FEDERAL CONTRACTS: THE YEAR IN REVIEW

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I. NEW STATUTORY DEVELOPMENTS

A. THE SEQUESTRATION/SHUT DOWN IMPACT

It will take a while for cases to be decided which were impacted by the government's financial problems this year, but here is one.

Croman Corporation v. United States, and Mountain West Helicopters, LLC, Defendant, and Siller Helicopters and Columbia Helicopters, CAFC No. 2012-5138, July 31, 2013. Forest Service contract for helicopter services. The Federal Circuit affirms the decision of the COFC. The Federal Circuit addresses two issues which appellant raises: "(1) whether the Forest Service had a reasonable basis to cancel CLINs 21, 22, 27, and 34 of the 2011 Solicitation; (2) whether the Claims Court erred in its determination that the Forest Service performed a proper tradeoff analysis;" Appellant argues that the cancellation of the four CLINs for alleged budget reasons was improper and pretextual as the Forest Service issued a solicitation for this CLINs shortly thereafter. The court notes that gravamen of appellant's argument is that the Forest Service "failed to act in good faith by misrepresenting the reasoning underlying the partial cancellation of the 2011 Solicitation." In rejecting this argument the court notes

In reviewing the Forest Service's exercise of discretion, this court has articulated relevant factors as general guidelines in determining whether the Forest Service's actions were arbitrary, capricious, or an abuse of its discretion. *Prineville Sawmill Co., Inc. v. United States*, 859 F.2d

[1] In preparing this I have relied on the subscription service compiled by Jerry Walz and his case summaries.

905, 911 (Fed. Cir. 1988). ''[R]elevant factors include: subjective bad faith on the part of the officials; the absence of a reasonable basis for the administrative decision; the amount of discretion entrusted to the procurement officials by applicable statutes and regulations; and proven violation of pertinent statutes or regulations.'' Id. (*quoting Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974). These factors support upholding the Forest Service's cancellation and resolicitation. As discussed above, Croman has failed to show that the partial cancellation of the 2011 Solicitation was in bad faith or lacking in rational basis. Given the level of discretion the Forest Service has to make decisions responsive to its actual needs, this court finds nothing arbitrary or capricious in the decision to cancel and re-solicit certain portions of the 2011 Solicitation. Thus, Croman's contentions related to CLINs 21, 22, 27, and 34 of the 2011 Solicitation fail in their entirety."

Regarding the tradeoff analysis the court finds that the Forest Service decision was rational and adequately supported.

B. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

Not as many procurement important issues as in previous years. Section 1601, Periodic audits of contracting compliance by Inspector General of DOD. Section 1611, Advancing small business growth in a new DFARS clause, specifically more information as to whether a prime contractor has attained percentages goals in the contract

C. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013[2]

The National Defense Authorization act for FY2013 required agencies to undertake many reviews which could have significant impact.

[2] This is taken from an article by Meghan A. Douris of Oles Morrison Rinker & Baker LLP, who specializes in Government Contracts, Environmental Law and Construction.

Three months into the fiscal year, on January 2, 2013, the President signed the National Defense Authorization Act (NDAA) for fiscal year 2013. Title VIII of NDAA contains many procurement and construction contract related provisions. This section briefly highlights some of the key provisions of the NDAA applicable to those seeking to contract with the federal government. The impact of these provisions on contractors will depend on the results of some of the "reviews" "guidelines" and "analyses" required by various agencies and their officials over the course of the next 180-270 days, although some of the provisions take immediate effect. The 44 provisions in Title VIII addressing procurement reform can be found in their entirety at Pub. L. No. 112-239.

The following section outlines those parts of the NDAA, outside of Title VIII, that apply only to small businesses.

- Section 802 addresses Pass-Through Contracts. Since 2009, the FAR required an offeror intending to subcontract more than 70 percent of the total cost of work to be performed under the contract to: (i) identify the "amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s)," and (ii) provide a "description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s)." If the Contracting Officer deemed the pass through excessive, the costs could be declared unallowable. However, under the new Act, Contracting Officers within DoD, the State Department and the Agency for International Development will now have the authority to contract directly with a prime contractor's proposed subcontractor(s) when a prime contractor proposes to have its subcontractor(s) perform more than 70 percent of the work. The Agency CO's will have to document that this approach is in the Agency's best interest.

- Section 804 addresses DFARs Profit Guidelines. The Act requires DoD to review its profit guidelines "in order to identify any modifications to such guidelines that are necessary to ensure an appropriate link between contractor profit and contractor performance." This review, which must obtain the views of private sector, the Government experts and interested parties, must consider (1) "[a]ppropriate levels of profit needed to sustain competition in the defense industry," (2) "[a]ppropriate adjustments to address contract and performance risk assumed by the contractor," and (3) "[a]ppropriate incentives for superior performance in delivering quality products and services in a timely and cost-effective manner[.]" Based on the findings in that review, DoD is then required to "modify" the DFARs profit guidelines and make appropriate changes.

- Section 811 addresses cost-type contracts. DoD is now required within 120 days of NDAA's passage to modify its regulations "to prohibit [DoD] from entering into cost-type contracts for the production of major defense acquisition programs" entered into after

October 2014. However, it will not apply in the case of a particular cost-type contract if the Under Secretary of Defense provides a written certification to the congressional defense committees that a cost-type contract is needed to provide a required capability in a timely and cost-effective manner. In theory, this seems more restrictive than it really is. Although Section 811 will limit the use of cost-type contracts for production of major defense acquisition programs, it only applies to production phases of a program. It does not apply to development phases, or other earlier phases which is where cost-type contracts have typically been viewed as more appropriate. See DFARS 235.006(b); See also, e.g., DoD Instruction 5000.02 (Milestone C).

- Section 822 addresses the commercial test program. It extends the authority for the FAR Subpart 13.5 commercial items test program from January 2012 to January 1, 2015. FAR Subpart 13.5 authorizes the use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold (i.e., $150,000) but generally not exceeding $6.5 million, including options. The Comptroller General is directed to report, by October 1, 2013, on the use of this authority. The Comptroller General's report is required to address: "(1) the extent of use of the authority; (2) the cited rationales for use of the authority; (3) the acquisition outcomes that have resulted; and (4) any waste, fraud, or abuse that have resulted from the use of the authority."

- Sections 827 and 828 expand the whistle-blower protections.

    - Section 827 amends the whistleblower protections presently available to employees of DoD contractors (outside the intelligence community) by: (i) covering NASA contractors and their employees, and DOD and NASA subcontractor and grantee employees; (ii) expanding the protection to cover grand jury, court, or management official or other contractor/subcontractor employee with responsibility to discover, investigate or address misconduct; and (iii) providing for attorneys' fees and costs when the Government (and possibly the whistleblower) successfully files a law suit to enforce such protections. In theory, the hope is that by including company management officials on the list of permitted recipients of protected disclosures, it will now encourage employees to raise concerns internally. This in turn may provide contractors an opportunity to remedy a problem without external investigations being conducted.

    - Section 828 creates a program analogous to whistleblower protections now available to DoD contractor and subcontractor employees. Under Section 828, after July 1, 2012, the protections are now extended for the employees of contractors, subcontractors and grantees of executive agencies – with the exception of DoD, NASA and the intelligence community – and affords such employees protection from reprisals as long as they "reasonably believe" they are disclosing "evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant."

    - As a result of Sections 827 and 828, Government contractors should be quite careful when considering employment actions concerning whistleblowers. In

addition to contractor employees, these new whistleblower protections now may cover subcontractor and grantee employees. "Reprisals" against the reporting individuals are also prohibited, even when requested by a DoD official. As a practical concern, contractors and subcontractors should update their compliance programs, conduct appropriate whistleblower training, and update their internal whistleblower protection policies. Contractors should also be aware of the permissive attorney's fees provisions for whistleblower actions.

- Section 829 addresses the potential for modification to personal conflicts of interest rules to DoD contractor employees. Currently personal conflict of interest rules apply only to employees carrying out procurement functions that are associated with inherently governmental functions (i.e. such as drafting specifications, advising the Government about acquisitions, approving contractual requirements, or otherwise administering, assessing or awarding contracts.). Section 829 now requires DoD to examine whether these rules should apply to "[f]unctions other than acquisition functions that are closely associated with inherently governmental functions," "[p]ersonal service contracts" and/or "[c]ontracts for staff augmentation services." The Act now permits modification of the DFARs to accommodate this analysis, but no specific time frame is set forth for the modification.

- Section 830 addresses Task & Delivery Order protests. This section makes permanent GAO's exclusive authority to review protests of DoD, NASA and Coast Guard task and delivery orders in excess of $10 million, as long as the protests do not involve increases in the scope, period, or maximum value of the contract under which the order is issued. (This authority was originally set to expire in September 2016).

- Section 832 addresses DCAA access to Contactor's Internal Audits. DCAA is now required to revise its guidance on access to internal contractor audit reports. DCAA is also required to document all requests for defense contractor internal audit reports. This "documentation" must include: (i) analysis that access to the internal reports are necessary to complete evaluation of the contractor business systems; (ii) a copy of the correspondence requesting such access; and (iii) the contractor's response to DCAA. This final version that ended up in the Act is much more contractor-friendly than the proposed senate version, which would have required DoD contractors to provide their internal audits as a condition of approval of the contractor's business system.

- Section 852 addresses the expansion of FAPIIS. The Federal Awardee Performance and Integrity Systems (FAPIIS) was established in 2010 with the goal of it being the sole resource for information about the business ethics of those competing for federal contracts. It includes determinations of responsibility, debarment/suspensions, defaults etc. Section 852 now requires offerors to include information in FAPIIS about parent companies, subsidiaries or successor entities so that the integrity of the entire corporation can be considered. As written, it is seemingly unclear whether this applies to *all* parent and subsidiary entities at all levels, or whether it is only those direct affiliated companies that will have to be reported. If it is the former, this will be a problematic requirement for large corporations with many subsidiaries, some of which may have minor infractions that may be considered in unrelated evaluations of the offeror.

- Section 864 addresses the allowable costs of contractor compensation. The compensation cap of $763,000 remains in place, for now. However, by May of this year the Comptroller

General is required to submit a report to Congress on the impact of reducing the allowable costs of contractor compensations to either the salary of the President of the United States, or the Vice President. This also requires that the Comptroller General undertake an analysis to determine how many contractor employees have compensation above those of the President and Vice President.

- Section 867 addresses bid protest statistics. The Comptroller General must now provide in its annual report to Congress "a summary of the most prevalent grounds for sustaining protests in the preceding year."

As noted above, the National Defense Authorization Act of 2013 ("NDAA") included significant changes affecting small business contracting. The changes largely came because of the House Armed Services Committee special "Panel on Business Challenges in the Defense Industry."

Under Section 1641, the NDAA is expanding the mentor-protégé program for "all small business concerns," from its present application that only applies to 8(a) disadvantaged businesses. The NDAA authorizes the Small Business Administration ("SBA") to create mentor-protégé programs for each type of small business concern, for example HUBZone businesses, Service Disabled and Veteran Owned businesses, and Women-Owned small businesses, among others. The NDAA requires the SBA to issue regulations establishing these mentor-protégé programs within 270 days.

The mentor-protégé program as it exists, applies to 8(a) disadvantaged businesses, and allows large businesses to act as mentors to small businesses. This permits the two companies to form a joint venture and bid on small business contracts without violating size or affiliation rules. Section 1641 should expand the number of potential protégés and create greater opportunities for large companies to serve as mentors.

The NDAA also changed the regulations on subcontracting calculations. Previously, a small business had to incur to incur at least 50 percent of the labor costs for service or supply contracts and 25 to 15 percent of the labor cost for general or specialty construction contracts. Sections 1651 and 1652 of the NDAA change the calculations from "price" to "cost", requiring a

comparison of prime contract price to subcontract prices. The NDAA also creates penalties (of $500,000 or the dollar amount expended over the permitted level, whichever is greater) for violating limits. The changes apply to the following contracts:

- For **service contracts**, not more than 50 percent of the amount paid to the contractor with a small business set aside for a services contract can be spent on subcontractors.

- For **supply contracts**, the small business may not expend over 50 percent of the prime contract price on subcontractors, less the cost of materials.

- For **construction contracts**, the SBA will determine the percentage after obtaining public comments.

Section 1681 creates a "safe harbor" for a firm that mistakenly represented itself as a "small business." However, this narrowly construed provision only provides a safe harbor if the company can show (1) it relied on an opinion provided by a Small Business Development Center or an entity participating in the Procurement Technical Assistance Program; and, (2) the written opinion must have been submitted for review to the General Counsel of the Small Business Administration beforehand.

Section 1695 expands the bonding capacity of the SBA. The SBA now has the ability to guaranty surety bonds for small business contracts up to $6.5 million, an increase from the prior $2 million limit. If the CO certifies a guarantee is necessary for the small business to obtain bonding and that it is in the government's best interests, Section 1695 permits the SBA to guarantee a bond for up to $10 million. The hope is that the increased bonding opportunities through the SBA will now allow small business to actively compete for the larger construction and/or service contracts.

Changes were also made to the Women-Owned small business program ceilings on set-aside contracts. Under Section 1697, the dollar limits for set-asides for women-owned small businesses have been removed in their entirety.

II. NEW REGULATIONS

A. FEDERAL ACQUISITION CIRCULARS (FACs)

FAC 2005-72, 78 Fed. Reg. 80367, December 31, 2013. This final rule amends the FAR to implement Section 743 of Division C of the Consolidated Appropriations Act 2010, which calls for certain agencies, not including DOD, to submit annual inventories of service contracts. The new reporting requirements will be in FAR Subpart 4.17.

The FAC also amends the FAR to update and clarify the priority of sources of supplies and services for use by the government at FAR Subpart 8.0. The rule also includes a list of other existing federal contract vehicles to consider for agency use such as Government-Wide Acquisition Contracts (GWACS), Multi-Agency Contracts (MACS) and other procurement instruments intended for use by multiple agencies, including blanket purchase agreements under FSS contracts.

Item III incorporates a long-standing rule but applies it to a new document, specifically an "End User License Agreement A, Term and Services," in which contracting officers would bind the government without statutory authorization or other exception to an open-ended unrestricted indemnification clause. The rule reminds government officials and the public that such an agreement is unenforceable and non-binding against the government and government-authorized end users unless there is a statutory provision for the indemnification.

FAC 2005-71, 78 Fed. Reg. 70476, November 25, 2013

Item I—Accelerated Payments to Small Business Subcontractors (FAR Case 2012–031) This final rule amends the FAR to add a new clause, Providing Accelerated Payments to Small Business Subcontractors, as part of the implementation of OMB Memorandum M–12–16, Providing Prompt Payment to Small Business Subcontractors (as extended by OMB Memorandum M–13–15, Extension of Policy to Provide Accelerated Payment to Small Business Subcontractors). This new clause requires the prime contractor, upon receipt of accelerated payments from the

Government, to make accelerated payments to small business subcontractors, to the maximum extent practicable, after receipt of a proper invoice and all proper documentation from small business subcontractors. This clause will be inserted into all new solicitations issued after the effective date of this rule and resultant contracts, including solicitations and contracts for the acquisition of commercial items. This rule does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions. Small businesses benefit from this clause in that they should be paid more expeditiously by their prime contractor, which should improve small businesses overall cash flow.

Item II—New Designated Country— Croatia (FAR Case 2013–019) This final rule amends the FAR to add Croatia as a new designated country under the World Trade Organization Government Procurement Agreement (WTO GPA)

FAC 2005-70, 78 Fed. Reg. 60168, September 30, 2013

Item I—Pilot Program for Enhancement of Contractor Employee Whistleblower Protections (FAR Case 2013–015) This interim rule amends the FAR to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at subpart 3.9. In accordance with FAR 1.108(d)(3), contracting officers are encouraged to include the changes in these rules in major modifications to contracts and orders awarded prior to the effective date of this interim rule. The pilot program is mandated by section 828, entitled ''Pilot Program for Enhancement of Contractor Employee Whistleblower Protections,'' of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239, enacted January 2, 2013).

Item II—Allowability of Legal Costs for Whistleblower Proceedings (FAR Case 2013–017) This interim rule amends the FAR by revising the cost principle at 31.205–47 to implement sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112– 239). There are two new whistleblower programs for contractor and subcontractor employees, at 10 U.S.C. 2409 and 41

U.S.C. 4712. The latter program is a pilot program, being addressed in FAR Case 2013–015, amending FAR subpart 3.9. The cost principle addresses the allowability of legal costs incurred by a contractor or subcontractor in connection with a whistleblower protection proceeding commenced by a contractor or subcontractor employee submitting a complaint of reprisal under the applicable whistleblower statute.

FAC 2005–69, 78 Fed. Reg. 46780, August 1, 2013, amends the FAR as specified below:

Item I—Definition of Contingency Operation (FAR Case 2013–003) This final rule revises the definition of ''contingency operation'' in FAR 2.101 to address the statutory change to the definition made by paragraph (b) of section 515 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81). Expanding the definition to include responding to a major disaster or emergency will increase the circumstances under which agencies may raise the micropurchase and simplified acquisition thresholds. This may increase opportunities for awarding contracts to small entities located at or near a major disaster area or emergency activities.

Item II—Iran Threat Reduction (FAR Case 2012–030) This final rule amended the FAR to require certifications that implement the expansion of sanctions relating to the energy sector of Iran and sanctions with respect to Iran's Revolutionary Guard Corps, as contained in titles II and III of the Iran Threat Reduction and Syria Human Rights Act of 2012. This final rule ensures that contracting officers will not award to offerors that engage in transactions with the Iran Revolutionary Guard Corps that exceed $3,000.

Item III—Documenting Contractor Performance (FAR Case 2012–009) This rule amends FAR part 42 to provide Government-wide standardized past performance evaluation factors and performance ratings, and to require all past performance information be entered into the Contractor Performance Assessment Reporting System (CPARS).

Item IV—Repeal of Sunset for Certain Protests of Task and Delivery Order Contracts (FAR Case 2013–011) This final rule revises the FAR to implement a section of the 2013 National

Defense Authorization Act (Pub. L. 112–239) for agencies covered by title 10 of the United States Code, namely DoD, NASA, and Coast Guard. This section removes the sunset date for protests against the issuance or proposed issuance of an order, valued at more than $10 million, under a task order contract or delivery-order contract for title 10 agencies only. This rule does not affect title 41 agencies.

Item V—Least Developed Countries That Are Designated Countries (FAR Case 2013–009) This final rule amends the FAR in parts 25 and 52 to revise the definitions of ''designated country'' and ''least developed country,'' adding South Sudan, removing the Maldives, and changing the name of East Timor to Timor-Leste.

FAC 2005–68 78 Fed. Reg. 38534, June 26, 2013, amends the FAR to implement the statutorily-expanded reach of the limitation on the allowability of compensation costs for certain contractor personnel. This limitation on the allowability of compensation costs is an amount set annually by the Office of Federal Procurement Policy. Prior to the enactment of section 803 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81), this limitation applied to a contractor's five most highly compensated employees in management positions at each home office and each segment of the contractor, with respect to all contracts subject to the FAR cost principles with all Federal agencies. In section 803, Congress expanded the application of the limitation so that it applies to all contractor employees, rather than just the top five executives in the case of contracts covered by Title 10 of the United States Code. Moreover, Congress in section 803(c)(2) stated that this expanded reach ''shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act'' (the date of enactment was December 31, 2011). Section 803(c)(1) also provided that this change shall be implemented in the FAR. This interim rule implements section 803 and provides that for DoD, NASA, and Coast Guard contracts, the compensation limitation applies to all contractor employees, rather than just the top five

executives. For contracts with agencies other than DoD, NASA, and the Coast Guard, the reach of the limitation was not changed by section 803 and therefore will continue to be a contractor's five most highly compensated employees in management positions at each home office and each segment of the contractor. An analysis of data in the Federal Procurement Data System (FPDS) revealed that most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principle contained in this rule. Section 803 is being implemented in the FAR through two rulemakings. In accordance with section 803, this interim rule applies to the compensation costs of all contractor employees incurred after January 1, 2012, on all DoD, NASA, and Coast Guard contracts awarded on or after December 31, 2011. Concurrently, DoD, GSA, and NASA are issuing a proposed rule (FAR Case 2012–025) to solicit comments on the application of the requirements of section 803 to DoD, NASA, and Coast Guard contracts entered into before December 31, 2011.

FAC 2005–67, 78 Fed. Reg. 37668, June 21, 2013, amends the FAR as specified below:

Item I—Contractors Performing Private Security Functions Outside the United States (FAR Case 2011–029) DoD, GSA, and NASA are issuing a final rule amending the FAR to implement Government-wide requirements contained in section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110–181), as amended by section 853 of the NDAA for FY 2009 (Pub. L. 110–417) and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111–383). See 10 U.S.C. 2302 Note. These statutes establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions outside the United States.

Item II—Contracting Officer's Representative (FAR Case 2013–004) This final rule amends the FAR to improve contract surveillance by clarifying the contracting officer's representative (COR) responsibilities in FAR 1.602–2(d). In addition, a corresponding change is also made at FAR 7.104(e). This case originated from a Department of Defense (DoD) Panel on

Contracting Integrity recommendation. The DoD Panel on Contracting Integrity, an internal DoD panel, consists of senior-level DoD officials from across DoD working to review progress made by DoD to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur, and recommend changes in law, regulations, and policy to eliminate the areas of vulnerability. In order to improve the contracting environment, this rule provides additional explanation in the FAR to ensure that CORs understand their duties and responsibilities to survey contractor performance. This final rule is not required to be published for public comment because it only involves internal Government procedures regarding the appointment of CORs and the clarification of COR responsibilities, and has neither a significant effect beyond the internal operation procedures of the agency issuing the policy, regulation, procedure or form, nor has a significant cost or administrative impact on contractors or offerors.

Item III—System for Award Management Name Change, Phase 1 Implementation (FAR Case 2012–033) This final rule amends the FAR by updating references and names to conform to the System for Award Management (SAM) designation. The SAM is a Federal Government owned and operated free Web site that consolidates the capabilities in certain legacy systems that are used by Federal officials in the procurement and awards process. This rule incorporates language that will transition the Central Contractor Registration (CCR) database, the Excluded Parties List System (EPLS), and the Online Representations and Certifications Application (ORCA) to the SAM designation. This final rule also makes a number of minor additional conforming changes, such as updates to definitions.

Item IV—Interagency Acquisitions: Compliance by Nondefense Agencies With Defense Procurement Requirements (FAR Case 2012–010) This final rule amended the FAR to implement section 801 of Pub. L. 110–181, as amended (10 U.S.C. 2304 Note). Section 801 requires compliance certifications by nondefense agencies that purchase on behalf of the Department of Defense (DoD), and clarifies which DoD laws and regulations apply. The agencies

must comply with new FAR subpart 17.7, in addition to complying with FAR subpart 17.5. To provide clarification for small business and contracting officers, existing policy for small business goal credit for assisted acquisitions was added by the interim rule to section FAR 4.603(c).

Item V—Terms of Service and Open- Ended Indemnification, and Unenforceability of Unauthorized Obligations (FAR Case 2013–005) (Interim) This interim rule amends the FAR to address concerns raised in an opinion from the U.S. Department of Justice Office of Legal Counsel that determined the Anti-Deficiency Act is violated when a Government contracting officer or other employee with the authority to bind the Government agrees, without statutory authorization or other exception, to an open-ended, unrestricted indemnification clause. This rule clarifies for the public that an End User License Agreement (EULA), Terms of Service (TOS), or similar agreement, containing an indemnification provision, is unenforceable and nonbinding against the Government and Government authorized end-users. The rule contains a new clause that applies to all solicitations and contracts and automatically applies to micropurchases, including those made with the Government-wide purchase card.

Item VI—Price Analysis Techniques (FAR Case 2012–018) This final rule amends the FAR to clarify a reference used in FAR 15.404– 1(b)(2)(i). FAR 15.404–1(b)(2) delineates the various price analysis techniques (to ensure a fair and reasonable price) with 15.404–1(b)(2)(i) being the comparison of proposed prices received from multiple offerors in response to a solicitation. The current reference in this section (FAR 15.403–1(c)(1)) was too broad; thus, this final rule changes this reference to 15.403–1(c)(1)(i), which precisely aligns the price analysis technique of comparing proposed prices in 15.404–1(b)(2)(i) with the adequate price competition standard (for exceptions from certified cost or pricing data requirements) of comparing proposed prices from multiple offerors.

Item VII—Contracting With Women-Owned Small Business Concerns (FAR Case 2013–010) (Interim) This interim rule amends FAR 19.1505 to remove the dollar limitation for set-

asides for economically disadvantaged women-owned small business (EDWOSB) concerns or women-owned small business (WOSB) concerns eligible under the Women-owned Small Business (WOSB) Program. This change implements section 1697 of the NDAA for FY 2013, Public Law 112–239, which amended section 8(m) of the Small Business Act (15 U.S.C. 637(m)). As a result, contracting officers may set aside acquisitions for competition restricted to EDWOSB concerns or WOSB concerns eligible under the WOSB Program at any dollar level above the micro-purchase threshold, provided the other requirements for a set-aside under the WOSB Program are met.

Item VIII—Deletion of Report to Congress on Foreign-Manufactured Products (FAR Case 2013–008) This final rule amends the FAR to eliminate an obsolete Congressional reporting requirement imposed by the United States Troops Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (41 U.S.C. 8302(b)(1)). This Act required these reports to Congress for Fiscal Year 2007 through Fiscal Year 2011 on acquisitions of end products manufactured outside the United States. This report to Congress is no longer required but the collection of the data in Federal Procurement Data System is still required (see FAR 52.225–18, Place of Manufacture). This final rule only affects the internal operating procedures of the Government.

Item IX—Free Trade Agreement (FTA)—Panama (FAR Case 2012–027) This final rule adopts without change an interim rule published November 20, 2012, which implemented a new Free Trade Agreement with Panama (see the United States—Panama Trade Promotion Agreement Implementation Act (Pub. L. 112–43) (19 U.S.C. 3805 note)). This Trade Promotion Agreement is a free trade agreement that provides for mutually non-discriminatory treatment of eligible products and services from Panama.

Item X—Updated Postretirement Benefit (PRB) References (FAR Case 2011–019) This final rule amends FAR 31.205– 6(o)(2)(iii)(A)(*1*) to remove references to paragraphs 110, 112, and

113 of the now superseded Financial Accounting Standard (FAS) 106, which were deleted in the Financial Accounting Standards Board's (FASB's) Accounting Standards Codification (ASC) of generally accepted accounting principles (GAAP) and replaces them with explicit criteria that are their functional equivalent. The FAR referenced GAAP to provide criteria for determining the allowability of the transition obligation, when converting from pay-as-you-go accounting for postretirement benefits (PRBs) to an accrual method of accounting for the purposes of Government contract cost accounting.

FAC 2005–66, 78 Fed. Reg. 13764, February 28, 2013, amends the FAR as specified below:

Item I—Definition of Contingency Operation (FAR Case 2013–003) (Interim) This interim rule amends the definition of ''contingency operation'' in FAR 2.101 to address the statutory change to the definition made by paragraph (b) of section 515 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–081). Expanding the definition to include responding to a major disaster or emergency will increase the circumstances under which agencies may raise the micro-purchase and simplified acquisition thresholds. This may increase opportunities for awarding contracts to small entities located at or near a major disaster area or emergency activities.

Item II—Changes to Time-and- Materials and Labor-Hour Contracts and Orders (FAR Case 2011–025) This rule adopts as final a proposed rule implementing a policy that provides additional guidance to address actions required when raising the ceiling price for a time-and-materials (T&M) or labor-hour (LH) contract or order or otherwise changing the general scope of a T&M or LH contract or order. The rule provides guidance to contracting officers to address this issue for the respective areas of the FAR addressing T&M and LH contracts or orders, such as FAR sections 8.404, 12.207, and 16.601. This rule deals with the administration of T&M and LH contracts and orders and will have no direct effect on contractors.

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Item III—Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2013–007) This final rule amends the FAR to implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 822 extends the authority of the Commercial Item Test Program at FAR subpart 13.5 to January 1, 2015. FAR subpart 13.5 authorizes as a test program, the use of simplified procedures for the acquisition of certain commercial items in amounts greater than the simplified acquisition threshold, but not exceeding $6.5 million ($12 million for acquisitions described in FAR 13.500(e)) including options, if the contracting officer can reasonably expect that offers will include only commercial items. This final rule extends the sunset date of the authority at FAR 13.500(d) from January 1, 2012, to January 1, 2015.

FAC 2005-65, 78 Fed. Reg. 6184, January 29, 2013, amends the FAR as specified below:

Item I—Prohibition on Contracting With Inverted Domestic Corporations (FAR Case 2012–013) This rule adopts as final an interim rule implementing section 738 of Division C of the Consolidated Appropriations Act, 2012 (Pub. L. 112– 74), which prohibits the award of contracts using Fiscal Year 2012 appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of such an entity. The interim rule extended an existing prohibition that applied to the use of Fiscal Year 2008 through 2010 funds. Contracting officers are prohibited from awarding contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of such entity, unless an exception applies. This rule will not have any significant economic impact on small businesses because this rule only applies to an offeror that is an inverted domestic corporation and wants to do business with the Government. Small business concerns are unlikely to have been incorporated in the United States and then reincorporated in a tax haven.

Item II—Extension of Sunset Date for Protests of Task and Delivery Orders (FAR Case 2012–007) This final rule amends the FAR to implement section 825 of the Ike Skelton

National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111– 383) and section 813 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81). These statutes extend the sunset date for protests against awards of task or delivery orders to September 30, 2016.

Item III—Free Trade Agreement— Colombia (FAR Case 2012–012) This final rule adopts, with minor change, the interim rule published in the **Federal Register** at 77 FR 27548 on May 10, 2012, to implement the United States-Colombia Trade Promotion Agreement. This Trade Promotion Agreement is a free trade agreement (FTA) that provides for mutually nondiscriminatory treatment of eligible products and services from Colombia. The Colombia FTA covers acquisition of supplies and services equal to or exceeding $77,494. The threshold for the Colombia FTA is $7,777,000 for construction. The excluded services for the Colombia FTA are the same as for the Bahrain FTA, Dominican Republic- Central American FTA, Chile FTA, NAFTA, Oman FTA, and Peru FTA.

Item IV—Unallowability of Costs Associated With Foreign Contractor Excise Tax (FAR Case 2011–011) This final rule amends the FAR to implement certain requirements of section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, which imposes a 2 percent excise tax on certain Federal procurement payments to foreign persons. First, the statute disallows the cost of the 2 percent excise tax on certain foreign procurements as part of a payment, or as part of a cost-based negotiated price. Second, the statute stipulates that no funds are to be disbursed to any foreign contractor in order to reimburse the tax imposed. This rule will have a minimal economic impact on small businesses because the 2 percent excise tax is applied only to foreign persons that receive Federal procurement payments pursuant to a contract with the Government of the United States for the provision of goods or services, if the goods are manufactured or produced in, or the services are performed in, a country that is not a party to an international procurement agreement with the United States.

FAC 2005–64, 77 Fed. Reg. 75766, December 21, 2012, Nondisplacement of Qualified

Workers Under Service Contracts. This final rule adds subpart 22.12, entitled ‘‘Nondisplacement of Qualified Workers Under Service Contracts,’’ and a related contract clause, to the FAR. The new subpart implements Executive Order 13495 and Department of Labor implementing regulations at 29 CFR part 9. The final rule applies to service contracts for performance by service employees of the same or similar work at the same location. It requires service contractors and their subcontractors under successor contracts to offer service employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified.

FAC 2005–63, 77 Fed. Reg. 73516, December 10, 2012. This interim rule amends the Federal Acquisition Regulation (FAR) to require certifications that implement the expansion of sanctions relating to the energy sector of Iran and sanctions with respect to Iran's Revolutionary Guard Corps, as contained in Titles II and III of the Iran Threat Reduction and Syria Human Rights Act of 2012.

B. OTHER FEDERAL WIDE REGULATIONS

1. New Interest Rate

For the period for January 1, 2014 to June 30, 2014 the rate is 2-1/8 percent. 79 Fed. Reg. 424. The Treasury rate for interest payments under the Contract Disputes Act or the Prompt Payment Act for the period beginning July 1, 2013 to December 31, 2013 was 1.75 percent. 78 Fed. Reg. 39063.

VA Veteran-Owned Small Business Verification Guidelines, Final rule, 78 Fed. Reg. 52085, August 22, 2013. The VA implemented a portion of the Veterans Benefits, Health Care, and Information Technology Act of 2006, which requires the Department of Veterans Affairs (VA) to verify ownership and control of veteran-owned small businesses (VOSBs), including service-

disabled veteran-owned small businesses (SDVOSBs), in order for these firms to participate in VA acquisitions set asides for SDVOSB/ VOSBs.

Specifically, this final rule requires re-verification of SDVOSB/ VOSB status only every 2 years rather than annually. The purpose of this change is to reduce the administrative burden on SDVOSB/VOSBs regarding participation in VA acquisitions set asides for these types of firms. Verified SDVOSB/VOSBs are placed on the Vendor Information Page (VIP) at www.vetbiz.gov.

The Labor Department's Office of Federal Contractor Compliance Programs (OFCCP) on September 5, 2013, issued its final rules which require federal contractors to engage in specific and measurable recruitment efforts to hire veterans and persons with disabilities. To replace the vague "good faith efforts" the rule now requires contractors to establish annual benchmarks to measure progress in hiring veterans and to conduct a qualitative analysis of the hiring data based upon veteran status and to keep that data for three years not just two.

Finally—and this is an implementation of the Viet Nam Era Veterans Readjustment and Assistant Act (VEVRAA)—contractors must now give applicants the opportunity to self-identify in both pre-offer and post-offer stages of their Veteran status.

Regarding Section 503 of the Rehabilitation Act of 1973, the new Act now requires that contractors try to hire individuals with disabilities so as to comprise at least 7 percent of the employees in each job group. Contractors must conduct a qualitative analysis of disabled applicants and those hired and to set goals in the affirmative action plans. Such data must be retained for three years not merely the existing two years. The final rule now requires contractors to allow applicants to self-identify as disabled at both the pre-offer and post-offer hiring stages.

III. PRE AWARD / PROTESTS

A. PROTESTS

1. General

Trailboss Enterprises, Inc. v. United States, COFC No. 13-296C, June 18, 2013. Post-award bid protest **by the awardee**. Air Force aircraft services contract. Plaintiff seeks injunctive relief to enjoin the Air Force from compelling plaintiff to perform under the awarded contract. The government moves to dismiss for lack of jurisdiction. Judge Firestone dismisses the suit. She finds that plaintiff lacks standing for a bid protest as once it receives an award it is no longer an interested party. She also finds that the court has no jurisdiction under the CDA as plaintiff filed suit before obtaining a CO's final decision.

ECO Tour Adventures, Inc. v. United States, COFC No. 13-532 C, December 12, 2013. Pre-award bid protest, National Park Service concession contracts. A rather unusual situation when the statute allowed a preference for incumbents which had submitted responsive proposals. The incumbent was given the opportunity to match the offerings of the highest rated offeror. Plaintiff, who had the highest rated offer, alleges arbitrary and capricious actions by the government including the findings that the proposals of the incumbents were responsive and disclosure of confidential information to the incumbents. Plaintiff seeks declaratory and injunctive relief and attorney and other costs.

Judge Bush first notes that although the Federal Circuit has adopted the use of procurement in 28 USC 1491(b) as the definition of procurement in Title 41, it has not specifically addressed concession contracts. After examining the case law including COFC, GAO and IBCA decisions she concludes that concession contracts here are not procurements and therefore the court does not have jurisdiction under 28 USC 1491(b). Instead she finds jurisdiction under 28 USC 1491(a). She finds that the incumbent's proposals were not responsive and grants summary

judgment for plaintiff. However as the court does not have declaratory or injunctive relief under 1491(a) plaintiff is only entitled to bid and proposal costs. The court encouraged the parties to confer on the bid and proposal costs issue and also to address the issue of attorney fees and costs in advance of any necessity to litigate that issue.

Neie, Inc. v. United States, COFC No. 13-164 C, December 06, 2013. Pre-award bid protest, EPA SDVOSB set-aside solicitation for to provide emergency and rapid response services for cleanup services for hazardous substances/wastes/contaminants/materials and petroleum products/oil for the EPA Region 2 in the states of New York and New Jersey. Plaintiff a SDVOSB service small business alleges that the government acted arbitrarily and capriciously and in bad faith when the agency determined the bidder to be non-responsible, proposed the bidder for debarment, and then cancelled the solicitation. The case hinges on the fact that veteran owner, James Coleson, of plaintiff died after plaintiff's proposal was submitted. Plaintiff, to no avail, filed number of agency and GAO protests attempting to determine the status of the award. Another firm protested plaintiff's status as a SDVOSB based on the death of James Colseson and other alleged irregularities and misrepresentations on the CCR and other databases. Based on these allegations the CO found plaintiff to be not responsible and recommended that SBA not issues a COC. Additionally the agency proposed a debarment of plaintiff.

Although recognizing the discretion afforded a CO in responsibility determinations, Judge Braden notes

> "Although the court is required to uphold an agency decision even if it is 'less than ideal clarity,' the court will not uphold 'implausible' decisions nor 'supply a reasoned basis for the agency's action that the agency itself has not given.' *State Farm*, 463 U.S. at 43 (*quoting Secs. & Exch. Comm'n v. Chenery Corp.,* 332 U.S. 194, 196 (1947)). In the Determination of Non-Responsibility, the CO characterized NEIE's handling of James Coleson's death as a vast conspiracy to mislead the EPA: '[i]n order to secure the possibility of a lucrative Government contract set-aside for a service-disabled veteran-owned small business, NEIE, Inc. knowingly and intentionally misled the Government by failing to advise EPA . . . that James Coleson had died.' AR Tab 154 at 2356. This reasoning, however, was deeply flawed.

> Nothing in the Administrative Record nor anything cited to by the CO gives credence to the serious charge that NEIE 'knowingly and intentionally misled' anyone. *Cf. Turner Constr. Co. v. United States*, 94 Fed. Cl. 561, 573, 581 (2010) (rejecting a GAO decision as arbitrary and capricious where the only 'hard fact' supporting an appearance of impropriety was 'mere 'suspicion or innuendo.'' (quoting CACI, 719 F.2d at 1581-82))); see also Overstreet Elec., 47 Fed. Cl. at 742 ('[T]he arbitrary and capricious standard . . . . does not require this court to accept . . . bald assertions on a critical point that are not otherwise tied to the administrative record and that are at least in tension with, if not contradicted by, various aspects of that record.'). NEIE had no reason to mislead the EPA about the death of James Coleson because, as confirmed by the SBA in resolving the Guardian protest, the FAR only requires that a contractor meet the eligibility requirements for an SDVOSB at the time of offer. AR Tab 223 at 3115 (finding that NEIE knew that James Coleson's death would not affect NEIE's eligibility); AR Tab 138 at 2126 (resolving the Guardian protest); AR Tab 149A at 2192.4 (NEIE's 2/6/12 response to the Guardian protest) ('The allegations raised by . . . Guardian . . . regarding NEIE's ownership ignore well-settled law establishing the date of submission of proposals as the proper date for determining an entity's eligibility as an SDVO SBC.'); AR Tab 149 (forwarding NEIE's 2/6/12 response to the CO on 5/11/12). NEIE unquestionably was controlled by James Coleson, a service-disabled veteran, at the time of its offer. The CO pointed to no evidence whatsoever suggesting that NEIE made any offers for SDVOSB set asides after James Coleson's death and, in fact, the Administrative Record contains evidence to the contrary suggesting that NEIE took proactive steps to ensure compliance with relevant requirements by declining to bid on other SDVOSB set-asides. AR Tab 149A at 2192.11 ('NEIE has not pursued any Government contracts with this CCR since the date of James Coleson's death.'); AR Tab 149A at 2192.15 (NEIE Corporate Meeting Notes) (same); AR Tab 149A at 2192.17 (turning down a solicitation from the United States Air Force in March 2012, because 'NEIE, Inc. cannot respond as an SDVO at this time.'); AR Tab 149A at 2192.19 (turning down an inquiry from the United States Navy in February 2012, because 'right now we are only Small Business' and not veteran-owned)."

Judge Braden denies plaintiff's request for an injunction because the government has agreed to include plaintiff in any new solicitation. She does allow plaintiff to submit its request for bid and proposal costs.

Amazon Web Services, Inc. v. United States, and IBM U.S. Federal, COFC No. 13-506C, November 08, 2013. Post-award contract by the CIA for cloud computing services. Plaintiff objects to the government's decision to request another round of proposal revisions as corrective action recommended by the GAO. Judge Wheeler holds for plaintiff finding that the GAO decision was irrational primarily because it never addressed whether or not IBM was prejudiced, a

necessary element of standing. Judge Wheeler concludes

> "There is no such thing as a perfect procurement. Thus, a bid protestor must show prejudice, not mere error, for '[n]ot every error compels the rejection of an award.' *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996). Rather, it is 'the significance of errors in the procurement process [that determines] whether the overturning of an award is appropriate,' and it is the protestor who 'bears the burden of proving error in the procurement process sufficient to justify relief.' Id. IBM never met that burden, and the GAO neglected to address it. Even if IBM's arguments regarding the price evaluation and modified solicitation requirement were persuasive, it remains implausible that there would be any effect on the outcome of the procurement. AWS's offer was superior, and the outcome of the competition was not even close.
>
> Indeed, if there has been any prejudice in this process, it has been to AWS, for improper corrective action in the form of reopening competition is not harmless. The unfairness inherent in such an action is that the winner must resubmit a new proposal with the information from its original offer already disclosed. In effect, AWS would have to bid against its own winning proposal. This Court will not allow such an unjust result.

For the reasons set forth above, Plaintiff's motion for judgment on the administrative record is GRANTED. Defendant's motion for judgment on the administrative record is DENIED, and Defendant-Intervenor's motion for judgment on the administrative record is DENIED.

2. Discussions

In *Mission Essential Personnel, LLC*, B-407474; B-407493 January 7, 2013, the company protested that the agency failed to engage in adequate discussions and misevaluated proposals under a task order competition. The GAO sustained the protest where the record shows that (1) agency identified two concerns with protester's proposal which led to its "No Go" rating but these concerns were not brought to the protester's attention during discussions; and (2) that agency evaluated the current contract performance evaluation factor in a manner that was inconsistent with the terms of the underlying contracts' stated evaluation scheme.

3. Evaluation

BCPeabody Construction Services, Inc., v. United States and Edens Construction Co., Inc.,

COFC No. 13-378C, September 25, 2013 involved a post-award bid protest of a Corps of Engineers competitive negotiated FAR Part 15 procurement with selection to be made to the lowest price technical acceptable firm. Plaintiff's proposal was $1,000,000 less than that of the intervenor. Plaintiff and intervenor both proposed to use the same firm, Bauer, for cutoff wall construction. Plaintiff mistakenly submitted two copies of the same document to show Bauer's experience and capability for two sub elements. The CO determined plaintiff's proposal unacceptable because of the missing document and did not point out plaintiff's mistake or request clarification. The CO evaluated intervenor's proposal as acceptable as the CO knew that Bauer had the necessary experience under the two sub elements.

Plaintiff "contends that the contracting officer erred by failing to seek clarification of a clerical mistake in its proposal and by unequally evaluating Bauer's demonstrated experience as a subcontractor for BCPeabody compared to Edens. BCPeabody avers that these actions were unreasonable and fell outside the reconcilable bounds of the contracting officer's discretion."

Judge Lettow discusses the differences between FAR Part 14 and FAR Part 15 regarding the CO's responsibility in advising and allowing an offeror to correct errors. He notes the "provisions in Part 15 does not mean that those provisions are not susceptible to judicial enforcement." He concludes "In short, BCPeabody has established that the contracting officer in this case abused her discretion in two ways. First, she impermissibly found Bauer, the projected subcontractor for both BCPeabody and Edens, to have acceptable experience insofar as Edens's proposal was concerned but not for BCPeabody's competing proposal. Second, she improperly refused to seek clarification from BCPeabody regarding the copying mistake in BCPeabody's offer that related to Bauer's experience in cutoff wall construction in which a sub-surface obstruction was encountered." Judge Lettow enjoins the performance by intervenor and directs the government to return plaintiff to the competitive range and reevaluate the proposals.

In *AXIS Management Group LLC*, B-408575, November 13, 2013, the protester protested

that agency's price evaluation was unreasonable and won where the solicitation gave offerors the discretion to propose a technical approach to satisfy the agency's requirements, and the agency improperly normalized labor hours and labor mix in its price evaluation, which had the effect of ignoring the protester's unique technical approach to satisfying the agency's requirements. Protest that agency failed to raise significant weaknesses in protested proposal during discussions is denied where the record shows the concerns at issue were not significant weaknesses and need not have been raised.

Coburn Contractors, LLC B-408279.2 September 30, 2013. Protest that agency used unstated evaluation criteria in assessing a weakness in protester's proposal for failure to submit a list of subcontractors is sustained where the solicitation did not require offerors to identify proposed subcontractors. Protest of awardee's technical evaluation is denied where, consistent with the solicitation, awardee met an office location requirement prior to contract award.

Caddell Construction Co., Inc. v. United States and Desbuild Incorporated-Rec International Joint Venture, COFC No. 13-20C, May 22, 2013. Post-award bid protest for a Department of State contract to construct a new annex building addition at the US Embassy in Moscow. The procurement consisted of two phases. Phase I was to determine qualified offerors and Phase II was a best-value phase where technical/management was rated significantly more than price. Phase I also indicated that Section 11 of the Foreign Service Buildings Act of 1926, codified at 22 U.S.C. § 302 (Percy Amendment), applied to the project and provided for a ten per cent price reduction factor for US firms under certain conditions. The government first found that intervenor (awardee) was not qualified under Phase I because it failed under Technical Project Experience and Past Performance factor. It also found that intervenor did not initially qualify for the price preference of the Percy Amendment. After intervenor questioned these finding the government reversed both determinations without an explanation for its reversal. At the conclusion of Phase II intervenor was awarded the contract as offering the best value to the

government. Although its price with Percy factor was somewhat lower than plaintiff's the record was not clear if its technical evaluation was equal to or slightly lower than plaintiff's. The Source Section Official Authority (SSA) checked and initialed an "Approved" block on the recommendation for award to intervenor prepared by the contract specialist. The recommendation for award indicated that it was best-value trade-off recommendation. The SSA provided no discussion or other record of his decision. Plaintiff seeks permanent injunctive relief and bid and proposal preparation costs.

In a 91 page opinion Judge Horn finds for plaintiff on the administrative record and issues a permanent injunction enjoining intervenor's performance of the contract. While discussing at great length the APA standards and the discretion accorded to the CO and to the agency's interpretation of the Percy Amendment she concludes that the lack of anything in record supporting the government's reversals and the total absence of the rationale of SSA's selection fails to show that the government's decisions were rational. She also notes that plaintiff's "ability to receive a fair evaluation by the agency was compromised by the careless and inconsistent evaluation process."

LINC Government Services, LLC, Plaintiff, and J&J Maintenance, Inc., v. United States, and Global Engineering & Construction, LLC, URS Group, Inc., ITSI Gilbane Company, United Excel Corporation v. United States, COFC 12-522, December, 28, 2012 Post-award bid protest of Army multiple award design-build contracts for medical facilities in the United States and overseas. Judge Braden starts her opinion with this rather telling comment "The United States Court of Appeals for the Federal Circuit has emphasized that 'best value' solicitations, such as the one at issue here, afford the contracting officer a great deal of discretion, 'so that the relative merit of competing proposals is primarily a matter of administrative discretion[.]' *Galen Med. Assoc. Inc. v. United States,* 369 F.3d 1324, 1330 (Fed. Cir. 2004). That discretion, however, does not allow the procuring agency the liberty to deviate from the Solicitation's requirements, ignore applicable Federal Acquisitions Regulations ('FAR'), or ascertain 'best value' in a manner that is arbitrary.

Nor does that discretion allow the court to overlook the fact that the Administrative Record does not contain sufficient information on which an agency could even make a rational procurement decision. See Vernon J. Edwards, *Complexity and Incompetence: The Revelations of a Failed Acquisition*, Nash & Cibinic Report, Dec. 2012, at 186 (describing incompetence and mismanagement in the procurement process). But, that is what happened in this case."

After an extensive review of plaintiff's allegations and the administrative record she finds that plaintiff prevails on all of the injunctive issues:"(1) immediate and irreparable injury to the movant; (2) the movant's likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on all the parties." *U.S. Ass'n of Imp. of Textiles & Apparel v. United States,* 413 F.3d 1344, 1346 (Fed. Cir. 2005). Judge Braden concludes "This procurement is remanded to Army 'for additional investigation or explanation.' *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ('If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'). The United States Army and its officers, agents, servants, employees, and representatives are preliminarily enjoined from proceeding with or awarding any MATOC Contracts for the design-build of medical facilities in the United States and overseas pursuant to Solicitation No. W912DY-10-R-0005 or any related procurement, solicitation, task order, or activity. See RCFC 65(a)."

Grunley Construction Co., Inc. B-407900 April 3, 2013. Agency's evaluation of the protester's proposal cannot be found reasonable where the record is inconsistent regarding the evaluation, and the agency has not explained the inconsistencies or adequately responded to the protester's assertions. So the protester won even though the GAO also found that the agency conducted meaningful discussions with the protester where the agency led the protester into the areas of its proposal requiring amplification or revision by informing the protester that, among

other things, the protester's proposed prices appeared to be materially unbalanced and unrealistically low.

4. Debarments

MG Altus Apache Co. v. U.S., 2013 WL 3120120 (Fed. Cl. May 30, 2013); *NCL Logistics Co. v. U. S.*, 109 Fed. Cl. 596 (2012). Court of Federal Claims endorsed government's use of a secret "blacklist" to debar contractors where justified by "national security" concerns. Field contracting personnel—not the agency suspension debarment official—can debar a contractor and deem the "blacklist" classified to avoid having to disclose the debarment to the contractor. The blacklisted contractor, unaware of it ineligibility, continues to submit proposals, wasting time and resources, never to secure an award. *See* 55 GC ¶ 251 (August 14, 2013).

IV. POST AWARD

A. DESIGN BUILD

Metcalf Construction Co., Inc. v. United States, 102 Fed. Cl. 334, December 09, 2011, involved a Navy design-build housing contract and illustrates the difficulty of getting used to federal contracting. Judge Braden introduces the case—"Metcalf Construction Co., Inc. ('Metcalf') was a successful contractor in the private sector when it commenced performance on its first federal housing contract on December 31, 2002. Metcalf, however, did not appreciate that, although this was a 'design-build housing project,' the United States Department of the Navy ('the Navy') would require strict adherence to contractual requirements, instead of deferring to Metcalf's private sector expertise." The Court focused on the following: "Metcalf's failure to appreciate the difference between the contractor's ability to make changes in the private design-build context and the contractual constraints necessarily required in government contract work lies at the heart of this dispute. The Navy's insistence that Metcalf adhere to contractual requirements, that Metcalf

deemed to interfere with the superior judgment of an experienced design-build contractor, was within the Navy's contractual rights." Judge Braden denies all of plaintiff's liability claims, regarding the conduct of the CO that "Nevertheless, inexperience and even incompetence do not amount to a breach of good faith and fair dealing on the part of government employees," but does grant plaintiff a "306-day extension caused by the Navy's violation of FAR 52.236-2, regarding the expansive soil condition, and an additional 73 days caused by the Navy's decision to change the Notice To Proceed." She also decides that the request to amend the complaint with the cardinal change count should be denied as matter of law after an extensive discussion of whether "an issue, not raised by the pleadings, was tried by the parties' express or implied consent." I should point out that Judge Braden's decision was reversed by the Court of Appeals for the Federal Circuit in *Metcalf Construction Company v. U.S.,* 2014 WL 519596, 2014 U.S. App. LEXUS 2515 (Fed. Cir. February 11, 2014). In that case the court ruled that the trial judge had read the government's duty of good faith and fair dealing too narrowly. While not focusing on the construction law aspects of it, the court decision returns the rules on assumption of risk and differing site conditions to what they were before, and amplifies and explains the duty of good faith and fair dealing.

B. GOVERNMENT OBLIGATIONS

Sigma Construction, Inc., a/k/a Sigma Services, Inc. v. United States, COFC No. 12-865, September 30, 2013. GSA 8(a) sole source procurement for a roofing system. The government terminated the contract for convenience and requested plaintiff to submit its request for a REA with a termination settlement proposal. The CO and plaintiff agreed during a telephone conference on a settlement of $485,000. The CO informed plaintiff that the agreement would be formalized by a final supplemental modification to the contract. The CO subsequently informed plaintiff that the settlement required review by a GSA regional office and then that the agreement needed a third

party audit. Plaintiff informed the CO that it consider the telephone agreement final and refused to negotiate further. Plaintiff argues that the agreement reached during the telephone conference was a valid oral contract which the government breached and that the government also breached the duty of good faith and fair dealing.

The government moves to dismiss arguing that there was no valid oral contract as FAR 49.001, FAR 49.109-1 and FAR 43.103(a) require that a settlement agreement be in writing and as there was no valid contract there was no duty of good faith and fair dealing.

Judge Braden grants the government's motion to dismiss. She discusses the elements of an oral contract but concludes "Therefore, the court has determined, as it must, that because the alleged oral settlement did not comply with FAR provisions 49.001 and 49.109-1 requiring a written modification for a settlement of a termination for convenience, and because the CO did not have authority to enter into an oral settlement, the December 12, 2012 Complaint fails to allege facts sufficient to establish the existence of a contractual obligation binding on the Government."

Regarding the breach of fair dealing she notes In addition, while it is true that the '[c]ovenant [of good faith and fair dealing] attaches to the underlying construction contract' (Pl.'s Resp. 10 (citing Compl. ¶s 50-53)), the duty 'cannot expand a party's contractual duties beyond those in the express contract.' Precision Pine, 596 F.3d at 830-31. Sigma has failed to identify any provision or term in the Contract requiring the GSA to pay $485,000, to waive a written contract modification, or settle the termination of the contract under the specific terms asserted in the December 12, 2012 Complaint. As discussed above, the FAR governs how the CO must proceed with the negotiation and settlement of a termination for convenience. Specifically, FAR 49.107(a) provides that the terminating CO must 'refer each prime contractor settlement proposal of $100,000 or more to the appropriate audit agency for review and recommendations' and 'may submit settlement proposals of less than $100,000 to the audit agency.' 48 C.F.R. § 49.107(a) (emphasis added). After the GSA's internal review deemed Sigma's settlement proposals

unacceptable, the CO's decision to submit this matter to a GSA auditor, even if inconsistent with prior statements regarding the necessity of review and even if the audit report would be 'advisory only' (FAR 49.107(d)), was well within the CO's discretion. This action, like the CO's rationale for reopening negotiations and the GSA's requirement of a written contract modification to effectuate a valid settlement, in compliance with the FAR, does not amount to 'specifically targeted' actions by GSA 'designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract.' Precision Pine, 596 F.3d at 829-30. Therefore, the court has determined that the December 1, 2012 Complaint failed to plausibly state a claim for breach of the implied duty of good faith and fair dealing."

Eden Isle Marina, Inc. v. United States, COFC No. 07-127 C, October 29, 2013. Judge Sweeney introduces the 163 page case as follows "Plaintiff Eden Isle Marina, Inc. operates a commercial marina located on a lake owned by the United States Corps of Engineers ('Corps'). It contends that the Corps breached the commercial concession leases governing its operation of the marina by thwarting its repeated attempts to develop its leasehold as permitted by the express terms of the leases. It further contends that the Corps deprived it of its property without just compensation in violation of the Fifth Amendment of the United States Constitution. After hearing plaintiff's case-in-chief at trial, it is crystal clear that the Corps-from its civilian leadership at headquarters through its personnel in the local office-breached its contracts and grievously wronged plaintiff. It is equally clear that one of plaintiff's elected representatives actively worked against plaintiff to prevent it from developing its leasehold. Plaintiff stood no chance to enjoy the benefit of its contracts with the Corps in the face of the political forces aligned against it.

However, despite plaintiff's presentation of an extensive record documenting the deleterious treatment it suffered at the hands of the government, it has failed to establish that it is entitled to relief from this court. Most of plaintif's claims are barred by the statute of limitations, and plaintiff has not established that it can recover on the merits of its remaining claims. Thus, the court must

grant defendant's motion for judgment on partial findings under Rule 52(c) of the Rules of the United States Court of Federal Claims ('RCFC'), and dismiss plaintiff's suit. Given the unavailability of judicial relief and the Corps' reprehensible treatment of plaintiff, the court strongly urges plaintiff to pursue redress from the United States Congress."

C. ANTI-KICKBACK ACT

U.S. ex rel. Vavra, et al. v. Kellogg Brown & Root, Inc., 2013 WL 3779225 (5th Cir. July 19, 2013). Fifth Circuit ruled that a contractor may be held vicariously liable for double damages under the Anti-Kickback Act (AKA) when the kickback is taken by an employee, not the contractor. So the employing contractor may be also held liable when its employees, without its knowledge, violate the AKA.

D. NEED TO TERMINATE FOR CONVENIENCE

TrustComm, Inc. B-408456; B-408456.2 September 20, 2013. Agency reasonably determined not to terminate contract of awardee in an acquisition set aside for small business concerns notwithstanding Small Business Administration (SBA) determination (almost 9 months after size status protest) that the awardee is other than small where there were countervailing circumstances that weighed against termination, including that delivery of required equipment could not be obtained from the offeror next in line for award without repeating extensive first article testing, and the resulting delay to an already delayed program would result in significant costs and adversely affect mission effectiveness of Coast Guard cutters.

E. BAD ESTIMATES

The Ravens Group, Inc. v. United States, COFC No. 07-754C, July 26, 2013, involved an army firm fixed-price and IDIQ contract for housing maintenance services. Plaintiff alleges breach by the Army primarily for not providing accurate historical data and faulty estimates of the number of service calls expected. The government orally told plaintiff before award the 50 service calls per month could be expected when it is undisputed that the actual figure was 90 or more calls per

month. Plaintiff argues that this was a breach of the implied duty of good faith and fair dealing. Judge Firestone reviews the faulty estimate cases noting "While the risk of variance generally rests with the contractor, the government may nevertheless be liable for breach where the contractor can show by a preponderance of evidence that the government (1) failed to prepare an estimate in good faith, (2) prepared an estimate negligently, or (3) failed to use reasonable care. *Rumsfeld v. Applied Cos.*, 325 F.3d 1328, 1335 (Fed. Cir. 2003); *Clearwater Forest Indus. v. United States*, 650 F.2d 233, 239 (Ct. Cl. 1981)" She denies the government's motion for summary judgment on this issue finding "that the plaintiff has presented evidence to show that it had no reason to know that the 50 call number was wholly fabricated." and "there is disputed evidence regarding the availability of potentially relevant historical records from other installations."

Judge Firestone finds for the government that plaintiff cannot use a jury verdict to calculate its damages. Plaintiff had priced its fixed price service call work at $15,000 per month based on 50 calls per month and argues that damages are fairly estimated at $300 per service call for those over 50 per month. The opinion notes that "The plaintiff, therefore, must establish some means of demonstrating that the number of excess calls resulted in labor hours requiring compensation beyond the $15,000 provided for under the contract." Judge Firestone notes "Also before the court are TRG's financial statements and general ledgers for the entire period of contract performance. *Id*. 51-701, 718-1711, 1715-2704. Given these records and the contract's provisions cited above, the court finds that the plaintiff fails to demonstrate that there is not a more reliable method for establishing damages. *See Dawco*, 930 F.2d at 880 (holding that 'reasonable computation' of damages from 'actual figures' is favored over the jury verdict method).

F. CO'S MISTAKE DOES NOT CHANGE THE LAW

In *Hart Ventures, Inc. d/b/a A-1 Fire Services, Appellant v. Department Of Agriculture,* CBCA No. 3081, June 21, 2013, appellant appealed the termination of a BPA for equipment in fighting wildfires. The CO's termination letter stated that it was a final decision and advised

appellant of its appeal rights. The government moves to dismiss for lack of jurisdiction arguing that the BPA is not a contract or subject to the CDA. Appellant argues

> "that the agreement is a contract, as it incorporates Federal Acquisition Regulation contract clauses. Appellant also notes that the contracting officer issued a final decision advising the contractor of its right to appeal the decision. Appellant concludes that because a termination for cause is considered to be a government claim against a contractor, the agreement must be a contract. If it is not, then the Board should reform the agreement and make it a contract. Alternatively, appellant argues that respondent should be estopped from denying that the agreement is a contract as respondent treated the agreement as such."

The CBCA grants the government's motion to dismiss. The opinion by Judge Goodman notes "the agreements are not contracts because neither party is obligated to perform. The Government is not required to place any orders, nor is the contractor required to furnish resources in response to any order placed. As the agreements are not contracts, the boards and courts conclude that contracting officer decisions terminating the agreements are not appealable under the Contract Disputes Act, even though they might be phrased as contracting officer final decisions. *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058 (Fed. Cir. 2002); *Crewzers Fire Crew Transport, Inc. v. United States,* No. 12-064C (Fed. Cl. May 31, 2013); *Crewzers Fire Crew Transport, Inc. v. United States*, 98 Fed. Cl. 71 (2011); *Dr. Lewis J. Goldfine v. Social Security Administration*, CBCA 2549, 12-1 BCA ¶ 34,926; *Tenderfoot Equipment Services v. Department of Agriculture*, CBCA 1865, 10-2 BCA ¶ 34,527; *Columbia Coach Service, Inc. v. Department of Agriculture*, CBCA 587, 07-2 BCA ¶ 33,584; *Petersen Equipment*, AGBCA 94-163-1, et al., 95-2 BCA ¶ 27,676; *Ann Riley & Associates, Ltd.*, DOT BCA 2418, 93-3 BCA ¶ 25,963."

G. AGENCY-DOJ DISAGREEMENT

In *Environmental Safety Consultants, Inc*., ASBCA No. 51722, May 16, 2013, the Board had earlier sustained the appeal of a termination for default. The government did not move for reconsideration, but did appeal to the Federal Circuit. The parties agreed to dismiss the appeal to

the Federal Circuit. The Navy was dissatisfied with DOJ's agreement to dismiss the appeal and now moves for a Motion for Relief from Judgment. The Navy argues that the Board should

> "[C]onsider the conduct of the ESCI's president in violating the Prompt Payment Act (PPA), submitting false certifications and false claims to the Government, and making repeated slanderous and offensive accusations, and threats directed at the Board, Government counsel, and other Government officials and trial witnesses, as exceptional circumstances which warrant the exercise of the Board's discretion to grant this motion." and " The motion goes on to argue that the Board's 28 September 2011 decision should be vacated because (i) the Board did not fairly evaluate the alternative grounds asserted for termination, (ii) the Board did not correctly analyze the repudiation issue, (iii) the Board's analysis was flawed under the DeVito waiver doctrine, and (iv) the government was unfairly prejudiced because the author of the decision was not present at the hearing, could not determine the credibility of the witnesses and otherwise made numerous errors of fact and law"

The Board denies the motion finding no extraordinary or exceptional circumstances noting that the Navy could have raised all of the issues in a timely motion for reconsideration or at the appeal to the Federal Circuit.

H. CONSIDERATION NEEDED FOR MODIFICATION

Strand Hunt Construction, Inc., ASBCA No. 55905, April 11, 2013. Corps of Engineers construction contract at Eielson Air Force Base, Alaska. Appellant claims that the government delayed contract completion by 105 days and is responsible for delay costs of $491,722. It also claims that the government erroneously imposed liquidated damages since any delay was either concurrent or government caused. The Board sustains the appeal insofar that the government shall release any remaining liquidated damages and that appellant is entitled 68 days of delay pursuant to the Suspension of Work clause. The appeal is otherwise denied.

Two judges dissent including Judge Paul who includes his own statement of facts in an 130-page dissenting opinion.

I. NO CONTRACT, THEN NO CLAIM

In *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, April 05, 2013, appellant appealed the

termination for default issued because appellant allegedly furnished false documents in order to obtain the Air Force contract to build a facility in Spain. The complaint also contained two sections asserting monetary claims. The government moved to dismiss the monetary claims for lack of jurisdiction as the claims were never presented to the CO. The government also moved to dismiss the appeal arguing that the contract is *void ab initio* as it was obtained by fraudulent inducement. The Board dismissed the monetary claims noting that the CDA requires that a claim be submitted to the CO and appellant has not shown that this was done.

Judge Wilson discussed the cases addressing the *void ab initio* issue and notes that "in order to render a contract voidable, three requirements must be met in addition to the requirement that there must have been a misrepresentation: (1) the misrepresentation must have been either fraudulent or material; (2) the misrepresentation must have induced the recipient to make the contract; and (3) the recipient must have been justified in relying on the misrepresentation." The Board granted the government's concluding "Here, based on the record, there is enough evidence to conclude that appellant materially misrepresented its relationship with Heliopol [a proposed subcontractor] to the government. Additionally, the government has demonstrated that it relied on appellant's misrepresentation in awarding the contract (finding 9), and that the government's reliance on said misrepresentation was reasonable. Based on the fact that appellant did not possess the requisite certifications on its own (finding 5), we further conclude that appellant would have been deemed technically unacceptable had it not misrepresented itself to the government. Accordingly, the contract is *void ab initio*."

J. ASBCA CANNOT REVIEW DEBARMENTS

In the *Appeal of Henry Stranahan*, ASBCA No. 58392, May 08, 2013, appellant appealed a debarment decision arguing that the Suspension and Debarment Official (SDO) was a contracting officer and the dispute arose under contract with appellant. The government moved to dismiss for lack of jurisdiction under the CDA. The board granted the government's motion finding that the

unchallenged declaration of the SDO that he was never a CO precludes CDA jurisdiction as the CDA requires a decision by the CO. Judge Wilson also noted "Regardless of the conclusion that the SDO was not a CO, the Board does not have jurisdiction to review debarment decisions. See *Inter-Continental Equipment, Inc.*, ASBCA No. 38444, 90-1 BCA122,501 at 112,956 (Board lacks authority to order or review actions which do not affect a contract that has already come into existence between the Government and a contractor)."

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