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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

The President's Column

Dear BCABA Members:

Welcome to the June 2012 edition of *The Clause*. Pete McDonald again has assembled a fine group of timely and informative articles for government contracts practitioners. *The Clause* is one of the great benefits of membership in the Board of Contract Appeals Bar Association, Inc. I hope that you enjoy this issue.

The BCABA held a happy hour at Bar Louie earlier in the year, another in a series of networking events held by the BCABA. We were fortunate to have Judge Jonathan Zischkau of the Civilian Board of Contract Appeals speak on his career path and experience as a lawyer and judge. We also had an engaging conversation among the attendees on their experiences in the government contracts fields. We plan to have similar networking events during the year, including our annual reception for the Board of Contract Appeals Judges Association later this summer.

Another upcoming event is the BCABA's annual program, to be held on **October 24, 2012** at the Renaissance Washington D.C. DuPont Circle Hotel. Judge Gary Shapiro of the Postal Service Board of Contract Appeals is acting as this year's

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President's Column (cont'd):

annual program chair, and is assembling an engaging and diverse program. We will circulate detailed information on the program in the weeks ahead.

Please look for information on all of our programs on our website, www.bcaba.org.

Best regards,

Francis "Chip" Purcell
President
BCABA, Inc.

Annual Meeting Announcement

The BCABA is excited to host its annual conference at the **Washington Renaissance DuPont Circle Hotel** on **October 24, 2012**. As you have come to expect, we anticipate a full day of discussions of timely issues of interest to our membership on a variety of topics. New this year will be a review of selected BCA decisions from the last year. We are pleased to announce that Professor Ralph Nash has agreed to speak during the lunch (which is included with the conference fee), and that Professor Daniel Gordon has agreed to lead a session about government contract litigation from a different perspective. Registration materials will be included in September issue of *The Clause* and on BCABA's website (www.bcaba.org). For more information, please contact Judge Gary E. Shapiro at 703-812-1900.

Bored of Contract Appeals
(a.k.a. The Editor's Column)
by
Peter A. McDonald
C.P.A., Esq.
(A nice guy . . . basically.)

Leading this issue is Ryan Roberts with the *Case Digests*, a much appreciated regular feature that helps keep us all up-to-date. Amy Hutchens then points out the many dangers inherent in simultaneously serving as both the general counsel and the chief compliance officer. In his article, Steve Raptis sagely points out the techniques for maximizing insurance coverage. Following that, Dave Schneider insightfully explores the jurisdictional conundrums between bankruptcy courts and courts handling government contract disputes. Dave Newsome then addresses the significance of issues related to the often overlooked indemnity clauses. Finally, there is an analysis of the recent ASBCA case on executive compensation.

The Clause will reprint, with permission, previously published articles. We are also receptive to original articles that may be of interest to government contracts practitioners. But listen, everybody: Don't take all this government contract stuff too seriously. Get a life. In that regard, we again received some articles that were simply unsuitable for publication, such as: "Angie's List Drops Pete!"; "BCA Judges Get Huge Salary Hike!!"; and "Pete Caught Partying with Secret Service!!!"

Reminder of Cheap Annual Dues

This is to remind everyone about the BCABA, Inc., dues procedures:

- ☺ Dues notices will be emailed on or about **August 1st**.
- ☺ Annual dues are **$30** for government employees, and **$45** for all others.
- ☺ Dues payments are due NLT **September 30th**.
- ☺ There are no second notices.
- ☺ Gold Medal firms are those that have all their government contract practitioners as members.
- ☺ Members who fail to pay their dues by September 30th do not appear in the Directory and do not receive *The Clause*.
- ☺ Members are responsible for the accuracy of their information in the Membership Directory, which is maintained on the website.

BCA Case Digests

by

Ryan E. Roberts

BCABA members – Thank you for reading the June edition of the *BCA Case Digests*. Below are summaries of the most interesting and relevant substantive decisions from the boards of contract appeals from the months of February through April.

Two administrative notes to begin. First, this edition marks the one year anniversary of the *Case Digests*, and I'd like to thank all of our contributors for their time and dedication to this publication. As always, the publication is a work in progress, and all comments or suggestions on improving the summaries are welcome. Second, a special congratulations to Christopher R. Noon, who recently started his new position as an associate at Baker & Hostetler LLP. Congratulations, Christopher!

The boards were incredibly busy during the last few months, and we have summarized over 30 cases below. In addition to the usual contract interpretation and performance cases, the boards decided a number of noteworthy appeals. Among the most interesting was the ASBCA's decision in Waterstone Environmental Hydrology and Engineering, Inc., where the Board was presented with the rare opportunity to interpret and apply a recent Supreme Court decision. Although there were no substantive appeals concerning cost isssues, there was a decision concerning the timeliness of an appeal of a draft DCAA audit report. Additionally, the boards were asked to interpret a Spanish environmental regulation (Weigel Hochdrucktechnik GmbH & Co. KG), to decide an appeal relating to the construction of the new U.S. Embassy in Kazakhstan (Fluor Intercontinental), to decide several cases involving settlement agreements, to decide two appeals concerning helicopters, and to determine whether stealing a gift certificate violated U.S. Postal Service regulations.

To the Digests!

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The *Case Digests* are presented in chronological order.

Erickson Air-Crane, Inc. v. Department of Agriculture
CBCA No. 1676, Feb. 1, 2012 – Judge Sheridan
by Gregory R. Hallmark, Holland & Knight LLP

The question before the Board was whether a contractor that was ordered to stop working during a bid protest was entitled to recoup costs of idle equipment and personnel during the stoppage, regardless of revenue it earned in replacement work.

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Case Digests (cont'd):

Erickson Air-Crane, Inc. won a contract with the Forest Service ("FS") to provide exclusive use of helicopters for fire-fighting. Payment was by a daily rate, plus an additional hourly rate for flight time. Soon after the notice to proceed, a bid protest was filed and the FS ordered Erickson to stop work. During the work stoppage, the FS continued to order helicopter services from Erickson under a separate "Call When Needed" contract, and Erickson also obtained work from other sources. During the 101-day stop work period, the three Erickson helicopters relevant to this appeal worked 68, 61, and 51 days, earning Erickson over $12 million.

Erickson argued that it was entitled to an equitable adjustment covering its costs of ownership of the helicopters and idle labor during the stop work period, in an amount of roughly $3 million. That figure was derived by multiplying the average daily costs of ownership of the helicopters and direct labor by the number of days the helicopter sat idle during the 101-day stoppage, not counting days that the helicopters were used for other work.

The Board denied Erickson's claim. It faulted Erickson's methodology for failing to account for the revenue Erickson's replacement work earned. The point of an equitable adjustment, the Board stated, was to put the contractor in as good a position as it would have been in but for the work stoppage.

The Board found that Erickson did not prove that it would have earned more revenue under the contract during the 101 days than it did with the replacement work. Compared to the $12 million it earned in replacement work, the contract guaranteed only $5.7 million for the daily rate during the 101-day period. Erickson failed to prove how much additional revenue it would have earned for flight time because it did not explain how it developed its estimates of average flight hours per day.

The proper measure of damages, according to the Board, was the unabsorbed ownership and labor costs Erickson would have incurred during the work stoppage, assuming no replacement work ($5.5 million) minus the amount that was actually offset by the revenue it received for replacement work. Erickson failed to prove that the $5.5 million was not completely offset by the $12 million it received for replacement work.

This case shows that a contractor is entitled to recoup costs that result from a government-caused work stoppage only if it proves that the stoppage put it in a worse position than if there had been no stoppage. A rote counting of idle days, without addressing revenue received through mitigation efforts, tells only half of the story.

Appeal of General Dynamics Ordnance and Tactical Sys., Inc.
ASBCA Nos. 56870, 56957, February 3, 2012 – Judge Delman
by Townsend L. Bourne, Sheppard Mullin Richter & Hampton LLP

This ASBCA decision involved a motion for sanctions filed by the contractor based on

(*continued on next page*)

Case Digests (cont'd):

the Government's failure to comply with discovery orders issued by the Board. At issue in the contractor's appeal was the adequacy of quantity estimates provided by the Government under the contract.

Following submittal of the Government's Rule 4 File, the contractor filed a motion for entry of a protective order in order to obtain documents that the Government had classified as "Possible Trade Secrets." The Government opposed the motion, arguing that the documents were not relevant to the appeal and that they constituted trade secrets. The ASBCA reviewed the contested documents *in camera* and ruled in favor of the contractor, ordering the parties to agree to a protective order or, if no agreement could be reached, to file proposed protective order terms for the Board's review. After the Government refused to comply with the order, the contractor filed a motion for evidentiary sanctions. Subsequently, the Board issued a protective order and ordered the Government to disclose the contested documents. The contractor renewed its motion for sanctions when the Government refused to comply with the protective order. The Government eventually provided the contractor with a document production and included the contested documents, but with redactions. As a result of the Government's actions, the contractor argued that the ASBCA should sustain the appeal or, in the alternative, should order evidentiary sanctions.

In determining appropriate sanctions, the Board considered several factors, including "the willfulness of the offending party; the degree of prejudice involved; the delay, burden and expense incurred by the movant; and evidence of the offending party's lack of compliance with other Board orders." *Lockheed Martin Corp.*, ASBCA No. 45719, 99-1 BCA ¶30,312. The Board found that the Government "knowingly, intentionally and willingly" chose not to comply with the Board's order, rejecting the Government's argument that a finding of willfulness required evidence of evil motives or bad faith. Regarding prejudice, the Board found that the information withheld was capacity and pricing data relevant to the contractor's case, such that the contractor's case was materially prejudiced by the Government's refusal to disclose the information. Further, the Government's disregard for the Board's orders resulted in delay, burden, and expense where the discovery dispute had been pending for over two years. The Board noted also that the Government failed to respond to other discovery requests from the contractor in a timely manner. The ASBCA declined to sustain the appeal based on the Government's actions because it was aware of no authority for such a sanction. Instead, the Board ordered evidentiary sanctions, stating that it would infer from the Government's refusal to provide the documents that such documents "would show that there was relevant information available to the [Government] that it failed to consider when developing the estimates in question for the solicitation documents, thereby causing the estimates to be inadequately or negligently prepared."

This appeal demonstrates that an egregious disregard for discovery orders will cause the Board to award evidentiary sanctions.

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Case Digests (cont'd):

Hillcrest Aircraft Co. v. Department of Agriculture
CBCA No. 2317, February 6, 2012 - Judge Borwick
by Katherine Allen, U.S. Department of the Treasury, Bureau of Engraving and Printing

In Hillcrest Aircraft Company ("Hillcrest"), the CBCA denied the Appellant's claim for reimbursement of federal excise taxes ("FETs") in a contract containing the commercial item tax clause at FAR § 52.212-4(k).

On May 20, 2010 Hillcrest was awarded a commercial item contract to provide helicopter firefighting services for the Department of Agriculture, National Interagency Fire Center. The contract contained the unique commercial item tax clause at FAR § 52.212-4(k) which succinctly states: "The contract price includes all applicable Federal, State, and local taxes and duties." This is in contrast with the Standard Tax clause, not included in this contract, which allows a contract price to be increased by the amount of any after-imposed Federal taxes which were not included in the original contract price (FAR § 52.229-3(b)). The Hillcrest contract also contained a Miscellaneous Cost clause which would allow reimbursement for "miscellaneous unforeseeable costs not covered through the contract payment rates and are the direct result of ordered service . . . ." Shortly after the start of performance Hillcrest began invoicing the Government requesting reimbursement for FETs eventually totaling $118,702.05 between June 3 and October 6, 2010.

Hillcrest brought this appeal, arguing the invoiced FETs were unforeseeable because it was impossible to determine when and for how long the helicopters would be in use, and therefore the FETs are compensable under the Miscellaneous Cost clause of the contract. Hillcrest also argued that definitions included in the Standard Tax clause should be read *in pari materia* with the commercial tax clause, making the after-applied FETs a recoverable expense. The CBCA ruled against Hillcrest, finding that the FETs do not fall under the Miscellaneous Cost clause, and that the commercial item contract clauses, including the commercial tax clause, are intended to be significantly different from standard government contract clauses, rendering *in pari materia* treatment improper. The commercial tax clause governs the contract, and means federal, state and local taxes are not permissible to be paid under the contract as an additional cost over and above the firm fixed-prices offered.

In the end, the FETs were not "unforeseeable costs" to Hillcrest, which held several similar contracts and should have included in these charges in its proposed prices.

Appeal of Muhtesem Co.
ASBCA No. 57538, February 7, 2012 – Judge Grant
by John Sorrenti, McKenna Long & Aldridge LLP

In this case, Muhtesem claimed $149,000 in damages based on three counts: Count 1

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Case Digests (cont'd):

was for interest on business loans, Count 2 was for loss of reputation damages, and Count 3 was for loss of anticipated profits on other business opportunities. The government moved for partial summary judgment on the three counts and, in the alternative, moved to dismiss Count 2 for lack of jurisdiction because the count sounded in tort. The ASBCA granted the government's motion for summary judgment on all three counts.

The government contracted with Muhtesem on a firm fixed-price contract to build a school in Iraq. Although the government promptly paid Muhtesem on its first four payments, it was late on the final payment. In the meantime, prior to submitting its final invoice, Muhtesem had obtained ten commercial loans for approximately $365,000. Before obtaining the loans, an unpaid subcontractor had issued a criminal complaint against Muhtesem that resulted in Muhtesem's president going to jail for ten days for failure to pay the subcontractor. Subsequent to the government's late payment on the final invoice, Muhtesem submitted a claim to the government for $681,966 for damages based on this late payment. The contracting officer denied all but $2940.07 of this claim, which it paid as a Prompt Payment Act interest penalty on the late payment. Muhtesem appealed the CO's final decision to the ASBCA and revised the amount claimed to $149,000.

Muhtesem argued that the ASBCA had jurisdiction over Count 2 because it flowed from the late payment, that the ASBCA should not apply "peacetime law" in a wartime scenario and that the ASBCA should rule for Muhtesem based on public policy considerations. The ASBCA rejected all of Muhtesem's arguments. On Count 1, the ASBCA found that not only were the loans obtained before the final invoice was submitted, which raised causation and nexus issues, but also that interest on the loans was not recoverable absent an express waiver of sovereign immunity that allowed a recovery. On Count 2, the ASBCA stated that in order for Muhtesem to recover damages for loss of reputation, it would have to prove the damages were the result of the government's late payment and foreseeable at the time of contracting. Here, the president was jailed as a result of a criminal charge filed before the final invoice was submitted so the loss of reputation was clearly not caused by the late payment. In addition, the government could not have foreseen Muhtesem's president would have been jailed as a result of a late payment. Finally, on Count 3 the ASBCA held that as a matter of law, "lost profits that might have been realized on other business endeavors are too remote and speculative to be compensable."

While contractors should not hesitate to pursue damages from the government, the contractor must demonstrate that the damages are connected to the contract or the government's actions in order to collect.

Appeals of Basirat Construction Firm
ASBCA Nos. 56808, 56810, 57085, 57150, February 16, 2012 – Judge Younger
by Christopher R. Noon, Baker & Hostetler LLP

The issue before the ASBCA was whether the Board should grant the Corps of

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Case Digests (cont'd):

Engineers' (the "Government") motion to dismiss with prejudice on the grounds that the parties had executed a settlement agreement, bilateral modifications, and release of claims in all four appeals brought by Basirat Construction Firm ("Basirat").

Under the terms of the settlement agreement, the Government had to: (1) replace a modification that had terminated the contract for default by executing a new bilateral modification that terminated the contract for the convenience of the Government; (2) cancel another modification and replace it with a new modification providing Basirat with a settlement amount of $495,198.40; and (3) pay the settlement amount to Basirat within 90 days of execution of the agreement. The only obligation imposed upon Basirat by the settlement agreement was to request dismissal with prejudice of the four appeals before the Board. The settlement agreement also contained a release of claims, whereby Basirat agreed to release the Government from any and all liability arising under the contract.

However, Basirat later sought further relief beyond the terms of the settlement agreement. Following the Government's motion to dismiss, Basirat opposed the motion on the grounds that the Government lacked factual and legal grounds to terminate for default and acted in bad faith in the terminations and denial of Basirat's claims. Further, Basirat challenged the validity of the settlement agreement, asserting that it was the product of duress, fraud and misrepresentation, mistake, and lack of consideration. Basirat claimed it was the target of financial threats by the Government and threats of physical harm to Basirat's president by "third parties." Basirat's president stated that he agreed to settle because they "got scared that it [would] take 3 to 4 more years and also because [they] were in a very bad condition financially and . . . in need of money." Basirat asserted that its claims aggregated to $1,687,522.35.

The Board rejected Basirat's contention that the settlement agreement was void due to duress. In order to render a contract unenforceable for duress, a party must establish that: "(1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts." The ASBCA further found that Basirat had the burden of demonstrating why it should not be held to the amount to which it agreed in the settlement agreement, and that Basirat failed to meet this burden. The Board found no substantiation for Basirat's assertions regarding duress, fraud and misrepresentation, mistake, and lack of consideration.

Having concluded that Basirat failed to justify setting aside the settlement agreement, the Board did not consider it necessary to consider Basirat's other arguments, which had been resolved in the settlement agreement. Accordingly, the ASBCA granted the Government's motion to dismiss the appeals with prejudice.

As this case illustrates, the ASBCA will enforce a settlement agreement even if the appellant signed it for reasons of financial difficulty.

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Case Digests (cont'd):

Appeals of Southern Defense Systems, Inc.
ASBCA Nos. 54045, 54528, February 16, 2012 – Judge Page
by Jeffery M. Chiow, Rogers Joseph O'Donnell

Southern Defense Systems, Inc. ("SDS") filed two appeals advancing different theories, both seeking to recover $859,875.63, under an indefinite delivery indefinite quantity ("IDIQ") small business 8(a) set-aside contract with the Air Force's Aeronautical Systems Center (Air Force) to deliver support equipment. The claimed amount represents the difference between the 20% pass-through rate SDS was authorized to apply under the basic contract and the lower 6.4% pass-through rate the Air Force negotiated with respect to a single delivery order (DO 20). In an earlier decision, the Board had found that the underlying contract was invalid because it did not contain a minimum order amount, which is a required element of any IDIQ contract, but it found that the delivery order at issue was itself a valid contract.

In its first appeal, SDS asserted that the basic contract compelled the use of a 20% pass-through rate and that DO 20 "mistakenly uses" a lower pass-through rate. The Board organized SDS's arguments as follows: a) the pass-through rate was not negotiable; or alternatively, b) the contract was ambiguous as to the negotiability of the pass-through rate; c) amending the pass-through rate violated the Federal Acquisition Regulations (FAR) because it deviated from the original acquisition plan and did so without the SBA's consent; and d) the 6.4% rate was inserted by mistake. The Board found that the basic contract contemplated negotiation of the pass-through rate and that SDS had presented no support for its claim that the 6.4% rate was the product of a mistake. With respect to FAR, the Board found the Air Force was not barred from deviating from its initial procurement strategy in negotiating a lower rate. Further, although SBA enters into contracts with agencies and then subcontracts with qualified 8(a) companies, the FAR does not preserve a role for the SBA in contract administration after award.

In its second appeal, SDS asserted that it had agreed to the 6.4% rate under duress because the contracting officer was threatening to blacklist the company if it did not agree to the lower pass-through rate. SDS also claimed the contracting officer falsely represented that the lower rate would accompany a larger than normal delivery. The Board did not credit unsupported testimony of threats alleged to have been made more than four years prior by the contracting officer. SDS, the Board concluded, could have declined DO 20, but made a reasoned business determination to accept it. As for the alleged misrepresentation, the Board found SDS had not proved anything other than a contracting officer driving a hard bargain.

This appeal demonstrates that the ASBCA will support the Government's attempts to negotiate terms more favorable than the IDIQ provides, and that contractors must take a hard negotiation stance to preserve these terms.

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Case Digests (cont'd):

Side Bar and Associates, Inc. v. Dept. of Health and Human Services
CBCA No. 2279, February 21, 2012 – Judge Hyatt
by Jeffery M. Chiow, Rogers Joseph O'Donnell

On October 16, 2010, Side Bar and Associates, Inc. ("Side Bar") presented a claim to the contracting officer under its contract to provide guard services for the Food and Drug Administration's ("FDA's") laboratory in Irvine, California. Side Bar submitted to the CBCA an appeal of the contracting officer's deemed denial of its claim on January 28, 2011. On March 1, 2011, the government filed a motion to suspend the proceedings for sixty days for the contracting officer to consider and decide the claim. The contracting officer then apparently found the claim "after conducting an extended search," but told the Board the claim had not been reviewed or processed, and the contracting officer was "concerned" that the claim had not been endorsed with either an electronic or actual signature, as required by FAR 33.207 and the Contracts Disputes Act. The Board ordered appellant to show cause why the appeal should not be dismissed for lack of jurisdiction and Side Bar provided a signed copy of the claim dated October 16, 2010 and a declaration from the individual who signed the claim, neither of which was challenged by the government.

On June 14, 2011, the contracting officer issued a final decision on the claim awarding Side Bar half of its claim value plus Prompt Payment Act interest and denied all other costs and claims. The government then contended that the issuance of the decision mooted Side Bar's claim requiring Side Bar to file a new appeal if it wished to challenge the final decision. The Board concluded that once jurisdiction is vested in a tribunal, as it was by Side Bar's timely appeal of the deemed denial of its claim, a contracting officer cannot destroy such jurisdiction simply by issuing or withdrawing a decision on a claim.

This case provides a primer on how contracting officers ought not to handle claims.

Appeal of Delta Industries, Inc.
ASBCA No. 57356, Feb. 23, 2012 – Judge Scott
by Gregory R. Hallmark, Holland & Knight LLP

The question before the ASBCA was whether the Government owed termination costs when it cancelled a purchase order, issued under the simplified acquisition procedures, after the contractor failed to deliver the goods on time.

The Defense Supply Center Columbus ("DSCC") issued a purchase order (PO) in response to a quotation by Delta Industries, Inc., for an armor plate on February 5, 2010. The due date was May 29, 2010. The PO indicated that it was an "offer" and did not request a signature from Delta. Following some confusion regarding specifications, Delta ordered materials from a supplier on May 20, for delivery on June 1. On June 7, DSCC notified Delta that it was "withdraw[ing] the award" and issued a PO modification reducing the quantity

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Case Digests (cont'd):

ordered and PO amount to zero. Delta shipped the goods the same day, after receiving notice of the cancellation. After DSCC stated that it would not accept delivery, Delta filed a claim for contract termination costs, which the CO denied.

In its appeal, Delta argued that the PO created a binding contract because Delta had substantially performed and that the cancellation was therefore a termination for convenience, entitling Delta to payment of the PO price. Delta argued that DSCC failed to follow procedures set out in FAR 13.302-4(b)(2) for canceling a purchase order that has not been accepted in writing. That provision states that the contracting officer "shall" notify the contractor in writing of the cancellation, request the contractor's written acceptance of the cancellation, and process the cancellation as a termination if the contractor does not accept the cancellation or claims costs that were incurred as a result of beginning performance.

The ASBCA denied the appeal, agreeing with the Government that the PO was a unilateral offer that lapsed when the goods were not delivered by the due date. Under FAR 13.004(c), the Government may withdraw, amend, or cancel any order resulting from a quotation "at any time before acceptance occurs." When the contractor does not accept an order by signing it, it accepts by furnishing the ordered supplies or by proceeding with the work to the point where substantial performance has occurred. But even if substantial performance has occurred, the Board held, the offer lapses by its own terms if the supplier fails to tender complete performance by the due date.

The ASBCA held that the procedures for cancellation set out in FAR 13.302-4 apply only to cancellations *prior* to the end of the performance period. Where, as here, a PO lapses because the contractor does not deliver by the due date, the cancellation procedures in FAR 13.302-4 do not apply.

This case offers a reminder that, in simplified acquisitions, the issuance of a PO does not itself create a binding obligation on the Government. Even the contractor's substantial performance is not enough to create a binding contract if delivery is late.

JRS Management v. Department of Justice
CBCA No. 2475, March 1, 2012 – Judge Drummond
by Christine Roushdy, Vinson & Elkins LLP

In *JRS Mgmt.*, the CBCA considered the Government's motion to dismiss for lack of jurisdiction, alleging that no contract existed between the parties. Appellant responded to a RFQ issued by Bureau of Prisons ("BOP") for phlebotomy services. The RFQ required offerors to submit the name and qualifications of the individual to perform the services under the contract. Appellant submitted a quote, identifying a particular phlebotomist. BOP awarded

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Case Digests (cont'd):

the contract to Appellant on a standard form ("SF") 1449, specifying the name of the phlebotomist identified in Appellant's proposal. The SF 1449 provided that Appellant had nine days to accept the terms and conditions of the SF 1449, or the offer would expire. During the period in which the offer was pending, Appellant signed the SF 1449, but substituted another phlebotomist, explaining that the one specified previously had not accepted the position.

BOP informed Appellant that it considered the substitution to be a counteroffer, and moreover, the counteroffer was a rejection of the Government's terms and conditions of the offer of award. BOP subsequently reissued an amended RFQ and Appellant did not submit a new quotation.

The Board held that the Government was mistaken in arguing that the Board lacked jurisdiction for the lack of an enforceable contract, because in order for the Board to have jurisdiction, a valid contract need only be pleaded, not proven. Since Appellant had met this standard, the Board assumed jurisdiction and treated the Government's motion as a motion to dismiss for failure to state a claim.

The Board held that even when considering the facts in a light most favorable to the Appellant, relief could not be granted. The Board agreed with the Government's contention that for a contract to exist there must be mutual intent, including an offer, acceptance, and consideration. In this case, Appellant did not accept the offer unequivocally, but by proposing another phlebotomist, rejected the Government's offer, and submitted a counteroffer, which the Government clearly rejected. As such, no contract ever existed.

The contractor clearly lacked standing to pursue an appeal here, and this case serves as a good reminder to contractors that not all claims should be litigated.

Bannum, Inc. v. Department of Justice
CBCA No. 2686, March 6, 2012 – Judge Walters
by Christopher R. Noon, Baker & Hostetler LLP

The issue before the CBCA was whether Bannum's damages claim under the CDA was timely submitted to the contracting officer. In this case, Bannum had entered into a contract with the Bureau of Prisons ("BOP") for the provision of comprehensive sanctions center services for male and female federal offenders in Orlando, Florida.

Bannum claimed it incurred damages due to the improper actions of a BOP employee, Ms. Callie Farr, who had been assigned as the contracting officer's technical representative ("COTR") under the contract. As the COTR, Ms. Farr had the responsibility of administering and overseeing the contract and for inspecting Bannum's work. From 2002 through November 2004, Bannum alleged that Farr engaged in a series of actions that "impacted, changed,

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disrupted, and delayed Bannum's performance of the subject contract, resulting in Bannum incurring additional costs over and above the scope of the subject contract." Bannum also believed that Ms. Farr interfered with its relationship with Christian Prison Ministries ("CPM"). To perform under the contract, Bannum had entered into a lease with CPM.

Bannum lodged a grievance with BOP in December 2004, and Farr's alleged misconduct was the subject of a BOP Office of Internal Affairs ("OIA") investigation that was completed in March 2006. After Ms. Farr resigned from her position in November 2005, Bannum received from BOP a "no-deficiency" monitoring report, thus underscoring the unfairness of Ms. Farr's previous inspections. Even though it was aware by this time of Ms. Farr's inappropriate activities, Bannum did not file a claim under the ("CDA"). Bannum did not submit its claim to the contracting officer until August 12, 2011, after the settlement of a lawsuit with Christian Prison Ministries, Inc. ("CPM") and Ms. Farr concerning the circumstances around the claim. The contracting officer issued a final decision on the claim several months later, denying the claim as untimely under the CDA, having been submitted more than six years after its accrual.

The CDA requires that "each claim by a contractor against the Federal Government relating to a contract…be submitted within 6 years after the accrual of a claim" (41 U.S.C. §7103(a)(4)(a)). The FAR defines claim "accrual" as "the date when all events, that fix the alleged liability of . . . the Government . . . and permit assertion of the claim, were known or should have been known" (48 C.F.R. § 33.201 (2004)).

The Board found the "events" that would fix the alleged liability to be the acts or omissions of Ms. Farr. These had all transpired as of December 2004. Therefore, the August 2011 claim was submitted beyond the six year timeframe contemplated under the CDA. Bannum argued that its claim is not only for constructive change arising out of the alleged actions of Ms. Farr, but also for events that occurred after 2004, including the failure of BOP to make the results of the OIA investigation known and the issuance of the BOP's "no-deficiency" monitoring report after November 2005.

However, the Board was not swayed by these arguments, stating that the "salient operative facts" that would "fix liability" were known well in advance of its receipt of the OIA investigation file and the "no-deficiency" report. Although the issuance of the report would be relevant to Bannum's claim, that issuance was not itself an "event" that would "fix liability." Accordingly, the Board dismissed Bannum's appeal.

As illustrated by this case, it is important to be mindful of the 6-year statute of limitation for claims under the CDA. Claims should be submitted as early as possible to avoid the risk of having the claim dismissed. As noted by the Board in this case, the timely submission of a claim is a condition precedent to the exercise of Board jurisdiction under the CDA.

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Case Digests (cont'd):

Walsh/Davis Joint Venture v. General Services Administration
CBCA No. 1460, March 13, 2012 – Judge Daniels
by Jeffery M. Chiow, Rogers Joseph O'Donnell

The General Services Administration ("GSA") contracted with Walsh/Davis Joint Venture (WDJV) to build a headquarters complex for the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives. WDJV's electrical subcontractor, AES Electrical, Inc., d/b/a/ Freestate Electrical Construction Company ("Freestate"), submitted claims which WDJV then submitted to GSA for the cumulative impact of labor inefficiencies allegedly resulting from contract modifications. The parties reached agreement on entitlement and quantum for all such claims after a November 2006 change to the language in WDJV's contract modifications. Thus, the Board was only asked to determine the contractor's entitlement to earlier claims.

Prior to November 2006, the language on WDJV's contract modifications stated: "[s]ettlement of this change includes all costs, direct, indirect, and impact and delay associated with this change." In an earlier decision on the Government's motion for summary relief, the CBCA had determined that the sentence was unambiguous in precluding further recovery for the affected contract modifications, and therefore recovery for WDJV was only available if it could demonstrate one of the special and limited situations in which a claim may be prosecuted despite the execution of a general release. WDJV asserted that it fit within two such special and limited situations because: (1) the modification failed to express the agreement of the parties; and (2) the parties' post-release consideration of the cumulative impact claims demonstrated an intent not to construe the release as an abandonment of WDJV's claims. In support of this view, WDJV cited parol evidence to suggest there was never a meeting of the minds with respect to the phrase "associated with this change." The CBCA cited *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009), as binding precedent that prohibited it from considering parol evidence where it found the contract language unambiguous.

GSA contended that under *Bell BCI* the unambiguous release language should have ended the inquiry, but the Board cited long-standing authority from the Federal Circuit and Court of Claims that had recognized "special and limited situations" where recovery was possible notwithstanding a general release. *Bell BCI* did not overrule (or even address) any of these decisions, according to the Board. The Board ultimately denied the claims after determining that with respect to the meeting of the minds, WDJV could not carry its burden of proving that the parties intended something different than the unambiguous language, and also could not prove that the parties continued to entertain the claim after the general release.

While the decision was not favorable for WDJV, this opinion preserves, at least at the CBCA, a narrow exception to the potentially harsh rule of *Bell BCI* that unambiguous release language can never be overcome.

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Veleta Corp. v. Department of Agriculture
CBCA No. 2199, March 14, 2012 – Judge Zischkau
by Steven Cave, Womble Carlyle Sandridge & Rice, LLP

Veleta involved a contract with the Department of Agriculture ("DOA") to cut and remove timber in a Colorado Forest. The issue in *Veleta* was whether the DOA had constructively changed the contract terms by requiring more large pine trees to be cut and removed than initially requested.

The Solicitation contemplated a firm-fixed price contract to provide various deforestation treatments including "thinning" and removing trees. Notably, the Solicitation included a bold-face statement, notifying offerors that:

> Volume quantities listed herein are made available with the understanding that values shown are Forest Service Estimates and are not guaranteed. For these reasons, Offerors are urged to examine the Project Area and make their own estimates.

The Solicitation further included "Silvicultural Summary Prescriptions" for each of the five treatment units. The summary prescriptions or contract requirements state, in pertinent part that the "successful offeror must . . . (2) Reduce existing basal area up to 40% . . . (4) Cut and remove lodgepole pine trees that are greater than 5" DBH [circumference] . . . (9) Reduce existing basal area by 20% within 50' of either side of trails or roads."

In July of 2008, the Contracting Officer's Representative ("COR") held a pre-proposal conference at the Treatment Unit 2 work-site. At that time, however, the Solicitation did not include the summary prescription requirement to "cut and remove lodgepole pine trees that are greater than 5" DBH [circumference]." As a result, there were some lodgepole pines in the sample that were greater than 5" circumference but not marked for cutting during the pre-proposal conference. Importantly, the COR encouraged the potential offerors to do a complete site inspection of each unit before submitting a proposal.

Upon completion of Unit 2 deforestation and treatment, Mr. Davis requested inspection and approval for billing. The COR concluded that the plots showed that more trees needed to be cut. After review by the COR and the Forest Service's silviculturist, the COR told Mr. Davis that lodgepole pines greater than 5" circumference had to be cut as stated in the Unit 2 specification summary. Mr. Davis acknowledged the prescription specification requirement but also noted that the sample area visited during the pre-proposal conference had lodgepole pines greater than 5" that were not marked for cutting. It was at this time that the COR advised Mr. Davis that after the solicitation was revised, the sample area had not been adjusted prior to the pre-proposal conference. At this point, the COR required Veleta Corporation ("Veleta") to remove all lodgepole pines greater than 5" circumference from the nine-acre Unit 2 treatment

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area.

Shortly after that discussion, the COR requested a schedule for Unit 2 completion. Mr. Davis responded by providing a completion date but distinctly failed to allege a change the contract specifications by the COR, or that the COR had imposed cutting requirements more voluminous than those in the Contract. Veleta then issued an invoice reflecting completion of Unit 2 and six acres of Unit 3 at the agreed-upon contract rate of $860 per acre. At no point during its work in Unit 2 or Unit 3 did Veleta ever advise the contracting officer that it received directions from the COR constituting a constructive change to the contract or affecting Veleta's cost of performance.

In November 2009, after finishing cutting and deforestation treatments in Units 2 and 3, Veleta sent a letter to the contracting officer raising concerns about contract requirements and its corresponding costs. Veleta then submitted a claim requesting an equitable adjustment wherein Veleta "asserted that the COR represented at the pre-proposal site visit that the sample marked area in Unit 2 'reflected the application of the Specifications for Units 2 and 3, specifically Exhibit 1, Silvicultural Summary Prescriptions.'"

In its appeal, Veleta argued that it was required to cut an increased timber volume in Units 2 and 3 as a result of the COR's direction to cut all lodgepole pines greater than 5" circumference. In rejecting this argument, the Board noted the record regarding the parties' frequent contact and "give-and-take." The Board focused on the parties' mutual understanding that the requirement to cut all lodgepole pines great than 5" circumference was to be taken within context of the overall 40% reduction requirement and 20% reduction requirement within 50 feet of trails and roads. The board ultimately concluded that Veleta failed to produce evidence supporting its contention that it cut more timber than initially required by the Contract, and that while the company may have overcut some areas, the record is clear that where the overcutting occurred, the COR allowed undercutting in adjacent areas.

Contractors should understand that, if a change or constructive change in a contract requirement arises as a result of new or non-conforming agency requests, the issue should be brought to the attention of the contracting officer as soon as possible.

Appeal of Weigel Hochdrucktechnik GmbH & Co. KG
ASBCA No. 57207, March 15, 2012 – Judge Melnick
by Ryan E. Roberts, Sheppard Mullin Richter & Hampton LLP

The ASBCA was presented with a unique question of Spanish law in *Weigel*, and partially sustained the contractor's appeal concerning the applicability of the Spanish regulation.

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The Air Force contracted with Weigel for the removal of rubber from a runway at Moron Air Force Base, Spain. During performance of the removal, the Air Force required Weigel to test the runoff water and ensure compliance with the water contamination requirements of Spanigh Royal Decree 509/96. Based on the requirements of the Royal Decree, the Air Force prohibited Weigel from discharging all of the project's runoff water, and forced Weigel to retain in containers the water the Air Force deemed to be too contaminated.

Weigel filed its appeal claiming a constructive change and increased costs for the testing and storage of water pursuant to the Royal Decree. Weigel argued that the Royal Decree was legally inapplicable to these circumstances, and it was therefore entitled to the additional costs associated with meeting its requirements. In response, the Government failed to refute Weigel's allegations concerning the applicability of the Royal Decree, and did not proffer evidence concerning the terms of the Royal Decree for the ASBCA to determine its applicability. Without having the Royal Decree to examine, and without a counterargument concerning its applicability, the ASBCA held that it did not apply, and granted Weigel's claim for increased costs. Unfortunately, the ASBCA did so without embracing the rare opportunity to interpret Spanish law.

This appeal, despite the factual circumstances, was relatively straightforward. It does underscore an important point for contractors, however, as when the Government insists on imposing extra-contractual requirements, the contractor should insist on recovering the additional costs associated with performance.

National Fruit Product Company, Inc. v. Department of Agriculture
CBCA No. 2445, March 26, 2012 – Judges Somers
by Benjamin J. Kohr, Wiley Rein LLP

In this appeal, the CBCA addressed its jurisdiction over appeals of a contracting officer's ("CO's") assessment of liquidated damages, as well as what formula would be applied to determine those liquidated damages where the contract was ambiguous. The CBCA held that: (1) it had jurisdiction over an appeal of the CO's final determination to impose liquidated damages; (2) liquidated damages were appropriate because the contractor's failure to provide timely delivery under the contract was not mitigated by circumstances out of its control; and (3) both the contractor and the Government were bound by their mutual understanding of the liquidated damages calculation, even though that understanding differed from the calculation called for by the contract's plain language.

Between April and September 2010, the United States Department of Agriculture ("USDA") issued three invitations to submit bids for delivery of canned apple slices and applesauce under the USDA's Agricultural Marketing Service Master Solicitation for Commodity Procurements ("Master Solicitation"). The Master Solicitation included a liquidated damages provision that applied if the contractor failed to deliver supplies or perform

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the services within the time specified in the contract. Prior solicitations from the USDA for similar services had included liquidation provisions that specified damages at "15 cents per hundredweight ($.0015 per pound) net per calendar day," but the Master Solicitation at issue specified, in error, that liquidated damages would be accrued at "$0.0025 per calendar day of delay, not to exceed 45 days of delay." In May 2009, before issuing the three invitations for bids relevant here, the USDA recognized the error in its Master Solicitation and clarified at the USDA Annual Industry Conference—which claimant attended—that liquidated damages under the Master Solicitation would be calculated at $0.0025 per hundredweight per day.

The claimant, National Fruit Product Company, Inc. ("NFPC"), submitted bids under each of the three invitations, all of which were accepted. NFPC was initially successful in performing the contracts, but beginning in October 2010, an incredibly poor apple crop in the eastern and midwestern United States hampered its ability to deliver canned apple slices and applesauce in a timely manner. NFPC attempted to find alternative suppliers in January and February 2011, but was unable to find any replacement apples. NFPC requested relief from the contract in early February 2011, but the USDA issued a cure notice six weeks later denying any relief on the basis of crop shortages. In the notice, the USDA advised NFPC that it was subject to a termination for default unless the deficiencies were cured. NFPC was unable to cure, leading the USDA CO to issue a final decision terminating all three contract for the convenience of the Government on April 29, 2011. The termination notice stated that NFPC would not be relieved of the liquidated damages for the period of July 2010 through February 2011, which the Government calculated at $526,930.

NFPC appealed the CO's final determination and sought repayment of the liquidated damages. NFPC argued that its delay in delivery were caused by factors outside its control (i.e., the crop shortage). In the alternative, NFPC argued that if liquidated damages were proper they should be determined by the plain language of the contract at $0.0025 per calendar day. As an initial response, the USDA argued that the CBCA lacked jurisdiction because NFPC failed to file a certified claim. In the alternative, the USDA argued that NFPC failed to mitigate any damages by not seeking alternative sources of apples unaffected by the crop shortage. The USDA also asserted that the liquidated damages clause in the Master Solicitation inadvertently excluded the language "per pound" due to a typographical error, and therefore the contract called for $0.0025 per pound per day in liquidated damages.

With respect to the jurisdictional argument, the Board concluded that it had jurisdiction because the matter involved the appeal of a final decision asserting a Government claim for liquidated damages. No certification was required by NFPC to defend against the Government's claim, and the Government was not required to certify its own claim. On the merits, the Board rejected NFPC's reasoning that it could not mitigate the damages. The Board found that NFPC failed to take steps to find alternative sources for four months after it was aware of the shortage of apples from its traditional suppliers, and was thus liable for liquidated damages. Finally, the CBCA rejected both parties' arguments with respect to the liquidated

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damages clause. The Board found that the USDA's statements at the May 2009 Industry Conference confirmed both parties' understanding that liquidated damages would be calculated at $0.0025 per hundredweight—not per pound as argued by the USDA—per calendar day for a maximum of 45 days. Thus, liquidated damages were calculated at $9,650 and the USDA was ordered to repay the excess withholdings totaling $517,281.

CBCA's holding provides confirmation of the Board's jurisdiction to hear appeals regarding the imposition of liquidated damages by the Government. Contractor's should be aware of this avenue for relief, but must also be cognizant—as this decision reiterates—that parties will be held to their mutual understanding of the contract draft articles in PSBCA and CBCA cases.

Appeal of Lockheed Martin Corp.
ASBCA No. 57525, March 28, 2012 – Judge Delman
by Christine Roushdy, Vinson & Elkins LLP

The Board considered Appellant's motion to dismiss the Government's claim for $29,900,000 plus interest for increased costs paid by the Government resulting from Appellant's alleged non-compliance with CAS 418, CAS 420, and FAR 31.205-18(a). Appellant argued that the Government's claim is time-barred under the Contracts Disputes Act ("CDA"), because it was filed more than six years after the claim accrued.

Appellant submitted a proposal for its Sniper XR. In its proposal, Appellant identified Related and/or Concurrent Independent, Research, and Development ("IR&D"), which included several tasks that were related to, but not required by the contract. These IR&D efforts were described as "company-funded in the proposal and meetings with the Government." Appellant was awarded a firm-fixed price contract in August 2001. The Defense Contract Audit Agency ("DCAA") conducted annual audits of Appellant's fiscal year IR&D costs. On December 31, 2002, DCAA issued a letter informing Appellant that it was questioning whether certain IR&D costs were allowable under FAR 31.205-18. Instead, DCAA contended that certain costs which Appellant had identified as IR&D were "dependent and related" to the contract. As a result, DCAA recommended a net downward adjustment to LMC's G&A pool, and an upward adjustment to direct costs in the G&A base pools. Importantly, the Board noted that "DCAA did not identify any overbillings or increased costs paid by the government resulting from the alleged improper classification of the charges."

On March 30, 2004, DCAA issued a similar letter, finding similar accounting errors in the Fiscal Year 2002 audit. On October 14, 2004, Appellant responded to DCAA's Fiscal Year 2001 and 2002 audit letters, disagreeing with DCAA's contention that the questioned costs were not IR&D costs.

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In September 2005, DCAA issued a draft audit report contending not only that Appellant was in noncompliance with CAS 420, 418, and FAR 31.205-18, but that this non-compliance had resulted in overbillings to the government. DCAA issued a final audit report in February 2007, reiterating the findings of its draft audit. As a result, the Contracting Officer issued a final decision on December 8, 2010, seeking $29,900,000 plus interest for incorrectly charging costs as IR&D that should have been charged to its firm fixed-priced contract.

The question before the Board was whether the December 2010 final decision was filed within the six year time period for presenting a claim under the Contracts Disputes Act ("CDA"). Under FAR 33.201, accrual of a claim is the date by which the events that give rise to the legal basis of the claim were known, or should have been known. However, monetary damages need not have been incurred for a claim to accrue, nor does a claimant need to be aware of the full impact of its costs or damages.

As the moving party, Appellant was required to show that the Government's claim to recover increased costs accrued more than six years prior to the December 8, 2010 claim. The Board held that while the DCAA's letters in 2002 and March 2004 recommended adjustments to certain accounts of Appellant, there were no allegations of overbillings to the Government, or overpayments made by the Government. It was not until the DCAA draft audit report in 2005 that DCAA contended that Appellant's CAS noncompliance resulted in overbillings to the Government. As such, the Board held that the draft audit report was when the Government's claim accrued, and since this was within the six year period prior to the Contracting Officer's final decision, Appellant's motion to dismiss was denied.

This is an important jurisdictional appeal. DCAA audits tend to be a long, convoluted process with much back-and-forth between the contractor and DCAA. Contractors should take note that the clock starts to run on DCAA's issuance of its draft audit report.

Fluor Intercontinental, Inc. v. Department of State
CBCA Nos. 490, 491, 492, 716, 1555, 1763, March 28, 2012 – Judge Stern
by Raja Mishra, Crowell & Moring LLP

Appellant, Fluor Intercontinental, contracted with the U.S. State Department to build a new embassy building in Astana, the capital of Kazakhstan, for $63 million. It was a firm fixed-price contact in which Fluor would both design and build the embassy. The embassy was to include a new chancery office, several other buildings, and a perimeter security wall. Fluor encountered several problems at the site in Kazakhstan: (1) the site lacked access to electricity and running water; (2) problems with obtaining and installing concrete piles, resulting in delays; (3) the State Department rejected its design for the perimeter wall; and (4) Fluor had to delay work, only to constructively accelerate the schedule when the State Department refused to alter the original project schedule. Additionally, the State Department assessed liquidated

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damages for the project delays and charged Fluor overtime costs for State Department workers that had to supervise construction during overtime work. Fluor filed six claims, and the Board considered each in turn—and denied all of them.

First, Fluor claimed the State Department represented that infrastructure conditions at the site would be adequate and sought $4.2 million for changes and warranty breach. The Board held there were no such representations and, in fact, the contract clearly stated that Fluor would be ultimately responsible for site infrastructure. The Board cited a contract clause that said Fluor "shall obtain all water, light, power, and other utilities necessary for completion of the work," and that Fluor "is responsible for determining with local authorities what is required in connection with outside services and utilities." The Board further noted that Fluor officials made a pre-construction visit to the site, and should have observed the infrastructure challenges at that time. Finally, the Board said the contract lacked any language of express or implied warranty. The claim was denied.

Second, with regard to concrete piles, Fluor argued that the State Department warranted that concrete piles would be locally available, constructively changed the contract to preclude Russian-made piles, and caused delays by ordering Fluor to encase the piles in steel. Fluor sought $10.6 million. The Board flatly stated that the contract explicitly made Fluor responsible for all aspects of design and construction, and never warranted the local availability of materials. The Board also said Fluor failed to provide evidence that it was forced to change its pile design because it could not use Russian materials, simply because Fluor was convinced local contractors could not provide adequate piles. Finally, the Board said the delays related to steel encasing of piles was caused by Fluor's failure to provide the State Department with timely engineering calculations demonstrating the need for steel encasing. The claim was denied.

Third, the CBCA rejected Fluor's argument that the State Department wrongly rejected its wall design. It noted that the contract left all design in Fluor's hands, subject to certain design requirements. Any delays caused by required design modifications was Fluor's burden, the Board said.

Fourth, the CBCA roundly rejected Fluor's argument that it provided the State Department with notice of project delays and therefore it deserved compensation for them. The Board held Fluor was responsible for the delays, not the State Department. Fluor further failed to provide evidence that the State Department, though aware of schedule slippage, ever threatened liquidated damages.

Fifth, the CBCA rejected Fluor's request to reduce the $3.6 million in liquidated damages assessed by the State Department, saying the amount was proper given the amount of delay that Fluor caused. Sixth, the Board upheld the State Department's $488,216 assessment for overtime charges, saying the overtime was necessitated by Fluor's actions. The Board also

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dismissed, with virtually no comment, Fluor's claims for misrepresentation, superior knowledge, and other miscellaneous claims.

The case starkly illustrates the risks to contractors working abroad, and the need to account for contingencies up front in the contract rather than post facto.

CDA, Inc. v. Social Security Administration
CBCA No. 1558, March 28, 2012 – Judge Steel
by Oliya Zamaray, Holland & Knight LLP

The Social Security Administration ("SSA") invoked FAR 52.212-4(m) to terminate for cause the commercial items contract for armed guard services it had awarded to CDA, Inc. ("CDA") only two months earlier. The SSA asked the CBCA to uphold its termination and award the agency excess re-procurement costs. CDA argued that the agency failed to prove by a preponderance of the evidence that the termination for cause was proper. Thus, the question for the Board was whether the SSA properly terminated CDA for cause. The CBCA found that the SSA has met its burden to show that the termination was proper.

On December 1, 2008, the SSA notified CDA by e-mail that it had been selected for award of a contract to provide armed security guards for an SSA facility. Award and performance could not commence because of a pending bid protest. However, the SSA notified CDA of the award on December 1st so that CDA could begin preparations and be in position to begin performance within less than two months. Later that day, CDA replied that it was "fully prepared to begin fulfilling its service obligation." In fact, the company did not begin formal preparations until December 17th when the official contract award document was signed. The next day, CDA agreed to a modification changing the base period of performance, including the length of the initial phase-in period. CDA did not object to the modification and did not raise any questions or concerns about the shortened period.

To be ready to provide the qualified guards, CDA had to hire persons who met the contract's educational, physical, and security requirements; submit their background information to SSA for suitability clearances (which required a fifteen-day lead time); arrange for physical and drug testing of the candidates; provide extensive guard duty, weapons, and CPR training; arrange for purchase of weapons, providing detailed information to SSA thereon; and secure North Carolina and Federal Communications Commission licenses to arm the guards and operate the guard posts, all before the January 18 start date. The Contracting Officer's Technical Representative became concerned when CDA requested a post-award meeting to be held on January 9; noting all of the contract requirements that CDA would need to perform before that date, he wrote to CDA: "[b]ottom line is that by January 9 you will have already either succeeded or failed."

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Between December 30, 2008 and January 13, 2009, CDA experienced challenges with recruiting qualified guards, securing fingerprint cards, correctly completing suitability packages, and timely submitting the suitability packages to SSA. The SSA was so concerned about CDA's lack of progress that a conference call was held on the afternoon of January 13, 2009 so that SSA could express its many concerns. CDA was unable to answer many questions to SSA's satisfaction. The SSA gave CDA a final opportunity to perform its contractual phase-in obligations, requiring it to submit certain documents by close of business that same day. CDA responded with the required documentation at 4:06AM on January 14, 2009.

Finding that CDA's responses and documentation did not meet the contract requirements, SSA concluded that it would be impossible for CDA to provide the proper number of armed guards for opening day four days later. On January 14th, SSA informed CDA that it was terminating the contract for cause (the commercial items equivalent to a termination for default) because CDA had failed to make adequate progress to complete any of the contract tasks required in the phase-in period. SSA also notified CDA of its intent to acquire the services of another contractor and charge CDA with any excess re-procurement costs. On January 15, 2009, SSA negotiated a modification to an existing contract for armed security guard services with Paragon Systems ("Paragon") to bridge the time it would take to re-procure the guard services. The two-month modification of Paragon's contract resulted in a cost of $273,870.94. A replacement contract was subsequently awarded to Basic Contracting Services, Inc., to provide guard services at the DSC starting in March 2009. SSA showed that through the base and first option year, it actually incurred excess re-procurement costs in the amount of $172,006.82 and CDA did not dispute this figure.

In its defense, CDA relied on FAR 12.403(c)(1), which requires the issuance of a cure notice prior to termination for cause "unless such termination is for late delivery." CDA argued that because the Contracting Officer based the termination on "non-performance," rather than late delivery, the SSA was required to issue a cure notice prior to issuing a termination for cause. The Civilian Board found that the non-performance resulted from late delivery and the SSA had no legal obligation to issue a cure notice. A termination for default will be upheld where a demonstrated lack of diligence indicates that the Government could not be assured of timely completion. The Civilian Board found that the Contracting Officer reasonably believed that there was no reasonable likelihood that CDA could remedy the errors within the time remaining before guards assumed their posts.

The CBCA issued a concise decision making clear that, in its view, when CDA failed to meet numerous schedules and reported that it would be unable to meet other requirements timely, the SSA was more than justified in terminating CDA. Since the SSA properly terminated CDA's contract for cause, the CBCA also held that the SSA was entitled to receive its costs to re-procure the guard services that CDA had agreed to provide.

The CBCA articulated the standard for recovery of re-procurement costs as follows.

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The Government must prove that: (1) the re-procured supplies or services are the same as or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize excess costs. Finding that the SSA met this standard, the Board turned to quantum. The Government may generally recover excess re-procurement costs for the entire re-procurement period, including option years, of the follow-on contractor, as long as the original contractor had agreed to perform for that duration, as CDA had here. However, the Government was not entitled to assess excess procurement costs for an option year until performance for that year was complete and final payment had been made. As of the date of the hearing, only Option Year 1 had been completed. Therefore, the CBCA found that SSA was entitled to $172,006.82 for the excess costs of re-procuring guard services from the base year through the last pre-hearing fully-completed option year (Option Year 1).

House of Joy Transitional Programs v. Social Security Administration
CBCA No. 2535 No. 2535, March 29, 2012 – Judge Zischkau
by Tara L. Ward, Wiley Rein LLP

In this appeal, the CBCA addressed the burden of proof borne by contractors seeking sums from the Government. Here, the board rejected the House of Joy Transitional Programs' ("HOJ") appeal of the Social Security Administration's ("SSA") contracting officer's decision denying HOJ's claim for $99,990 in contract performance, on the ground that HOJ had failed to present sufficient evidence to support any of its theories of entitlement.

In December of 2005, HOJ was awarded a contract to be an employment network ("EN") under the Social Security Administration's ("SSA") Ticket-to-Work program. On May 19, 2011, the SSA informed HOJ that its executive director had been found "unsuitable" and suspended HOJ's contract pending HOJ's designation of an acceptable new authority. On June 8, 2011, the SSA accepted HOJ's new signatory authority, and the contracting officer ("CO") issued a modification lifting HOJ's contract suspension.

On May 27, 2011, however, HOJ filed a claim with the CO, asserting that the SSA had subjected HOJ to harassment, wrongful contract termination, an improper unsuitability determination, and discrimination. HOJ also claimed that the SSA had not paid HOJ $99,990 "based on the payments held, dropped, lost, and overlooked during the 2005-2011 term contracts." On August 6, 2011, the CO issued a final decision denying HOJ's claim.

The board denied HOJ's claim on the ground that HOJ failed to meet its burden of proof. The SSA had identified a total of 277 payment requests submitted by HOJ, the status of those requests, and the rationale for each payment disposition, but HOJ did not identify a single payment that was improperly denied or not addressed, and only "itemized" damages under broad categories such as "loss of revenue and staff" and "unpaid invoices." The board rejected HOJ's argument that it was entitled to additional payments, noting that HOJ failed to show how

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it computed the $99,990, and that that amount was not supported by any evidence in the record. The board also found the CO's suspension action to be reasonable, and HOJ's claims of unfair treatment and harassment to "entirely unsupported" and "erroneous."

This decision reminds contractors and their counsel to submit specific evidence supporting the claim amount, including invoices or other backup where payments are at issue.

The Timber Harvester, Inc. v. Dep't of Agriculture
CBCA No. 2492, March 29, 2012 – Judge Vergilio
by Eugene Scott

This appeal presents two questions, one of contract interpretation and whether the contractor's or the Government's interpretation of the scope of performance should win the day. The second question is the proper basis for calculating damages.

Appellant was awarded a contract to cut down, remove and pay the Government for "*included timber*." The contract defined "*included timber*" as trees and portions thereof that met utilization standards. The utilization standards specified the type and minimum dimensions of the trees to be cut and removed, that is, the trees should be merchantable as sawtimber. There was an additional clause, the Designation by Damage Class clause, that identified other criteria used to designate trees for cutting and removal, such as all pine trees with no needles, or trees marked by the Government.

Prior to the end of the contract's period of performance, Appellant stopped cutting and removing timber asserting that no merchantable sawtimber remained, that is, no saw mills wanted the remaining timber. The Government contended that additional timber needed to be cut and provided notice that it deemed Appellant's failure to resume cutting and removing timber was a breach under the contract and assessed damages of approximately $53,000.

The Government's interpretation relied upon the 'Description by Damage Class' clause to establish the trees to be cut by Appellant. In accordance with that clause, the Government determined that any trees meeting the description in the clause, such as pine trees without needles, must be cut and removed. This interpretation made the merchantability of the trees as sawtimber irrelevant.

The Government calculated damages based on the difference between the estimated weight of the timber stated in the contract and the weight of timber actually removed.

The Board reasoned that Description by Damage Class clause must be interpreted in light of the contract's utilization standards, i.e., the contract must be read as a whole. The

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proper interpretation is that Appellant was obligated to cut "*included timber*," which meant trees that fell within the Description by Damage Class and that met the utilization, i.e., merchantability standards.

The CBCA went on to note that because the contract expressly discounted the accuracy of the timber estimates in the contract, those estimates could not form a reasonable basis for calculating damages.

The lesson to be learned here comes from any Contracts 101 course, as stated by the Board: "the contract must be read as a whole." The Government's reliance on a single clause interpreted without context from the rest of the contract was improper. Although made moot by the finding that there was no breach of contract, if the Government had shown a breach, it would have failed to support the amount of damages it claimed because its damages calculations were based on unreliable data.

The Carrington Group, Inc. v. Dep't of Veterans Affairs
CBCA No. 2091, April 2, 2012 – Judge Sheridan
by Townsend L. Bourne, Sheppard Mullin Richter & Hampton LLP

This appeal involved a dispute over whether the contract between the parties constituted a firm fixed-price definite quantity contract or an indefinite delivery/indefinite quantity ("IDIQ") contract.

The contract at issue called for the contractor to provide certain IT support and maintenance services. It listed five types of services to be provided by the contractor as well as the anticipated number of hours associated with each service, the hourly rate, and the total amount anticipated for the service. FAR 52.216-22, Indefinite Quantity, was included in the Contract. This clause provided: "This is an indefinite-quantity contract for the supplies or services specified . . . The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract." After the contract had been closed out for several years, the contractor sent an invoice to the Government for a lump sum representing the difference between what the contractor was paid under the contract and the "total contract amount," which the contractor asserted was the total amount provided in the contract associated with each type of service. The contractor argued that the amounts provided in the contract for each type of service constituted fixed price terms such that the contractor was entitled to payment in accordance with the total amounts in the contract.

The CBCA looked to the rules of contract interpretation and determined that the contract, which contained FAR 52.216-22, Indefinite Quantity, but no stated minimum or maximum quantities, constituted a "defective indefinite delivery/indefinite quantity contract" such that the contractor was entitled only to payment for the work performed, "with the

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reasonable value of the work measured by the contract prices." Because the contractor was already paid for work performed, the Board denied its appeal. The Board also denied the contractor's related appeal for the cost of additional services performed, where the contractor presented this claim several years after the contract ended and there was no contemporaneous record of performance of the services.

The lesson here is simple: make sure to define clearly the type of contract you plan to execute, and include minimum and maximum quantities in your ID/IQ contracts.

Appeal of Ironhorse Ltd.
ASBCA No. 56866, April 4, 2012 – Judge Ting
by Tara L. Ward, Wiley Rein LLP

In this case, the board addressed its jurisdiction where a contractor allegedly failed to comply with statutory deadlines and certification requirements in submitting requests for equitable adjustments ("REAs") and claims. Specifically, the ASBCA considered the agency's motion to dismiss Ironhorse Ltd.'s ("Ironhorse") appeal, either because the appeal was time barred or because Ironhorse had failed to combine and certify some of its REAs such that its claim lacked the required certifications.

In May of 2000, the Naval Facilities Engineering Command awarded Ironhorse an indefinite quantity contract for railroad repairs at the Naval Weapons Station in Charleston, South Carolina. In February of 2002, Ironhorse submitted 28 REAs to the contracting officer ("CO") via email. Ironhorse included certification language, but did not sign the REAs. In January of 2008, Ironhorse requested a CO final decision on those REAs, and on May 1, 2009, the CO denied Ironhorse's claims in their entirety. Ironhorse subsequently appealed that decision to the ASBCA.

The Government filed a motion to dismiss the appeal on two grounds. First, the Government argued that the appeal was barred by the CDA's 6-year statute of limitations (41 U.S.C. §7103 (a)(4)(A)). Second, the Government argued that some of the REAs were based on a common or related set of operative facts and should have been combined when submitted. According to the Government, if the REAs had been properly combined, they would have exceeded the $100,000 certification threshold. The Government's argument continued that because Ironhorse did *not* properly sign or execute the necessary certifications, the board had no jurisdiction over its appeal.

With regard to the first issue, Ironhorse moved to supplement the record and amend the complaint to include a June 19, 2002 letter reminding the CO to respond to its REAs. The board granted Ironhorse's motion, and concluded that Ironhorse's letter converted the REAs into claims such that they were not barred by the CDA's 6-year statute of limitations.

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The ASBCA deferred ruling on the second question. The Government argued, by way of example, that REAs that were related to unused line items should have been grouped together, and REAs related to pieces of hardware required for rail installation. Ironhorse countered that the claims had not been submitted to avoid certification, and noted that the CO had considered and responded to the REAs separately. The board determined that "the present record does not allow us to decide what claims should or should not have been certified when submitted," and indicated that a hearing would be necessary to determine "whether any group of REAs should have been combined for certification purposes when submitted."

Though contractors need not anticipate an appeal at every REA submission, contractors should be aware of the timing and certification requirements set forth in the CDA even when submitting REAs and certifying claims to ensure their rights are preserved. In addition, if a contractor anticipates submitting more than one REA that does not exceed the certification threshold, it may want to consider whether that REA could or should be combined with other REAs, and whether that REA should be certified, to avoid a similar challenge on appeal.

Appeal of A-1 Horton's Moving Service
ASBCA No. 57750, April 6, 2012 – Judge Grant
by Daniel Strouse, Wittie, Letsche & Waldo LLP

The question before the ASBCA was whether it had jurisdiction to hear a breach claim for lost profits from non-performance of a non-FAR based transportation services contract; the dispositive issue was whether the claim was governed by the Transportation Act or the CDA.

A-1 Horton's ("A-1") entered into contracts governed by the Defense Transportation Regulation—not the FAR—to provide transportation services for shipping items for DoD employees. The contracts included evaluation factors for the Agency to select a carrier for each individual shipment.

An audit revealed that the Agency had not properly selected carriers during a three year period. A-1 filed a claim asserting that it had lost profits as a result of the Agency's breach in failing to select A-1 for certain shipments. The Agency responded that the claim was controlled by the Transportation Act, and not by the CDA. A-1 treated the Agency's response as a denial of the claim and appealed to the Board.

The Agency argued that the ASBCA did not have jurisdiction because A-1's claim was for a breach that pertained to non-FAR based transportation services contracts governed by the Transportation Act. Specifically, the Agency asserted that 31 U.S.C. § 3726 provided for the adjudication of "transportation claims," and that A-1's breach claim fell under the review

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scheme of that statute. The Agency cited Federal Circuit cases in which the Court lacked CDA jurisdiction because the contractor's claim involved payment disputes for shipments actually provided; these cases included broad language such as "[the Transportation Act applies] broadly in the specific realm of contracts for transportation services" and "[the CDA applies to] government contracts generally."

The ASBCA rejected the Agency's argument. It found that while undefined in 31 U.S.C. §3726, the term "transportation claims" must be viewed within the context of the statute, which relates to billing, payment, and audits of charges, billings, and payments made for shipments provided by carriers. The purpose of the statute is to ensure the accuracy of charges billed and payments made—not to review entitlement to breach damages. By contrast, the Board found that the CDA provides jurisdiction over claims concerning express or implied contracts, including procurement of services. The scheme to review billing and payments in Section 3726 is "very different from un-auditable matters such as whether a transportation contract was breached or the type of damages recoverable." The Board distinguished the cases cited by the Agency, noting that disputes over payments and charges for actual shipments brought under the Transportation Act are distinct from breach of contract disputes relating to shipments not actually made. A-1's claim did not arise from a payment or billing dispute on shipments; therefore, the CDA applied and the Board had jurisdiction to hear A-1's claim.

This case makes clear that claims relating to billings and payments made pursuant to a transportation services contract under the Transportation Act are governed by that statute. However, the Transportation Act does not take precedence over the CDA for breach of contract claims arising out of non-performance of transportation contracts.

Singleton Enterprises v. Dep't of Agric.
CBCA No. 2136, April 10, 2012 – Judge Borwick
by Daniel Strouse, Wittie, Letsche & Waldo LLP

The CBCA was asked to review an Agency's termination of a contract for default, to determine if the Government had met its burden of showing that at the time of termination, there was no reasonable likelihood that the contractor could timely perform the contract.

The Agency had awarded to Singleton Enterprises a contract for marsh restoration requiring, among other things, excavation, dredging and containment work. Singleton subcontracted the dredging work, but the subcontractor failed to provide necessary equipment and personnel and failed to perform the required dredging. After issuing a cure notice to which the response was inadequate, the Agency terminated Singleton's contract for default.

The Agency subsequently agreed to reinstate Singleton's contract. But performance of the reinstated contract was repeatedly delayed, and again riddled with equipment failures and a

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lack of adequately trained personnel. The Agency issued an order to show cause why the contract should not be terminated for default. In response, Singleton alleged that it was impossible to perform the contract in light of high water levels and lack of fully contained dikes. The Agency terminated Singleton's contract for default and hired a replacement contractor, whose contract included the same terms and specifications as Singleton's. The replacement contractor completed the work within the contractually specified time frame.

Singleton appealed the termination, arguing that it was impossible to perform the contract pursuant to the Agency's specifications. The Board rejected the commercial impossibility argument, finding that Singleton had failed to show that: 1) a supervening event made performance impracticable or impossible; 2) the non-occurrence of that event was a basic assumption upon which the contract was made; 3) the occurrence of that event was not the contractor's fault; and 4) the contractor did not assume the risk of occurrence. Instead, the CBCA found that Singleton's performance was "plagued with faulty equipment and an undermanned work force," and that the problems had persisted throughout the period of performance. The Board rejected Singleton's excuse that high water levels made dredging impossible, noting that there were 47 days where the water levels were low enough for dredging; the record led the Board to conclude that this was ample time to complete the dredging. The Board also found that the lack of fully contained dikes had been shown in the solicitation, so Singleton was fully aware of the need to perform under such conditions, and the Board did not find Singleton's expert testimony on this subject to be credible. Finally, citing case law holding that "it is not enough to show that performance was impracticable for the individual contractor; it must be shown that performance would have been impossible for any similarly situated contractor." The Board noted that "the ability of other contractors to perform disputed work is persuasive evidence that the contract was not impossible to perform."

The decision makes evident that a contractor must be sure to show that contract performance was impossible, objectively, when raising an impossibility defense.

Appeals of Sharon Roedel
PSBCA Nos. 6347, 6368, April 10, 2012 – Judge Shapiro
by John Sorrenti, McKenna Long & Aldridge LLP

On August 11, 2011, the PSBCA denied the United States Postal Service's ("USPS") motion for summary judgment, finding that disputed issues of material fact existed, among them a question as to whether or not the contract between the appellant and the USPS included a 24-hour no-cost termination right for the USPS. In this decision, the PSBCA ruled for the appellant, finding that the USPS inappropriately terminated Ms. Roedel's contract and that she was thus entitled to compensation.

The main disputed issue was whether the appellant and the USPS had agreed to an oral contract for an emergency replacement for a mail delivery contractor who had been hospitalized

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that included a 24-hour no-cost termination right. Reconciling this previously disputed issue, the PSBCA specifically found that during a telephone call discussing the contract, the USPS and the appellant agreed to a 6-month contract, and that there was no mention of a 24-hour no-cost termination right for the USPS. The appellant was told that the contract would last 6 months regardless of whether the previous contractor was able to return to work. Thus, the PSBCA found that when the USPS terminated the appellant's contract after only one week of performance by the appellant when the pervious contractor was released from the hospital, they breached the contract. Although the appellant eventually signed a written contract that included a 24-hour no-cost termination right for the USPS, she did so only after the being told that she would not be paid for the work she had performed under the contract.

The PSBCA based its finding about the termination right primarily on the testimony provided by both the appellant and the USPS's transportation contract specialist who had negotiated the contract with the appellant. The PSBCA found that a pre-award questionnaire prepared by the contract specialist contradicted her testimony in that it did not mention a termination right. In holding for the appellant, the PSBCA rejected the USPS's claim that if the contract specialist intended to include a 24-hour no-cost termination right in the contract but the appellant understood that no termination right existed, then there was no meeting of the minds on the material terms of the contract. Specifically, the PSBCA found that the contract specialist's "subjective unexpressed intention is irrelevant to determine the terms of the contract."

The USPS also argued that the appellant's signature on the written contract that included the 24-hour no-cost termination clause proved that the parties agreed on a contract that included that termination right. The PSBCA rejected this argument as well, holding that the appellant's signature on the written contract was excused because of the doctrine of economic duress. The PSBCA found that the appellant involuntarily signed the written contract because she believed she had no other alternative and had to sign it in order to receive payment for her services.

The appellant sought the full value of the contract as damages. However, the PSBCA found that the appellant's recovery had to be reduced by what it would have cost her to perform the contract. Accordingly, the PSBCA found that expectancy damages were appropriate, which it measured by the benefits, including profit, that the appellant would have received had the USPS not breached the contract. Thus, the PSBCA calculated the appellant's damages to be the wages she would have earned, as well as the profit that the parties had agreed to and foreseen had she performed the complete 6-month contract, minus the amount the appellant had already been paid for her one week of service.

The decision highlights the importance of testimony regarding the material terms of a contract, as the PSBCA relied on this testimony to determine the main issue of the existence of a termination right in ruling for the appellant.

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Appeal of Valley Apparel, LLC
ASBCA No. 57606, April 10, 2012 – Judge James
by Steven Cave, Womble Carlyle Sandridge & Rice, LLP

The issue in *Valley Apparel, LLC* ("*Valley Apparel"*) was whether, under the plain terms of the contract, the Government guaranteed the percentage of different jacket sizes to be ordered when it included a "size tariff chart" depicting the number of parka jackets, by size, the Government "anticipates" ordering.

On 7 May 2007, Defense Supply Center Philadelphia ("DSCP") issued a solicitation requesting proposals for the manufacture and delivery of Navy Task Force Uniform parkas. The Solicitation required firm fixed-unit prices for supplying parkas ordered on an indefinite quantity basis.

The initial Solicitation included a table depicting a minimum and maximum order quantity. Amendment 0004 ultimately replaced the table with a "size tariff chart" that specified the quantity of each individual size parka the Government anticipated ordering, stated as a percentage of the total number of parkas. The size tariff chart was accompanied by a note, stating:

> This chart depicts by size what the Government anticipates ordering under the resultant contract. Each delivery order issued will stipulate exactly what sizes and quantities the Government will require for delivery.

The Solicitation also included the DSCP 52.245-9P20 SIZED ITEMS (JAN 1992) clause, providing in pertinent part: "(c) Sizes and/or quantities of each size awarded are subject to change by the contracting officer [CO]. The Government and the contractor agree that the monetary adjustment shall be limited to the value of the saving or excess in material usage."

Valley Apparel was awarded the contract and, after fulfilling orders placed by DSCP, submitted "reconciliation of sizes" requests relating to fulfillment of four orders. Valley's requests sought a price adjustment pursuant to the DSCP Sized Items clause, and alleged that the Government constructively changed the contract terms by ordering different quantities of parka sizes than those depicted in the size tariff chart.

In denying the reconciliation request, the Contracting Officer wrote that:

> Size reconciliations under Clause 52.245-9022, "Sized Items", apply only when the [CO] has issued a size change to an existing order. The key word in the . . . clause is "awarded". When the [CO] issues an order, a size is "awarded" under the contract. Unless a size change has been issued against the order or the order contains a size not

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> within the original tariff, then the "Sized Item" clause does not apply and no reconciliation is required.

After its reconciliation request was denied, the company submitted a certified claim, which was also denied by the Contracting Officer. On appeal from the denial, Valley Apparel's President stated that:

> if the quantities in later orders varied from what was "anticipated," there would be size 'reconciliations,' with a price adjustment (up or down) as is normally the case where a solicitation provides a size breakdown and DSCP later changes the sizes at the time of ordering.

The ASBCA addressed both the issue of whether the size tariff chart specified the exact quantity of each parka size to be ordered, and whether the Government awarded the orders through the blanket purchase agreement. The Board found Valley Apparel's interpretation of the contract unreasonable on both issues and denied its claim.

First, the ASBCA defined "anticipates" and concluded that "anticipates does not mean that the size tariff specified certain or exact parka size quantities or percentages." According to the Board, the contract as a whole, and more specifically, the second sentence of the note accompanying the size tariff chart, foreclose any possibility that "anticipates" could be interpreted as specifying the exact quantity of each parka size the Government would order.

Turning its attention to when the Government "awarded" orders, the ASBCA found that quantities of parka sizes were only "awarded" through task order awards, and that any "change" to an order justifying a reconciliation request would have to arise after a task order award. Valley Apparel also unsuccessfully attempted to argue that the Government's interpretation of the contract rendered the size tariff chart meaningless. Rejecting this argument, the ASBCA stated that while not guaranteeing quantities of parka sizes to be ordered, the chart was useful to potential offerors.

Appeal of Triad Mechanical, Inc.
ASBCA No. 57971, April 14, 2012 – Judge Freeman
by Ryan E. Roberts, Sheppard Mullin Richter & Hampton LLP

In *Triad*, the ASBCA dismissed Triad's appeal of an alleged deemed denial of its convenience termination settlement proposal.

In August 2010, Triad was awarded a contract for the installation of new cable components and weld repairs at a dam in Washington state. After Triad failed to complete the work by the date specified in the contract, the Government terminated the contract for

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convenience in June 2011.

In October 2011, Trial submitted a termination settlement proposal to the Government. The proposal was subsequently reviewed by DCAA pursuant to the requirement of FAR 49.107(a). DCAA analyzed the proposal and submitted a memorandum to the Contracting Officer identifying 21 deficiencies. The Contracting Officer informed Triad of the deficiencies by letter, and requested additional documentation to support the proposed settlement. Shortly thereafter, Triad provided approximately 300 pages of supporting documentation. Without any further documented communications between the parties, Triad filed its appeal claiming that its settlement proposal had been deemed denied.

Triad argued that its termination settlement proposal constituted an appeal under the CDA and as such, its claim was deemed denied by the Contracting Officer under the 60 day decision provision of the CDA. In dismissing Triad's appeal, the ASBCA held that there was no basis to conclude that, at the time the appeal was filed, there was an impasse in negotiations, or that the proposal had otherwise ripened into a CDA claim, as required by the relevant Federal Circuit case law.

This decision affirms the difficulty in winning a deemed denial appeal of a termination settlement proposal. Should a contractor choose to bring such an appeal, it must possess some documentation demonstrating, at least, an impasse in negotiations.

Appeal of Laura K. McNew
PSBCA No. 6286, April 23, 2012 – Administrative Judges Cambell
by Benjamin J. Kohr, Wiley Rein LLP

The central issue in this appeal concerned whether a United States Postal Service ("USPS") contractor's unauthorized removal and use of a gift certificate from undeliverable bulk business mail ("UBBM") permitted the termination of her contract, or whether her conduct was excused by a prevailing practice allowing such behavior. The majority of the Postal Service Board of Contract Appeals ("PSBCA" or "Board") held that the taking of the gift certificate violated USPS regulations, but the ensuing termination of her contract was improper. The Board held that a customary practice allowing contractors to keep items recovered from UBBM gave her no reason to suspect that her violation of USPS regulations would lead to the termination of her contract. In dissent, Administrative Judge Menegat disagreed that her actions were excused, arguing that the common practice should not trump the underlying regulation.

McNew's contract with the USPS required her to deliver mail and to safeguard mail that could not be delivered. The contract permitted the USPS to terminate the contract for default if McNew failed to perform according to the contract; failed to properly account for mail or other

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property; or if she were not reliable, trustworthy, or of good character. If mail could not be delivered, forwarded, returned to the sender, or mail which included UBBM, USPS procedures required postal workers to return undeliverable mail to the post office for destruction. In practice, however, the postmaster at McNew's post office allowed employees and contractors to remove and keep promotional items from the UBBM. In June 2009, McNew discovered a piece of UBBM containing a $10 gift certificate to a local hardware store, which she removed and attempted to use for her personal use. However, the gift certificate was electronically associated with its intended recipient, and the hardware store informed the intended recipient that another party was attempting to use the certificate. The intended recipient reported the incident to the Postmaster, who informed the Contracting Officer for McNew's contract, and her contract was terminated for default.

McNew appealed her termination and argued that: (1) all UBBM is free for the taking by anyone because it is destined to be abandoned in the trash; (2) this piece of UBBM was entitled to less security because it was addressed to "Occupant" at a vacant address; and (3) even if the default termination was proper under the contract, her actions were consistent with the established practice of her post office and were therefore excused. In response, the USPS argued that her taking of the coupon addressed to another party constituted theft of the mail, thus justifying default termination. In addition, the USPS submitted a declaration of the Postmaster stating that employees were not currently allowed at the time of litigation to keep items from UBBM. The USPS failed to submit any evidence with respect to the custom at the time of the incident.

The PCBCA opinion summarily rejected McNew's first two arguments. The Board determined that the area of the post office restricted to employees does not contain public trash bins, and thus items thrown away in the post office cannot be considered abandoned. Furthermore, the Board found no merit to the argument that UBBM addressed to "Occupant" should be given any less protection than mail bearing the name of an addressee. Thus, the Board found that the USPS had established a prima facie case for default determination. However, the majority of the Board found that the evidence supported McNew's contention that the general practice at the time of the incident was to allow employees and contractors to retain items recovered from UBBM. Thus, McNew's actions were excused because it was reasonable for her to believe she was permitted to use items from UBBM for her personal use, and her termination for default was converted into a termination for convenience.

In dissent, Administrative Judge Menegat noted that even though such actions may have been common practice at McNew's post office, the custom does not negate that such actions violated USPS regulations. Furthermore, a $10 gift certificate has inherent value and thus keeping one would still violate any policy allowing employees to keep UBBM items of nominal value. Administrative Judge Menegat dissented from the majority's grant of the appeal because these distinctions removed any reasonable excuse for McNew's actions.

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While the holding in this case may appear to be quite narrow, the Board's majority opinion presents a potential defense for contractors facing a termination for default. If, as in this case, an Administrative Officer or Contracting Officer allows a common practice in contravention of a contract or an Agency's regulations, such a practice may be adequate to excuse a breach of a contract requirements if the practice is sufficiently widespread that the contractor reasonably believes their actions are permitted.

D&M Grading, Inc. v. Department of Agriculture
CBCA No. 2625, April 24, 2012 – Judge Vergilio
by Oliya Zamaray, Holland & Knight LLP

D&M Grading, Inc. ("D&M") appealed the decision by the Department of Agriculture, Forest Service (the "Agency") to terminate for default a task order under D&M's roadway vegetation maintenance contract. The task order required D&M to perform brushing over and along roads; D&M completed approximately twenty-one (21) of forty-eight (48) miles of work. The agency terminated D&M for default and retained payments due to D&M to offset its costs for the re-procured work. In its appeal, D&M maintained that the default is improper, that the agency required work other than routine brush maintenance, that a differing site condition existed, that it was entitled to additional payment, that the agency must pay for the work performed, and that it may not assess any damages against D&M. Denying D&M's claim, the CBCA upheld the termination for default and the agency's retention of money otherwise due the contractor.

Contrary to D&M's narrow interpretation, the CBCA found that the terms of the contract and task order were not as limited as D&M argued. The task order called for vegetation maintenance and did not state that only routine brushing would be required; rather, the required brushing was defined by the characteristics of the vegetation to be removed. The CBCA held that D&M accepted the risks of performing the called-for brushing for the unit price in its task order, writing:

> It is immaterial that the site was inaccessible at the time the contractor formulated its task order pricing; either one does not seek the award or one accounts for the unknown element in pricing. There is no basis to shift contractor risks to the agency. The contractor was obligated to perform the work at the fixed unit price.

The CBCA also held that because the contract and task order did not indicate the conditions of the vegetation on and along the roads to be treated, there was no differing site condition (type I), given that an element for such a differing site condition is that conditions "differ materially from those indicated in this contract" (FAR 52.236-2(a)(1)). Further, the

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record did not demonstrate that the encountered vegetation or surrounding conditions differed materially from those conditions ordinarily encountered in work of the character provided for in the contract. Thus, there could be no differing site condition (type II) under FAR 52.236-2(a)(2). The Board held that D&M made incorrect assumptions about the conditions and undervalued the level of difficulty of the work. "The contract places the risks for such errors on the contractor."

Finding nothing in the record to support D&M's argument that the agency required D&M to perform work outside the scope of the task order, the Board noted that when D&M failed to complete the required brush work, the agency was justified in issuing the termination for default. Because D&M failed to demonstrate either an impropriety in the default or that its failure to perform was excusable, the Board upheld the default and found D&M liable for the agency's $12,132.50 in excess re-procurement costs.

Appeal of Hartman Walsh Painting Company
ASBCA No. 57832, April 24, 2012 - Judge James
by Katherine Allen, U.S. Department of the Treasury, Bureau of Engraving and Printing

In *Hartman Walsh Painting Co.* ("Hartman") the ASBCA denied the Appellant's claim for extra work performed to redirect traffic around the work site following the Government's alleged misrepresentation.

In 2009, Hartman was awarded an Army Corps of Engineers ("ACOE") Multiple Award Task Order Contract for preparation, rehabilitation and painting of large industrial structures with an initial task order to sandblast and paint the eight tainter gates of the Fall River Dam in Kansas. During a site visit attended by Hartman, an ACOE representative deferred responding to questions about lane, road or bridge closures during contract performance, but noted any road or bridge closures would require at least seven (7) days public notice. The contract specifications stated: "The Contractor may upon approval and proper traffic control close one lane of the road for extended periods of time. Complete closure of the road will be limited to a maximum of 4 hours at a time and only with good justification."

After award, Hartman submitted a Traffic Control Plan, requesting the complete closure of the road across the dam for a period of twelve (12) months, with appropriate public notice. This Traffic Control Plan was rejected and a revised plan put into effect that left one lane open to traffic. Hartman sought an equitable adjustment of $27,628.92 for additional traffic control costs to keep the lane open, alleging the ACOE representative explicitly stated during the site visit that the entire road could be closed for an extended period of time. Hartman claimed it was harmed when it relied on this misrepresentation.

Upon examining the specifications and testimony, the ASBCA concluded that Harman

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failed to show the ACOE made an erroneous misrepresentation of material fact. There was no evidence the ACOE representative told Hartman the road or bridge could be closed for an extended period of time, and the specifications only allowed for limited closures.

This case is a reminder to contractors that when there is confusion over what a project requires or allows, it is best to rely on the words of the contract documents themselves, rather than anecdotal information or your own interpretation of the Government's intent.

Appeal of Waterstone Environmental Hydrology and Engineering, Inc.
ASBCA No. 57557, April 26, 2012 – Judge Delman
by Raja Mishra, Crowell & Moring LLP

The appellant submitted a claim stemming from a task order dispute with the Air Force, but to the wrong forum. By statute, the appellant should have filed suit in the Armed Services Board of Contract Appeals. Instead, it filed in the Civilian Board of Contract Appeals, which services the GSA. Ninety days from the contracting officer's denial elapsed, and the Government moved to dismiss because appellant failed to timely file with the ASBCA. The Contact Disputes Act contains a 90-day appeal limit (41 U.S.C. §7104(a)). The Board said: "We have a long line of Board precedent – extending over 30 years – holding that the 90-day appeal period under the CDA is jurisdictional, absolute, and may not be waived."

In its brief, appellant pointed to a recent Supreme Court decision that held that the 120-day appeal period from the Board of Veterans' Appeals to the US Court of Appeals for Veterans Claims was not jurisdictional, and therefore absolute, but merely a claims processing rule. *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011). On that basis, appellant sought equitable tolling from the date it filed with the CBCA. But the Board distinguished that case from the matter at hand by noting that veterans affairs are governed by statutes that greatly favor veteran claimants, while the CDA contains unequivocal language about time limits. It also noted that the CDA does not provide for transfer of matters between boards.

The Board dismissed for lack of jurisdiction. This was a very interesting appeal, as the ASBCA was presented with an opportunity to interpret, and apply, a recent Supreme Court decision. In what some would consider a bold decision, the ASBCA chose not to apply the Supreme Court's logic, distinguishing the case and limiting the scope of its application.

Wearing Two Hats: The Dual Roles of In-house Counsel and Compliance Officer

by

*Amy E. Hutchens**

[Note: Reprinted with permission of the author and the Association of Corporate Counsel as it originally appeared: "Wearing Two Hats – In-House Counsel and Compliance Office," *ACC Docket* 29, no. 9 (Nov. 2011):67-74. If you are interested in joining ACC, please go to www.acc.com, call 202.293.4103, ext. 360, or email membership@acc.com.]

Imagine this all-too-familiar scenario: You have arrived at your dream in-house counsel job with a simple title of "general counsel," or something to that effect. You are well positioned to defend the company and advise on a full spectrum of legal issues, ranging from labor and employment law to data security and contracts. It is your other title—chief compliance officer—that you may not have given much thought to until a colleague struts into your office with a request to draft the corporate code of conduct, otherwise known as the "not-so-legal legal document that no one really knows how to draft." This raises the question: What is the role of chief compliance officer really all about for an in-house attorney?

There is no question that compliance is a top priority for in-house counsel.[1] Many in-house counsel wear "two hats"—common parlance for fulfilling two roles at the same time. Wearing the hats of both counsel and compliance officer can be challenging and rewarding at best, and can become a nightmare at worst. The complexity of fulfilling two roles is directly related to what those roles demand in a particular business, and what may be required by laws and regulation. Moreover, each role demands dramatically different skill sets. For some counsel, they may not see themselves wearing two hats as much as having two titles; for others, they may easily switch between roles, depending on the needs of the business. Another critical factor in the balancing game is how one wears the two hats: At the same time? Wear one hat, then the other? Or, is it a fluctuating and dynamic blend of each hat depending on the circumstances?

But let's get real for a moment. In today's business environment, is it realistic to expect a great general counsel to operate as a great compliance officer? Are the inherent conflicts reconcilable? Is executive management deprived of a valuable perspective when the roles are combined?

The Challenges of Unification

Over the past decade, several cases highlight the challenges faced by organizations that had unified the roles of counsel and compliance officer.

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Tenet Healthcare

In 2003, the Senate Finance Committee began an investigation into Tenet Healthcare's corporate governance practices with respect to its federal healthcare programs. Tenet had a long history of fraud, including upcoding, overbilling, duplicate billing, kickbacks, providing medically unnecessary services, misrepresenting services, and falsifying medical records. In 1994, a Tenet employee, Christi Sulzbach, signed a "corporate integrity agreement" on behalf of Tenet with the Office of Inspector General of the U.S. Department of Health and Human Services and was subsequently promoted to chief compliance officer and general counsel. Widespread fraud continued for nearly a decade.

In September 2003, the then chairman of the Senate Finance Committee, Sen. Chuck Grassley (R-IA), wrote a letter to Tenet. He blasted Sulzbach for her dual roles:

> Apparently, neither Tenet nor Ms. Sulzbach saw any conflict in her wearing two hats as Tenet's general counsel and chief compliance officer. As general counsel, Ms. Sulzbach zealously defended Tenet against claims of ethical and legal noncompliance; e.g., the April 2001 *qui tam* suit, while as chief compliance officer, she supposedly ensured compliance by Tenet's officers, directors, and employees. It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement.[2]

Sulzbach left Tenet shortly after, citing outside pressure.[3]

WellCare

In 2007, WellCare followed suit. Thaddeus Bereday served as WellCare's general counsel and chief compliance officer. Some 200 federal investigators descended upon WellCare in response to allegations of fraud, leading to the ouster of several corporate executives, including Bereday. When new corporate leadership assumed their roles, the general counsel and chief compliance officer became independent positions.[4]

These cases highlight how a combined general counsel/compliance officer role can deteriorate. Even so, the Department of Health and Human Services Office of the Inspector General stopped short of requiring the roles to be separate, and instead, recommended independence because:

> Free-standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institute's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief hospital financial officer (where the size and structure of the hospital makes this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program.[5]

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Compare this language with the standard language being used by the Office of the Inspector General in recent corporate integrity agreements, which have been entered between providers and the Office of the Inspector General. Most corporate integrity agreements dictate the role and position of the compliance officer in the organization. The standard language being used by the Office of the Inspector General is:

> The compliance officer shall be a member of senior management of [provider], shall make periodic (at least quarterly) reports regarding compliance matters directly to the board of directors of [provider], And shall be authorized to report on such matters to the board of directors at any time. *The compliance officer shall not be, or be subordinate to, the general counsel or chief financial officer*.[6]

This guidance represents the opinion of one government agency that compliance programs are more effective when the general counsel does not function as the compliance officer and when the compliance officer is seated at a high level in the organization. Where the earlier language clearly contemplates that it may not be an option for some organizations, and it makes room for a combined role, albeit with diminished checks and balances, the corporate integrity agreement language makes it quite clear that there is no room for a combined role. However, if there is substantial involvement by a compliance committee at the management level, this may mitigate the effect of the limited perspective of a dual-hatted counsel.[7]

More recently, this trend of separation has included a third element of a compliance committee. In many cases, it may be advisable to have both a chief compliance officer and a compliance committee. Some recently proposed Office of the Comptroller of the Currency orders directed at major banks, and the proposed settlement agreements involving banks, government agencies, and certain states' attorneys general, show a pattern that points toward a separation of the roles and the creation of committees to oversee compliance.

The Changing Legal Landscape

In recent years, other regulations have stopped short of requiring separate roles.[8] The Federal Acquisition Regulation (FAR) requires "[a]ssignment of responsibility at a sufficiently high level…to ensure effectiveness of the business ethics awareness and compliance program and internal control system."[9] This echoes the U.S. Federal Sentencing Guidelines requirement: "High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program."[10]

Certainly, a general counsel or chief compliance officer would fit the bill as high-level personnel within the corporation, and many general counsels manage effective programs. However, the legal landscape is always changing, and the increasing emphasis on transparency, self-reporting, and mandatory disclosure proves problematic for attorneys bound by attorney-client privilege.

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Recent legislation and regulations have encouraged corporations to self-report and cooperate with governmental enforcement agencies.[11] In some circumstances, self-reporting is encouraged by a "carrot" approach, including a possibility of expedited resolution and more leniency for self-reporting.[12] The carrot approach also encourages the waiver of attorney-client privilege in some circumstances by offering the possibility of a deferred prosecution agreement or nonprosecution agreement for full disclosure and cooperation. On the other hand, the "stick" deterrent for failure to disclose may result in harsher penalties, such as debarment from government contracting for failing to follow mandatory disclosure rules,[13] or a higher culpability score under the U.S. Federal Sentencing Guidelines.

This trend is a challenge for dual-hatted in-house counsel. In-house attorneys are obligated by professional responsibility rules regarding attorney-client privilege. Few in-house attorneys will feel comfortable defending an organization against allegations of wrongdoing or noncompliance, while, at the same time, advising the executive leadership to self-report the same misconduct, particularly when the self-reporting is not mandatory. Senator Grassley may well have smelled the "stench of conflict" in this arrangement, as well. Even for counsel who are familiar with the "up the ladder" reporting requirements of Sarbanes-Oxley,[14] the idea of mandatory reporting, such as that found in the FAR, is enough to make most in-house counsel shudder. Even with client consent, most in-house counsel would prefer to keep issues in-house and not take on the responsibility of reporting to an enforcement agency. Yet, in many situations, it may be appropriate for a compliance officer to recommend disclosure and full cooperation with governmental authorities. Ultimately, if a dual-hated counsel remains in a legal role providing legal advice in defense of the company, the corporate leadership may be deprived of a legitimate compliance perspective—one that may prove to be more beneficial to the organization. In his paper, "The Chief Compliance Officer vs. the General Counsel: Friend or Foe?" Jose Tabuena states: "In difficult situations, a [chief compliance officer's] perspective about a controversial transaction or event would obviously go unnoticed, if that person was also serving as the [general counsel] who happened to agree with executive management."[15]

As the whistleblowing landscape continues to change, the concerns of self-reporting are being compounded. The Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010[16] provides financial incentives to whistleblowers. Now more than ever, internal compliance programs need to be visible and reliable, and hotlines should not only be functional and effective, but inviting to employees. Though the rules provide that a whistleblower should utilize internal reporting processes first, there is no requirement to do so, and the financial incentive may unfairly tip the scales. From both a compliance and legal angle, the choice is clear: Companies want to hear the whistleblowers' complaints before the government hears them. Again, this poses a challenge to in-house counsel. Among the demands of managing litigation, advising on employment law issues and regulatory compliance concerns, drafting and reviewing contracts, and responding to client needs, in-house counsel will need to ensure "far more nimble and responsive investigative, triage, analytical, and governance capabilities" to ensure effectiveness in compliance program governance.[17]

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One immediately apparent issue for whistleblowers is that attorneys often seem intimidating to average employees, particularly employees who do not deal with counsel in their day-to-day operations. A second concern for in-house counsel is that creating a feeling of trust among the corporate employees is paramount to encouraging internal reporting. This requires that in-house counsel be visible and accessible within the organization, getting out of the office and establishing relationships. In larger or more global companies, this is not realistic. There are few in-house counsels who would agree that they have enough time to address the legal needs of an organization, much less impact corporate culture. Where the attorney advises on employment law matters, such as discipline and terminations, it is even more difficult to establish a relationship of trust to encourage internal whistleblowing. This is where an in-house counsel must tap into nonlegal skills to be the most effective.

A Dual-Hatted Attorney Needs More Than Legal Skills

In organizations where there simply aren't resources for an independent compliance officer, in-house counsel are most frequently the first-choice alternative. However, management of an effective compliance program requires additional skills. The skills required of an in-house counsel are more widely understood than those required of a good compliance officer.

Compliance, as anticipated by the Federal Sentencing Guidelines and other legislation, such as Sarbanes-Oxley, should be a "program" that needs management. Program management, coordination across functions or divisions, and implementation of major initiatives are skills required of a good compliance officer, and not necessarily essential to the in-house practice of law. In larger corporations, the legal department may also be managed like a program; however, in smaller organizations, where it is more common to find dual-hatted attorneys, there may not be enough time or resources for the attorney to effectively manage a compliance program, even with more third-party compliance resources available to give guidance and supplement internal initiatives.

When it is necessary to have an in-house counsel function as the compliance officer, it is essential that the attorney have strong interpersonal skills, the ability to listen, and discretion.[18] They must be able to be proactive as well as reactive.[19] In addition, it is essential that in-house counsel know how to conduct a thorough and proper investigation.

In many circumstances, it is unrealistic to expect a general counsel of a smaller organization to conduct investigations and risk assessments; draft a code of conduct; design, develop, and even deliver educational programs for adult learners; and draft policies and procedures—all of which are tasks necessary for a legitimate compliance program. As the saying goes, "It takes a lot of paper to prove you don't have just a paper program." One solution to this challenge is to have the attorney manage these processes internally, but have the work performed by other functions, or even by third-party vendors. According to a recent survey by the Ethics Resource Center, 56 percent of ethics and compliance function

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respondents report directly to the general counsel, which means that about half of the respondents perform compliance functions at a level subordinate to the general counsel. However, even the attorney who maximizes personnel resources will still have to balance the two roles, and will face the challenges of conflicts and the consequences of the silent compliance voice when defaulting to professional responsibility obligations of the legal profession.

There is little doubt that the importance of the corporate compliance officer hat has increased in the past decade, and continues to increase. Dodd-Frank is the most recent challenge for corporate compliance officers, but surely will not be the last. Similarly, the role of in-house counsel is growing. There appears to be more litigation, regulatory enforcement, desire to save on outside counsel costs, and pressure on in-house counsel to be involved in business operations.

Regardless of how an organization or individual decides to wear the two hats, one thing is certain: Corporate regulatory and enforcement authorities have turned on the proverbial "Fasten Seat Belt" sign for both in-house counsel and compliance officers. As the duties for both roles continue to expand, dual-hatted in-house counsel will need to rise to the occasion, either by showing the agility to adjust to the changing demands or by educating executive leadership about the importance of independence, both for the in-house attorney and for the compliance officer. Ladies and gentleman, hold on to your hats.

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Surviving False Claims Act Allegations: What Every Government Contractor Needs to Know to Maximize Insurance Coverage

by

*Stephen T. Raptis**

In recent years, an increasing number of governmental and private party "whistleblower" claims alleging claims for payment from the U.S. Government have been brought against government contractors under the False Claims Act.[1]

Civil violations of the FCA carry severe economic consequences, potentially including treble damages, additional civil penalties, and payment of the government's costs in pursuing the FCA case.[2] Moreover, the legal costs of defending the company (and, in some cases, its officers or directors) from investigations and related actions under the FCA can be staggering, often reaching hundreds of thousands, if not millions, of dollars. It is therefore critical for companies that do business with the government to consider purchasing appropriate insurance coverage, and, if claims arise, carefully preserve and pursue coverage claims.

Of the various types of insurance purchased by most companies, "Directors and Officers Liability" (D&O) policies are the most likely to cover alleged FCA violations. D&O policies typically insure against losses involving "Claims" arising from "Wrongful Acts," as defined in the policy, committed by the company's officers and directors. Wrongful Acts are typically defined to include some combination of "errors," "misleading statements," "acts," "omissions," "neglect," and "breaches of duties" committed by an insured. The company can also elect to purchase optional "entity" or "Side C" coverage, which protects the company itself against losses arising from Wrongful Acts. Because most FCA actions involve at least some claims directed at the company, purchasing entity coverage is the most critical step the company can take to protect itself against the substantial expense associated with FCA claims. Accordingly, government contractors should give serious consideration to purchasing entity coverage, despite its additional cost.[3] Note, however, that for publicly traded and large private companies, the scope of available entity coverage may be considerably less broad than for other companies, and often is limited to securities-related claims.

Because language among D&O policies varies in critical respects, it is imperative that a government contractor understand the protections and limitations of the coverage it has purchased or is considering purchasing before an FCA claim arises and, where warranted, negotiate for more suitable policy language. This article discusses specific D&O policy provisions that should be of particular concern to government contractors when purchasing their D&O policies and in determining the extent to which they are covered against FCA claims.[4]

Potentially Problematic Exclusions

Certain exclusions have become standard in D&O policies, and therefore may be

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overlooked by government contractors when purchasing D&O coverage. However, these exclusions can have profound and often unanticipated consequences in the context of FCA claims.

Contractual Liability Exclusion

Most D&O policies contain broadly worded exclusions for losses arising from liability of the insured under any written or verbal contract or agreement (except to the extent that the insured would bear such liability absent the contract). On its face, the intent of this exclusion appears to be relatively narrow—to limit the insurer's exposure for liability voluntarily assumed by its insured (e.g., through indemnity agreements) that the insurer never intended to underwrite. However, insurers have argued, with mixed results, that the exclusion applies more broadly to preclude coverage for claims involving Wrongful Acts that relate to a contract in any way.[5]

Such a broad interpretation threatens to preclude coverage for government contractors because the fundamental nature of the contractor's relationship with the government is based on a contract. Insurers may assert, therefore, that FCA claims are not covered because they arise from or relate to contracts with the government. Although contractors have strong arguments in response,[6] the contractor could avoid this fight and its associated coverage risks altogether by negotiating to narrow the exclusion.

Fraud Exclusion

Culpability under the FCA requires a "knowing" presentation of a "false or fraudulent claim for payment or approval." Knowing includes "deliberate ignorance" and "reckless disregard" of the truth or falsity of the information being provided in support of a claim for payment, and requires no specific intent to defraud.[7] As noted above, in most D&O policies, covered Wrongful Acts are defined to include "misstatements" and "misleading statements" by the insured. However, most D&O policies also contain so-called "fraud exclusions" purporting to preclude coverage for any intentionally fraudulent, dishonest, or criminal act or omission. Given the broad range of interpretations that may apply to these terms, coverage disputes may arise as to whether the representations that form the basis of an FCA claim are (despite being "knowing") merely "misstatements" or "misleading statements" or whether they rise to the level of intentionally fraudulent or dishonest misrepresentations.

Again, this dispute likely can be avoided on the front end when purchasing coverage. Specifically, the fraud exclusion under many D&O policies applies only where there is a formal adjudication or admission of fraud. Because most FCA claims will be settled or dismissed with no formal adjudication, the fraud exclusion would not apply. Some fraud exclusions, however, do not require a formal adjudication or admission of fraud. Rather, these exclusions apply where the claim at issue merely alleges fraudulent, dishonest, or criminal conduct. Because allegations of such conduct are the norm in FCA claims, exclusions containing this broad language may severely restrict available coverage. Contractors should make sure that their D&O policy contains a narrow form of the exclusion.

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Exclusion For Claims Made By an Insured

Most D&O policies contain some form of exclusion for claims maintained by, or on behalf of, any "Insured" under the policy. Insured often is defined broadly to include both the company and its officers and directors, and may also include the company's other employees as well. Because most FCA claims are brought, at least initially, by "whistleblowers" within the company, insurers might argue that this exclusion precludes coverage for certain FCA claims. Government contractors should insist, therefore, that their D&O policies be issued without this exclusion or that the exclusion be narrowly drafted, for example by carving out whistleblower claims by current or former executives or other employees. Often such carve-outs are added to the policy by endorsement, and typically apply to claims where the executive's or employee's actions in bringing the FCA claim are protected under applicable whistleblower laws.

Definition of "Loss"

The definition of covered "Loss" in many D&O policies is subject to certain exceptions that could substantially limit the coverage available for FCA claims. Because these exceptions effectively function as exclusions, government contractors need to be particularly wary of them.

Pre-Claim Defense Costs

Many D&O policies do not include in the definition of covered "Loss" costs that are incurred by the insured in defending or investigating a matter that has yet to become a formal "Claim," as defined in the policy, even if the matter ultimately becomes a Claim or the pre-Claim defense efforts ultimately benefit the defense of a later asserted Claim. Although the definition of Claim varies among policies, it typically includes (when applicable to the company):

- A written demand for money damages or nonmonetary relief,
- A civil proceeding commenced by some form of pleading,
- A criminal proceeding commenced by an indictment, and
- In some policies, a formal civil administrative or regulatory proceeding that is commenced by the filing of charges.

Insurers may contend that the issuance of a subpoena or commencement of an investigation by the government, without more, does not constitute a "Claim." Thus, even though the company may expend substantial sums in responding to a subpoena or defending an investigation that ultimately aids in the defense of, or even prevents, a subsequent claim under the FCA, insurers often argue that such expenses are not covered.

Again, policy language differs, and even though individual contractors may not have the negotiating leverage to demand wholesale modifications to the definition of Loss, they certainly should attempt to negotiate policy language that defines covered Claim and Loss as broadly as

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possible in order to mitigate the effect of the limitation. Also, by providing notice to their D&O insurer of a pending or threatened FCA investigation in a timely manner, as will be discussed more fully later, contractors may be able to persuade their D&O insurer to begin paying for the investigation or defense early in the process. In any event, simply understanding that pre-Claim legal defense costs may not be covered is an important strategic consideration for government contractors in determining how best to respond to potential FCA claims.

Multiple Damage Awards

Arguably, the most formidable aspect of the FCA is its nondiscretionary award of treble damages (or double damages where there are certain mitigating factors) for established violations of the act. For many contractors, such liability essentially would be a death penalty. Under many D&O policies, the definition of covered loss expressly excludes multiple damage awards. In light of the increased exposure of government contractors to FCA claims, they should seek to purchase D&O coverage that does not exclude multiple damage awards from the definition of Loss. Even if multiple damage awards are excluded under the applicable standard policy form, coverage for such awards can be added back into the policy by endorsement.

Other Key D&O Provisions

Entity Coverage and Related Allocation Issues

As noted above, D&O policies may cover only the company's officers and directors, or they may cover the company itself as well, depending on whether the insured elects to purchase optional entity coverage. Where a company elects to insure only its officers and directors and both the company and its officers and directors become the subject of a potentially covered claim, most D&O policies contain allocation provisions governing the extent to which the insurer will pay for defense and indemnity of the officers and directors. These provisions also typically address allocation of defense and indemnity costs with respect to claims alleging both covered and uncovered matters.

These provisions vary in important ways. For example, many allocation provisions state that Loss is to be allocated among covered and noncovered matters based on the relative legal and financial exposure to the insured presented by each. Others simply state that if the parties cannot mutually agree to an allocation, the dispute will be submitted to arbitration. Likewise, some allocation provisions apply only to indemnity costs but not to defense costs, which, given the substantial costs of defending many FCA claims, can have significant financial implications. In any event, contractors need to be aware of these provisions, particularly if they choose not to purchase entity coverage—not only so they can seek the most favorable policy language, but because they may limit otherwise available D&O coverage if the company later becomes the subject of an FCA claim.

Notice Obligations

Most companies know that they are required to provide timely notice to their insurer of

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claims against the company. Many do not realize, however, that under many D&O policies, they are also required to provide notice of circumstances that could give rise to a covered claim once such circumstances become known to the company. Because providing timely notice of both claims and circumstances that could give rise to a claim is typically a condition precedent to coverage, failing to comply strictly with both obligations can result in a reduction of coverage or, in some cases, even a complete forfeiture of coverage.

Circumstances that could result in an FCA claim may become known to a company well before they materialize into an actual Claim, as defined in the policy.[8] At such a time, the company is likely to be focused on internal investigation and damage control rather than seeking insurance for a Claim that has yet to be asserted. All too often, such companies fail to provide timely notice of these circumstances, thereby providing their insurer with a substantial defense to coverage. Accordingly, government contractors need to be mindful of, and strictly comply with, both notice obligations. Focusing on notice upon discovery of a potential claim may also provide the company an opportunity to conduct a more thorough investigation of the circumstances being reported, anticipate the insurer's potential defenses to coverage, and frame the notice in a manner that supports the insurance claim and avoids coverage defenses. Particularly with respect to the latter two objectives, the company would be well advised to consult with experienced coverage counsel.

Non-Rescission and Severability

D&O policies typically do not cover claims where relevant facts underlying the claim were known to the company at the time the company applied for coverage but were omitted or misstated in the company's application for coverage. Indeed, if during their investigation of a coverage claim, the insurer discovers information indicating that one or more individuals within the company had knowledge of relevant facts that may have affected the insurer's decision to issue the coverage but failed to report or misstated such facts, the insurer may seek to rescind the policy altogether. In some cases, companies can purchase D&O coverage that, by its terms, cannot be rescinded by the insurer. This is often accomplished by addition of a "nonrescindable coverage" endorsement.

If non-rescission is not an available option, the company can also protect itself through so-called "severability" provisions. Typically, these provisions limit the individuals within the company whose knowledge is deemed relevant for purposes of representations in the coverage application, for purposes of providing notice, or for application of certain knowledge-based exclusions (e.g., fraud exclusions, as previously discussed). For instance, they may limit individuals who are deemed to possess relevant knowledge to certain specified officers or directors. They may also limit the imputation of coverage-preclusive knowledge among the various insureds, including the company. Thus, the narrower the scope of individuals whose knowledge is deemed relevant, and the less knowledge that may be imputed among the insureds, the less likely the company and its individual officers and directors are to lose coverage for an FCA claim, particularly where the circumstances underlying the claim are not widely known within the company. Contractors should carefully review their D&O policies

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prior to purchase to make sure they contain severability provisions applicable to the company's application for coverage and key knowledge-based exclusions and, where feasible, seek to negotiate the application of these provisions as broadly as possible.

Conclusion

Liability imposed by an FCA claim, as well as the costs of defending the claim, can have a monumental impact on a government contractor's business. The extent to which such liability and defense costs may be covered by the contractor's D&O insurance will depend on the specific terms of its policy. Because the terms bearing on coverage for FCA claims can vary substantially from policy to policy, government contractors need to review the terms of their D&O policies carefully and, where warranted, seek more favorable terms at renewal time. Because policy language is subject to legal interpretation, consulting with experienced insurance coverage counsel when purchasing D&O coverage is advisable.

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Endnotes

1 - 31 U.S.C. §§3729 *et seq*. (civil component) and 18 U.S.C. §287 (criminal component).
2 - Criminal violations of the FCA are punishable by fines and imprisonment. However, because criminal conduct and fines arising from such conduct are not covered by most liability policies, this article focuses on the civil component of the FCA.
3 - Depending on the nature of the claim and the language of a company's policies, insurance other than D&O coverage could be implicated by an FCA claim. For example, a company's "Errors and Omissions Liability" or "Professional Liability" policy, which typically insures against losses for Wrongful Acts committed by the company in the course of providing specified "Professional Services," may also provide coverage for alleged violations of the FCA. Because both types of policies tend to be similarly structured, this article focuses on D&O policies, although much of the discussion applies equally to the other policies. In any event, companies facing actual or potential FCA claims should review (or ask experienced coverage counsel to review) all policies for possible coverage.
4 - In many respects, this discussion also applies to D&O coverage for government actions brought under other laws governing the operations of many government contractors, including, for example, the Foreign Corrupt Practices Act (15 U.S.C. §§78dd-1, *et seq*.).
5 - The better-reasoned opinions hold that the contractual liability exclusion applies only where the contract is the sole basis for the insured's liability, and does not apply if there is any basis for liability other than the contract. These cases further recognize that mere involvement of a contract in the circumstances of the insured's liability does not mean that the liability arises from the contract for purposes of the exclusion. *See, e.g*., *Harker's Distr., Inc. v. Federal Ins. Co*., 2009 U.S. Dist. LEXIS 90820 (N.D. Iowa 2009) (contractual liability exclusion did not apply to suit against insured for refusing to redeem shares of stock pursuant to shareholder agreement because claimant "could have asserted a claim against [insured] for its wrongful acts under a legal theory independent of

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Surviving False Claims Act Allegations (cont'd):

Endnotes (cont'd)

any contract"); *Church Mut. Ins. Co. v. U.S. Liab. Ins. Co*., 347 F. Supp. 2d 880, 888-89 (S.D. Cal. 2004) (fraud claims where insured allegedly defrauded contractors by entering into contracts without any intent to pay them covered because 1) the insurer's broad interpretation would "eviscerate" coverage that otherwise expressly was provided under the policy and 2) "the gravamen of…the claims against [the insured] is fraud rather than breach of contract."); *Admiral Ins. Co. v. Briggs*, 264 F. Supp. 2d 460, 463 (N.D. Tex. 2003) (where insured entered into lease agreement under which its rent was paid in the form of stock that ultimately proved to be worthless, and insurer denied coverage for subsequent fraud claims based on contractual liability exclusion, court held that insured's "breach of lease is immaterial to the securities fraud claim because the alleged harm…occurred at the time the agreement to accept stock instead of cash was made. The lease contract did not cause the stock fraud claim, it simply provided the context in which the stock fraud took place.").
6 - Examples of such arguments include the contactor's alleged liability arises under statute (the FCA), not the contract with the government (i.e., the contract is merely the context in which the liability arose); and if the exclusion applies as broadly as the insurer asserts, the policy essentially provides no coverage to government contractors due to the nature of their business and therefore cannot be enforced under uniform rules of contract interpretation (i.e., the exclusion renders any coverage the policy purports to provide illusory).
7 - 31 U.S.C. §3729(b)(1).
8 - For the reasons discussed later in this article, the company should seek to negotiate as narrowly as possible the scope of individuals within the company whose knowledge is deemed relevant for purposes of providing notice.

Out of Step: A Proposed Four Factor Test to Reconcile The Tango Between Bankruptcy and Government Contract Jurisdiction

by
*David Schneider**

I. Introduction

Bankruptcy jurisdiction is in disarray. Congress has given bankruptcy judges the authority to hear and enter final judgments in "all *core* proceedings arising under title 11, or arising in a case under title 11."[1] In 28 U.S.C. §157(b)(2), Congress provided a list of sixteen examples of what constitutes a core proceeding.[2] This past year, the Supreme Court, in *Stern v. Marshall*, found one of these examples unconstitutionally overbroad because it allowed bankruptcy courts, which are Article I courts, to adjudicate a common law tort claim in violation of Article III of the Constitution.[3, 4, 5] This provision stated that all "counterclaims by the estate against persons filing claims against the estate" were core and a bankruptcy court has jurisdiction over the counterclaim.[6] In *Stern*, the counterclaim by the estate was for tortious interference.[7] The Supreme Court held that this claim is rooted in common law, and not the Bankruptcy Code.[8] While the Bankruptcy Code gives bankruptcy courts statutory jurisdiction to hear the claim, that jurisdiction is unconstitutional because the claim must be heard by the Article III judiciary.[9]

The impact of *Stern* is unclear. One of the topics of this year's national Bankruptcy Moot Court competition is whether this case broadly opened the door to redefine what is "core," or should be narrowly applied to the specific facts of *Stern*.[10]

II. Analysis

Bankruptcy jurisdiction has another layer of complexity when the debtor is a federal contractor and one of the creditors is the United States.[11] Before *Stern*, the Supreme Court held that bankruptcy courts could not enter final judgments on claims for breaches of contracts based on state common law because such claims were outside their constitutional jurisdiction.[12] Because federal contracts are not based in state common law, the jurisdiction of bankruptcy courts over federal contract claims is unclear.

The primary government contract dispute fora, the Boards of Contract Appeals and the United States Court of Federal Claims, are given their jurisdiction under the Contract Disputes Act and the Tucker Act.[13, 14] Bankruptcy courts are given their jurisdiction over cases arising under Title 11 of the United States Code.[15] When confronted with a claim that combined both a bankruptcy issue and federal contract issue, former 5th Circuit Senior Judge Goldberg wrote, "[g]iven such conflicting mandates, what is a poor circuit judge to do?"[16] In answering this question, the Supreme Court removed state common law issues from the jurisdiction of Article I

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bankruptcy courts and gave it to Article III courts. However, if jurisdiction is taken away from a bankruptcy court on a government contract issue, the question arises whether the jurisdiction will be given to the Court of Federal Claims, which is also an Article I court.[17]

This analysis must begin with the commonality between the two types of claims, i.e., they are both against the United States. To bring a claim against the United States, a party must demonstrate a waiver of sovereign immunity and a "source of substantive law upon which the claimant relies provides an avenue for relief."[18] If a court believes that subject matter jurisdiction may be lacking, the court must raise that issue *sua sponte* to determine whether it has jurisdiction to adjudicate the matter.[19]

Even though a waiver of sovereign immunity may exist, it does not mean that there is a cause of action for damages against the government.[20] The Tucker Act provides only a waiver of sovereign immunity for the claims that fall within the jurisdiction of the Court of Federal Claims, and does not in itself give the Court of Federal Claims subject matter jurisdiction.[21] The Tucker Act does shed light as to where the substantive jurisdiction of the Court of Federal Claims originates.[22] For example, the Court of Federal Claims is given exclusive jurisdiction of monetary claims against the United States for relief in excess of $10,000 that are substantively based on "the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States."[23] When passing the Tucker Act, Congress "intended the jurisdiction and remedies of the Tucker Act to be exclusive in cases based on government contracts…."[24] However, jurisdiction to hear a government contract dispute may not be exclusive to the Court of Federal Claims if there is another statute besides the Tucker Act that independently provides a waiver of sovereign immunity and a provision of subject matter jurisdiction.[25]

Waivers of sovereign immunity, if not explicit, must be strictly construed in favor of the United States.[26] Section 106 of the Bankruptcy Code, titled "Waiver of sovereign immunity," provides the requisite, albeit limited, waiver of sovereign immunity to bring a claim against the United States Government.[27] Like the Tucker Act, 11 U.S.C. §106 does not itself create a substantive claim for relief, and a claimant must look elsewhere in the Bankruptcy Code to find a substantive claim.[28] This section is comprised of three subsections, each creating a waiver of sovereign immunity.[29] The first subsection provides a list of other sections of the Bankruptcy Code where "sovereign immunity is abrogated as to a governmental unit," and a violation of these sections constitutes a substantive claim that can be brought.[30, 31] The second subsection, provides a waiver of sovereign immunity when a governmental unit has filed a proof of claim.[32, 33] The third and final subsection provides the following waiver of sovereign immunity: "there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate."[34, 35] These waivers allow monetary relief in two circumstances.[36] First, "compulsory counterclaims to governmental claims [current §106 (b)], and second, permissive counterclaims to governmental claims capped by a setoff limitation

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[current § 106(c)]."[37] Congress added these three waivers of sovereign immunity "to create a level playing field between sovereign entities and other participants in the bankruptcy court."[38]

When the line between a government contract claim and a bankruptcy claim is blurred, the proper jurisdiction for the claim is difficult to ascertain.[39] The Court of Federal Claims and bankruptcy courts are both specialized courts, and their judges possess the requisite specialized knowledge to hear claims within their respective jurisdictions.[40] "We have been presented with two inclusive, exclusive, sweeping schemes, both of which the Supreme Court has endorsed. The disputes clause is something that *no court* can disregard. Bankruptcy courts have jurisdiction exclusive of *all other courts*."[41] If a bankruptcy court does not have jurisdiction to enter a final decision on a claim, then it may still hear the issue and make a recommendation to the district court.[42] Yet, even a district court might not be able to enter a final judgment on a government contract/bankruptcy hybrid issue because of the Tucker Act's mandate of exclusive jurisdiction of government contract claims in the Court of Federal Claims.[43]

While there is no bright-line rule of how to deal with this jurisdictional struggle, the general application appears to be an implicit balancing.[44] "We must mediate between [government contracts and bankruptcy claims] in the manner that least impairs their respective goals and purposes."[45] The circuit courts approach this balancing differently and there is not one universal way to reconcile these two jurisdictional mandates.[46] Below are examples of this balancing from the circuits that have dealt with this issue:

III. Court of Appeals Cases

A. *Federal Circuit*[47]

In *Quality Tooling, Inc. v. United States*, the U.S. Court of Appeals for the Federal Circuit was presented with a dispute between a contractor, Quality Tooling, and United States Army over a contract for manufacturing parts to a missile system.[48] Unhappy with Quality Tooling's performance, the Army terminated the contract for default on October 11, 1990 and informed the contractor that it owed the government for losses caused by the default.[49] Quality Tooling then brought a claim in the U.S. Court of Federal Claims alleging that the contract had been terminated for convenience, and therefore the government was not entitled to damages.[50] With the contract claim ongoing, the contractor filed for bankruptcy and after several "moves and countermoves" both the bankruptcy dispute and the contract dispute were brought before the District Court for the Northern District of Alabama.[51]

Appreciating that "Government contract law is a specialized, even arcane, field," the Federal Circuit held that "[i]n many cases, bankruptcy courts should stay their proceedings while the contractual issues are resolved by the Court of Federal Claims, which is accustomed to the intricacies of government contracts."[52] In this case, the Federal Circuit held that a district

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court

may hear a bankruptcy/government contract hybrid claim if "the interest expressed by the Bankruptcy Act in providing fair and expeditious relief to creditors is greater than the interest expressed by the CDA in resolving government contract claims in familiar, and expert, fora."[53] The Federal Circuit did not balance the jurisdictions in this case, but remanded the case back to the District Court with the instruction to conduct the balancing.[54]

B. *Second Circuit*

In *Presidential Gardens Associates v. U.S. ex rel. Secretary of Housing and Urban Development*, the U.S. Court of Appeals for the Second Circuit acknowledged the need to balance the bankruptcy and government contract concerns, but did not have to balance the jurisdictional questions.[55] In this case, the bankruptcy proceeding was terminated and the government contract claim did not involve the reorganized debtors themselves; therefore, the court determined it did not have to apply the balancing.[56]

C. *Third Circuit*

The U.S. Court of Appeals for the Third Circuit, in *In re University Medical Center*, conducted the jurisdictional balancing and found that the specific hybrid claim should be heard in a bankruptcy court.[57] The debtor in this case, a Medicare provider, claimed that the Department of Health and Human Services ("HHS") violated the automatic stay put in place by the Bankruptcy Court by withholding payments to setoff a pre-petition debt owed to the agency.[58] A debtor that files for bankruptcy is given an automatic stay to prevent creditors from attempting to collect debts outside of the bankruptcy process. The automatic stay prevents "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor."[59, 60] In this case, the parties did not dispute the amount of reimbursement to be paid. Therefore, the issue before the court could be limited to whether a bankruptcy court had jurisdiction to decide whether HHS's withholding violated the automatic stay.[61] The debt arose from an overpayment by HHS to the hospital before the hospital filed for bankruptcy.[62] HHS tried to setoff this debt by withholding payments earned through different a transaction between the parties that occurred after the hospital filed for bankruptcy.[63, 64] Because this second transaction occurred after the debtor filed for bankruptcy, the court held the automatic stay protected the hospital from HHS withholding payments.[65] The court held that because the cause of action was a violation of the automatic stay, the issue should be heard in front of a bankruptcy court.[66]

D. *Fifth Circuit*

In *Matter of Gary Aircraft Corporation*, the U.S. Court of Appeals for the Fifth Circuit conducted the government contract and bankruptcy balancing. However, the issue was filed in

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bankruptcy court in 1976 and, therefore, was governed by the amended Bankruptcy Act of 1898 and not under the current Bankruptcy Reform Act of 1978.[67] In this case, Gary Aircraft had entered into a contract with the United States Air Force, and while the contract was being performed the Air Force sent a team to the contractor that imposed "stringent property and quality control procedures."[68] These procedures led to missed delivery deadlines and the second contract was terminated for default.[69]

Before balancing, the Fifth Circuit cited three cases from the 1940s and 1950s in which the Supreme Court said bankruptcy courts should defer to an administrative tribunal.[70] The Fifth Circuit acknowledged that "the primary purpose of a proceeding in bankruptcy is to ensure that all creditors are treated fairly," which "makes it absolutely essential that all claims be *satisfied* in one forum."[71] The court held that under the Bankruptcy Act of 1898, Bankruptcy Courts had only ancillary jurisdiction to liquidate claims; therefore, having all disputes settled by the bankruptcy court is merely an "administrative convenience" and not "vital to the purpose of bankruptcy."[72] In applying the balance, the court said: "We need a narrow turf and a legal tightrope walker to determine the validity and magnitude of the contract claims, if any. Assuming there be such, we may then return to bankruptcy turf to see if reorganization is to be found in the grass."[73] The court qualified its opinion by explaining that "[c]ertainly the rule we announce today requiring liquidation in the Board of Contract Appeals cannot be used per se to support a finding of undue delay."[74]

While *Gary Aircraft* does not conduct the jurisdictional balance with the current Bankruptcy Code, this case presented several factors that other courts have turned to when presented with this jurisdictional issue.[75] "The court based its reasoning on a multi-factored approach, including the ability of bankruptcy court to ultimately determine all claims, the exclusive jurisdiction of the Court of Claims to resolve claims against the government, the lack of undue delay in deferring to the Board of Contract Appeals, the esoteric nature of government procurement law, and the presence of specialized fora designed to resolve procurement disputes."[76]

E. *Sixth Circuit*

In *In re MacLeod Company, Inc.*, the U.S. Court of Appeals for the Sixth Circuit, conducted the jurisdictional balance in a dispute between the Defense Construction Supply Center ("DCSC") and MacLeod Company Incorporated.[77] MacLeod was awarded a contract to construct and deliver thirteen water tank trucks for the United States Air Force.[78] The company received $525,750 in progress payments, but did not deliver the trucks as scheduled.[79] Because of this delay, and learning that MacLeod was going to file for reorganization under Chapter 11 of the Bankruptcy Code, DCSC terminated the contract for default.[80] The United States filed a motion for summary judgment in the bankruptcy court that sought the release of the trucks, and MacLeod filed a counterclaim for the balance of the unpaid value of the contract, $57,000.[81]

The Court began its analysis in reconciling the two statutory provisions of exclusive

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jurisdiction by turning to statutory canons of construction.[82] The Sixth Circuit acknowledged Supreme Court precedents that state when there are two statutes "capable of co-existence, it is the duty of the courts, absent a clear intention to the contrary, to regard each as effective."[83] Then, the court turned to the statutory construction that a "later enacted statute may limit the scope of an earlier statute, if the two laws conflict."[84] The Contract Dispute Act was enacted on November 1, 1978 and the bankruptcy jurisdiction statute, as amended, took effect on July 10, 1984.[85] Under this time-based canon of construction, the Bankruptcy Code "should be given precedence since it was passed after the CDA."[86] Next, the court turned to the canon of construction that states a "specific statute will not be controlled or nullified by a general one, regardless of priority of enactment."[87] The court reasoned that had Congress wanted a debtor to exhaust administrative remedies in all bankruptcy cases, like the one before the court, then Congress would have said so with an express provision.[88]

The Sixth Circuit then looked to the legislative history of the Bankruptcy Code and quoted a Senate Report on the Bankruptcy Reform Act that said: "[a] major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the Bankruptcy Court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction...."[89] The court concluded that Congress' intention to have bankruptcy claims heard in one forum overrides the Contract Dispute Act's procedural requirements, and that "Chapter 11 reorganizations would be at the mercy of lengthy administrative proceedings."[90]

The Sixth Circuit reasoned that the breach of contract counterclaim was so straightforward that for the bankruptcy court to defer and wait would cause an unnecessary delay.[91] Citing the Fifth Circuit *Gary Aircraft* decision for the proposition that deferring a bankruptcy proceeding for a government contract claim should not occur if the deferral causes undue delay, the court held that the bankruptcy court had jurisdiction to decide this dispute.[92]

F. *Ninth Circuit*

In *McGuire v. United States*, the United States Court of Appeals for the Ninth Circuit explicitly disagreed with the Federal Circuit's holding in *Quality Tooling*, when it applied a balancing analysis between a constitutional takings claim and a bankruptcy claim.[93] The Tucker Act also gives jurisdiction to the United States Court of Federal Claims over constitutional takings claims.[94] The Ninth Circuit held that the Court of Federal Claims had exclusive jurisdiction to try the merits of the takings claim.[95] The bankruptcy court, however, was not without a jurisdictional role because, "any money judgment obtained in such an action is the property of the bankruptcy estate" because "the district court in which the bankruptcy case is commenced obtains exclusive in rem jurisdiction over all of the property in the estate."[96] If the takings claim were brought before the Court of Federal Claims without the approval of the bankruptcy court, the suit would have lacked standing.[97] The court added, "although the bankruptcy and district court do not have jurisdiction to hear the merits of the Tucker Act claims, the cause of action still forms part of the bankruptcy estate and the management

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thereof is subject to bankruptcy court jurisdiction."[98]

On remand from the Ninth Circuit, the Court of Federal Claims reconciled proceeding with the claims, despite the clear circuit split, for three reasons.[99] First, the Court of Federal Claims explained that the Federal Circuit, in *Quality Tooling*, "described the decision as narrow."[100] Second, the court explained that Federal Circuit's holding was specific to government contracts claims, not taking claims, heard by district courts sitting in bankruptcy.[101] Third, if the court refused to hear the transferred case, then the case would return to the district court and "'jurisdictional ping-pong' would result.'"[102]

IV. Proposed test

After studying all the preceding cases, I concluded that the Sixth Circuit's articulation of the balancing test applied by the Fifth Circuit provided the most guidance in navigating this jurisdictional quagmire. Synthesizing this test with the other Circuit Court opinions, I now offer a four factor test to determine whether bankruptcy courts or a district court reviewing a bankruptcy court's recommendation can decide a government contract issue. All four of the following factors must be balanced and no single factor is dispositive. *First*, the courts should determine the facts and the body of law that gives rise to the cause of action.[103] *Second*, courts must consider the "esoteric nature of procurement law" and "presence of specialized fora designed to resolve procurement disputes."[104] *Third*, courts need to take into account a bankruptcy court's "exclusive in rem jurisdiction over all of the property of the estate."[105] *Fourth*, courts must bear in mind the effects on the entire case of delaying a proceeding to allow the different court to decide one issue.[106] Below, I will apply this test to the facts of three of the preceding cases.

V. Application of the Test to Court of Appeals Cases

A. *Federal Circuit*

In *Quality Tooling v. United States*, the Government terminated the contract for default and the contractor believed the Government had actually terminated the contract for convenience.[107] This cause of action is created under federal procurement law and does not exist under bankruptcy law; therefore, the first factor says a government contract tribunal should adjudicate the issue.[108] The second factor requires an appreciation of the complexities of the federal procurement system, and the specialized boards and courts created to resolve procurement disputes.[109] The determination of whether a contract was terminated for default or terminated for convenience should be determined by a tribunal specialized in the nuanced differences between the two types of terminations.[110] According to this factor, the bankruptcy court should not adjudicate this claim. The third factor intrinsically favors bankruptcy courts

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hearing the claims.[111] In bankruptcy, all of the debtor's assets are gathered and the bankruptcy court has exclusive jurisdiction over how these assets should be disbursed.[112] Therefore, because the government is seeking damages from the contractor and all of the contractor's assets are now part of the bankruptcy estate, the government is seeking damages from the bankruptcy estate.[113] This factor weighs in favor of the Bankruptcy courts' jurisdiction over this claim. Finally, the fourth factor requires addressing the dangers of possible delay to the bankruptcy proceeding.[114] The Bankruptcy Code strives to provide a swift relief for both debtors and creditors.[115] The government contract claim must first be answered to know how much money is in the estate to be divided amongst creditors.[116] As a practical matter , the determination of what type of termination occurred might not take long at all, but every other party to the bankruptcy proceeding must wait until it is determined.[117] Accordingly, this factor is evenly split between the two jurisdictions as more needs to be known about the extent of the delay. Therefore, under this test the bankruptcy court should stay its proceeding until the procurement dispute is resolved.

B. *Third Circuit*

In *In re University Medical Center*, the cause of action was for a violation of the automatic stay put in place by the Bankruptcy Court. The Government violated the stay by withholding Medicare reimbursement payments to setoff a previous debt that were owed from a separate transaction.[119] Because this cause of action is created by bankruptcy law and enforced by bankruptcy courts, the first factor clearly says that bankruptcy and district courts should have jurisdiction over the claim.[120] The second factor, the esoteric nature of procurement law and the specialized nature of contract dispute tribunals, is not as significant in this case because this was purely a question about whether the stay was violated. The amount withheld is not in question. This factor also weighs in favor of bankruptcy and district courts being able to hear and decide the case. The third factor weighs heavily in favor of bankruptcy courts' and district courts' jurisdiction as well, because stays are put in place to protect debtors and to preserve the estate. Lastly, the delay to the bankrupt estate is a major concern. All of the other creditors are honoring the stay to get their fair share of the bankruptcy estate and should not be forced to wait longer for the government to have this claim answered separately.[122] Just because the creditor is the United States does not mean it should be treated differently.[123] All four of these factors say that a bankruptcy court or district court should be able to hear this claim. This is the same outcome that the Third Circuit held.[124]

C. *Sixth Circuit*

In *In re MacLeod Company, Incorporated*, the cause of action was the Government's termination of the contract for default.[125] In this case, the government paid $525,750 in progress payments, and hence the government wanted the contractor to release the trucks. The contractor wanted $57,000, the unpaid value of the contract.[126] This cause of action stems from government contract law. The Sixth Circuit appreciated the complicated nature of procurement

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law and its specialized tribunals, but felt this issue was straightforward enough for another court to decide.[127, 128] This factor is not as significant here because most courts could determine this issue.[129] Third, the bankruptcy court must identify and protect the assets in the bankruptcy estate. The trucks in dispute are part of the estate and the bankruptcy court has exclusive jurisdiction over these trucks.[130] It follows that this factor also weighs in favor of the bankruptcy courts hearing the claim. The Sixth Circuit stressed that the delay of deferring this issue to a procurement tribunal would cause unjust delay.[131] This is the main factor the court used to decide that bankruptcy or district courts should be able to determine this claim.[132] Both the four factor test and the Sixth Circuit's opinion dictated that this claim should be resolved in a bankruptcy court.[133]

VI. Conclusion

The Circuit Court decided these cases before the Supreme Court's June 23, 2011 landmark decision in *Stern v. Marshall*.[134] In *Stern*, the Supreme Court limited bankruptcy courts' jurisdiction by holding that the courts cannot hear counterclaims that are based on state common law.[135] The courts have not addressed the impact of *Stern* on non-common law counterclaims that stem from other federal statutes. While Congress' intent in drafting the current Bankruptcy Code was to give the bankruptcy courts broad jurisdiction, the Supreme Court has limited this broad mandate three separate times: *Stern v. Marshall*[136]*; Northern Pipeline Construction Company v. Marathon Pipe Line Company*[137]*, and Granfinanciera, S.A. v. Nordberg.*[138] However, the Supreme Court has not specifically addressed the intersection of government contract and bankruptcy jurisdiction. While the circuit courts agree that there should to be a balancing of these two jurisdictions, they apply the balancing differently. Using the above four part test provides the same outcome as the circuit court's held in their respective cases. This allows for a uniform and standardized methodology regarding how these cases were decided. Such a methodology is instructive in evaluating future cases.

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Endnotes

1 - *Stern v. Marshall*, 131 S. Ct. 2594, 2603 (2011) (quoting 11 U.S.C. §157(b)) (emphasis added).
2 - 28 U.S.C. §157(b)(2).
3 - *Stern*, 131 S. Ct. 2594.
4 - The Supreme court found 28 USC §157(b)(2)(C) to be unconstitutionally overbroad.

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Endnotes (cont'd)

5 - Vickie Lynn Marshall, whose estate brought this action as the petition, is better known as the former playboy playmate Anna Nicole Smith.
6 - 28 U.S.C. §157(b)(2)(C).
7 - *Stern,*131 S. Ct. at 2595, 2598
8 - *Id.*
9 - *Id.*
10 - Information about the annual Hon. Conrad B. Duberstein Bankruptcy Moot Court Competition can found at http://www.stjohns.edu/academics/graduate/law/academics/llm/bankruptcy/duberstein/20th_annual_ duberstein _moot_court_competition/20th_annual_duberstein_moot_court_competition.stj
11 - See *Matter of Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir. 1983).
12 - *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).
13 - The Contract Disputes Act gives jurisdiction to the boards of contract appeals. The language giving authority is the following: "(a) Appeal to agency board**.** A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title" (41 USC §7104).
14 - The Tucker Act gives exclusive jurisdiction to the U.S. Court of Federal Claims to hear a claim based on an express or implied contract with the United States (28 U.S.C. §1491).
15 - 28 U.S.C. §157.
16 - *Gary Aircraft*, 698 F.2d 780.
17 - *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009).
18 - *F.D.I.C. v. Meyer*, 510 U.S. 471, 484 (1994).
19 - *In re Carrington Gardens Associates*, 248 B.R. 752, 765 (Bankr. E.D. Va. 2000).
20 - *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 254 (5th Cir. 2006).
21 - *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 359-60 (5th Cir. 1987).
22 - *Id.*
23 - 28 U.S.C. §1491(a)(1).
24 - *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 895 (D.C. Cir. 1985).
25 - *Id. (citing Van Drasek v. Lehman,* 762 F.2d 1065, 1071, n. 10 (D.C.Cir.1985); *McGuire v. United States*, 550 F.3d 903, 911 (9th Cir. 2008).
26 - *Supreme Beef*, 468 F.3d at 253 (citing *United States v. Nordic Vill. Inc.,* 503 U.S. 30, 34-35, (1992)).
27 - 11 U.S.C. §106, *Carrington,* 248 B.R. at 769.
28 - 11 U.S.C. §106(a)(5).
29 - 11 U.S.C. §106.
30 - 11 U.S.C. §106(a).
31 - The list provided in §106(a)(1) is the following: "Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title" (11 U.S.C. §106(a)(1)).
32 - The Federal Rules of Bankruptcy define a proof of claim as "a written statement setting forth a creditor's claim" (Fed. R. Bankr. P. 3001).
33 - 11 U.S.C. §106(b) reads: "A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose" (11 U.S.C. §106(b)).
34 - 11 U.S.C. §106(c).
35 - Congress, wanting this waiver of sovereign immunity to be as explicit as possible, added the language "notwithstanding an assertion of sovereign immunity." to the beginning of this subsection. *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 253 (5th Cir. 2006).
36 - *Id.* at 254.

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Endnotes (cont'd)

37 - *Id. (citing United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992)).
38 - *Supreme Beef*, 468 F.3d at 254.
39 - *Matter of Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir. 1983).
40 - *Id.*
41 - *Id.* at 785 (emphasis in original).
42 - *Stern v. Marshall*, 131 S. Ct. 2594, 2596 (2011).
43 - *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 368 (5th Cir. 1987)(vacated a district court opinion and remanded with instruction to transfer the case to the U.S. Federal Court of Claims).
44 - *Gary Aircraft*, 698 F.2d at 785.
45 - *Id.*
46 - *In re MacLeod Company, Inc.,* 1991 WL 96718 *8 (6th Cir.1991).
47 - The U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction over the subject matter of government contracts (http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html).
48 - *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1571 (Fed. Cir. 1995).
49 - *Id.*
50 - *Id.*
51 - *Id.*
52 - *Id. at* 1580.
53 - *Id.*
54 - *Id.*
55 - *Presidential Gardens Assocs. v. U.S. ex rel. Sec'y of Hous. & Urban Dev.*, 175 F.3d 132, 142 (2d Cir. 1999).
56 - *Id.*
57 - *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1089 (3d Cir. 1992).
58 - *Id.* at 1080.
59 - 11 U.S.C. §362(a)(7).
60 - The court explained the automatic stay as a protection that "'gives the debtor a breathing spell from his creditors. *It stops all collection efforts, all harassment, and all foreclosure actions.* It permits a debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.'" *In re Univ. Med. Ctr.*, 973 F.2d at 1074 (quoting *In re Schwartz,* 954 F.2d 569, 571 (9th Cir. 1992) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978)) (emphasis in original).
61 - *In re Univ. Med. Ctr.*, 973 F.2d at 1073.
62 - *Id.*
63 - *Id.*
64 - It is vital that to the court that the funds HHS attempted to withhold came from another transaction because if the money had come from the same transaction, HHS would have had a recoupment defense to the stay. The court defines recoupment as "the setting up of a demand *arising from the same transaction* as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim." *Id.* at 1089 (quoting 4 COLLIER ON BANKRUPTCY §553.03, at 553–15–17) (emphasis added).
65 - *In re Univ. Med. Ctr.*, 973 F.2d at 1085.
66 - *Id.*
67 - *Matter of Gary Aircraft Corp.*, 698 F.2d 775, 777 (5th Cir. 1983).
68 - *Id*. at 776-7.
69 - *Id.*
70 - *Id*. (citing *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946) (holding the bankruptcy court should not decide which two rival unions had the right to conduct the debtor's trains); *Smith v. Hoboken R.R. Warehouse & S.S. Connecting Co.*, 328 U.S. 123 (1946) (holding the bankruptcy court should have deferred to the Interstate Commerce Commission to decide if bankrupt railroad had forfeited its rights to leased tracks); *Nathanson v.*

(*continued on next page*)

Out of Step (cont'd):

Endnotes (cont'd)

N. L. R. B., 344 U.S. 25 (1952) (holding that the bankruptcy court must defer to the NLRB for liquidation of unfair labor practice claim).
71 - *Gary Aircraft*, 698 F.2d at 783 (emphasis in original).
72 - *Id.*
73 - *Id.* at 785.
74 - *Id.* at 784 n. 7.
75 - *In re MacLeod Company, Inc.,* 1991 WL 96718 *8 (6th Cir.1991).
76 - *Id. (citing Gary Aircraft*, 698 F.2d at 783-4).
77 - *MacLeod*, 1991 WL 96718 *1.
78 - *Id.*
79 - *Id.*
80 - *Id.*
81 - *Id.*
82 - *Id.* at *4.
83 - *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984)).
84 - *MacLeod*, 1991 WL 96718 *4.
85 - *Id.*
86- *Id.*
87 - *Id.*
88 - *Id.*
89 - *Id.* (quoting S.Rep. No. 95-989, 95 Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5803).
90 - *MacLeod*, 1991 WL 96718 *4.
91 - *Id.* *6.
92 - *Id.*
93 - *McGuire v. United States*, 550 F.3d 903 (9th Cir. 2008).
94 - 28 U.S.C. §1346(a)(2).
95 - *McGuire*, 550 F.3d at 914.
96 - *Id.* (quoting *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 996 (9th Cir.1998)).
97 - *McGuire*, 550 F.3d at 914.
98 - *Id.*
99 - *McGuire v. United States*, 97 Fed. Cl. 425, 428 (Fed. Cl. 2011).
100 - *Id.*
101 - *Id.*
102 - *Id*. (quoting *Christianson v. Colt Indus. Op. Corp.,* 486 U.S. 800, 818, (1988)).
103 - The Third Circuit, in *In re Univ. Med. Ctr*., 973 F.2d 1065 (3rd Cir. 1992), and the Ninth Circuit, in *McGuire v. United States*, 550 F.3d 903 (9th Cir. 2008), both emphasized this factor.
104 - *In re MacLeod Company, Inc.,* 1991 WL 96718 *7 (6th Cir.1991); *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1580 (Fed. Cir. 1995).
105 - *McGuire*, 550 F.3d at 914.
106 - *Matter of Gary Aircraft Corp.*, 698 F.2d 775, 777 (5th Cir. 1983); *MacLeod,* 1991 WL 96718; *Quality Tooling,*47 F.3d at 1569.
107 - *Quality Tooling,* 47 F.3d at 1571.
108 - *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987).
109 - *MacLeod,* 1991 WL 96718 *7; *Quality Tooling* ,47 F.3d at 1580 (Fed. Cir. 1995).

(*continued on next page*)

Out of Step (cont'd):

Endnotes (cont'd)

110 - *J. D. Hedin Const. Co. v. U. S.*, 408 F.2d 424, 431 (Ct. Cl. Mar. 14, 1969); *Schlesinger v. U. S.*, 390 F.2d 702, 708-09 (Ct. Cl. Feb. 16, 1968).
111 - *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).
112 - *McGuire v. United States*, 550 F.3d 903, 914 (9th Cir. 2008).
113 - *Quality Tooling,* 47 F.3d at 1571.
114 - *Matter of Gary Aircraft Corp.*, 698 F.2d 775, 784 n. 7 (5th Cir. 1983) .
115 - *Id.*
116 - *Id.*
117 - *See Id.*
118 - *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1073 (3d Cir. 1992).
119 - *Id.*
120 - *Id.*
121 - *Id.*
122 - *Id.*
123 - *United States v. Maxwell*, 157 F.3d 1099, 1100 (7th Cir. 1998).
124 - *In re Univ. Med. Ctr.*, 973 F.2d at 1089.
125 - *In re MacLeod Company, Inc.,* 1991 WL 96718 *1 (6th Cir.1991).
126 - *Id.*
127 - *Id. at *8.*
128 - "The scenario before us is one of the rare cases envisioned by *Gary Aircraft,* where jurisdiction need not be deferred. The counterclaim involved straightforward breach of contract analysis and the bankruptcy court specifically was concerned with the possibility of additional delay in resolving the contract question." *Id.*
129 - *Id.*
130 - 11 U.S.C. §541.
131 - *MacLeod.,* 1991 WL 96718 *8.
132 - *Id.*
133 - *Id.*
134 - *Stern v. Marshall*, 131 S. Ct. 2594, 2596 (2011).
135 - *Id. at 2601.*
136 - *Id. at* 2594.
137 - *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
138 - *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 69 (1989).

In-House Considerations for Reviewing Indemnification Clauses: A Primer

by

*David Newsome, Jr.**

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Consider the following hypothetical situation. "John Jones" is the new in-house counsel for "XYZ," a small construction company. Its exclusive teaming partner, "Big Prime," a large construction company, just won a multimillion-dollar contract with the U.S. Government. XYZ, contemplating the riches soon to be earned, is as happy as a pig at a trough. In the midst of the celebration, however, the contract manager hands Big Prime's subcontract terms and conditions to Jones to review. The subcontract is long, but he digs right in, and sees no major problems; that is, until he reaches the indemnification clause. The indemnification clause makes XYZ hold Big Prime harmless for all damages resulting from the work, even if the damages are solely caused by Big Prime. Jones suspects something is awry.

One of the primary responsibilities of in-house counsel, and arguably the most important, is to review contracts for risks. These risks, loosely defined as "contractual risks," include, but are certainly not limited to, risks inherent in such contractual provisions—contained in federal, state, and commercial contracts—such as:

- the "changes clause;"
- the "termination clause;"
- the "limitation of liability clause;" and
- the "indemnification clause," to mention only a few.

Of all the risk clauses, the most confounding can be the indemnification clause, which normally consists of an extremely long, paragraph-size sentence with legalese stacked atop legalese. Indeed, counsel should consider it a victory to be able to read a standard indemnification clause without nodding off somewhere in the middle. Typically, counsel must read, reread, and read again an indemnification clause to completely grasp its meaning; and its meaning is paramount, because an improperly written or agreed-to indemnification clause could be financially disastrous to a contractor.

The law of indemnity is broad and complex, and there is a ton of information thereon. A detailed analysis, however, is beyond the scope of this article; instead, this article will provide a primer for counsel and contracting personnel for drafting or responding to indemnification clauses between contractors. Specifically, this article will address four areas for John Jones to consider in his review of Big Prime's indemnification clause:

(*continued on next page*)

Reviewing Indemnification Clauses (cont'd):

- the purpose and types of indemnities;
- the interaction between indemnities and insurance;
- how the various states treat contractual indemnification provisions; and
- how corporate policies affect the negotiation and approval of indemnification clauses.

This article is construction industry oriented because indemnification clauses are almost universally included in construction subcontracts at all levels. The principles discussed, however, are applicable to all indemnities. It is hoped that not only will in-house counsel and contracting personnel find this discussion useful and relevant, but that their federal and state government counterparts will as well. It provides a glimpse of an important risk that government construction contractors and other government clients must address when bidding or proposing on government construction contracts.

We start with the general principle that every contract has risks. There are performance risks, financial risks, and environmental risks inherent in every construction contract. A contractor's goal is to manage these risks, a process commonly known as "risk management." Three widely recognized essential components of risk management are:

- identifying the risks;
- analyzing the risks; and
- minimizing the risks.

A commonly accepted method of managing risk is to transfer it; that is, to make another party responsible for the risk. One common, industry-wide technique of risk transfer is a contractual indemnification clause.[1]

Indemnity

An "indemnity" is when one party agrees to cover another party's losses to a third party. A typical indemnification clause places responsibility of loss or damage on the party who controls the work. The party who provides the indemnification is the "indemnitor," and the party who receives the protection is the "indemnitee."[2] In the hypothetical situation previously presented, XYZ would be the indemnitor and Big Prime the indemnitee. Indemnification clauses come in many shapes and sizes, but there are generally three recognized types:

- "Limited;"
- "Intermediate;" and
- "Broad."

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Reviewing Indemnification Clauses (cont'd):

In a limited indemnity, the indemnitor holds harmless the indemnitee only for damages or liability that are the fault of the indemnitor. Limited indemnities are normally agreed to without much trouble because they are fair. That is to say, our society recognizes that one should be responsible for one's actions. An example of a limited indemnification clause would be: "Subcontractor shall indemnify and hold harmless Owner from and against any and all damages arising out of Subcontractor's failure to perform the contractually required work."

An intermediate indemnity, on the other hand, makes the indemnitor liable for its own negligence, as well as the partial negligence of the indemnitee. This type of indemnity provides more protection for the indemnitee than does a limited indemnification clause. The key to recognizing an intermediate indemnification clause is that its determination of liability is based upon fault of the parties.[3] A typical intermediate clause could contain such language as: "This Subcontract's indemnification obligation applies regardless of whether or not the damages are caused in part by the negligence of the Owner."

The third type of generally recognized indemnity is the hated broad indemnity; "hated," at least, by the indemnitor. Under a broad indemnification clause, the indemnitor assumes the entire risk of loss, even those solely caused by the fault or negligence of the indemnitee. Obviously, from the indemnitee's perspective, this is the best type of indemnity to have, as it provides complete protection. The relevant language of a typical broad indemnity would say: "This Subcontract's indemnification obligation applies regardless of whether or not the damages are caused solely by the negligence of the Owner." However, as will soon be discussed, including a broad indemnification clause into a subcontract may be—to reverse the saying—a sheep in wolf's clothing.

Thus, John Jones's initial step should be to understand what type of indemnification clause Big Prime has proposed, which is a broad indemnification clause (as it holds XYZ liable for even Big Prime's sole negligence). Indeed, John Jones was right when he detected that something was amiss.

Insurance

Armed with a basic understanding of the various types of indemnification clauses, and the realization that Big Prime's clause is a broad indemnity provision, is John Jones now ready to approve or negotiate the indemnification clause? Not yet. Were XYZ to agree to Big Prime's indemnification clause, then Big Prime will have successfully transferred a substantial portion of its project risk. Although this would be great for Big Prime, it would not be so great for XYZ. XYZ has to mitigate this additional risk. Assuming, however, that XYZ self-performs the work, transferring any risk through an indemnification to another party to the contract is not an option.

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Reviewing Indemnification Clauses (cont'd):

Yet, XYZ can transfer its assumed risk, not to another party, but to an insurance policy issued by its insurance carrier. John Jones needs to be aware of the fact that an indemnification clause is not a provision that stands on its own, separate and apart from other considerations; rather, an indemnification clause must be consistent and compatible with any contractual insurance requirements and XYZ's various insurance policies. Indeed, an indemnitor's indemnity agreement and its insurance coverage are closely intertwined.

Contractors often maintain myriad insurance policies, consistent with what they do and the risks associated with doing it. In construction, contractors maintain (and most prime contracts and subcontracts require) commercial general liability (CGL) insurance.[4] CGL insurance covers risks typically assumed by an indemnitor: death, bodily injury, and property damage to third persons. John Jones must work closely with XYZ's risk management group or its insurance provider to ensure that any assumed liability under Big Prime's indemnification clause is covered by XYZ's CGL policy, or purchase a policy that covers the risk. However, Jones must also be mindful of the fact that CGL may not necessarily cover all damages that may flow from the indemnification clause. Contract type damages and the actual contractual work itself, for example, may not be covered by CGL.[5]

Moreover, it is also standard practice in construction contracting for the indemnitee to contractually require the indemnitor to name the indemnitee as an additional insured under its CGL policy. As an additional insured, the indemnitee would have insurance coverage under its insurance coverage as well as under the indemnitor's policy.

Anti-Indemnity Statutes

Let's say that John Jones has researched the types of indemnities and has consulted with the company's insurance provider. He understands what Big Prime's indemnification clause requires, and which losses would be covered by XYZ's insurance. Is he now ready to approve the indemnification clause so XYZ can start to generate revenue? Again, not quite.

The transfer of risk through indemnification clauses, particularly in the construction industry, is highly regulated by state statutes—the so-called "anti-indemnity statutes."[6] These statutes resulted primarily from states' concerns about broad indemnification agreements under which the usually larger prime contractors—who controlled the overall work—required their usually smaller subcontractors to indemnify them, despite the prime's own, and oftentimes sole, negligence. Many states deem these agreements to be void as against public policy and, therefore, unenforceable. Anti-indemnity statutes, and the type of indemnifications agreements they ban, vary from state to state, but they are by far the norm. There are only six states, along with the District of Columbia, that have not enacted an anti-indemnity statute in some form:

- Alabama;

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Reviewing Indemnification Clauses (cont'd):

- Iowa;
- Maine;
- Nevada;
- Vermont;
- Washington, DC; and
- Wyoming.[7]

In these jurisdictions, contractual indemnification provisions are permitted if they are clearly stated in the contract.

As to be expected, the particular statutory language varies among the states. The Massachusetts statute, for example, which precludes sole and partial negligence, states:

> Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition, or maintenance work, including without limitation, excavation, backfilling, or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water, or other utility line, which requires a subcontractor to indemnify any party or injury to persons or damage to property not caused by the subcontractor or its employees, agents, or subcontractors, shall be void.[8]

Missouri's statute precludes sole negligence indemnification agreements, and states in pertinent part:

> [I]n any contract or agreement for public or private construction work, a party's covenant, promise, or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable.[9]

Moreover, not only do anti-indemnity statutes preclude various indemnification agreements, but some statutes—such as Kansas'—also prohibit contractual provisions naming the indemnitee as an additional insured:

A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions is against public policy and is void and unenforceable.[10]

John Jones is finally comfortable with reviewing Big Prime's indemnification clause. He now knows the type of clause it is, the company's insurance coverage, and the fact that state

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Reviewing Indemnification Clauses (cont'd):

law may preclude it (he knows he must research which state has jurisdiction over the work, and how the various courts interpret the statutes). However, he then recalls that during the first few days of his employment, he received a binder covering corporate policies. He didn't read it then, but wonders whether he should read it now to see if there's anything in it about indemnities.

Company Policies

Of course, John Jones should have read XYZ's company policies when they were initially handed to him, but better late than never. Most companies have policies that address how they conduct business. Normally included therein are specific policies on managing risk. For example, a company may have specific policies on accepting contractual risks, and dollar limitations thereon, for death, personal injuries, and property damage. Moreover, some contractors have specific indemnification policies that are contingent upon the type of contract at issue—construction, engineering, or design, for example. Another common corporate policy is the requirement for "knock for knock," which is a reciprocal indemnity, the gist of which is that each party is responsible for damage to its own employees and property, even if the other party is at fault.[11] A company may also place dollar limits on the approval authority of its contract managers and legal counsel, above which approval rests with senior-level management. Thus, before approving or negotiating Big Prime's indemnification clause, John Jones must know what XYZ's indemnification policies are and, in particular, the level of authority, if any, he has to negotiate or approve the indemnification clause.

Conclusion

Finally, John Jones is prepared to negotiate Big Prime's indemnification clause. He has researched indemnity law and understands the types of indemnities. He is cognizant of the interaction between indemnities and insurance. He also knows that indemnification provisions are highly regulated by the various states, the majority of which have anti-indemnity statutes. And he realizes that any authority he has is contingent upon XYZ's company risk policies. John Jones— and all in-house counsel in general—must be cognizant of all of these factors and the interaction among them. Failure to do so could be devastating to the company.

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(*continued on next page*)

Reviewing Indemnification Clauses (cont'd):

Endnotes

1 - *See* David T. Dekker, Jenna Kirkpatrick Howard, Melissa C. Lesmes, Jose M. Pienknagura, and Laura Thomson; "Insurance and Risk Transfer Basics for Construction Projects"; *Construction Insurance, A Guide for Attorneys and Other Professionals*; Stephen D. Palley, Timothy E. Delahunt, John S. Sandberg, and Patrick J. Wielinski (editors) (American Bar Association, 2011).
2 - *See The Construction Contracts Book*; Daniel S. Brennan, Michael J. Hanahan, Jennifer A. Nielsen, John I. Spangler III (editors) (American Bar Association, 2008).
3 - *See* Tracy Alax Saxe and Ashley Rose Adams, "Walking the Minefield: Navigating Anti-Indemnity Statutes and Maximizing Third-Party Contractual Indemnification for Construction Contracts," *The John Liner Review*, 24(4) (2011).
4 - *See* note 1, Chapter 2.
5 - *Ibid.*, Chapter 4.
6 - *See* Timothy E. Hoerman, "State by State Anti-Indemnity Statutes," *available at* http://koponairdo.com/documents/Anti IndemnityStatutes.pdf; and Saxe Doernberger & Vita, P.C., "Construction Anti-Indemnity Statutes," *available at* www.sdvlaw.com/state_by_state/Construction%20Anti-Indem nity%20Statutes.07.15.11.pdf.
7 - *Ibid.*
8 - Mass. Gen. Laws, ch. 149 §29C.
9 - Mo. Rev. Stat. §434.100.
10 - Kansas Stat. §16-121(c).
11 - *See* Henry A. King, "Contractual Indemnities: Getting the Other Guy to Pay Your Legal Liability," *available at* www.acc.com/chapters/louis/upload/Contractual%20Indemnities.pdf.

DCAA Loses Executive Compensation Appeals

by
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I. Introduction

In recent years, challenging executive compensation for government contractors under FAR 31.205-6 has been a significant initiative of the Defense Contract Audit Agency (DCAA). Indeed, this subject has also been a particular concern of Congress as well.[1] To focus its efforts in this area, in 2007 DCAA formed a separate task force of experienced senior auditors under its Technical Programs division called the "Mid-Atlantic Compensation Team" or MACT. Not only is MACT an "Agency-wide Center of Excellence,"[2] but MACT senior auditors also receive additional specialized training in compensation.[3]

Although many contractors have experienced executive compensation reviews, executive compensation cases have rarely been litigated. For that reason, there are few decisions by the Armed Services Board of Contract Appeals (ASBCA) in this area. The leading cases had been *Techplan*[4] and *Information Systems and Networks*,[5] but on January 18, 2012 the ASBCA decided the appeals of *J.F. Taylor, Inc*.[6] That decision is the subject of this article.

II. The *J.F. Taylor* Appeals

The relevant facts and procedural history are briefly stated. The Appellant, J.F. Taylor Inc. ("JFT"), is a privately held company with a "horizontally oriented executive scheme," including a CEO and four vice presidents with "substantially equal" responsibilities and who received equal pay.[7] After comparing JFT's executive compensation for fiscal years 2002 through 2005 to compensation market surveys of similarly situated contractors, DCAA determined that JFT's executive compensation was unreasonable, and that excess compensation in the amount of $849,051 had been paid over the four-year period.[8] Repayment of the excess amounts was demanded in several Administrative Contracting Officer (ACO) final determinations, and JFT appealed these final determinations to the ASBCA. The appeals were subsequently consolidated.

a. Government Position

MACT conducted Executive Compensation Reviews (ECRs) for the five executives of JFT for the fiscal years 2002 through 2005. The ECRs compared executive compensation reported on JFT's incurred cost submissions with MACT's calculation of reasonable

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DCAA Loses Executive Compensation Appeals (cont'd):

compensation, which was based on survey data from other companies. MACT then disallowed compensation that exceeded the "reasonable compensation" amounts it had statistically determined.

The DCAA disallowances were based on the methodology set forth in the ASBCA's *Techplan* decision. The ASBCA repeated this methodology in the *J.F. Taylor* decision:

> In *Techplan* we found that experts in the compensation field generally accept taking the following eight steps to evaluate the reasonableness of executive compensation:
>
> (1) Determine the position to be evaluated.
> (2) Identify survey(s) of compensation for the position to be evaluated which match the company in terms of revenues, industry, geographic location and/or other relevant factors.
> (3) Update the surveys to a common data point for each year through the use of escalation factors.
> (4) Array the data from the surveys for the relevant compensation elements at various levels of compensation such as the average (mean) or selected percentiles and develop a composite number for each.
> (5) Determine which of the numbers to use for comparative purposes.
> (6) Apply a range of reasonableness such as 10% to the number or numbers selected.
> (7) Adjust the actual total cash compensation for lower than normal fringe benefits.
> (8) Compare the adjusted compensation to the range of reasonableness.[9]

Following these steps, DCAA found that the compensation for all five JFT executives exceeded the amounts MACT deemed to be reasonable for fiscal years 2002 through 2005.

b. Contractor Position

Relying upon expert testimony, JFT argued that the MACT evaluations were unreasonable for the following reasons:

1. DCAA ignored the actual dispersion of data in the surveys and instead applied an arbitrary 10% range of reasonableness.[10]
2. DCAA ignored the differences in survey sizes.[11]
3. DCAA should have evaluated each vice president's compensation based on the revenues of the whole company, and not just on the percentage of revenue attributed to each vice president by DCAA.[12]

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DCAA Loses Executive Compensation Appeals (cont'd):

4. DCAA did not initially consider financial performance, but would do so only if challenged by the contractor.[13]
5. DCAA failed to consider discriminators such as security clearances and customer satisfaction.[14]
6. DCAA inconsistently used industry compensation surveys over a four year period, i.e., at times comparing JFT to service companies, and at other times comparing it to engineering companies.[15]
7. DCAA inconsistently deemed JFT's Chief Executive as "Chairman and CEO" for some years, but only as "CEO-Non Chairman" in other years.[16]
8. DCAA was inconsistent with its use of the compensation surveys, by failing to use the same surveys in each of the years.[17]
9. DCAA was inconsistent with its use of medians vs. means amounts from different surveys, treating both as if they were the same.[18]

The ASBCA's decision primarily focused on the first of these arguments, e.g., the contractor's disagreements with the MACT's statistical practices for calculating the "range of reasonableness." The specific statistical shortcomings alleged by JFT are unique to the MACT evaluations of the executive compensations involved, the mathematical nuances of which lie beyond the scope of this article. The Board specifically did not address JFT's other arguments, except to note that it agreed with the DCAA's percentage of revenue attribution (i.e., the Board disagreed with JFT's argument no. 3).[19]

III. Analysis and Commentary

In *J.F. Taylor*, the Board referred back to the eight factors set forth in *Techplan* and found that DCAA essentially followed these steps.[20] JFT's expert, however, challenged Step 6 in *Techplan* – MACT's 10% "range of reasonableness" – on several grounds of statistical shortcoming that were not presented in *Techplan*.[21]

In accounting, reasonableness is a subjective factor and not susceptible to being precisely defined (akin to defining "the reasonable man" in the law). Even the FAR defines cost reasonableness ambiguously:

> A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.[22]

Seriously – what does THAT mean?! The definition is so vague that subjective judgments must be made, and when that occurs knowledgeable individuals in good faith can disagree. The only objective standards are the annual compensation ceilings announced by the Office of Federal Procurement Policy.[23] In the *J.F. Taylor* appeals, however, all of the disallowed executive compensation amounts were below these limits.

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DCAA Loses Executive Compensation Appeals (cont'd):

Because compensation evaluations below the OFPP maximums are subjective, the reasonableness of a particular number can only be determined when compared to another number or numbers, as is provided in the more particularized FAR guidance on reasonableness of compensation (which is not particularly helpful either):

> Compensation not covered by labor-management agreements. Compensation for each employee or job class of employees must be reasonable for the work performed. Compensation is reasonable if the aggregate of each measureable and allocable element sums to a reasonable total. In determining the reasonableness of total compensation, consider only allowable individual elements of compensation. In addition to the provision of 31.201-3 [Determining reasonableness], in testing the reasonableness of compensation for particular employees or job classes of employees, consider factors determined to be relevant by the contracting officer. Factors that may be relevant may include, but are not limited to, conformity with compensation practices of other firms –
>
> (i) Of the same size;
> (ii) In the same industry;
> (iii) In the same geographical area; and
> (iv) Engaged in similar non-Government work under comparable circumstances.[24]

This is what DCAA's MACT attempted to do in this case, i.e., compare the compensation of the five executives to various compensation surveys. Where DCAA ran into trouble, however, was in applying a 10% "range of reasonableness" to the average (mean) of the various compensation surveys for comparable positions.

The ASBCA was persuaded by JFT's argument that the MACT's 10% range of reasonableness analysis was "fatally flawed […] as a matter of basic statistical analysis."[25] This was because, among other things, MACT's analysis led to the absurd result that approximately 40% of all companies within the DCAA's own surveys paid their executives more than what MACT deemed to be reasonable.[26]

For whatever reason, the government made no effort to respond to the statistical arguments made by JFT's expert.[27] The Board also found that the government relied on an "expert witness of questionable judgment" to support its methodology.[28] Therefore, the Board gave the government's expert "little or no weight," and adopted JFT's statistical arguments as both "credible and unrebutted."[29]

The Board's decision ultimately found DCAA's methodology to be "unreasonable," concluding that "there are statistical flaws in the government methodology for determining reasonable compensation," and that "the computations performed by [JFT's expert] to

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DCAA Loses Executive Compensation Appeals (cont'd):

overcome those flaws are reasonable."[30] Accordingly, the ASBCA agreed with the modified analysis of JFT's expert, which used the same compensation surveys as DCAA but applied a data dispersion analysis instead of the 10% range of reasonableness. This modified analysis resulted in only $42,437 (as opposed to $849,051) of the executives' compensation being unallowable.[31]

IV. Conclusion

Obviously, the contractor prevailed in this case because the government did not address the statistical deficiencies raised by the contractor's experts. We can only speculate about what the result might have been had the government marshaled suitable expertise.

As stated earlier, the issue of executive compensation is a significant initiative for the Obama Administration, and is of concern to Congress as well. Not surprisingly, government officials are very disappointed with the *J.F. Taylor* decision. However, in conversations with this author they viewed the *J.F. Taylor* case only as a setback and not a defeat. Accordingly, allowable executive compensation will likely continue to be fertile ground for litigation until objective criteria are established.

Speaking of objective criteria, the decision in *J.F. Taylor* may be legislatively overruled in that the maximum allowable executive compensation may soon be determined by Congress. Judging from the proposed legislation, the statutory limits are likely to be much lower than the OFPP amounts.[32]

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Endnotes

1. FY 2012 National Defense Authorization Act; H. 1540 - limit is the salary of a Cabinet secretary (approximately $200,000), but S. 1867 - limit is President's salary ($400,000). *See* "Senate Defense Bill Limits Reimbursement of Contractor Executive Compensation Costs," by Deborah Billings, BNA *Federal Contracts Report*, Vol. 96, p. 558, December 2, 2011; "House-Passed DOD Authorization Bill Aims to Boost Competition in Acquisitions," by Deborah Billings and Jessica Coomes, BNA *Federal Contracts Report*, Vol. 95, p. 571, June 7, 2011. Neither bill has been enacted.
2. "Compensation Is Not a Four-Letter Word: Coping With a DCAA Executive Compensation Review," by Richard B. O'Keefe, Jr., *The Procurement Lawyer,* Vol. 45, Issue No. 1, American Bar Association, 2009.

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Endnotes (cont'd)

3. *Id*. Specifically, members of the MACT office were trained by "World at Work" (WAW), which was previously the American Compensation Association. WAW trains and certifies specialists in various subcategories, such as "certified compensation professional" (CCP). This information was provided by David Durante, a MACT supervisor, on November 14, 2007 in a meeting of the National Defense Industrial Association.
4. ASBCA No. 45387, 96-2 BCA ¶28426, 1996 WL 391461 (July 2, 1996).
5. ASBCA No. 47849, 97-2 BCA ¶29132, 1997 WL 381263 (July 7, 1997).
6. ASBCA Nos. 56105, 56322, __ BCA ___, 2012 WL 261272 (January 18, 2012).
7. *Id.* at 2.
8. *Id.* at 6.
9. *Id.* at 20.
10. *Id*. at 14-15.
11. *J.F. Taylor, Inc.,* 2012 WL 261272, at 15-16.
12. *Id*. at 16.
13. *Id*.
14. *Id*.
15. *Id*. at 16-17.
16. *J.F. Taylor, Inc.,* 2012 WL 261272, at 17.
17. *Id*.
18. *Id*.
19. *Id.* at 20-21.
20. *Id.* at 20.
21. *Id*.
22. FAR 31.205-3. *See also J.F. Taylor, Inc.,* 2012 WL 261272, at 20.
23. *See* 41 U.S.C. §435; FAR 31.205-6(p). The OFPP amounts for the years involved in *Taylor* are: FY2002 - $387,783; FY2003 - $405,273; FY2004 - $432,851; FY2005 - $473,318. The OFPP amounts since then are: FY2006 -$546,689; FY2007 - $597,912; FY2008 - $612,196; FY2009 - $684,181; and FY2010 - $693,951. As of this writing, no amount has yet been announced for FY 2011.
24. FAR 31.205-6(b)(2).
25. *J.F. Taylor, Inc.,* 2012 WL 261272, at 20.
26. *Id.* at 15.
27. *Id.* at 21.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. Indeed, the Commonsense Contractor Compensation Act of 2012 (S. 2198) was introduced just before this article went to press. The bill, which enjoys bi-partisan support, would impose a compensation limit of $400,000 on all contractor employees governmentwide. *See* Bloomberg BNA's Federal Contracts Report, ''Latest Developments,'' March 16, 2012.