Pretty much up-to-date.

C. Army Regulation No. 5-20, Commercial Activities Program (20 October 1986). Under revision. Proponent office opines new regulation may be available by March 1992. However, no major changes are expected.

MAJ Bobby D. Melvin
4th Installation Contracting Course
September 1991

III. MISCELLANEOUS STATUTORY PROVISIONS.

A. Prohibition on Contracts for Performance of Firefighting or Security-Guard Functions. 10 U.S.C. § 2465.

Funds appropriated to DoD may not be obligated or expended for the purpose of entering into a contract for firefighting or security-guard functions at any military installation or facility

B. Prohibition on Certain Depot Maintenance Workload Competitions. 10 U.S.C. § 2466.

In selecting an entity to perform any depot maintenance workload, the Secretaries of the Army and Air Force are prohibited from carrying out a competition for such selection;

(1) between or among maintenance activities of the Department of the Army and the Department of the Air Force, or

(2) between a maintenance activity of either department and a private contractor.

C. Cost Comparisons: Requirement with Respect to Retirement Cost and Consultation with Employees. 10 U.S.C. § 2467.

1. Retirement Costs in Cost Comparisons. Requires DoD, in all cost comparisons, to include the retirement system costs of both the Department of Defense and the contractor.

2. Consultation with DoD Employees. Requires DoD officials responsible for making the decision whether to keep a commercial function in-house or to contract it out to consult monthly during the review process with the civilian employees who will be affected by the determination. [Implemented by Msg, HQDA, CSER-SP, 281600Z Apr 89].

D. Private Operation of Commissary Stores. 10 U.S.C. § 2482

Prohibits the contracting out of procurement functions (relating to products bought for resale) or overall management functions at military commissaries. Contracting out of other commissary functions, such as checkout clerks and stock employees, is still allowed, however.

IV. RECENT LEGISLATION AFFECTING THE COMMERCIAL ACTIVITIES PROGRAM.

A. FY 1991 DoD Authorization Act, Pub. L. No. 101-510, 104 Stat. 1485.

1. Continuation of Authority of Installation Commanders Over Contracting for Commercial Activities. (Nichol's Amendment). Section 921 extends for one more year the authority of installation commanders to decide which commercial activities at the installation will be reviewed under the commercial activities procedures and when they would be reviewed.

2. Pilot Program Authorization for Depot Maintenance Workload Competition. Section 922 authorizes the Secretary of Defense to conduct a depot maintenance workload competition pilot program during fiscal year 1991, notwithstanding 10 U.S.C. § 2466. The pilot program shall involve competition for a portion of the depot maintenance workload at one Army and one Air Force depot maintenance activity. Any competition shall be open to such maintenance activities of DoD as the Secretary of Defense may designate as well as private contractors.

3. Prohibition on Use of Appropriated Funds to Perform Cost Studies. Section 8087 prohibits the use of appropriated funds under the DoD Appropriation Act, 1991, Pub. L. 101-511, 104 Stat. 1896, to be used to perform cost studies pursuant to the provisions of OMB Circular A-76 if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 48 months after the initiation of a multi-function activity. Appropriated funds, however, may be used to fund presently ongoing studies until May 5, 1991.

B. Proposed Legislation.

1. HR 3163. Introduced 1 August 1991 by Representative John Conyers (D-Mich). The major objective of the bill is to give federal employees the right to appeal preliminary contracting out decisions before they become final - while preventing HCA's from making final awards while such appeals were pending. In addition, HR 3163 would require:

   a. Performing the work in-house if the cost studies showed that the federal employees could perform the work at a cost no more than 10% higher than the anticipated cost of contracting out;

b. Private firms to bid on a firm fixed price basis (for three years or less) unless agencies make a special exception for cost reimbursement contracts;

c. The FAR Council to establish new standards for cost comparison studies;

d. Agencies to prepare and make public before March 31 of each year and inventory of commercial activities done by private firms during that year;

e. Agencies to publish performance work statements about commercial activities; and

f. Agencies to establish boards to review their cost review analyses.

2. FY 92 Authorization Act. Senate version of proposed act seeks to repeal the Nichols Amendment.

V. **THE "NICHOLS AMENDMENT."** DoD Authorization Act, § 1131, Pub. L. No. 101-189, 103 Stat. 1560.

A. DoD must delegate to the commander of each military installation the authority to decide which commercial activities at the installation will be reviewed under the CAP procedures and when.

B. DoD implementation: DoD Dir. 4100.15, para. 3.e., says to "delegate, as much as practicable, broad authority to installation commanders to decide how to best use the CA program to accomplish the mission. . . ."; but Commanders may <u>not</u> use their "Nichols Amendment" authority to stop cost studies already underway as of 4 Dec 87.

VI. **THE OFFICE OF FEDERAL PROCUREMENT POLICY'S POSITION: CAP IS ALIVE.**

A. FY 1989, FY 1990 and FY 1991 budget cuts: an attempt to force agencies to meet their study goals.

-- DoD Appropriations Act, 1991, § 8087, 104 Stat. 1896 (1990) limits availability of appropriated funds for cost comparison studies.

B. Planned revision of OMB Circular A-76.

VII. OTHER AREAS OF INTEREST.

A. Government Furnished Property. The DAR Council approved an Army deviation to the DFARS which permits, during a two-year test period effective 27 September 1989, the Army to provide existing Government property under installation support services contracts without retaining the responsibility for replacement. 54 Fed. Reg. 39537 (27 Sept. 1989).

B. Proposed FAR change. A proposed change to FAR 7.307 to require an administrative review of and appeal from a cost comparison by an official at a **higher level** than the official who approved the initial cost comparison. (Currently by official of same level). FAR Case 91-26 (56 Fed. Reg. 29556).

VIII. DEPARTMENT OF THE ARMY POLICY ACTIONS.

A. Concerns. Army commanders most effected by CA programs have identified a number of areas of major concern. They include:

1. Providing local commanders with maximum flexibility in choosing which CAs to compete. (Current policy of "dealer's choice" seems to provide that.)

2. Program Reporting Requirements.

3. Local retention of savings from MEO and contract conversions.

B. Problem Areas.

1. Commanders have (wrongly) interpreted Nichols Amendment as authorizing them to do nothing. Army policy is still to compete our commercial activities.

2. Length of time to complete contracting out studies. GAO reports that average time is now four years and eight months to complete a single function study.

C. Initiatives.

1. Adoption of DCAA report EC 89-205, dtd 9 June 1989 recommendation to perform annual cost-effectiveness reviews on all CA contract conversions to ensure costs remain reasonable.

2. Requirement for FY 92 CA Study Plans. Authorization and encouragement to CA Program Managers to include functions from activities whose studies had been cancelled.

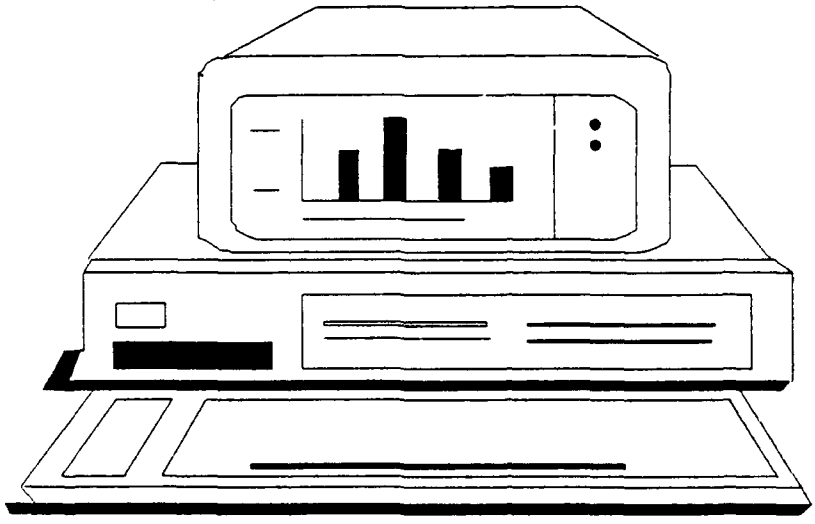
3. Revision of AR 5-20.

4. ALAP Video Teleconference on Commercial Activities scheduled for November 1991.

IX. SUMMARY.

CHAPTER 17

MULTIPLE AWARD SCHEDULE CONTRACTS



CHAPTER 17

MULTIPLE-AWARD SCHEDULE CONTRACTS

CHAPTER 17

MULTIPLE-AWARD SCHEDULE CONTRACTS

I. INTRODUCTION.

A. The Federal Supply Schedule (FSS) Program. FAR 8.401, FAR 38.101.

1. The FSS Program is administered and managed by the General Services Administration and is designed to provide Federal agencies with a simplified process for acquiring commonly used supplies and services at prices associated with volume buying.

2. Indefinite quantity contracts, which include requirements contracts, are established with commercial firms to provide supplies and services at a stated price for a given period of time.

3. The schedule contracting officer issues Federal Supply Schedules, which contain the information necessary for placing orders with a contractor. The schedule contracting officer has responsibility for overall administration of the schedule contracts.

4. Ordering offices place orders directly with the schedule contractors, consistent with the terms and conditions of the schedules.

LTC Glenn E. Monroe
4th Installation Contracting Course
September 1991

5. Copies of the schedules may be obtained by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing Lists Services, 819 Taylor Street, P.O. Box 17077, Fort Worth, Texas 76102-0077.

6. Copies of the GSA Supply Catalog, which includes a listing of schedules and information on the use of schedules, may also be ordered from the above address.

7. The purchase of Federal Information Processing resources under GSA schedule contracts is governed by the Federal Information Resources Management Regulation (FIRMR) and not by the FAR. The FIRMR is codified at 41 C.F.R. Part 201. See also DFARS Part 239.

B. Types of Federal Supply Schedules. FAR 8-403, FAR 38.102.

1. Single-Award schedules cover contracts made with a supplier for a given geographic area. Designated agencies must fulfill their requirements by placing ordering against these schedules.

2. Multiple-Award schedules cover contracts made with more than one supplier. Mandatory user agencies must order schedule items if such items meet their needs.

3. The New Item Introductory Schedule (NIIS) introduces new or improved products into the Federal Supply System. The NIIS is published approximately four times a year and is cumulative.

4. International Supply Schedules provide sources of supply (supplies and services) to U.S. Government activities overseas. The use of these schedules is mandatory only on GSA.

II. MULTIPLE-AWARD SCHEDULE CONTRACTS.

A. Establishment of Multiple-Award Schedules. FAR 38.102-2.

1. Multiple-Award schedules are negotiated contracts with more than one contractor for delivery of comparable commercial supplies or services.

2. Multiple-Award schedules are generally established annually after an open solicitation. The government's objective is to obtain a discount from the supplier's catalog or commercial price list that is equal to or greater than the discount given the contractor's "most favored customer."

3. Multiple-Award schedule contractors must prepare and distribute catalogs and price lists that must be used to prepare orders.

4. An annual business volume of $1,000 for national and $250,000 for regional schedules is required to establish or continue a schedule.

B. Mandatory Use of Multiple-Award Schedule Contracts.

1. Each schedule will list those agencies which are required to use the schedule. Mandatory user agencies must order schedule items if such items meet their needs. FAR 38.101.

2. DoD will not become a mandatory user of any schedule unless individual DoD activities elect to provide annual requirements estimates to GSA and become mandatory users. DFARS 208.404-1.

3. In the case of a mandatory schedule, ordering officers may not solicit bids, proposals, quotations, or otherwise test the market solely for the purpose of seeking alternate sources. They may also not request formal or informal quotations from FSS contractors for purposes of price comparisons. FAR 8.404(c).

4. There are several exceptions to the mandatory use of schedules. FAR 8.404-1. The more important exceptions are:

a. Urgent requirements. When a shorter delivery time is required than that specified in the schedule, the ordering officer must first notify the schedule contractor. If the schedule contractor can not provide an acceptable accelerated delivery schedule or fails to respond, use of the schedule is not required.

b. Small requirements. Mandatory use is also not required for orders that are below the schedule's dollar or quantity minimums.

c. Lower prices for identical items. When an ordering officer finds that an identifiable item is available from another source at a lower price, the office may purchase the identifiable item subject to the requirement to obtain competition.

C. Nonmandatory Use of Multiple-Award Schedule Contracts.

1. The procedures for nonmandatory users of schedule contracts are for the most part the same as the procedures for mandatory users.

2. Nonmandatory users are free to issue solicitations or the test the market before making schedule orders. Columbia Diagnostics, Inc., B-210345, May 31, 1983, 83-1 CPD ¶ 578. An agency may also issue Requests for Quotation (RFQs) to obtain information from schedule contractors as features of their products to determine whether such items meet agency needs. Amray, Inc., B-209481, June 6, 1983, 83-1 CPD ¶ 608.

3. Nonmandatory users are not exempt from the Commerce Business Daily requirement. See Information Marketing International, B-216945, June 28, 1985, 85-1 CPD ¶ 740 (GAO noted that orders on mandatory FSS contracts are exempt from the CBD requirement but did not comment on nonmandatory users).

D. Ordering from Multiple-Award Schedule Contracts.

1. Users (mandatory and nonmandatory) of schedules should place orders with the schedule contractor offering the lowest delivered price available. The ordering office must justify in its contract file any orders over $1,000 per line item placed at other than the lowest price. FAR 8.405-1(a).

2. When two or more items at the same price will meet an ordering office's needs, preference shall be given to items of small business and/or labor surplus area concerns following the order of priority of FAR 14.407-6 for equal low bids. FAR 8.405-1 (B).

3. The procedures of FAR Part 25, Foreign Acquisitions, are used when a schedule lists both foreign and domestic items meeting the ordering office's needs. FAR 8.405-1(c).

4. The ordering office must notify the schedule contract officer within 10 days whenever an item is ordered from the schedule contractor at a price lower than the schedule price. FAR 8.405-1(d).

E. Administration of Multiple-Award Schedule Contracts.

1. The schedule contracting officer shall (FAR 38.205):

a. Exercise general supervision of the schedule contract;

b. Issue final decisions on all disputes which relate to the schedule contracts, or arise under orders which cannot be resolved between the ordering officer and the contractor;

c. When necessary, terminate the schedule contract for default or for the convenience of the government; and

d. Make necessary changes to the schedule contract.

2. An ordering officer may:

a. Terminate any one or more orders for default. The schedule contracting officer shall be notified whenever a FSS contractor is declared to be in default or fraud is suspected;

b. Terminate individual orders for the convenience of the government.

III. PURCHASES OF FEDERAL INFORMATION PROCESSING (FIP) RESOURCES FROM GSA SCHEDULE CONTRACTS.

A. Preliminary Considerations.

1. Federal Information Processing (FIP) resources is an umbrella term which includes automatic data processing equipment (ADPE) and telecommunications resources. FIRMR 201-4.001.

2. The GSA directs and manages some mandatory and nonmandatory schedule contracts that contain some resources that fall within the definition of FIP resources. Most FIP schedule contracts are nonmandatory.

3. The use of schedule contracts for FIP resources is governed by FIRMR Subpart 201-39.8. The procedures of FAR Subpart 8.4 are followed when an order is placed against a GSA Federal Supply Schedule. FIRMR 201-39.801-2.

4. The purchase price may not exceed the maximum ordering limitations of the schedule contract. FIRMR 201-39.803-3(d).

B. The Purchase of Telephones and Services (POTS) Contracts. FIRMR 201-39.802.

1. GSA has established POTS contracts to provide telecommunications supplies and services, including purchase, installation, maintenance, repair, deinstallation, and relocation of both contractor-owned and Government-owned telephone equipment, at locations throughout the United States.

2. The use of POTS is <u>mandatory at some locations</u> where GSA operates or manages the telecommunications system or service.

3. Agencies may determine whether the use of POTS contracts is mandatory from the General Services Administration, Technical Contract Management Division (KVT), 18th and F Streets, N.W., Washington, D.C. 20405.

4. Nonmandatory user agencies may use POTS contracts when their requirements fall within the scope of the POTS contract and the contracting officer determines that placing an order under the POTS contract is most advantageous to the government.

C. Limitations on the Use of FIP Schedule Contracts.

1. The use of a FIP schedule contract does not obviate the need for competition.

2. The use of a FIP schedule contract does not eliminate the need for justifications and approvals (J&As) applicable to restrictive requirements. Telos Field Engineering, GSBCA No. 9802-P, 89-1 BCA ¶ 21,533.

3. The use of a FIP schedule contract does not eliminate the need to synopsize the requirement in the CBD if the price will exceed $50,000. FIRMR 20139.501-2.

4. The use of a FIP schedule contract does not eliminate the need to justify Warner Amendment (10 U.S.C. § 2315) applicability. DFARS 239.001.

D. Procedures.

1. Prior to selecting a GSA schedule contract and placing an order or, if applicable, publishing a synopsis of an intent to place an order, the agency must justify any restrictive requirement (an "all or none" requirement or requirement of "only new" equipment), and it must consider the offerings of a reasonable number of nonmandatory schedule contractors. FIRMR 201.39-803-3(a).

2. The intent to place an order against a GSA nonmandatory schedule contract must be synopsized in the CBD at least 15 calendar days before placing the order if the order will exceed $50,000. In calculating the 15 calendar days, the first day shall be the actual date the synopsis appears in the CBD. FIRMR 201-39.501-2, FIRMR 201-39.501-3(b).

3. The synopsis of an intent to place an order must include (FIRMR 201.39-501-3(c)):

   a. An identification of the specific nonmandatory schedule contract intended to be used.

   b. A description of the resources to be ordered, including, as applicable:

      (1) The make and model of any FIP equipment to be ordered or maintained;

(2) The name, functional description, and operating environment of any FIP software to be ordered;

(3) The quantities, dates required, and period of performance;

(4) The life system; and

(5) The type of support to be ordered.

c. A request for pricing data.

d. The following statement:

All responses from responsible sources will be fully considered. As a result of analyzing responses to this synopsis of intent, the contracting officer may determine that a solicitation will be issued. If a solicitation is issued, no additional synopsis will be published. Any such solicitation will be issued to the intended schedule vendor and all firms that respond to this synopsis of intent or otherwise request a copy of the solicitation.

4. Choices after the CBD synopsis of an intent to place an order (FIRMR 201.39.803-3(b):

a. If no responses are received, the procurement file is documented accordingly and an analysis is included which indicates that the schedule purchase represents the lowest overall cost alternative to the government.

b. If a response is received from either a responsible vendor without a nonmandatory GSA schedule contract or a vendor with a GSA nonmandatory schedule, the contracting officer shall take one of the following actions (SYNON, INc., GSBCA No. 9404-P, 88-2 BCA ¶ 20,780):

(1) Document the file with information explaining why the responding company's product will not meet the requirement (e.g., not technically acceptable (detail reasons), cannot meet the delivery schedule, more expensive) or that the synopsized GSA nonmandatory schedule provides the lowest overall cost alternative and place an order against the synopsized GSA schedule contract;

(2) Document the file with an analysis indicating that a responding contractor's GSA nonmandatory schedule offering provides the lowest overall cost alternative and place an order against that GSA nonmandatory schedule contract; or

(3) Document the file with an analysis indicating that ordering from a GSA nonmandatory schedule contract will not result in the lowest overall cost alternative to meet the government's needs. Then the contracting officer may prepare a competitive solicitation and synopsize the requirement.

E. Common Pitfalls.

1. A CBD synopsis of an intent to place an order is not a formal competition. It is a desire to test the ADPE market to determine whether there are nonschedule vendors interested in competing for the requirement at prices that would make competition practical. A responding contractor may protest, however, the contracting officer's determination that its offering does not meet the government requirement. International Systems, Marketing, Inc., B-215174, August 14, 1985, 85-2 CPD ¶ 166.

2. The synopsis must accurately describe the agency's needs. North American Automated Systems Co., GSBCA No. 9098-P, 87-3 BCA ¶ 20,203.

3. The GSBCA has revoked an agency's blanket Delegation of Procurement Authority (DPA) because of poor procurement practices in GSA schedule purchases, including (ISYX, GSBCA No. 0907-P-R, 88-2 BCA ¶ 20,815):

a. The failure to combine orders for identical requirements;

b. The rejection of a low offer by a nonschedule vendor;

c. An improper synopsis which advised that only schedule offers would be considered; and

d. Mathematical errors.

4. Material deviations from the terms of the schedule contract are not allowed, such as (American Management Software Systems, Inc., B-216998, July 1, 1985, 85-2 CPD ¶ 3):

a. The inclusion of software development in a straight software purchase contract; and

b. The negotiation of a multi-year contract.

5. Fragmentation of requirements to avoid synopsis are not permissible. Digital Services Group, Inc., GSBCA No. 8735-P, 87-1 BCA ¶ 19,555.

6. Intentional fragmentation of requirements to "fit under" a GSA schedule is impermissible. North American Automated Systems Co., GSBCA No. 9122-P, 87-3 BCA ¶ 20,208.

IV. PRICE REDUCTIONS UNDER MULTIPLE-AWARD SCHEDULE CONTRACTS.

A. The Three Bases for Price Reductions.

1. Under multiple-award schedule contracts, contractors are subject to three possible price reduction clauses.

2. The FAR Defective Pricing Clause entitles the government to a price reduction when the schedule contractor does not qualify for an exemption under the Truth in Negotiations Act (TINA), codified at 10 U.S.C. § 2306(a) and 41 U.S.C. § 254(b), and the prices were increased by the submission of inaccurate, incomplete, or noncurrent data. FAR 52-215.22

3. The GSA Defective Pricing Clause entitles the government to a price reduction when the schedule price was increased because the prices, data, and facts were not as stated in the contractor's "Certificate of Established Catalog Price." See GSA Multiple Award Schedule Procurement: Notice of Procurement Policies, 47 Fed. Reg. 50,243 (1982).

4. The Contract Price Reduction Clause entitles the government to a price reduction when the schedule contractor reduces its prices below that of the discount offered to the government. See GSA Multiple Award Schedule Procurement: Notice of Procurement Policies, 47 Fed. Reg. 50,243 (1982).

B. The FAR Defective Pricing Clause.

1. TINA provides for an exemption from the submission and certification of cost or pricing data when the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public. 10 U.S.C. § 2306a(b)(1)(B).

2. Schedule contractors who cannot qualify for the commerciality exemption must comply fully with the TINA requirements to submit accurate, complete, and current data.

3. The government is entitled to a price reduction when the price is increased due to inaccurate, incomplete, or noncurrent data.

C. The GSA Defective Pricing Clause.

1. Multiple-Award schedule contractors respond to a schedule solicitation by submitting its sales, discounts, and marketing practices for each Special Item Number (SIN) listed in the solicitation. This data is known as "discount schedule and marketing data."

2. Discount schedule and marketing data (DSMD) is used to determine whether a schedule contractor qualifies for the TINA commerciality exemption and to determine whether the offeror has proposed a fair and reasonable price. DSMD is also used by the contracting officer in negotiating a discount equal to or greater than the discounts granted to an offeror's most favored customer.

3. Schedule contractors must execute a certificate (Certificate of Established Catalog Price) that certifies that its products qualifies for the TINA exemption and that the pricing data disclosed in support of the certificate are accurate, complete, and current.

4. GSA multiple-award schedule contracts contain a clause, the *GSA Defective Pricing Clause*, that entitles the government to a price when any negotiated price is increased because the disclosed data was inaccurate, incomplete, or noncurrent.

D. The Contract Price Reduction Clause.

1. The principal advantage of multiple-award schedule contracts is the government's discount from the supplier's catalog or commercial price list that is equal to or greater than the discount given the contractor's "most favored customer."

2. The Contract Price Reduction Clause entitles the government to a price reduction whenever the schedule contractor offers a discount to another customer or category of customers upon which the schedule contract award is predicated that disturbs the established government discount.

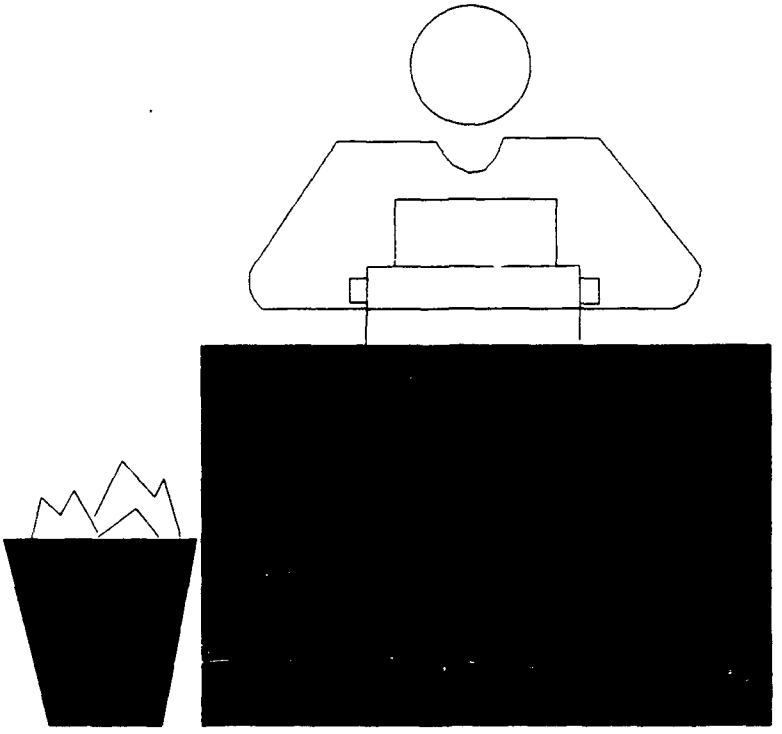
3. Schedule contractors must disclose and report all discounts to a customer or category of customers upon which the schedule contract award is predicated.

4. Subsequent discounts are effective at the same time as the price reduction to the other customer.

V. CONCLUSION.

CHAPTER 18

LITIGATION SUPPORT



CHAPTER 18

LITIGATION SUPPORT

CHAPTER 18

LITIGATION SUPPORT

"He that goes to law holds a wolf by the ears."

Robert Burton
Anatomy of Melancholy
"Democritus to the Reader"

I. INTRODUCTION.

A. References.

1. FAR SUBPART 33.2; DFARS 33.232; AFARS 33.212-90(a); AFARS, Appendix A, Part II; AFFARS 33.290; NAPS 33.9002.

2. AR 27-1, para. 2-4(b); AR 27-40; AFR 110-24.

3. Rule 4 and TALF Pamphlet, Office of the Army Chief Trial Attorney, "Preparing the Rule 4 File and the Trial Attorney's Litigation File"; AFCLC/JAB, "Instructions for Processing Appeals and Milestones in Contract Litigation."

MAJ Michael Killham
MAJ Bobby Melvin
4th Installation Contracting Course
September 1991

B. Policy.

1. Armed Services Board of Contract Appeals (ASBCA).

a. The Army Chief Trial Attorney (CTA), as the authorized representative of the Secretary of the Army, is responsible for the conduct and control of litigation of all ASBCA appeals arising out of contracts awarded by Army contracting activities. AFARS ¶ 33.212-90(a)(2).

b. The Staff Judge Advocate, HQ, AFLC, represents the Air Force before the ASBCA and has delegated this authority to the Director of Contract Appeals, Air Force Contract Law Center (AFCLC/JAB). (AFFARS 33.290 (a)(1).

c. The Office of the General Counsel (OGC) has sole litigation authority for all appeals under Navy contracts to the ASBCA. (NAPS 33.9002(a)).

d. Litigation of ASBCA appeals is accomplished by trial attorneys designated by the services' CTAs. Local counsel assist and support the trial attorneys in case preparation. AFARS 33.212-90(a)(2)(ii); AFFARS 33.290(a)(3); NAPS 33.9002(f). On occasion, local counsel may be detailed to assist as an attorney of record in Army appeals. AFARS ¶ 33.212-90(a)(2)(i)(B).

2. Claims Court.

a. Department of Justice (DOJ) is responsible for the defense of suits brought against the United States in all U.S. and foreign courts. 28 USC § 520.

b. DoD, through each services' litigation office, assists DOJ in the defense of suits arising out of defense contracts.

c. Local commands and counsel provide assistance in accordance with applicable regulations and upon request. (AR 27-40; AFR 110-24).

II. THE DISPUTES PROCESS.

A. Steps in the Process.

1. A valid claim;

2. A contracting officer's final decision;

3. Timely appeal to either the Armed Services Board of Contract Appeals (90 days) or to the Claims Court (1 year);

4. Hearing, or submission on the record; and

5. Timely appeal of unfavorable decisions to the Court of Appeals for the Federal Circuit (CAFC). (120 days - ASBCA; 60 days - Claims Court).

B. Participants.

1. Contractors, subcontractors, and sureties.

2. Government contracting officers and staff.

3. Attorneys.

III. LOCAL COUNSEL RESPONSIBILITIES DURING CONTRACT LITIGATION.

A. Prior to the Final Decision.

1. Anticipate litigation and prepare for it. Although litigation should be the last resort, it happens. Do not be caught by surprise.

2. Hope for the best case but plan for the worst. Protect government interests.

3. Review documents and potential testimony with an open mind. Consider how they will be perceived by judges who have not dealt with a particular contract or contractor as you have. Evaluate your command's decisions and actions from the contractor's perspective, and from the perspective of an impartial judge viewing them for the first time.

B. Prior to Appeal.

1. Once the contracting officer issues the final decision, the second step in the litigation process has been taken. Gather potential evidence and organize litigation files.

2. Preserve witness testimony. Identify potential government and contractor witnesses, and maintain current addresses and telephone numbers throughout the disputes process.

3. Safeguard potentially relevant documents. There are many sources of relevant documents in contract disputes, and some are often overlooked until late in the litigation process. Check obvious sources, such as the procuring contracting officer's (PCO) contract files, and less obvious ones such as files kept by the contracting officer's representative, inspectors, engineers, Defense Contract Audit Agency (DCAA), Defense Contract Management Area Office (DCMAO), administrative contracting officer (ACO), Criminal Investigation Division (CID), Small Business Association (SBA), test facilities, and "personal" files.

C. Appeal to the Armed Services Board of Contract Appeals.

1. Upon receiving notice of appeal, verify that the appeal has been signed personally by the contractor taking the appeal or by the appellant's duly authorized representative or attorney. DFARS, App. A, Part 2, Rule 2. If not, notify the trial attorney so that a motion to dismiss may be filed.

2. Within 30 days of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board an appeal file, commonly called the Rule 4 file.

3. The contracting officer shall furnish the trial attorney with two copies of the Rule 4 file, and shall furnish the appellant a copy of all documents furnished to the Board, excluding the contract, specifications, amendments, plans, and drawings, for which only a list need be furnished. DFARS, App. A, Part 2, Rule 4(b); AFARS, App. A., Part 2, Rule 4(a)(2); AFFARS 33.290(a)(2); NAPS 33.9002(d).

4. Appellant must submit any additional relevant documents to the Board within 30 days after receipt of the government's Rule 4 file. See DFARS, App. A, Part 2, Rule 4(b). More commonly, appellant will postpone submitting additional supplemental matters until later in the litigation process. Contracting officers and their attorneys assist in evaluating these documents and responding to them.

5. Usually, both parties are permitted to submit supplementary Rule 4 matters for the Board's consideration at hearing or on the record. Accordingly, government attorneys and contracting officers continually seek to identify additional documents relevant to the appeal.

6. Concurrent with forwarding the Rule 4 file to the Board, the contracting officer shall forward to the trial attorney, but not to the appellant, a Trial Attorney's Litigation File. AFARS, App. A, Part 2, Rule 4(a)(2)(ii); NAPS 33.9002(e); AFCLC/JAB "Instructions for Processing Appeals."

D. Appeal to the Claims Court.

1. The Department of Justice (DOJ), assisted by the services' litigation divisions, represents the government in contractor appeals to the Claims Court. Once a final decision has been appealed to the court, the contracting officer loses the authority to settle or to otherwise resolve that particular dispute; that authority belongs to DOJ.

2. Unless otherwise provided in regulations or directed by department level authority, the staff judge advocate (SJA) or legal advisor to whom legal process or pleadings have been referred will prepare an investigative report (litigation report) concerning the proceeding and supplemental reports and submissions as requested. AR 27-40, para. 2-4a; AFR 110-24.

a. The investigative report must be tabbed and contain the following:

(1) A statement of facts upon which the action and any defenses are predicated;

(2) A statement indicating whether any setoff or counterclaim exists;

(3) A response to pleadings, including a draft answer to appellant's complaint;

(4) A memorandum of law, including comments upon the facts of the case as necessary to show the applicability of authorities cited;

(5) An exhibit and witness list, including documentary evidence; copies of the process and pleadings; copies of contracts and related documents; and a witness list, including addresses, telephone numbers, and social security numbers, plus signed statements summarizing the testimony that each witness might be expected to give. AR 27-40, para. 2-4b; AFR 110-24.

b. In the alternative, the Army Litigation Division will accept a Rule 4 file and TALF in the formats described herein.

c. The SJA or legal advisor must ensure that all DA records related to administrative or legal proceedings are preserved and that disposition is not made without proper approval. AR 27-40, para. 2-4c.

E. Hearings.

1. The legal advisor's involvement at hearing is largely determined by the extent of his participation prior to hearing.

2. Assuming significant involvement during the pre-hearing process, the legal advisor may be significantly involved in the presentation of the government's case.

3. In a limited number of Army cases, and with the approval of the CTA and the local staff judge advocate/chief counsel, local counsel may be designated as an attorney of record. Designation is appropriate when local counsel will perform the spectrum of trial attorney functions with minimal supervision; will substantially participate at hearing or will prepare documentation for Rule 11 submission; and will prepare briefs.

4. Designation operates as an informal detail of counsel for that particular case. Factors such as complexity, policy implications, dollar amount, precedential impact of an appeal, experience, capabilities, availability of local counsel, and effective use of resources are considered to determine whether designation is appropriate.

5. Once designation occurs, local counsel shall not be released from responsibilities thereunder, unless:

a. The CTA and SJA or chief counsel agree; or

b. The CTA determines that local counsel cannot adequately perform trial attorney functions.

F. Appeal to the Court of Appeals for the Federal Circuit (CAFC). During appeals to the CAFC, the legal advisor assists the trial attorney in the preparation of legal memoranda for submission to the court.

IV. DOCUMENTARY EVIDENCE.

A. Rule 4 File.

1. The Rule 4 file should contain all documents pertinent to the appeal, including:

a. The decision from which the appeal is taken;

b. The contract, including pertinent specifications, amendments, plans, and drawings;

c. All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;

d. Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

e. Any additional information considered relevant to the appeal. DFARS, App. A, Part 2, Rule 4(a).

2. The Rule 4 file should be arranged chronologically. Command legal advisors should review the Rule 4 file and discuss its contents with the trial attorney before submitting it to the Board.

3. Documents contained in the appeal file are considered without further action by the parties, as part of the record upon which the Board will render its decision, unless one of the parties objects to consideration of particular documents reasonably in advance of hearing. DFARS, App. A, Part 2, Rule 4(e).

B. Supplementary Rule 4 Matters.

1. Within 30 days after receipt of a copy of the government's Rule 4 file, the appellant is permitted to submit additional documents which it considers relevant to the appeal. DFARS, App. A, Part 2, Rule 4(b). Legal advisors assist in reviewing these documents and in preparing a response to them.

2. Normally, the Board will permit both parties to submit additional documents for the Board's consideration prior to hearing or prior to submission of the case on the record.

C. Trial Attorney's Litigation File (TALF).

1. The contracting officer, with the assistance of his legal advisor, shall prepare a TALF which includes the following:

a. The names, addresses, and telephone numbers of all potential witnesses, including those of the contractor(s), having information concerning the facts in dispute;

b. A signed statement of each government witness particularizing personal knowledge of the facts as he will testify under oath at hearing (or a summary thereof, if it is impossible to obtain a signed statement). It shall include:

(1) Background and circumstances surrounding the generation of pertinent documents;

(2) Explanation, basis and/or rationale of those portions of the available documents which will require clarification at the hearing;

(3) Recitation of any facts and events not shown by available documents;

(4) Identification of any other persons having personal knowledge of pertinent facts; and

(5) A statement as to the expected availability of the witness at the hearing.

c. An analysis for the CTA discussing the contractor's individual allegations and overall position and an opinion as to the validity of each, and an appraisal of the strengths and weaknesses apparent in the positions adopted by both parties;

d. A memorandum by the legal advisor or the official making the decision, setting forth an analysis of the legal issues involved in the dispute and comments upon the adequacy of the findings of fact and the legal sufficiency of the decision; and

e. The advisory report, if any, of the Contract Settlement Board. AFARS, App. A, Part 2, Rule 4(a)(2)(ii); NAPS 33.9002(e)(3).

2. A well-prepared TALF assists the trial attorney in evaluating, developing, and presenting the government's case.

D. Discovery.

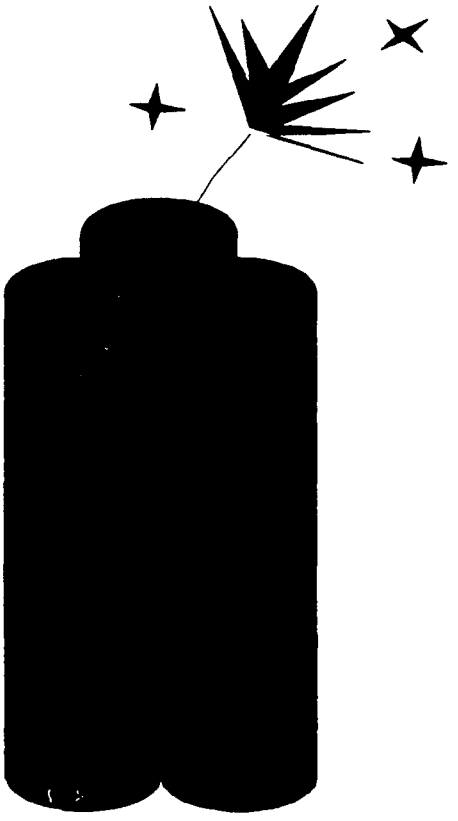
1. Depending upon the case, the parties may be permitted to conduct written discovery and/or depositions. Command legal advisors contribute by suggesting questions, reviewing documents, answering interrogatories, and by participating in or conducting depositions.

2. The duty to respond to interrogatories is a continuing one. Government attorneys must, therefore, periodically review government responses provided to the appellant to ensure that the information furnished previously remains accurate and complete.

V. CONCLUSION.

CHAPTER 19

BANKRUPTCY



CHAPTER 19

BANKRUPTCY

Distinguished Guest Speaker

Mr. Ralph E. Avery
Attorney
General Litigation Branch
Litigation Division
U.S. Army Legal Services Agency
Arlington, VA

Mr. Ralph E. Avery

Attorney
General Litigation Branch
Litigation Division
U.S. Army Legal Services Agency
Arlington, VA

Litigation Attorney with U.S. Army Litigation Division, specializing in bankruptcy, since June 1987.

Government contracts attorney with the Nuclear Regulatory Commission from January 1978 to June 1987.

Government contracts attorney with the Navy Office of General Counsel from August 1975 to January 1978.

ARMY BANKRUPTCY PRACTICE OUTLINE

Ralph E. Avery
Office of the Judge
Advocate General

I. OVERVIEW OF CHAPTER 11 BANKRUPTCY LAW

A. TRENDS.

1. Caseload will increase.

(a) Increased use of bankruptcy as a business planning tool. It is no longer limited to companies in financial distress.

(b) Decreasing Defense budget will force marginal producers into bankruptcy. Also, companies will "buy in" to new procurements at low or no profit, hoping to get well on claims, etc. If they don't, they will go bankrupt.

(c) Increased use of bankruptcy courts to litigate nonbankruptcy disputes, e.g. nonresponsibility determinations characterized as discrimination against bankrupt, attempts to litigate terminations for default, etc.

(d) Leveraged buy-outs of the 1980's will shake out, causing more bankruptcies.

(e) More coordination with other Army elements will be required. E.g., more actions required in bankruptcy court to setoff our claims against recoveries by contractors at the ASBCA.

2. Increased exposure to risk.

As the number of cases increases, the chances of violating the stay or other bankruptcy law increase. E.g., termination of contracts, reclamation of inventory, effecting setoff, without relief from the stay.

B. CONSTITUTIONAL BASIS OF BANKRUPTCY LAW. The Bankruptcy Code is based on the Constitution, (U.S. Const., art. I, section 8, cl. 4) which empowers Congress to enact uniform laws governing bankruptcy. The historical antecedents of bankruptcy law are traced in T. Jackson, The Logic and Limits of Bankruptcy Law, Ch. 1 (1986); Comment, Legislative and Judicial Confusion Concerning Executory Contracts in Bankruptcy, 89 Dick. L. Rev. 1029 (1985); Sturges v. Crowninshield, 17 U.S. 122 (1819).

C. PURPOSE OF CHAPTER 11--REORGANIZATION OF A BUSINESS. Although the primary purpose of Chapter 11 is to reorganize, or liquidate, a business, the Supreme Court has ruled that it is not limited to that purpose and can be utilized by individuals not engaged in business if they otherwise comply with the requirements of the Chapter. Toibb v. Radloff, ___ U. S. ___, 111 S.Ct. 2197 (1991).

Although it is not necessary for a business to be insolvent in order for it to take advantage of Chapter 11, the business must be attempting in good faith to reorganize for its filing under Chapter 11 to be proper. In re Talladega Steaks, Inc., 50 B.R. 42 (Bankr. N.D. Ala. 1985). Use of Chapter 11 for an improper purpose, such as to resolve a dispute between parties to a contract or to delay foreclosure of a lien may result in dismissal of the

petition (Cinema Services Corp. v. Edbee Corp., 774 F.2d 584 (3d Cir. 1985); In re Southern California Sound Systems, Inc., 69 B.R. 893 (Bankr. S.D. Cal. (1987)) as well as imposition of sanctions. Cinema Services Corp., supra; Byrne, Sanctions for Wrongful Bankruptcy Litigation, 62 Bankr. L.J. 109 (1988).

D. HOW A CASE IS COMMENCED. A Chapter 11 case is commenced by the filing of a petition with the court. VISUAL 6 (ARE PETITION) Our cases are almost exclusively voluntary filings by the debtor under 11 USC 301, although an involuntary petition may also be filed under Section 303. The debtor must also file a list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures, and a statement of financial affairs. 11 USC 521; Bankr.R. 1007.

E. EFFECT OF FILING.

1. CREATION OF THE ESTATE. The filing of a petition creates an estate which is composed essentially of the property of the debtor. Section 541.

2. CREATION OF THE DEBTOR IN POSSESSION. Usually the debtor continues to operate its business in the status of a new legal entity, the "debtor in possession," which has the rights and duties of a trustee, with a few exceptions rarely relevant to our

cases. Sections 1101, 1107; Cowan's Bankruptcy Law and Practice, section 20.6. Whether the debtor in possession is a new entity, distinct from the debtor for all legal purposes, is subject to debate. See, Bordewieck, The Postpetition, Pre-Rejection, PreAssumption Status of an Executory Contract, 59 Am. Bankr. L. J. 197, 198-200 (1985) (discussing the effect of NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)) and In re Heafitz, 85 B.R. 274 (Bankr. S.D.N.Y. 1988).

3. APPOINTMENT OF A TRUSTEE. At the request of a party in interest, the court may appoint a trustee, if cause is shown. Section 1104. Cause may include fraud, dishonesty, incompetence, and gross mismanagement of the affairs of the debtor by current management. Id. Appointment of a trustee is also permitted if in the interests of creditors, any equity security holders, or other interests of the estate. Id.; In re Oklahoma Refining Co., 838 F.2d 1133 (10th Cir. 1988). The court may engage in a cost-benefit analysis to determine whether appointment of a trustee is appropriate. In re Brown, 31 B.R. 583, 585 (D.D.C. 1983).

4. IMPOSITION OF THE AUTOMATIC STAY. The filing of a petition gives rise to an automatic stay which protects the debtor and its property from attempts of creditors to proceed against them. Section 362. The purpose of the stay is to provide the debtor a "breathing spell" during which it may assess its

situation and devise a strategy for reorganization. In re Inslaw, Inc., 76 B.R. 224 (Bankr. D.C. 1987). The automatic stay has a dramatic effect on the Army's transactions with debtors, such as termination of contracts, recovery of government furnished property and progress payment inventory, actions to setoff debts from other contracts, and debarment and suspension. These aspects of bankruptcy will be discussed in greater detail below.

F. FILING OF PROOF OF CLAIM. Creditors will normally file a document called a proof of claim. This document represents a statement by the creditor that the debtor is indebted to the creditor in the amount and in the manner specified in the proof of claim. The claim is deemed allowed unless a party in interest objects. Section 502.

G. EFFECT OF FILING A PROOF OF CLAIM. Section 106(a) waives sovereign immunity with respect to counterclaims. In re OPM Leasing Services, Inc., 21 B.R. 993 (Bankr. S.D. N.Y. 1982) and In re Inslaw, Inc., 76 B.R. 224 permitted recovery on a compulsory counterclaim in excess of the amount of the government's claim. Actual filing of a proof of claim is not necessary to enable the debtor to assert a counterclaim, assertion of an interest in the case may be sufficient. In re Inslaw, supra. The debtor may setoff any claim against claims of the government up to the amount of the government's claim under section 106(b). When our proof of

claim is filed, we become a secured creditor to the extent we have a security interest in property of the estate and are unsecured creditors for the balance. Section 506.

H. DEBTOR MAY DECIDE WHETHER TO ASSUME OR REJECT EXECUTORY CONTRACTS. Section 365 of the Code permits the debtor in possession to assume or reject any executory contract of the debtor subject to the approval of the court, unless the law imposes limitations on the assumption or assignment of the contract. This qualification is of major significance in the context of government contracts, as will be discussed further below. If the contract is in default, it may not be assumed unless the debtor in possession cures, or provides adequate assurance of prompt cure of the default, compensates for any actual pecuniary loss resulting from the default, and provides adequate assurance of future performance.

I. DISCLOSURE STATEMENT AND REORGANIZATION PLAN. Following the filing of a petition, the debtor must begin plans to reorganize. These efforts will result in a disclosure statement and a reorganization plan. The disclosure statement is intended to provide information and factual support to parties who will be asked to vote on the plan of reorganization. The disclosure statement is required to contain sufficient information to enable a hypothetical reasonable investor typical of holders of claims or

interests of the relevant class to make an informed judgment about the plan. Section 1125. The contents of the plan are prescribed by Section 1123, and include such items as classifying claims, explaining how each class of claims will be treated, and providing adequate means of plan implementation.

J. CONFIRMATION OF THE PLAN. After the proponent of the plan, which is usually the debtor, has solicited acceptance of the plan, a hearing is held to determine whether the plan should be accepted. The conditions for acceptance and confirmation of a plan are set out in Sections 1126 and 1129. A class of creditors or interest holders is deemed to have accepted a plan if two thirds in amount and more than one half in number vote in favor of the plan. Section 1129 contains a dozen requirements for plan confirmation. These include requirements that classes of claims which are impaired by the plan will receive not less than they would if liquidation were to take place and that confirmation of the plan is not likely to be followed by liquidation or further reorganization. Ballots on behalf of the Government are cast by the Justice Department, since acceptance of a plan of reorganization is analogous to the acceptance of an offer of settlement in civil litigation.

K. EFFECT OF PLAN CONFIRMATION. The confirmed plan is binding on the debtor, creditors, and interest holders. The

confirmation of the plan vests the property of the estate in the debtor free and clear of all claims and interests, except as provided otherwise in the plan. Section 1141. The debtor is also discharged from all pre-confirmation debts, with certain exceptions usually not relevant to our cases. The debtor is then required to carry out the provisions of the plan. The bankruptcy court retains jurisdiction to oversee the implementation of the plan. Section 1141; Bankr.R. 2030(d).

L. CLOSING OF CASES. After the estate is fully administered, the court issues a final decree closing the case. Section 350; Bankr.R. 3022.

II. IMPLICATIONS OF BANKRUPTCY TO ARMY PROCUREMENT.

A. ARMY RESPONSE TO FILING OF PETITION. The clerk of court is required to give notice to the government of the bankruptcy of any entity in which the papers in the case disclose a debt to the government. Bankr.R. 2002(j). AR 37-103, chap. 13 also requires that any command which receives notice of bankruptcy of an entity indebted to the Army to furnish all relevant information to the U.S. Army Finance and Accounting Center (USAFAC) (recently reorganized into the Defense Finance and Accounting Service). USAFAC sends out a circular notice to all procurement commands announcing the bankruptcy and soliciting the information needed for us to

file a claim against the estate in the bankruptcy proceeding. Typically this includes items such as unliquidated progress payments, the value of government furnished property, liquidated damages, and excess reprocurement costs. The definition of what constitutes a claim which may be asserted against the estate is extremely broad, so any possible fact which may furnish the basis for recovery from the debtor should be included. Section 101(4); In re Remington Rand, 836 F.2d 825 (3rd Cir. 1988). When adequate information has been compiled by USAFAC, a proof of claim is forwarded to the Litigation Division of the Judge Advocate General's Corps (LITDIV). LITDIV then forwards the proof of claim to the United States Attorney for the district in which the petition has been filed. For claims in excess of $500,000, a copy of the proof of claim is also forwarded to the Commercial Litigation Branch of the Department of Justice, so they can decide if they wish to retain the case or delegate it to the U.S. Attorney's office.[1] In a chapter 11 case, the proof of claim generally must be filed not later than the date that the reorganization plan is confirmed or by such earlier date, called the bar date, as is set by the court. Sections 501, 502, 1141; NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529-30 (1984).

B. EFFECT OF BANKRUPTCY ON RESPONSIBILITY OF CONTRACTORS.

NON-DISCRIMINATION PROVISION OF BANKRUPTCY CODE. Section 525 of the Code provides that a debtor is protected from discrimination based on its status as a debtor in bankruptcy, insolvency before or during the case, or failure to pay a dischargeable debt. The section specifically states that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title...." This section thus prevents a finding of nonresponsibility based solely on the filing of a petition for bankruptcy. In re Sonshine Grading, Inc., 27 B.R. 693 (Bankr. E.D.N.C. 1983); In re Marine Electric R.R. Products, 17 B.R. 845 (Bankr. E.D.N.Y. 1982); Coleman American Moving Services, Inc. v. Tullos, 8 B.R. 379 (Bankr. D. Kansas 1980). This does not, however, prevent consideration of the traditional elements related to responsibility and a finding of nonresponsibility based on those elements. All that is prohibited is a finding of non-responsibility based solely on the fact that a contractor has filed for bankruptcy. In this regard, note well In re Exquisito Services, Inc., 823 F.2d 151 (5th Cir. 1987) in which the Fifth Circuit prohibited the Air Force from refusing to exercise an option with a bankrupt contractor.

C. DEBARMENT AND SUSPENSION. Because of the automatic stay, which arises upon the filing of a petition, a question occurs as to whether a contractor which has filed for bankruptcy may be debarred or suspended. Section 362, which deals with the automatic stay, contains an exception to the stay for an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. A very strong argument can be made that debarment and suspension are regulatory actions designed to protect the public from dealing with non-responsible contractors. See, National Labor Relations Board v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986). However, because the legislative history contains language to the effect that the exception should be narrowly construed, the courts have shown a tendency to require a showing of some impending harm to the public health or safety to allow invocation of the exception. In re Four Winds Enterprises, Inc., 17 Bankr.Ct.Dec. 1033 (Bankr. S.D. Cal. 1988); Klee and Merola, Ignoring Congressional Intent: Eight Years of Judicial Legislation, 62 Am. Bankr. L. J. 1, 5-8 (1988).

D. ASSUMPTION OF EXECUTORY CONTRACTS IS BARRED WITHOUT CONSENT OF THE GOVERNMENT. Section 365 of the Code permits the debtor in possession to assume or reject any executory contract of the debtor subject to the approval of the court. If the contract is in default, it may not be assumed unless the debtor in possession cures, or provides adequate assurance of prompt cure of the

default, compensates for any actual pecuniary loss resulting from the default, and provides adequate assurance of future performance. Section 365(c) prevents assumption of executory contracts if applicable law excuses a party from accepting performance from another party and there is no consent to the assignment. Because the Anti-Assignment Act, 41 USC 15, is applicable law which excuses the government from accepting performance from anyone but the original contractor, it has been held that the debtor in possession may not assume government contracts without the government's consent. Matter of West Electronics, Inc., 852 F.2d 79 (3d Cir. 1988); In re Adana Mortgage Bankers, 12 B.R. 977 (N.D. Ga. 1980); In re Pennsylvania Peer Review Group, 50 B.R. 640 (Bankr. M.D. Pa. 1985). The effect of this is that the government is entitled to a lifting of the automatic stay so that it may terminate the contract for whatever grounds may exist. Note that the contract must be executory, i.e. that some material performance must remain on both sides. In re Adana, supra. A contract terminated before filing of the petition cannot be assumed or rejected. Moody v. Amoco Oil Co., 734 F.2d 1200, 1212-13 (7th Cir. 1984), cert. denied, 469 U.S. 982 (1987); In re Iriss, 630 F.2d 1370 (10th Cir. 1980). If the decision to terminate is issued before the petition is filed and is definite and not conditional upon the debtor's failure to cure, the termination is not stayed by 11 USC 362(a) even if the terms of the termination make it effective after the filing of the petition. Moody v. Amoco Oil Co., 734 F.2

1200, 1212-13 (7th Cir. 1984), cert. denied, 469 U.S. 982 (1987); see, also, In re Anne Carra Oil Co., Inc., 32 B.R. 643, 647-48 (Bankr. D.Mass. 1983); Matter of Lauderdale Motor Corp., 35 B.R. 544, 548 (S.D. Fla. 1983).

E. EFFECT ON PENDING BIDS AND PROPOSALS. Query what effect the filing of a petition has on pending bids and proposals. If the debtor in possession is indeed a separate entity from the debtor (a proposition which has been questioned in some contexts, NLRB v. Bildisco & Bildisco, 465 U.S. 513; In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986)), may the debtor in possession automatically assume the pending bids and proposals which were submitted by the debtor? This is an especially complex question in the context of government procurement because of the implications of the Anti-Assignment Act, 41 USC 15. Should the debtor in possession be required to go through a novation type procedure to assume the debtor's pending bids and proposals? Cf., Mil-Tech Systems, Inc., 6 Cl.Ct. 26 (1984); Numax Electronics, Inc., B-181670, 54 Comp. Gen. 580, 75-1 CPD para. 21.

F. REJECTION OF THE CONTRACT BY THE CONTRACTOR CONSTITUTES A BREACH AS OF IMMEDIATELY BEFORE FILING OF THE PETITION. Section 365(g) states that if the contractor rejects the contract the rejection constitutes a breach of the contract as of immediately before the filing of the petition. If the contract is first as-

sumed and then rejected, the resulting breach is as of the time of the rejection. The damages associated with the breach of an assumed contract are administrative costs. The rejection of the contract allows us to terminate it. This will ordinarily be for default, based both upon then existing defaults and upon the statutory breach (repudiation) occasioned by the rejection of the contract. The contractor should be afforded its usual contract appeal rights. Rejection of a contract only forecloses those arguments which are inconsistent with the rejection, e.g., that there was no contract. In re White Motor Corp., 44 B.R. 563 (N.D. Ohio 1984); In re Continental Airlines Corp., 64 B.R. 865, 871 (Bankr. S.D. Tex. 1986).

G. THE STATUS OF CONTRACTS BEFORE THEY ARE ASSUMED OR REJECTED IS UNCERTAIN. What actions the government may take under a contract before the debtor assumes or rejects it is uncertain. For instance, may the government reduce progress payments to the debtor after the filing of the petition but before the debtor assumes or rejects the contract? The Supreme Court has held that the contract is unenforceable against the debtor during this period, NLRB v. Bildisco & Bildisco, 465 U.S. 513. The courts have gone to dramatic extremes to preserve the status quo for the debtor pending its decision as to whether to assume or reject executory contracts. In In re Ike Kempner & Bros., 4 B.R. 31 (Bankr. E.D. Ark. 1980), the court ordered a shoe supplier to

continue supplying shoes to the debtor even after filing of the petition. In an even more dramatic case, which may have been strongly affected by the public interest inherent in the reorganization of railroads, the court held in In re AutoTrain Corp., 6 B.R. 510 (Bankr. D.D.C. 1980) that the nondebtor had to continue to provide post-petition services to the debtor and, in effect, extend credit to the debtor. Additonal concern about the ability of the government to take action pending assumption or rejection of the contract arises from the decision in In re Exquisito Services, Inc., 823 F.2d 151 (5th Cir. 1987) holding that the nondiscrimination provision of the Code prevents the government from refusing to exercise an option in a contract with the debtor. These decisions might imply that the government is limited in its ability to deny post-petition credit, in the form of progress payments, to the debtor, or to otherwise alter the status quo of the contract. On the other hand, if, as noted above, government contracts are indeed unassumable because of the Anti-Assignment Act, the government ought to be able to take any action it chooses, including termination of the contract, even before the debtor decides to assume or reject the contract. Several cases have noted the inequity which would result from prohibiting the government from recouping its pre-petition progress payments from postpetition deliveries. In re Mohawk Industries, Inc., 82 B.R. 174 (Bankr. D.Mass. 1987); In re Midwest Service & Supply Co., 44 B.R. 262 (D. Utah 1983). See, also Buschman, Benefits and

Burdens: PostPetition Performance of Unassumed Executory Contracts, 5 Bankr. Dev. J., 341, 348-49 (1988). Of course, the nondebtor can seek to reduce the extent of its uncertainty by asking the court to set a date by which the debtor must assume or reject the contract, but the court is not obligated to do so. Discussions of this issue are found in Buschman, supra; M. Bienenstock, Bankruptcy Reorganization, 469-72 (1987) and Bordewieck, The Postpetition, Pre-Rejection, Pre-Assumption Status of an Executory Contract, 59 Am. Bankr. L. J. 197, 198-200 (1985).

H. RECLAMATION OF PROPERTY IN WHICH THE GOVERNMENT HAS AN INTEREST. Typically, the contractor will be in possession of government furnished property, progress payment inventory, or other items in which the government claims an interest. The automatic stay prevents the government from immediately obtaining possession of this property. The contractor is required to provide adequate protection of the property to prevent damage or other diminution in value. Usually, the contractor will cooperate with the government in negotiating a stipulated order which will allow the government to retrieve its property, because that will enable the government to reduce its proof of claim by the value of the property and inventory recovered and will relieve the contractor of the burden of caring for it. The provision in the standard progress payment clause, FAR 52.232-16, which vests title in the government whenever property for which the contractor is entitled

to progress payments is identified to the contract has been explicitly upheld by the bankruptcy courts in a strong line of cases. E.g., In re American Pouch Foods, Inc., 769 F.2d 1190 (7th Cir. 1985), cert. denied, 475 U.S. 1082 (1986). Note that in In re Economy Cab and Tool Co., 47 B.R. 708 (Bankr. D.Minn. 1985) the court expressly held that title to progress payment inventory vested in the government, even though it had not actually made progress payments based on that inventory, because the contractor had requested progress payments, and the clause does not require the actual making of payment as a condition of title vestiture. Unfortunately, the Claims Court has confused this position in a line of cases which seems to require an actual tracing of payments into the property claimed by the government and only gives the government a lien interest in the property, rather than title. Marine Midland Bank v. United States, 231 Ct.Cl. 496, 687 F.2d 395, (1982) cert. denied, 460 U.S. 1037 (1983); First National Bank of Geneva, 13 Cl.Ct. 385 (1987). Thus, in the Claims Court, the government interest is somewhat less secure than in the bankruptcy courts. The Claims Court has recognized that this is an unfortunate dichotomy in the law, but feels bound by the precedent of Marine Midland Bank until the Federal Circuit should rule otherwise. First National Bank of Geneva, supra, at note 3.

I. SETOFF IS BARRED BY THE AUTOMATIC STAY. One of the most effective means the government has of collecting its debts is to

setoff the debts a contractor may owe on one contract against proceeds of that contract owing to the contractor (recoupment) or against proceeds owed that contractor on other contracts (setoff). Section 362(a)(7) prohibits the actual setoff of funds without relief from the automatic stay. There is substantial disagreement in the cases as to whether recoupment is subject to the automatic stay. E.g. In re Midwest Service & Supply Co., 44 B.R. 262 (D.Utah 1983) holds that recoupment is not subject to the stay, while In re Heafitz, 85 B.R. 274 (Bankr. S.D.N.Y. 1988) holds to the contrary. See the discussion of recoupment in Buschman, supra. There is likewise disagreement as to whether funds may be "frozen" pending the actual execution of the setoff or recoupment transaction. In re Heafitz, supra.

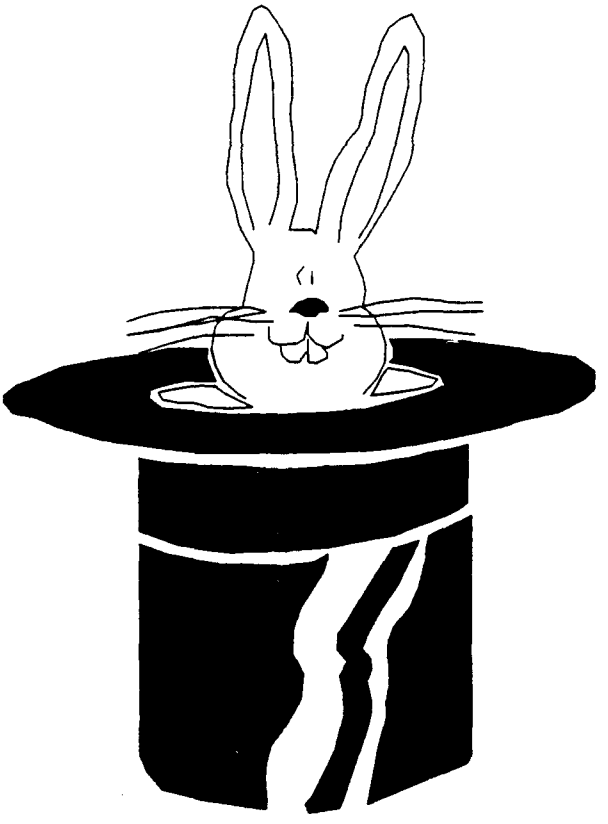
J. BANKRUPTCY COURTS SHOULD DEFER TO THE BOARDS OF CONTRACT APPEALS OR CLAIMS COURT FOR RESOLUTION OF CONTRACT DISPUTES. The government has argued with considerable success that the bankruptcy courts lack jurisdiction over, or at least should voluntarily abstain from hearing, government contract disputes in favor of the boards of contract appeals or the Claims Court. In re Gary Aircraft, 698 F.2d 775 (5th Cir.), cert. denied, 464 U.S. 820 (1983); In re American Pouch Foods, Inc., 30 B.R. 1015 (N.D.Ill. 1983), aff'd, 769 F.2d 1190 (7th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); In re Economy Cab and Tool Co., Inc., 47 B.R. 708 (Bankr. D.Minn. 1985); contra, In re The MacLeod Co., 67 B.R.

134 (Bankr. S.D. Ohio 1986), aff'd, ___ F.2d ___ (6th Cir. 1991) (finding debtor's claim to be a compulsory counterclaim, permitting its assertion notwithstanding debtor's failure to comply with jurisdictional requirements of the Contract Disputes Act). This can be beneficial in that the boards and Claims Court usually have more expertise in government contract matters than the bankruptcy courts.

[1] The proof of claim is forwarded through litigation channels because filing a proof of claim is analgous to the filing of a complaint in civil litigation .

CHAPTER 20

INTRA-GOVERNMENT AND REQUIRED SOURCE ACQUISITIONS



CHAPTER 20

INTRA-GOVERNMENT AND REQUIRED SOURCE ACQUISITIONS

CHAPTER 20

INTRA-GOVERNMENT AND REQUIRED SOURCE ACQUISITIONS

I. **INTRODUCTION.**

II. **INTRA-GOVERNMENT ACQUISITIONS UNDER THE ECONOMY ACT.** 31 U.S.C. § 1535. See Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network, June 28, 1991, 70 Comp. Gen. ___.

A. Purpose of the Economy Act. In 1932, Congress passed the Economy Act to allow one agency to utilize the services or supplies of another agency when the requiring agency lacked the ability to obtain the services and supplies "in-house."

B. Statutory Provisions. 31 U.S.C. § 1535(a).

1. An agency may place an order for goods or services with another agency or with a major organizational unit within the same agency if:

a. Funds are available;

b. The order is in the best interests of the government;

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c. The agency or unit to fill the order can provide or obtain by contract the goods or services; and

d. The ordering agency decides that contracting directly for the requirement is not as convenient or cost effective.

2. An agency may not obtain goods and services from another agency, unless the providing agency complies with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5)(B); 41 U.S.C. § 253(f)(5)(B).

C. General Regulatory Guidance. FAR Subpart 17.5; DFARS Subpart 217.5.

1. An "interagency acquisition" under the Economy Act is a procedure by which one agency needing supplies or services (requesting/ordering agency) obtains them from another agency (servicing/ performing agency). FAR 17.501.

2. Economy Act acquisitions also include orders placed <u>within</u> a military department or <u>between</u> military departments. DFARS 217.502; AR 37-1, para. 12-5r(2).

3. Determination requirements. FAR 17.503; DFARS 217.503(b); AR 37-1, para. 12-5r. In addition to making the statutorily-required determination that an interagency acquisition is in the best interests of the government, the head of the requesting agency, or designee, must find that:

a. Authority for the purchase exists;

b. The action does not conflict with another agency's authority or responsibility; and

c. The action conforms to the requirements of FAR Subpart 7.3, Contractor versus Government Performance, if the servicing agency intends to fill the order with a commercial or industrial activity it operates. Under the DFARS, ordering activities must find that services cannot be performed as conveniently or more economically by private contractors.

4. If the performing activity contracts for a requirement, it is responsible for ensuring compliance with competition requirements. FAR 17.504(d); AR 37-1, para. 12-5r(7)(c). Cf. FAR 6.002 (no agency shall contract with another agency to avoid competition requirements).

D. Ordering under the Economy Act.

1. The requesting agency contracting officer has the authority to approve Economy Act acquisitions unless agency regulations direct otherwise. DFARS 217.502(a).

2. Issuing orders. FAR 17.504; DFARS 217.504; AR 37-1, para. 12-5a. through 12-5q.

a. The requesting activity must obtain all required determinations before ordering.

b. The activity should issue orders far enough in advance of the desired delivery or start date to ensure adequate lead time. The activity should also negotiate orders for services in advance. AR 37-1, para. 12-5b. and 12-5d.

c. If an order is placed within a military department, follow procedures established for that department. DFARS 217.504(b).

(1) In the Army, the activity may issue a "direct citation" order on DD 458, Military Interdepartmental Purchase Request (MIPR); by message; or by memorandum. AR 37-1, para. 12-5c. Direct citation orders are preferred. AR 37-1, para. 12-7b.

(2) For "reimbursable orders" the activity must use a MIPR unless the requirement is for aviation fuel or stock fund material. AR 37-1, paras. 12-5e and 12-5m.

d. For orders placed between DoD components the activity will normally use a MIPR. In the Army, follow the rules set forth above.

e. For orders placed outside DoD, the parties will agree on the use of a particular document.

f. Orders must include a description of the requirement, delivery terms, fund citation, and payment provisions. FAR 17.504(b); AR 37-1, para. 12-5r(5).

E. Accepting Orders. AR 37-1, para. 12-7.

1. The accepting officer must be a duly authorized employee of the performing activity.

2. If a MIPR is used, the performing activity communicates acceptance of an order by issuing a DD 448-2, Acceptance of MIPR. Otherwise, the terms of the interagency agreement will determine the method of acceptance.

3. An activity shall not accept an order unless it intends to begin work within 90 days and complete performance within the projected period. AR 37-1, para. 12-7h.

4. Acceptance establishes fund obligation authority in the performing activity account, and that activity may incur costs in accordance with the terms of the order.

5. Acceptance must indicate whether reimbursement will be on a "fixed-price" or "cost incurred" basis. Acceptance must be on a fixed-price basis if:

   a. The order specifications are stable/specific;

   b. Each item or service ordered is separately priced;

   c. The price does not include substantial contingencies;

d. The cost estimating included consideration of expected variances;

e. Neither activity expects many change orders; and

f. The requirement is of the type for which a fixed-price basis is practicable.

6. Commander's orders. The performing activity does not usually begin work until receiving a properly documented order. In emergency situations, the commander of the performing activity may permit early performance if it is certain an order will be issued promptly. Ordering activities cannot rely on this method to compensate for poor advance planning.

F. Payment and Billing. FAR 17.505; AR 37-1, paras. 12-5r(8) and 20-48.

1. The performing activity may require advance payment for all or part of the estimated cost of the supplies or services.

2. The ordering activity may pay by check after receiving the goods or services, or in the case of purchases within DoD, the billing and payment will be automated.

3. The ordering activity must pay bills within 15 days of receipt. Bills or requests for advance payment are not subject to audit before payment. The GAO will resolve disputed bills.

G. Problem Areas. DoD Inspector General Audit Report No. 90-085, June 19, 1990.

1. Activities failed to obtain proper approvals to issue orders.

2. Activities obtained supplies and services that did not require the technical expertise of the performing agency.

3. Activities failed to determine whether an intra-governmental acquisition was the most economical and efficient method to obtain goods and services.

4. Activities ordering in excess of the maximum quantities specified in the performing activity's requirements contract (not a focus of the DoD IG report). Liebert Corp., B-232234.5, April 29, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 413.

III. PROJECT ORDERS.

A. Statutory Provisions. 41 U.S.C. § 23 (DoD); 14 U.S.C. § 151 (Coast Guard).

1. All orders placed with government-owned establishments shall be considered as obligations in the same manner as similar orders placed with commercial activities.

2. The appropriation shall remain available for the payment of the obligations as in the case of obligations incurred with commercial activities.

3. The statute does not require special determinations as with Economy Act orders.

B. General Regulatory Guidance. DoD Instruction (DoDI) 7220.1; AR 37-1, para. 12-5o.

1. A project order is an order for specific types of goods or services. A project order may remain open until the work is done. DoDI 7220.1, para. III. A.; AR 37-1, Glossary.

2. Project orders are issued only to government-owned and operated (GOGO) facilities and may only be for the following types of goods and services:

a. Production, maintenance, or overhaul of:

(1) Missiles and other weapons;

(2) Vehicles;

(3) Ammunition, clothing, and machinery;

(4) Other military supplies or equipment; and

(5) Component and spare parts for the above.

b. Research, Development, Test and Evaluation (RDTE).

c. Minor construction or the maintenance of real property.

3. Activities shall not issue project orders for requirements other than the above, including:

a. Major new construction;

b. Education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, or communications; and

c. Any requirement where a contractual relationship cannot exist.

4. Any order that is not a "project order" is an Economy Act order. AR 37-1, para. 12-5e.

C. Ordering Procedures.

1. No specific form is required, but the MIPR is normally used within DoD. The order must be specific, definite, and certain as to the work and the terms of the order itself.

2. Activities must issue orders on a reimbursable basis to DoD GOGO's. If possible, project orders to non-DoD GOGO's should also be on a reimbursable basis.

3. The order must indicate whether it will be performed on a cost basis or fixed-price basis. Follow the guidance set forth above for Economy Act orders to determine whether a fixed-price basis is required.

D. Acceptance and Performance.

1. Acceptance must be in writing. If the ordering activity issues a MIPR, the performing activity accepts on a MIPR. Acceptance establishes the obligation. DODI 7220.1, para. VI.A.1; AR 37-1, para. 12-7a.

2. At the time of acceptance there must be evidence that work is expected to commence within a reasonable time. DODI 7220.1, para. VI.A.3. For the Army, 90 days is reasonable. AR 37-1, para. 12-7h.

3. A GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Only subsidiary ordering within the government and/or incidental subcontracting is permitted. DoDI 7220.1, para. VI.A.7.

IV. REQUIRED SOURCES.

A. Source Priorities. 41 C.F.R. § 101-26.107; FAR 8.001. Agencies shall follow the following order of precedence when obtaining supplies or services:

1. Supplies.

a. Agency inventory;

b. Excess from other agencies;

c. Federal Prison Industries, Inc.;

d. Committee for Purchase from the Blind and Other Severely Handicapped;

e. Wholesale supply sources;

f. Federal Supply Schedules; and

g. Commercial sources.

2. Services.

a. Committee for Purchase from the Blind and Other Severely Handicapped;

b. Federal Supply Schedules and GSA term contracts for property rehabilitation;

c. Federal Prison Industries, Inc.; and

d. Commercial sources.

B. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; 28 C.F.R. §§ 301-345; FAR Subpart 8.6.

1. All federal agencies and institutions shall purchase FPI products that meet their requirements and are available. A purchase may not exceed the current market price. 18 U.S.C. § 4124.

2. FPI lists its products and services in the "Schedule of Products made in Federal Penal and Correctional Institutions (Schedule)."

3. Ordering procedures are set forth in the Schedule. Generally, however, order less-than-carload lots of common-use items from GSA. Otherwise, order directly from FPI.

4. An activity must obtain clearance from FPI to acquire Schedule supplies from other sources unless:

   a. Exigent circumstances arise;

   b. Used or excess supplies are available;

   c. Goods are acquired and used outside the U.S.; or

   d. Orders total $25.00 or less and are needed within 10 days.

5. FPI will not issue a clearance merely because the contracting officer obtains a lower price from an alternative source.

6. Disputes regarding price, quality, and suitability of supplies are subject to arbitration.

C. Committee for Purchase from the Blind and Other Severely Handicapped (Committee). 41 U.S.C. § 46-48c; 41 C.F.R. Part 51; FAR Subpart 8.7.

1. Like FPI, the Committee publishes a "Procurement List" of products and services. These items are available from nonprofit agencies for the blind or severely handicapped.

2. Activities must purchase listed supply requirements from applicable nonprofit agencies (workshops) at prices established by the Committee, unless the supply is also available from FPI. The Committee, however, has priority over FPI for listed services.

3. Agencies may obtain requirements from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee. The central nonprofit agency must grant an exception if:

   a. The workshops cannot timely perform, and the commercial sources can; or

   b. The workshops cannot economically produce in the quantities required.

4. Orders are placed with GSA, DLA, and, in some cases, directly with the nonprofit agency/ workshop. FPI must grant clearance to purchase directly from a workshop.

5. Address complaints about the quality of supplies distributed by GSA or DLA to the pertinent agency. For supplies or services obtained directly from a workshop, address complaints to the workshop with a copy to the central nonprofit agency. Contact the central nonprofit agency, and if necessary, the Committee.

6. Workshops may compete against commercial sources on acquisitions for supplies or services not included in the Procurement List.

D. The DoD Coordinated Acquisition Program. DFARS Subpart 208.70.

1. DoD agencies may obligate funds for the acquisition of supplies only under regulations prescribed by the Secretary of Defense. 10 U.S.C. § 2202(a).

2. Under the Coordinated Acquisition Program (Program), as a general rule, one DoD component ("requiring department") must purchase certain commodities from another DoD component or GSA ("acquiring department"). DFARS 208.7000.

3. The purpose of the Program is to obtain maximum economy through the consolidation of requirements. Consolidation reduces the number of competitive purchases initiated by the departments. DFARS 208.7003-6.

4. Military Department Commodity Purchase Assignments. DFARS 208-7001-1. Under the Program, activities may purchase locally available items otherwise assigned to a military department if it is in the best interest of the government in terms of quality, timeliness, and cost. The following types of items shall, however, be acquired through the assigned department:

   a. Items necessary for the wartime mission;

   b. Items required for deployment;

   c. Items required to support the industrial mobilization base;

   d. Items related to a weapon system or its support equipment;

e. Items with special security characteristics; and

f. Dangerous items.

5. Defense Logistics Agency (DLA) and General Services Administration (GSA) Commodity Purchase Assignments. DFARS 208.7001-2.

a. There are 10 situations in which an activity may directly acquire commodities assigned to DLA or GSA for acquisition. Unless the requirement fits one of these exclusions, the activity must order the item through the applicable commodity purchase assignee.

b. One exclusion permits local purchase in an emergency. The item must be readily available commercially, and if it is not immediately available, the requiring activity must coordinate with the applicable purchase assignee.

c. Another exclusion permits local purchase for military service-managed line items not in excess of $25,000, if it is determined to be in the best interests of the government.

6. Activities normally use the MIPR to place orders under this program. DFARS 208.7006-1.

a. The acquiring department determines whether the requirement will be financed as a reimbursable (Category I) or direct citation (Category II) order. DFARS 208.7007-1.

b. Reimbursable orders shall be used if delivery is from existing inventories or by diversion from existing contracts of the acquiring activity; production or assembly is at government-owned plants; the requirement involves assembly of end items by the acquiring department; or contract payments will be made without reference to deliveries of end items.

c. If direct citation MIPRs cite funds that will expire after 30 September, the acquiring department must receive the MIPR by 31 May. DFARS 208.7008-2.

d. The acquiring activity must formally accept MIPRs within 30 days. DFARS 208.7009.

V. FISCAL ISSUES.

A. Miscellaneous Receipts Statute. 31 U.S.C. § 3302. See Walter L. Jordan, Director Finance Division, Department of the Treasury, B-241269, February 28, 1991 (unpub.)

1. As a general rule, any money received from outside an agency/activity for the use of the government must be deposited into the Treasury as miscellaneous receipts.

2. An agency improperly augments its appropriations by retaining and crediting to its own accounts funds that should have been deposited as miscellaneous receipts.

3. The Economy Act and the project order statute are exceptions to this rule.

B. Rules of Obligation.

1. Direct citation orders. Obligate funds current at the time the acquiring activity awards a contract for the ordering activity's requirement. Record obligations for direct citation orders when the activity receives a conformed copy of the contract awarded by the acquiring activity. 31 U.S.C. § 1501(a)(1); DFARS 208.7009; DoD Manual 7220.9-M, ch. 25, para. F(2); AR 37-1, para. 9-7g; AR 37-1, Table 12-3.

2. Reimbursable orders and all project orders. Obligate funds current when the performing activity accepts the order. Record obligations using the reimbursable method upon receipt of written acceptance, e.g., an executed DD 448-2. 31 U.S.C. § 1501(a)(1); DFARS 208.7009; DoD Manual 7220.9-M, ch. 25, para. F(1); AR 37-1, Table 9-3.

3. Required source orders. For orders required by law to be placed with another U.S. government agency, e.g., FPI or the Committee, obligate funds current when the order is issued. Likewise, record obligations in the amount stated in the order at the time the order is issued. 31 U.S.C. § 1501(a)(3); DoD Manual 7220.9-M, ch. 25, para. F(2); AR 37-1 para. 9-7h; AR 37-1, Table 9-3.

C. Project Orders vs. Economy Act Orders.

1. Under the Economy Act, if the performing activity has not incurred obligations with respect to funds obligated by an order, the requiring activity funds must be deobligated (recovered) at the end of their period of availability. The Honorable Augustus F. Hawkins, Chairman, Committee on Education and Labor, House of Representatives, B-223833, November 5, 1987 (unpub.).

2. Under the project order statute, once a performing activity accepts an order, the funds remain available even though performance may extend beyond their period of availability. There is no requirement to recover funds at the end of the period of availability as with the Economy Act. To the Secretary of Defense, B-121982, March 4, 1955 (unpub.).

3. Under the Economy Act one agency may require advance payment, but under the project order statute advance payment is not authorized.

D. Potential Problem Areas.

1. A requiring activity cites Operations and Maintenance (O&M) funds on a MIPR for purchase of investment/capital end items.

2. A requiring activity misuses the intra-government purchase process to dump year end funds.

3. Misclassifying an Economy Act order as a project order to avoid recovery requirements.

VI. CONCLUSION.