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President's Column

by

Peter A. McDonald

C.P.A., Esq.

There are a number of significant initiatives to announce:

1. The Army's Contract Appeals Division (CAD) will be the organizational sponsor for this year's annual meeting in October.
2. Don Barnhill (Barnhill & Douglas) has agreed to chair the Nominations Committee. Please contact him if you are interested in serving on the BCABA Board of Governors or want to be an officer of the BCABA.
3. David Metzger (Holland & Knight) is hosting this year's Executive Policy Forum, which is tentatively scheduled for May 21st. This year's meeting will be one not to be missed.
4. David Fowler has agreed to chair the Trial Practice Committee. There will be two meetings of this Committee (one in June and one in September), the purpose of which is to permit younger practitioners to chat informally with judges about trial tactics – what works, what doesn't, etc.
5. The BCABA Technology Committee recently received welcome news about the GSBCA moving to efiling (more on this in the next issue of *The Clause).*

Please don't forget to make it to the BCAJA annual meeting on April 16th.

A lot is happening. Get involved!!

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News About Dues

- Annual dues notices are mailed out in early August.
- The dues are $30 for government employees, and $45 for everyone else.
- Payments are due NLT September 30th.
- There are no second notices.
- Gold Medal firms are those who have all their government contract practitioners as members.
- Individuals who do not pay their dues by September 30th will not appear in the annual BCABA Directory.

About the BCABA

Membership in the BCABA is open to any attorney interested in the field of government contract law. The BCABA annual meeting is held in October, at which time the annual BCABA Directory is distributed. The BCABA's publication, *The Clause*, is published quarterly. At the annual meeting, the Writing Award is presented for the year's

best article, and the Life Service Award is presented to the individual who has done the most to further the goals of the BCABA.

The BCABA Constitution and By-laws are available at our website (www.bcabar.org).

By long-standing policy, the BCABA does not sell or give its mailing list to any external organization.

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EDITOR'S COLUMN

Clarence D. "Hugh" Long, III

One of the pleasures of producing this magazine is that I do not have to do much work. It is all done for me by our highly competent member/readers. With some gentle prodding, our reader/members have contributed five articles to the 1st Quarter 2002. issue. First an interesting article by Dave Dempsey on the Service Contract Act and computer professionals, then an article by Steve Briggerman on the revocation of the contractor responsibility rules promulgated under the last administration. These rules would, in the opinion of many, have given virtual veto power to environmental groups and labor unions over the business continuation of government contractors.

Third, a review of the new book, "Sticks and Bricks." Jim Nagle, who is a fine attorney on the west coast, has written a good review of a good book about construction technology for lawyers. Jim may not be as well known in the Washington, DC area as others because he resides in Seattle, but he is an Adjunct Professor at Georgetown University and frequently flies in for classes. He is also a frequent litigator before the ASBCA and the GAO.

Dave Metzger and Pete McDonald have written "A Tale of Two Cases," a fine description of decisions in an obscure area of accounting, collaborative partnerships and pension funds. This type of analysis will become more important in the light of possible future Enron-type situations.

Elizabeth Fleming Wallace has written an excellent article on the criminalization of the regulatory process. The article is similar in theme to the article by Steve Briggerman, in that both concentrate on the increasingly heavy hand of government in commercial affairs.

Jim McCullough and Louis Victorino, of Fried Frank, have contributed a short but interesting article on the DPAS system, a Korean War era statutory priority system that most of us had forgotten about but which is now enjoying a new vogue.

I should note that, if the last Clause might be called the "Air Force" issue, with three articles by Air Force military attorneys, this Clause might be called the "US Army,

Retired," issue, with three articles submitted by former Army JAGs, not to mention the efforts of your editor.

The Service Contract Act and Computer Professionals

by
David Dempsey, Partner
Holland & Knight LLP

Under the Service Contract Act, 41 U.S.C. §351, et. seq., executives, administrative personnel, and professionals usually are exempt from the minimum wage and fringe benefit determinations published by the Department of Labor. The Service Contract Act (SCA) operates in tandem with the Fair Labor Standards Act (FLSA), 20 U.S.C. §213(a)(1). If a service employee is exempt under the FLSA, that service employee will be exempt from the SCA. As a practical matter, this means that exempt personnel are not under the overtime provisions of the FLSA (*i.e.*, no "time and a half").

Persons working in computer-related occupations may be exempt from the SCA requirements because they fit within one of the categories discussed below.

Computer Professionals

Computer employees fall under the administrative or professional employee exemption if the employer can demonstrate that such employee exercises independent discretion and judgment, requires no, or only limited, supervision, etc. In order to be exempt from the FLSA (and thus from the SCA), the primary duties of a "computer professional" have to include one or more of the following:

- the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to users of system design specifications
- the design, documentation, testing, creation or modification of computer programs related to machine operating systems.

No academic degree is required for this exemption; a combination of education, training and experience is satisfactory. In other words, the "computer professional" exemption is not the "learned profession" exemption under 29 C.F.R. § 41.301(e)(1). Expressly excluded from the context of this exemption are those employees engaged in the operation of computers (key entry occupations) or in the repair or maintenance of "ADP" (automatic data processing) hardware and related equipment.

Retired," issue, with three articles submitted by former Army JAGs, not to mention the efforts of your editor.

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Computer-Related Occupations

Within the "professional employee" exemption, service employees in "computer-related occupations" (i.e., computer systems analysts, computer programmers, software engineers, and "other similarly skilled" computer personnel) have a special statutory exemption. This exemption results from a unique legislative and regulatory history, which is too involved to describe in this article. However, the result is that computer-related occupations are exempt from the overtime pay provisions of the FSLA if the workers are paid at least $27.63 an hour. *See* Labor Department's Employment Standards Administration Fact Sheet No. 96-13.

Service Employees Engaged In the Repair and Maintenance of ADP Equipment, Scientific Equipment and Office Machines

Administrative exemptions from the SCA are authorized for the maintenance, calibration and/or repair of:

- automated data processing equipment and office information/word processing systems
- computer-based scientific equipment and medical apparatus or equipment
- office/business machines not otherwise exempt, where such services are performed by the manufacturer or supplier of the equipment.

For this exemption to apply, four specific tests must be satisfied. First, the equipment must be "commercial items that are used regularly for other than Government purposes, and are sold or traded by the contractor in substantial quantities to the general public in the normal course of business operations." Second, the maintenance or repair services must be furnished at prices that are, or be based on, an established catalog or market price. Third, the contractor must utilize the same compensation plan (*i.e.*, wages and fringe benefits) for the service employees performing work under the government contract as the contractor employs for equivalent employees servicing the same equipment of commercial customers. Fourth, the contractor must certify to the first three tests. *See* 29 C.F.R. §4.123(e)(2), FAR 22.1003-4(b)(4).

What contractors must realize is that the "ADP exemption" is completely unrelated to the "computer professional" and "computer-related occupation" exemptions discussed above. The three exemptions occur under different standards (*i.e.*, experience versus hourly wage versus commercial item) and have different tests. Each is available to a contractor, if the contractor can demonstrate (through job descriptions, payroll records, commercial item lists) that a service employee qualifies for the exemption.

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Revocation of Federal "Contractor Responsibility Rules"

by

Steven Briggerman, Esq.
Seyfarth Shaw

Revocation of Federal "Contractor Responsibility Rules"

Acknowledging that they were the "most controversial" federal procurement regulations it had ever published, the FAR Council, on December 27, 2001, revoked the "Contractor Responsibility Rules." Those regulations — which had taken effect on the last full day of the Clinton administration — linked eligibility for federal contracts to a company's compliance with various non-procurement laws, including those related to labor and employment. Widely criticized by business groups, many members of Congress from both sides of the aisle, and even some within executive agencies as "giving unions and other third parties inappropriate influence over the process to advance their own institutional self-interests," it came as no surprise that the Bush administration "stayed" the regulations shortly after taking office. The formal revocation of the rules thus ends, at least for the moment, a contentious debate that has lasted over four years.

The "Most Controversial" Regulations. What evolved into a bitter debate on the use of government contracts for political purposes started out simply enough. The government's Contracting Officer is required, by statute, to award contracts only to a "responsible source." 41 U.S.C. §253b and 10 U.S.C. §305. A "responsible source" is defined generally as a contractor who has adequate financial, technical and organizational resources to perform the contract and who has a record of satisfactory performance on previous contracts. 41 U.S.C. §403. In addition, the statute requires that the contractor must have "a satisfactory record of integrity and business ethics" to be eligible for award.

These statutory requirements are implemented in Subpart 9.1 of the Federal Acquisition Regulation (FAR). Basically, those regulations repeat the substance of the statute, and then provide guidance to the Contracting Officer as to how to apply and evaluate each of them when making the required "responsibility" determination.

The exception to this was the "integrity and business ethics" requirement. The regulations were silent as to what types of activity should be considered or what standards should be applied in determining whether the contractor's record was "satisfactory." From a rule-making perspective, the task was clear: draft some regulations to guide the Contracting Officer in carrying out his statutory responsibilities.

The problem was that from the outset it was evident that the driving force behind the regulations was politics. Vice President Al Gore first disclosed the administration's thinking at a meeting of the Executive Council of the AFL-CIO on February 18, 1997. There he outlined a plan to revise FAR to require companies bidding for government contracts to have a satisfactory record of labor relations and other employment practices. The plan also included changing the regulations to prohibit contractors from being reimbursed for the costs incurred in resisting unionization efforts. A government official familiar with the plan was quoted as saying the intent was to ensure that companies with a history of unfair labor practices under the National Labor Relations Act would not receive federal contracts.

With this as background, the Clinton administration developed a number of related regulations, collectively referred to as the Contractor Responsibility Rules, which defined "satisfactory record of integrity and business ethics" in terms of compliance with a variety of federal and state statutory and administrative law. Draft regulations were issued in July 1999 and in June 2000. They were issued in final form on December 20, 2000 and took effect on January 19, 2001.

Although the details had evolved since 1997, the basic thrust of the regulations remained unchanged. In summary the final rule provided that:

- A "satisfactory record of integrity and business ethics" included satisfactory compliance with tax, labor and employment, environmental, antitrust, and consumer protection laws;

- Potential contractors must certify regarding violations of these laws adjudicated with the past three years;

- Contracting Officers were to consider all relevant information in evaluating a contractor's record, ranging in descending order of importance from conviction or civil judgments for violation of those laws to the filing of a civil or administrative complaint by an agency if that action reflected an adjudicated determination by that agency;

- Contracting Officers were to promptly notify contractors if they were excluded from award based on a non-responsibility determination; and

- The "cost allowability" provisions of FAR Part 31 were changed to make "unallowable" any costs incurred in assisting, promoting, or deterring unionization or costs incurred in connection with a civil or administrative proceeding brought by a government where the contractor violated, or failed to comply with, a law or regulation.

Opposition From The Outset. Opposition to the regulations was vocal and immediate. Shortly after the Vice President's announcement, Sen. Warner proposed a non-binding Senate resolution urging that the administration abandon the plan. Business

groups also immediately joined the fray. Linda Chavez-Thompson, Executive Vice President of the AFL-CIO, offered this response: "If a company can't play by the rules that Congress set for businesses in this country, why should it benefit from government business?" Thus, the stage was set for a repeat of the battle that had erupted over the administration's ultimately unsuccessful efforts to bar federal contractors from permanently replacing legally striking workers.

Although the objections were many, three stood out. First, the regulations were profoundly different from the existing "responsibility" criteria because they allowed the government to withhold a contract for reasons that had nothing with the contractor's ability to perform the work. Many felt that since the individual statutes already contained remedies and penalties for violations, adding another sanction in the form of withholding award of a federal contract was unfair and invaded the prerogative of Congress. Second, they were viewed as tipping the scales in favor of unions by giving them a powerful club in dealing with management. Thomas J. Donohue, president of the U.S. Chamber of Commerce, reportedly said the proposed rule "would politicize federal contracting and give unions and other third parties inappropriate influence over the process to advance their own institutional self-interests." Finally, the regulations would not only authorize, but require, contracting officers to delve into complex issues in which they had no real expertise. This raised the possibility of erroneous or arbitrary decisions by a single contracting officer or conflicting decisions by different contracting officers reviewing the same matters for separate procurements. Critics also argued that the repeated exclusion of a contractor based on the same facts would amount to a "de facto debarment" from government contracting.

The administration tried to assure opponents that the rules would be applied even-handedly, and that Contracting Officers would focus on repeated, pervasive and significant violations of law rather than a single, minor infractions, but opponents remained unconvinced. Not surprisingly, members of Congress continued to criticize the regulations. In addition, several major business groups joined forces in a U.S. District Court lawsuit to enjoin implementation of the final rules. This was apparently the first time opponents of new FAR regulations had resorted to court action, indicating just how controversial the whole matter had become. Even more embarrassing, shortly before the issuance of the final rules, the Defense Acquisition Regulation Council and segments within GSA and EPA publicly came out against the rules. Nonetheless, the administration issued the final rules on December 20, 2000 with an effective date of January 19, 2001.

The Battle Is Concluded. Actually, the rules were only effective for about 10 weeks. On April 3, 2001, the Bush administration "stayed" the regulations to allow further review and, at the same time, issued a proposed rule to revoke them in their entirety. On December 27, 2001, the FAR Council finalized the proposed revocation. 66 Fed. Reg. 66984.

Although the FAR Council agreed with the notion that "the government ought not do business with lawbreakers," it acknowledged that much of the earlier criticism of the rules was justified. For example it noted regulations required Contracting Officers to

perform a function for which they lacked experience, resources and procedures to accomplish. What little guidance the regulations contained was inadequate to assure consistent application of the rules. Overall, the Council concluded, the existing debarment provisions in FAR Subpart 9.4 were the most appropriate way to exclude contractors who have an *un*satisfactory "record of integrity and business ethics."

The effect of the revocation was to reinstate the "responsibility," certification and cost allowability rules as they existed before January 19, 2001. Thus, FAR 9.104-1 now states:

> General standards.
>
> To be determined responsible, a prospective contractor must—
>
> (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
>
> (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments;
>
> (c) Have a satisfactory performance record (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or non-responsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;
>
> (d) Have a satisfactory record of integrity and business ethics;
>
> (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)
>
> (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and
>
> (g) Be otherwise qualified and eligible to received an award under applicable laws and regulations.

Implications For Government Contractors. The revocation the Contractor Responsibility Rules probably reduces the potential for disruption to a contractor's operations in having to revisit its recent history of compliance with laws every time it is tentatively selected for award and the possibility for exposure to arbitrary or inconsistent decisions that could result from that process. However, it would be unwise to assume that there is no longer any linkage between eligibility for a government contract and the

contractor's past record of compliance with laws that appear totally unrelated to its ability to perform the government contract. Four points are worth noting.

First, although the Clinton administration rules have been revoked, the basic requirement that a contractor have "a satisfactory record of integrity and business ethics" still exists. At the time the rules were suspended, the FAR Council commented:

> The requirement that contractors must be responsible is statutory, and this stay does not relieve offerors of the requirement to have a satisfactory record of integrity and business ethics.... Contracting officers will continue to have the authority and duty to make responsibility decisions and agency debarring officials will continue to have the authority and the duty to make determinations whether to suspend and debar a contractor.

Thus, the FAR Council left open the door for a Contracting Officer to consider a contractor's past record of compliance with various laws in making a responsibility determination, even in the absence of the Contractor Responsibility Rules. Given the revocation of the rules, it is unlikely that a Contracting Officer would find a contractor to be ineligible for award *solely* on the basis of non-compliance with laws that are unrelated to performance. However, there is no reason why this could not be considered along with the other factors in making an overall responsibility determination.

Second, the suspension and debarment provisions of FAR Subpart 9.4 will continue to be an effective tool for excluding contractors from eligibility for award for violating procurement and non-procurement statutes. Those provisions state that a contractor may be debarred or suspended for "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." The government has not hesitated is using the provisions to exclude companies from federal contracts for violations of most of the same laws identified in the Contractor Responsibility Rules. See Glenwood Patterson, HUDBCA 87-2306-D9, (Slip op., Oct. 22, 1987) where the Board upheld a suspension from eligibility, stating "Violation of income tax laws has been held to be conduct that indicates a lack of business integrity and honesty for purposes of debarment pursuant to 24 C.F.R., Part 24."

Third, various agencies charged with enforcing substantive laws have their own, independent authority to suspend or debar a company from eligibility for federal contracts for violations of those laws. For example, where the Department of Labor finds that a contractor violated the Service Contract Act by not paying service employees prevailing wages and benefits, it may place the contractor on an ineligibility list barring the company from future government contracts for a three year period. 41 U.S.C. §354(a); 29 CFR §4.188. Only under "unusual circumstances" may an offending contractor obtain relief from the debarment penalty. Likewise, firms found to have violated the Walsh-Healy Act provisions that apply to government supply contracts may be barred from future contract awards for three years. 41 U.S.C. §37.

Finally, executing one of the many certificates that is a routine part of the performance of a government contract can expose a contractor to unexpected consequences for non-compliance with statutes that have little relation to the contract. For example, contractors know they face potential liability under the False Claims statute, 31 U.S.C. §3729, if they request payment for supplying defective products under a government contract. However, they also risk this same exposure if they knowingly violate a statute, even though unrelated to performance, that they have agreed to comply with as part of their government contract. For example, in U.S. ex rel. Fallon v. Accudyne Corp., 880 F.Supp. 636 (W.D.Wis., 1995), the Army awarded a contract for electronic assemblies to Accudyne. The contract contained the typical provision requiring that all work be performed in accordance with applicable federal, state and local environmental laws and regulations. During the course of performance, the contractor knowingly violated the Clean Air and Clean Water Acts by improperly disposing of certain chemicals. When requesting monthly progress payments, the contractor certified that the work for which payment was being requested had been performed in accordance with the terms of the contract. In denying a motion to dismiss, the court found that compliance with the statutes was as much a part of performance as producing the electronic assemblies:

> The complaint alleges that the contracts expressly required compliance with environmental regulations and that defendant knowingly failed to comply with such regulations and falsely certified that it had so complied in order to induce payments under the contracts. Such a claim is fundamentally no different than falsely representing that tests have been performed or falsely representing the results of product testing. See, e.g. Neal v. Honeywell Inc., 33 F.3d 860 (7th Cir.1994). Defendants' characterization of the claim as an attempt to sue for violations of environmental laws misses the point--it is not the violation of environmental laws that gives rise to an FCA claim but the false representations to the government that there has been compliance.

880 F.Supp. at 638.

In short, although the Clinton administration rules authorizing the Contracting Officer to exclude a contractor from federal projects for failing to comply with various statutes that have little to do with the contract are now history, the government has ample other tools at its disposal for accomplishing the same objectives and all signs indicate it will not hesitate to use them.

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Sticks and Bricks: A Practical Guide to Construction Systems and Technology,[1]

by

Christopher C. Whitney, Robert J. MacPherson and James Duffy O'Connor, editors

Published by the Forum on the Construction Industry, American Bar Association, 2001

Available through www.aba.net.org//abapubs.

Reviewed by James F. Nagle
Oles Morrison Rinker & Baker LLP

Normally I review law books written by lawyers for lawyers, dealing with substantive legal issues such as delay claims, differing site conditions, bonds, or the generic field of construction or public contract law. Such law books are useful but cases are often lost not on the law but on the facts. Inexperienced counsel simply do not know the difference between concrete and cement and therefore not only can't figure out the proper questions to ask on cross-examination, but can't figure out the proper questions to ask their own clients during trial preparation to identify weaknesses.

To remedy that problem, the Forum on the Construction Industry presented a program in the Fall of 1995 entitled *Sticks and Bricks: Construction Technology for Lawyers*. That successful program was reprised in the Fall of 1999. The programs and this book aim to describe and give an understanding of how buildings are constructed and how building systems operate after the construction is complete. While it is written *by* experts, it is not written *for* experts. Think of this as "Construction for Dummies" but no one should take offense. Many lawyers who are extremely knowledgeable, indeed, experts, in particular fields need to have a handy reference that can explain the properties of concrete or the design principles of curtain walls.

To be useful such a book must contain a detailed index so you can focus on exactly the matter of interest (shrinkage of concrete, for example); a glossary so that you can have a general idea of what "initial rate of absorption" means; and an easy, understandable text loaded with illustrations. The book has all three.

This paperback book has nine chapters: Foundations; Concrete Basics; Structural Steel Design and Construction; Masonry Basics – How Bricks and Blocks Stack Up to Support and Enclose Our Buildings; Curtain Wall Design Construction Basics; Heating, Ventilating and Air-Conditioning (HVAC) Systems; Electrical Systems; Plumbing; and Roofing Basics. Each chapter ends with a glossary and four of the nine chapters have a subsection that's a reference for further study. That marvelous organization allows people to go to the glossary section and get a quick definition of "tremie" and then go to

[1] Coincidentally, another reviewer of this book also used the same phrase. *See* Review by Lawrence C. Melton, *The Construction Lawyer*, Winter 2002 at page 38.

the references to find more specific and more technical information on such topics as "settlement from pile driving in sands." Another added benefit (which I am sure is intended) is that the referenced lists of books and articles also provide the reader with potential expert witnesses.

The editors, all very experienced construction lawyers, have assembled nine experts, eight of whom are engineers, to draft the nine chapters. All have a great deal of experience in construction, construction management, investigative research, analytical forensic review and have served as expert witnesses. Most of the chapters have numerous diagrams, charts and photographs to facilitate understanding. While the chapters on Concrete Basics and Plumbing do not have any illustrations, they have numerous charts and tables.

The book concludes with a 21-page index. Since the text of the book itself is only 283 pages, this is the most detailed index I've come across. This proves that the authors realized that this was to be used as a reference material. It is exactly the type of thing that a new construction lawyer or even an old, experienced hand needs to pull out and speed-read before meeting with the client.

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A Tale of Two Cases:
Pratt & Whitney and *Teledyne*

by
David P. Metzger, Esq.
and
Peter A. McDonald, C.P.A., Esq.[2]

Two recent cases, decided in different forums, have significant consequences for government contractors. Both cases -- *United Technologies Corporation/Pratt & Whitney*[3] and *Teledyne, Inc. v. United States*[4] -- reaffirm basic cost accounting principles and apply them to circumstances critical to government contractors.

United Technologies Corporation/Pratt & Whitney has significant implications for structuring collaborative federal contracting arrangements. It raises the troublesome question of how a systems integrator in a complex collaboration should treat revenues returned to collaborators – as subcontract costs or as pass-through revenues? The case characterized revenue distributions to collaborators more like distributions of a joint venture than like subcontractor costs. By requiring that such distributions be included in Pratt & Whitney's total cost input bases[5], the decision provides a revealing *tour de force* of basic accounting principles.

Teledyne, Inc. v. United States raises the question whether government contractors with over-funded pension plans that are contemplating a divestiture should establish a reserve against anticipated pension surpluses that might have to be refunded to the government. The issue in the case was whether Teledyne's sale of two of its divisions constituted "segment closings" under the Cost Accounting Standards (CAS) applicable at the time of the sales.[6] The Court of Federal Claims (COFC or the Court) determined that both sales were segment closings and that Teledyne was liable to the government for pension surpluses attributable to government pension contributions paid under both firm fixed-price and flexibly priced contracts.[7]

United Technologies Corporation/Pratt & Whitney

The *Pratt & Whitney* case involved revenue sharing payments to foreign collaborators. The Armed Services Board of Contact Appeals ("ASBCA") had to decide whether these payments from Pratt & Whitney to its foreign collaborators constituted costs for parts. The Defense Contract Management Agency and the Defense Contract Audit Agency argued that such payments should have been included in Pratt & Whitney's indirect cost allocation bases pursuant to CAS 410, 418, and 420.[8] Pratt &

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[3] 01-2 BCA ¶ 31,592 (July 30, 2001).
[4] 50 Fed. Cl. 155 (Aug. 9, 2001).
[5] 01-2 BCA ¶ 31,592 at 45.
[6] 50 Fed. Cl. 155 at 191.
[7] *Id.*
[8] 01-2 BCA ¶ 31,592 at 42