

FEDERAL CONTRACTS: THE YEAR IN REVIEW

BY

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I. NEW STATUTES

A. THE SMALL BUSINESS JOBS ACT OF 2010

The U.S. Court of Federal Claims in *Mission Critical Solutions v. United States* held that federal contracting officers must give priority to companies in the Small Business Administration (SBA) Historically Under Utilized Business Zone (HUBZone) program before offering contracts to SBA 8(a) and other firms qualified for set aside programs under the SBA regulations.

The priority afforded HUBZone firms set forth in *Mission Critical Solutions* ended when President Obama signed the Small Business Jobs Act of 2010. Among other things, the Act relegated the HUBZone program to a position equal with other small business programs, such as the 8(a), service disabled veteran-owned, and pending women-owned small business programs. As such, federal contracting officers administering set-aside procurements need not consider whether HUBZone firms can satisfy agency needs prior to considering firms qualifying under other SBA programs.

The Act also:

- Authorizes the SBA to establish mentor-protégé programs to assist small businesses owned and controlled by service-disabled veterans, women, and those operating in

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

HUBZones. These programs would be modeled after the 8(a) mentor-protégé program.

- Requires OMB's Office of Federal Procurement Policy to establish a government-wide policy aimed at the reduction of contract bundling – a process in which several small contracts are consolidated and awarded to one firm, often beyond the capability of small businesses. Prior to bundling a contract, the agency's senior procurement executive must render a determination that consolidation is necessary and justified. The rationale for bundling then would be publicly disclosed.
- Instructs OFPP to develop guidance that would allow agencies to set aside parts of a multiple award contract for small business concerns. The policy would apply to indefinite delivery-indefinite quantity contracts and task and delivery-order awards.
- Establishes the Small Business Teams Pilot Program under which the SBA Administrator may make grants to eligible organizations to provide assistance and guidance to teams of small business concerns seeking to compete for larger procurement contracts.
- Mandates small businesses recertify their size status annually. The Act also establishes a government-wide policy for prosecuting companies that fraudulently disclose themselves to be a small business.
- Requires prime contractors to notify the contracting officer if certain subcontractors are paid a reduced price or payment is made more than 90 days past due. The unjustified failure by a prime contractor to make a full and timely payment to a subcontractor will be considered in evaluating the performance of the prime.

Although described by SBA representatives as a “clarification” to existing law, the re-establishment of contracting parity among the SBAs programs is significant; in fact, some

HUBZone firms are concerned that, absent priority over other SBA programs, the HUBZone program will not long survive.

We can expect to see changes to the FAR and related agency regulations implementing these various directives in the near future.

B. THE FRANKEN AMENDMENT

The Department of Defense Appropriations Act for fiscal year 2010 (H.R. 3326) contains a provision (section 8116) (The Franken Amendment) which prohibits the use of funds appropriated by the Act for any federal contract over \$1 million unless the contractor agrees, within 60 days of enactment, not to: (1) enter into any agreement with its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through binding arbitration the individual's claims under Title VII of the Civil Rights Act of 1964 or any tort claim related to or arising out of sexual assault or harassment; or (2) take any action to enforce any provision of an existing arbitration agreement that mandates that the employee or independent contractor resolve such claims through arbitration.

The language also forbids the expenditure of funds for federal contracts awarded more than 180 days from the date of enactment of the Act, unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, covered arbitration agreements and claims with respect to any employee or independent contractor performing work on covered subcontracts. Section 8116 includes a provision authorizing the Secretary or Deputy Secretary of Defense to waive the arbitration restrictions upon a personal determination that the waiver is necessary to avoid harm to the national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm.

Although section 8116 is limited to government contracts funded by the Defense Appropriations Act for fiscal year 2010, clearly this provision portends more expansive provisions to come next year and beyond. Section 8116 requires contractors to agree not to enter into agreements or seek to enforce specified claims through arbitration “with any of its employees or independent contractors...,” not just those working on defense contracts. In other words, compliance with section 8116 will affect all employees and independent contractors company-wide, even if only a small number of employees are actually working on the government contract(s) at issue.

II. NEW REGULATIONS

A. FEDERAL ACQUISITION CIRCULARS (FACs)

FAC 2005-48, 75 Fed. Reg. 82565, December 30, 2010

Item I--Repeal of the Small Business Competitiveness Demonstration Program (FAR Case 2011-005)

This final rule amends the FAR to remove FAR subpart 19.10, Small Business Competitiveness Demonstration Program. This change is necessary to address the requirements of section 1335 of the Small Business Jobs Act of 2010 (Pub. L. 111-240) which repealed the Small Business Competitiveness Demonstration Program.

This final rule also removes the following clauses: FAR 52.219-19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program; FAR 52.219-20, Notice of Emerging Small Business Set-Aside; and FAR 52.219-21, Small Business Size Representation for Targeted Industry Categories under the Small Business Competitiveness Demonstration Program.

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Item II--Personal Identity Verification of Contractor Personnel (FAR Case 2009-027)

This final rule amends the FAR to provide additional regulatory coverage in subpart 4.13 and in FAR clause 52.204-9 to reinforce the requirement of collecting from contractors all forms of Government-provided identification once they are no longer needed to support a contract. The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

Item III-- Terminating Contracts (FAR Case 2009-031)

This final rule amends the FAR to clarify procedures regarding the applicability of FAR part 49, Termination of Contracts, to commercial item contracts. Minor changes are made to the proposed rule published in the Federal Register at 75 FR 28228 on May 20, 2010.

The rule specifically impacts contracting officers and contractors by clarifying that FAR part 49 does not apply to the acquisition of commercial items when using procedures at FAR part 12.

Item IV-- Payrolls and Basic Records (FAR Case 2009-018)

This rule adopts as final, with a minor change, the interim rule published in the Federal Register at 75 FR 34286 on June 16, 2010. The interim rule amended the FAR at 52.222-8, Payrolls and Basic Records to delete the requirement for submission of full social security numbers and home addresses of individual workers on weekly payroll transmittals by prime contractors. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes the Department of Labor's finding that complete social security numbers and home addresses for individual workers are personal information to the worker and that any unnecessary

disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

FAC 2005-47, 75 Fed. Reg. 77722, December 13, 2010, implements President Obama's Executive Rule 13496, Notification of Employee Rights Under Federal Labor Laws which: requires contractors and subcontractors to post a notice that includes employee rights under the National Labor Relations Act; encourages collective bargaining; and protects the exercise by employees of their freedom to associate, to self-organize and to designate representatives for the purpose of negotiating the terms and conditions of their employment. The rule establishes a new FAR Subpart 22.16 and a new clause, 52.222-40, Notification of Employee Rights under the National Labor Relations Act.

This FAC also amended the HubZone Program to require a HubZone Small Business Concern to be a HubZone Small Business Concern both at the time of its initial offer and at the time of contract award. It requires that HubZone Concern to notify the Contracting Officer, if material changes occur before award that could affect its HubZone eligibility. The FAC allows the government to waive the 50 percent requirement (which required a HubZone Small Business to incur at least 50 percent of the cost of contract performance with its own employees or subcontract employees) to be waived if the Contracting Officer determines at least two HubZone Small Business Concerns cannot meet the requirement. The FAC allows small disadvantaged businesses to self represent their SDB status to prime contractors in good faith when seeking federal subcontracting opportunities.

The FAC also mandates that suspension and debarment requirements flow down to all subcontracts except contracts for the acquisition of commercially available off-the-shelf items, in the case of contracts for the acquisition of commercial items, first tier subcontracts only.

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The FAC instituted, as a final rule, the interim rule from last year which put limits on pass-through charges.

FAC 2005-46, 75 Fed. Reg. 60248, September 29, 2010, amends the FAR as specified below:

Item I--Equal Opportunity for Veterans (FAR Case 2009-007) (Interim)

This interim rule implements amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA), as amended by the Jobs for Veterans Act (JVA). The rule re-titles FAR subpart 22.13 from "Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans" to "Equal Opportunity for Veterans." Accordingly, FAR clause 52.222-35 is also renamed "Equal Opportunity for Veterans" and incorporates the new categories and definitions of protected veterans as established by DoL. In addition, the FAR clause at 52.222-37, "Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans" is renamed "Employment Reports on Veterans" and the new DoL requirements for using the VETS-100A report are incorporated. Lastly, the FAR provision at 52.222-38, "Compliance with Veterans' Employment Reporting Requirements," is revised to incorporate new title references for FAR 52.222-37 and the new report form VETS-100A.

Item II--Certification Requirement and Procurement Prohibition Relating to Iran Sanctions (FAR Case 2010-012) (Interim)

This interim rule amends the FAR by enhancing efforts to enforce sanctions with Iran. The rule implements requirements imposed by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195), specifically sections 102 and 106. To implement section 102, the FAR will require certification that each offeror, and any person owned or controlled by the offeror, does not engage in any activity for which sanctions may be imposed

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under section 5 of the Iran Sanctions Act. This rule also partially implements section 106 of Public Law 111-195, which imposes a procurement prohibition relating to contracts with persons that export certain sensitive technology to Iran. There will be further implementation of Section 106 in FAR Case 2010-018. This rule will have little effect on United States small business concerns, because such dealings with Iran are already prohibited in the United States.

Item III--Termination for Default Reporting (FAR Case 2008-016)

This final rule amends the FAR to revise the contractor performance information process and to establish procedures for contracting officers to provide contractor information into the Federal Awardee Performance & Integrity Information System (FAPIS) module of Past Performance Information System (PPIRS). This case sets forth requirements for reporting defective cost or pricing data and terminations for cause or default and any amendments. Evaluation of past performance information, especially terminations, manages risks associated with timely, effective and cost efficient completion of contracts, a key objective of the President's March 4, 2009, Memorandum on Government Contracting.

Item IV--Award-Fee Language Revision (FAR Case 2008-008)

This final rule amends the FAR to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 and section 867 of the Duncan Hunter 2009 National Defense Authorization Act for Fiscal Year 2009. This rule requires agencies to—

- (1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;
- (2) Clarify that a base fee amount greater than zero may be included in a cost-plus-award-fee type contract at the discretion of the contracting officer;
- (3) Prescribe narrative ratings that will be utilized in award-fee evaluations;

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- (4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;
- (5) Conduct a risk and cost-benefit analysis and consider the results of the analysis when determining whether to use an incentive-fee type contract or not;
- (6) Include specific content in the award-fee plans; and
- (7) Prohibit the rolling over of unearned award fees to subsequent rating periods.

Item V--Offering a Construction Requirement--8(a) Program (FAR Case 2009-020)

This final rule amends the FAR to conform to the SBA regulations. SBA regulation 13 CFR 124.502(b)(2) requires that the offering letter for an open construction requirement be submitted to the SBA District Office for the geographical area where the work is to be performed. SBA regulation 13 CFR 124.502(b)(3) requires that the offering letter for a construction requirement offered on behalf of a specific participant be submitted to the SBA District Office servicing that concern. This rule revises FAR 19.804-2 accordingly.

Item VI--Encouraging Contractor Policies To Ban Text Messaging While Driving (FAR Case 2009-028) (Interim)

This interim rule amends the FAR to implement Executive Order 13513, entitled "Federal Leadership on Reducing Text Messaging while Driving," which was issued on October 1, 2009 (74 FR 51225, October 6, 2009). Section 4 of the Executive order requires each Federal agency, in procurement contracts, entered into after the date of the order, to encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving company-owned or -rented vehicles or Government-owned vehicles; or privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government. Section 4 also requires Federal agencies to encourage contractors to conduct initiatives such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text

messaging while driving, and education, awareness, and other outreach programs to inform employees about the safety risks associated with texting while driving. This requirement applies to all solicitations and contracts. Contracting officers are encouraged to modify existing contracts to include the FAR clause.

Item VII--Buy American Exemption for Commercial Information Technology--Construction Material (FAR Case 2009-039) (Interim)

This interim rule implements section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117). Section 615 authorizes exemption from the Buy American Act for acquisition of information technology that is a commercial item.

FAC 2005-45, 75 Fed. Reg. 53127, August 30, 2010, amends the FAR as specified below:

Item I--Inflation Adjustment of Acquisition--Related Thresholds

This final rule amends the FAR to implement section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 807 requires an adjustment every 5 years of acquisition-related thresholds for inflation using the Consumer Price Index for all urban consumers, except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. The Councils have also used the same methodology to adjust nonstatutory FAR acquisition-related thresholds in 2010.

The micro-purchase base threshold of \$3,000 (FAR 2.101) is not changed.

The simplified acquisition threshold (FAR 2.101) is raised from \$100,000 to \$150,000.

The FedBizOpps preaward and post-award notices (Part 5) remain at \$25,000 because of trade agreements.

Commercial items test program ceiling (FAR 13.500) is raised from \$5,500,000 to \$6,500,000.

The cost or pricing data threshold (FAR 15.403-4) is raised from \$650,000 to \$700,000.

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The prime contractor subcontracting plan (FAR 19.702) floor is raised from \$550,000 to \$650,000, and the construction threshold of \$1,000,000 increases to \$1,500,000.

Item II--Definition of Cost or Pricing Data

This final rule amends the FAR by redefining "cost or pricing data," adding a definition of "certified cost or pricing data," and changing the term "information other than cost or pricing data," to "data other than certified cost or pricing data." The rule clarifies the existing authority for contracting officers to require certified cost or pricing data or data other than certified cost or pricing data, and the existing requirements for submission of the various types of pricing data. The rule is required to eliminate confusion and misunderstanding, especially regarding the authority of the contracting officer to request data other than certified cost or pricing data when there is no other means to determine that proposed prices are fair and reasonable. Most significantly, the rule clarifies that data other than certified cost or pricing data may include the identical types of data as certified cost or pricing data but without the certification. Because the rule clarifies existing requirements, it will have only minimal impact on the Government, offerors, and automated systems.

Item III--American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Buy American Requirements for Construction Materials

This final rule implements section 1605 of Division A of the American Recovery and Reinvestment Act (Recovery Act) of 2009. It prohibits the use of funds appropriated for or otherwise made available by the Recovery Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605 mandates application of the Recovery Act Buy American requirement in a manner consistent with U.S. obligations under international agreements. Least developed countries continue to be

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treated as designated countries per congressional direction. Section 1605 also provides for waivers under certain limited circumstances.

FAC 2005-44, 75 Fed. Reg. 39413, July 8, 2010, amends the Reporting Executive Compensation and First-Tier Subcontract Awards (FAR Case 2008-039) Requirement.

This interim rule amends the Federal Acquisition Regulation to implement section 2 of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), which requires the Office of Management and Budget (OMB) to establish a free, public, website containing full disclosure of all Federal contract award information. This rule will require contractors to report executive compensation and first-tier subcontract awards on contracts and orders expected to be \$25,000 or more (including all options), except classified contracts and contracts with individuals. This information will be available to the public at available at USAspending.gov.

The law was intended to reduce “wasteful and unnecessary spending” because “government officials will be less likely to earmark funds for special projects if they know the public could identify how much money was awarded to which organization, and for what purpose,” according to the July 8 *Federal Register* notice. The law led to the creation of USAspending.gov.

“The reporting requirements of the Transparency Act are sweeping in their breadth, and are intended to empower the American taxpayer with information that may be used to demand greater fiscal discipline from both executive and legislative branches of government,” the *Federal Register* notice said.

To minimize the burden implementing the Transparency Act will impose on both Federal agencies and contractors, the Councils intend to implement the reporting requirements in a phased approach:

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1. Until September 30, 2010, any newly awarded subcontract must be reported if the prime contract award amount was \$20,000,000 or more.
2. From October 1, 2010, until February 28, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$550,000 or more.
3. Starting March 1, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$25,000 or more.

The rule is applicable to all solicitations and contracts with a value of \$25,000 or more. The clause is required in commercial item contracts, including commercially available off-the-shelf (COTS) item contracts, as well as actions under the simplified acquisition threshold, meeting the \$25,000 threshold. The clause is not required in classified solicitations and contracts, and contracts with individuals.

The *Federal Register* notice acknowledged the rule “may have a significant economic impact on a substantial number of small entities” because of the reporting requirements.

So, contractors and subcontractors are exempt from the reporting requirements if their gross income is less than \$300,000. Moreover, the executive financial disclosure will be required only if a contractor or subcontractor received at least 80 percent of its annual gross revenue and \$25 million from federal awards and if senior executives do not already publicly report compensation information.

Previously, a pilot program was conducted to collect subcontracting information. The final rule was published Sept. 6, 2007 (72 Fed. Reg.) but the pilot ended Jan. 1, 2009.

FAC 2005-43, 75 Fed. Reg. 38673, July 2, 2010, amends the FAR as specified below:

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This final rule implements Public Law 109-295, the Department of Homeland Security Appropriations Act, 2007, section 697, which requires the establishment and maintenance of a registry of disaster response contractors. The Disaster Response Registry is located at <http://www.ccr.gov>. The Federal Emergency Management Agency (within the Department of Homeland Security) has a link to the registry for vendors on its Web site at <http://www.fema.gov/business/contractor.shtm>. The Registry covers domestic disaster and emergency relief activities.

This FAC also amends the FAR to revise the clause at FAR 52.204-11, American Recovery and Reinvestment Act--Reporting Requirements. The revised clause will require first-tier subcontractors with Recovery Act funded awards of \$25,000 or more, to report jobs information to the prime contractor for reporting into FederalReporting.gov. It also will require the prime contractor to submit its first report on or before the 10th day after the end of the calendar quarter in which the prime contractor received the award, and quarterly thereafter.

The revised clause will be used for all new solicitations and awards issued on or after the effective date of this interim rule. This clause is not required for any existing contracts, or task and delivery orders issued under a contract, that contain the original clause FAR 52.204-11 (March 2009). Therefore, this interim rule does not require renegotiation of existing Recovery Act contracts that include the clause dated March 2009.

Finally, this FAC amends FAR 19.1406(a) to clarify the criteria that need to be met in order to conduct a sole source service-disabled veteran-owned small business (SDVOSB) concern acquisition. The FAR language is amended to be consistent with the Veterans Benefit Act of 2003 (15 U.S.C. 657f) and the Small Business Administration's regulation (13 CFR 125.20) that implements the Act. This final rule also amends FAR 19.1306(a) to clarify the criteria that need to be met in order to conduct a sole source for Historically Underutilized Business Zone (HUBZone)

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small business concern acquisitions. These amendments to the FAR alleviate confusion for contracting officers on the appropriate use of the criteria needed to conduct sole source HUBZONE small business and SDVOSB concern acquisitions.

FAC 2005-42, 75 Fed. Reg. 34255, June 16, 2010, amends the FAR as specified below:

It amends the FAR to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.

This FAC also amends the FAR to implement the use of the Electronic Subcontracting Reporting System (eSRS) to fulfill small business subcontracting reporting requirements. The eSRS, a web-based system, replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. In addition, this rule adds a new Alternate III to FAR clause 52.219-9 to recognize that there is a circumstance under which contractors will need to use SF 294, rather than eSRS, to submit an Individual Subcontract Report. The contractor will use SF 294 if a contract is not reported in the Federal Procurement Data System because reporting it in that system may disclose information that would compromise national security.

The FAC also changed the publication requirements, as follows:

FAR 5.704(a)(2) to clarify that modifications of orders are not required to be publicized at the pre-award stage.

FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.

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FAR 5.704(c) and 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.

FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price.

This FAC amends the FAR to implement the requirements of Section 844 of the National Defense Authorization Act for Fiscal Year 2008 that the head of an executive agency make certain justification and approval documents relating to the use of noncompetitive procedures in Federal contracting be posted on the website of an agency and through FedBizOpps. The final rule requires that if the justification is a brand name justification under FAR 6.302-1(c) then it must be posted with the solicitation. Justifications must remain posted for a minimum of 30 days. The final rule clarifies that posting the justification does not apply if it would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks. The final rule also establishes procedures at FAR 13.501 similar to procedures at FAR 6.305. The rule is intended to enhance competition in Federal contracting and provide greater transparency to the taxpayer.

This FAC implements Section 826 of Pub. L. 110-181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). As a matter of policy, this provision of law is applied to contracts awarded by all executive agencies. This rule requires that market research must be accomplished before an agency places an indefinite-delivery/indefinite-quantity (ID/IQ) task or delivery order in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold when the contractor is acting as a purchasing agent for the Government.

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This interim rule is applicable to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of the rule.

This FAC amends the FAR to implement sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Collectively, these sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds. These Recovery Act provisions are implemented in new alternate clauses to FAR 52.212-5 "Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items" and FAR 52.214-26 "Audit and Records--Sealed Bidding," and by amending FAR 52.215-2 "Audit and Records--Negotiation." For the Comptroller General, these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency Inspector Generals receive the same authorities, with the exception of interviewing subcontractor employees.

The changes to the interim rule clarify its application to supplemental agreements, and orders under task- or delivery-order contracts, involving Recovery Act funds.

This final rule implements the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. This FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act (BAA) if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

In another BAA change, this FAC amends FAR 25.104(a) to add certain items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for

receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

FAC 2005-42 also implements some Cost Accounting Standards (CAS) changes. This FAC amends the FAR to align the existing FAR clause 52.230-4 with the changes made in CAS Board clause, Disclosure and Consistency of Cost Accounting Practices--Foreign Concerns.

On March 26, 2008, the CAS Board published, without change from the proposed rule (72 FR 32829, June 14, 2007), a final rule in the Federal Register at 73 FR 15939 to utilize the clause, Disclosure and Consistency of Cost Accounting Practices--Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns. This rule is necessary in order to maintain consistency between CAS and FAR in matters relating to the administration of CAS.

This interim rule amends the FAR to align the existing FAR 31.205(q)(2)(i) and (ii) with the changes made in Cost Accounting Standards (CAS) Board Standards 412, "Cost Accounting Standard for composition and measurement of pension cost," and 415, "Accounting for the cost of deferred compensation." Formerly, the applicable CAS standard for measuring, assigning, and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.001. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

Finally, this FAC implements changes that the Department of Labor (DOL) instituted regarding the submission of payroll data in their final rule, Protecting the Privacy of Workers:

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Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the Federal Register at 73 FR 77504 on December 19, 2008. The rule revises FAR 52.222-8, Payrolls and Basic Records, to delete the requirement for submission of full social security numbers and home addresses of individual workers, prime contractor, on weekly payroll transmittals as required on covered construction contracts. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes DOL's finding that complete social security numbers and home addresses for individual workers is personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

FAC 2005-41, 75 Fed. Reg. 19167, April 13, 2010 amends the FAR to implement Executive Order (E.O.) 13502, Use of Project Labor Agreements for Federal Construction Projects. The E.O. encourages the use of project labor agreements for Federal construction projects where the total cost to the Government is \$25 million or more in order to promote economy and efficiency in Federal procurement. The rule provides that an agency may, if appropriate, require that every contractor and subcontractor engaged in construction on a construction project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations. The rule identifies factors that agencies may consider to help them decide, on a case-by-case basis, whether the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project, and multiple strategies for timing the Federal Government's receipt of project labor agreements.

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FAC 2005-40, 75 Fed. Reg. 14057, March 23, 2010, amends the FAR to implement section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 872 requires the establishment of a data system, Federal Awardee Performance and Integrity Information System (FAPIIS), containing specific information on the integrity and performance of covered Federal agency contractors and grantees. FAPIIS is available for use in award decisions at www.ppirs.gov. Government input to FAPIIS is accomplished at www.cpars.csd.disa.mil.

FAPIIS is intended to significantly enhance the scope of information available to contracting officers as they evaluate the integrity and performance of prospective contractors competing for Federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources. This final rule impacts Government contracting officers and contractors. The Government contracting officers will be required to--

Check the FAPIIS website, available at www.ppirs.gov, before awarding a contract over the simplified acquisition threshold, consider all the information in FAPIIS and PPIRS when making a responsibility determination, and notify the agency official responsible for initiating debarment or suspension action if the information appears appropriate for the official's consideration; and Enter a non-responsibility determination into FAPIIS.

The contractor will be required to:

1. Confirm, at the time of offer submission, information pertaining to criminal, civil and administrative proceedings through which a requisite determination of fault was made, and report this information into FAPIIS; and
2. Update the information in FAPIIS on a semi-annual basis, throughout the life of the contract, by entering the required information into FAPIIS via the Central Contractor Registration database, available at <http://www.ccr.gov>.

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FAC 2005-39, 75 Fed. Reg. 13411, March 19, 2010, amends the FAR as specified below:

Item I--Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035). This final rule amends the FAR to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010. The rule extends for two more years the commercial items test program in FAR subpart 13.5. The program was to expire January 1, 2010.

Item II--Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012). This final rule amended the FAR to implement section 814 of the NDAA for FY 2008. Section 814 requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the Truth in Negotiations Act (TINA) threshold for cost or pricing data. By linking the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold at FAR 15.403-4, whenever the TINA threshold is adjusted the threshold for cost or pricing data on non-commercial modifications of commercial items will be automatically adjusted as well.

Item III--Use of Standard Form 26 - Award/Contract (FAR Case 2008-040). This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR subparts 15.5 and 53.2 to clarify that block 18 of the form should not be used to award a negotiated procurement. No change is made to existing policy or procedures.

Item IV--Enhanced Competition for Task- and Delivery-Order Contracts--Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006). This final rule adopts, with changes, the interim rule published in the Federal Register at 73 FR 54008 on September 17, 2008. The interim rule amended FAR subpart 16.5 to implement section 843 of the NDAA for FY 2008. The provisions of section 843 include (1) Limitation on single award task- or delivery-order contracts greater than \$100 million; (2) Enhanced competition for task and

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delivery orders in excess of \$5 million; and (3) Restriction on protests in connection with issuance or proposed issuance of a task or delivery order except for a protest on orders on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of \$10 million. Several changes are made to the FAR as result of public comments on the interim rule. FAR 16.503 is amended to clarify that a requirements contract is awarded to one contractor. FAR 16.504(c)(1)(ii)(D)(3) is amended to clarify that the agency-head determination to award a single-award task- or delivery-order contract over \$100 million does not apply to an architect-engineer task- or delivery-order contract awarded pursuant to FAR subpart 36.6. The Councils also revised FAR 16.504(c)(1)(ii)(D)(3) to state that the requirement for a determination for a single-award contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single award task- or delivery-order contract greater than \$100 million is required in addition to the Justification and Approval (J&A) required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition.

This final rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements.

This rule amends FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, to revise and clarify the retainage requirements. The contracting officer can withhold up to 10 percent of the payment due in any billing period when the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. However, withholding the entire 10 percent is not required, and no withholding is required if the contractor's performance has been satisfactory. The changes clarify

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that retainage is optional and any amounts retained should not be held over beyond the satisfactory completion of the instant contract.

FAC 2005-38, 74 Fed. Reg. 65596, December 10, 2009, amends the Federal Acquisition Regulation (FAR) as specified below:

Item I – Revocation of Executive Order 13201, Notification of Employee Rights Concerning Payment of Union dues or Fees. Executive Order 13201 required contractors to post a notice informing employees of their rights concerning payment of union dues or fees and detailed that employees could not be required to join unions or maintain membership in unions to retain their jobs. Executive Order 13496, of January 10, 2009, Notification of Employee Rights under Federal Labor Laws, revoked Executive Order 13201.

This rule implements the Federal Food Donation Act of 2008 (Pub. L. 110-247), which encourages executive agencies and their contractors, in contracts for the provision, service, or sale of food, to the maximum extent practicable and safe, to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States.

The contracting officer is required to insert the clause at FAR 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations, in solicitations and contracts greater than \$25,000 for the provision, service, or sale of food in the United States. Contractors would only be impacted if they decided to donate the excess food; they would bear all the costs of donating the excess food. The Act would extend to the Government and the contractor, when donating food, the same civil or criminal liability protection provided to donors of food under the Bill Emerson Good Samaritan Food Donation Act of 1996.

B. OTHER FEDERAL WIDE REGULATIONS

1. New Interest Rate

The Treasury rate for interest payments under the Contract Disputes Act or the Prompt Payment Act for the period beginning July 1, 2010 to December 31, 2010 is 3 -1/8 percent. 75 Fed. Reg. 37881, June 30, 2010.

2. DoD Issues Guidance Aimed at Obtaining Greater Efficiency and Productivity in Defense Spending

Current and prospective Government contractors will soon be facing a lesser-experienced acquisition workforce guided by a mandate to keep Government expense to a minimum: “To put it bluntly: we have a continuing responsibility to procure the critical goods and services our forces need in the years ahead but we will not have ever increasing budgets to pay for them. We must therefore strive to achieve what economists call productivity growth: in simple terms, DO MORE WITHOUT MORE.”

This introductory language sets forth the theme of a 17 page letter recently sent to all acquisition professionals by Ashton B. Carter, Under Secretary of Defense for Acquisition, Technology & Logistics. The guidance in the letter affects approximately \$400 of the \$700 billion defense budget spent annually on contracts for goods and services and seeks to redirect approximately \$100 billion defense budget dollars from “unproductive to more productive purposes” over the next five years. The letter also acknowledges that “[w]hile Secretary Gates has directed a scrub of the oversight staff in OSD and military commands, he has also determined that acquisition workforce increases planned last year should proceed.”

Twenty three principal actions to improve efficiency are organized into five major areas:

1. Target Affordability and Cost Growth
2. Incentivize Productivity and Innovation in Industry

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3. Promote Real Competition
4. Improve Tradecraft in Services Acquisition
5. Reduce Non-productive Processes and Bureaucracy

Among the more noteworthy actions we can expect to see: “affordability” mandated as a program requirement; shorter program timelines; increased use of fixed price incentive firm target contracts that emphasize the tie between profit and performance; expansion of the Navy’s “Preferred Supplier Program” to a DoD-wide pilot program; price negotiations with all single bid offerors based on cost or price analysis using non-certified data; increased emphasis on small business utilization; limitation of single-award contract actions to three years; clarification of the roles of DCMA and DCAA to reduce overlap, and; increased use of forward pricing rate agreements.

Current and prospective Government contractors should read this significant guidance closely, as it is most certainly a harbinger of things to come. Indeed, Mr. Carter advises that the letter is “not the end of a process, but the beginning of vigorous implementation and further refinement.”

3. SBA Finalizes Women-Owned Small Business Rule to Expand Federal Contracting Opportunities

On October 4, 2010, with its publication of a final rule in the Federal Register, the U.S. Small Business Administration (“SBA”) will begin implementation of its women-owned small business (“WOSB”) federal contract procurement program. The program, which will focus on 83 industries in which women are under- or substantially-under represented in the federal contract marketplace, is part of the Obama Administration’s overall commitment to expanding opportunities for small businesses owned by women to compete for federal contracts. In addition

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to opening up more opportunities for WOSBs, the rule is another tool to help achieve the statutory goal that five (5) percent of contracting dollars go to women-owned small businesses.

“Women-owned businesses are one of the fastest growing sectors of our nation’s economy, and even during the economic downturn of the last few years, have been one of the key job creation engines in communities across the country,” SBA Administrator Karen Mills said. “Despite their growth and the fact that women lead some of the strongest most innovative companies, women-owned firms continue to be underrepresented in the federal contracting marketplace. This rule will be a platform for changing that by providing greater opportunities for women-owned small businesses to compete for and win federal contracts.”

The creation of a rule to increase federal contracting opportunities for WOSBs was approved by Congress back in 2000. Since that time, SBA has taken a number of steps to analyze the market, including a study of WOSB participation in a number of industries. The proposed rule was published for comment on March 2, 2010. After receiving over 1,000 comments, the SBA published the final rule early this month, which is very similar to a rule the Obama Administration proposed back in March 2010, with minor changes.

Some of the essential elements of the program include the following:

To be eligible, a firm must be 51 percent owned and controlled by one or more women, and primarily managed by one or more women. The women must be U.S. citizens. The firm must classify as “small” within its primary industry in accordance with SBA standards for that industry.

The final rule authorizes a set-aside of federal contracts for WOSBs where the anticipated contract price does not exceed \$5 million in the case of manufacturing and \$3 million in the case of other contracts. Contracts with values in excess of these limits are not subject to set-aside under the program.

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The rule allows WOSBs to self-certify as “WOSBs” or to be certified by third-party certifiers, including government entities and private certification groups. For those who self-certify, the rule requires the WOSB to submit a certification verification, to complete the certifications at the federal Online Representation and Certification Application (“ORCA”) website, and also to submit a set of eligibility-related documents to an online “document repository” to be maintained by the SBA. The SBA intends to conduct a significant amount of certification verification to confirm eligibility of WOSBs. In the event of a contract protest or program review, the SBA has the authority to request additional documentation from the WOSB, and to initiate punitive action against ineligible firms which seek to take advantage of the program.

The SBA has 120 days to implement the program; a time period in which the agency expects to educate and train federal contracting officers on the rule’s new requirements and to finalize a database of eligible firms. SBA expects the program to be up and running for WOSBs by early February 2011.

4. Federal government suspends major contractor with ties to Alaska Native Corporations

On October 1, 2010, the Small Business Administration suspended GTSI Corp. from contracting with the federal government, following an investigation into GTSI’s involvement in subcontracting with small businesses. The main allegation is that GTSI, one of the top 50 federal contractors, acted as a subcontractor to small businesses – Alaska Native Corporations (“ANCs”) in particular – in order to gain access to government small business set-aside contracts. Though GTSI acted as a subcontractor, the SBA has found evidence that GTSI essentially performed all of the work under the contracts, while the prime contractors (the actual small businesses) had little to no involvement in the contract work.

Small businesses and ANCs have enjoyed long-standing contracting preferences and privileges with the federal government. ANCs also receive additional benefits, including the right to receive contracts of any size without competition. In recent years, concerns regarding abuse of these programs by large businesses have increased. In October 2009, the SBA issued proposed revisions to the small business contracting rules in an effort to curb these abuses, while maintaining the purpose of the contracting programs to boost small businesses.

The SBA's actions against GTSI are significant, as the contractor relies on the federal government for 90 percent of its sales, according to The Washington Post. It is also the first time in many years, if not decades, that the government has taken such serious action against a top-tier contractor. The SBA's investigation is ongoing and it may decide to suspend GTSI for a specific period of time or, if the alleged misconduct is determined to be serious enough, GTSI could be permanently debarred from federal contracting.

Within a short time, the suspension ended when GTSI's president agreed to resign.

III. PRE AWARD

A. PROTESTS

In *Pitney Bowes Government Solutions, Inc. v. The United States and Stanley Associates, Inc., Intervenor*, COFC No. 10-257C, June 04, 2010, a post-award protest of a DOJ contract for mail services, Plaintiff moved to supplement the administrative record alleging bias on the part of the Chairperson of the Technical Evaluation Panel (TEP) and improper destruction of the rating sheets prepared by the individual members of the TEP. Judge Lettow grants the motion allowing discovery to supplement the record. He notes that "The burden of proof required for supplementing the administrative record is lower than that required for demonstrating bad faith or bias on the merits. The test for supplementation is whether there are sufficient well-grounded

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allegations of bias to support an inquiry and supplementation; the protesting plaintiff need not make a showing of clear and convincing evidence of bias on the merits.” He also finds that destruction of the rating sheets was a violation of FAR 4.801 and allows depositions of the TEP members.

Electronic Data Systems, LLC v. The United States, and BAE Systems Information Technology Inc., Defendant-Intervenor, COFC No. 09-857C, May 13, 2010, involved a post-award bid protest of a Department of Treasury contract. Judge Allegra finds for the government on the administrative record even though he found that RFP should have been amended. He concludes “In the final analysis, the court remains unpersuaded that plaintiff was prejudiced by the error committed by Treasury in failing to amend the solicitation. Every indication instead is that the impact of that error was dwarfed by the huge price differential between the relevant proposals and more than offset by the adjustments made by the SSA in his best value determination. To conclude otherwise would be to depart not only from well-accepted concepts of what constitutes prejudice, but from commercial reality. Absent a showing of prejudice, plaintiff’s case must fail, even though it has been marginally successful in demonstrating that an error occurred in the subject procurement.”

In *Brican Inc.*, B-402602, June 17, 2010, GAO sustained the protest where the agency evaluated the awardee’s and the protester’s proposals unequally by crediting the awardee for the experience and past performance of a specialty subcontractor, but not similarly crediting the protester, which proposed the same subcontractor.

In *AINS, Inc.*, B-400760.4; B-400760.5, January 19, 2010, the Agency failed to conduct meaningful discussions with protester where it did not reasonably advise the protester of agency’s real concern with protester’s quotation-- that evaluators considered its project schedule to be too short. Agency’s request during discussions that protester submit a new project schedule as part

of its final revised quotation did not reasonably convey to the protester that the evaluators viewed its proposed schedule as too aggressive, particularly given that a period of over a year had elapsed between submission of initial quotations and submission of final revised quotations. The protest also challenged the agency evaluation of quotations received in response to solicitation for establishment of a blanket purchase agreement for an automated Freedom of Information Act system and associated services. GAO sustained the protest because the record fails to demonstrate that the evaluation was reasonable and even-handed.

CFS-Inc, JV, B-401809.2 March 31, 2010, involves a reoccurring problem when severe snowstorms closed the government in Washington D.C. on a day when proposals were scheduled to be received, the agency reasonably received proposals on the next day that the Government was open and resumed its normal processes, as authorized by FAR § 52.212-1(f)(4) (Instructions to Offerors--Commercial Items (June 2008)); the fact that a delayed arrival/unscheduled leave policy for government employees was authorized for that day did not mean normal government processes had not resumed.

ALATECH Healthcare, L.L.C. v. The United States, COFC No. 09-332C, December 01, 2009, involved a bid protest on the procurement of condoms by a USAID prime contractor. Plaintiff argues that the purchase of condoms of foreign manufacture violates a statutory requirement that domestic condoms be purchased “[T]o the maximum extent feasible.” Judge Hodges rejects the argument of the government that this is not a procurement action by the government and holds that the COFC has jurisdiction to hear the matter following the Federal Circuit’s decision in *Distributed Solutions v. United States*, 539 F.3d 1340 (Fed. Cir. 2008). Judge Hodges remands the case “to a contracting officer authorized to administer this contract on behalf of the Agency for International Development. The contracting officer will make findings on factors

other than cost used by the Agency in awarding this contract, if applicable, or provide such findings that may have been made to this court as soon as possible.”

IV. POST AWARD

A. TERMINATIONS FOR DEFAULT

In *Selva Construction and Rental Equipment Corp*, PSBCA 5039, December 20, 2010, the Postal Service Board of Contract Appeals upheld a termination for default of a contractor in Puerto Rico. The case is interesting because the contractor threw basically every conceivable argument against the termination for default—bad faith, waiver, excusable delay, issuance of a third party check, failure to assign a Spanish speaking COR etc. While the Board found that the government’s administration was not flawless, it held that the contractor’s arguments did not prevail because, inter alia, it not produce any delay analysis to prove that it was delayed by any of the alleged government malfeasances.

Edge Construction Company, Inc. v. United States, COFC No. 06-635C, October 29, 2010, does not announce new law, but every once in a while it needs to be restated. The Veteran Affairs contractor was terminated for default. It weighs several claims, including one for equitable adjustment for lost productivity damages due to “unseasonable weather.” The court granted the government’s motion for summary judgment on the issue of the equitable adjustment for the weather, citing the standard Default clause, 52.249-10, in fixed price construction contracts and relevant case law, the court held that delays not caused by the government are not entitled to an equitable adjustment.

B. DIFFERING SITE CONDITIONS

In *United Constructors, LLC v. United States*, COFC No. 08-757C, October 18, 2010, the court denied a Differing Site Condition claim. The court noted that a Type 1 Differing Site Condition claim requires that the conditions encountered materially differ from those indicated in the contract documents. In this case, the contract contained no indication regarding the amount of rock to be encountered. Moreover, the appellant did not attend the pre-bid site inspection. The court therefore concluded that the contractor could not have justifiably relied on any such representation even if it had been made.

C. CONTRACT INTERPRETATION

Parkview Engraving LLC, Appellant, v. Department of Veterans Affairs, CBCA No. 1564, February 23, 2010, involved a contract for the Department of Veterans Affairs (VA) National Cemetery Administration for engraving of inscriptions on marble headstones. Appellant claims it should be paid double its price when required to place inscriptions on both faces of the headstone. On cross motions for summary judgment the CBCA grants the motion by the government and denies the appeal. Judge Borwick notes “The contract is as clear as words can make it. Considering all specifications and drawings together, the contract unambiguously provides that appellant shall be compensated at a rate of \$59 for a headstone inscription, whether a particular order calls for inscriptions on one or both faces of a headstone.”

C.R. Pittman Construction Company, Inc. v. The United States, COFC No. 08-196C, March 10, 2010, involved a Corps of Engineers contract to build pumping stations in the New Orleans area. Plaintiff claims that damages caused by flooding from Hurricane Katrina to material purchased for the contract and stored at an offsite location are the responsibility of the government under the terms of the Damage to Work Clause in the contract. Judge Smith grants

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summary judgment for the government holding the ordinary meaning of the language “to any part of the permanent work” in the subject clause “cannot include uninstalled, unincorporated equipment.” Judge Smith also rejects the other arguments by plaintiff that such an interpretation would make other provisions of the contract superfluous.

D. JURISDICTION – PAST PERFORMANCE EVALUATIONS

In *Colonna’s Shipyard, Inc.*, ASBCA No. 56940, June 24, 2010, Navy the Appellant appeals the denial of its claim that the Contractor Performance Assessment Reporting System (CPARS) report on appellant’s was erroneous, arbitrary and capricious and “[a]t worst such scoring represents bad faith or prejudice on the part of the Navy or the CPARS evaluation team that performed such scoring.” The government “contends that appellant has not submitted a valid CDA claim and moves for dismissal for lack of jurisdiction and for failure to state a claim,” The ASBCA denies the motion to dismiss, except for those portions of the claim which seek injunctive relief. Relying primarily on its decision in the *Appeal of -- Versar, Inc.*, ASBCA No. 56857, May 06, 2010, the Board holds that it does have jurisdiction to hear the appeal.

E. CONSTRUCTIVE CHANGES

American Ordnance LLC, ASBCA No. 54718, February 17, 2010, involved an Army GOCO fixed price contract to manufacture 155mm high explosive M107 projectiles. The claims arise from the direction of the Army to change from a TNT explosive to an explosive known as Composition B (COMP B). The ASBCA sustains the appeal. Judge Page concludes: “We sustain appellant’s claim that the government was responsible for increased costs and delays resulting from the government’s defective specifications, the superior knowledge regarding the production of Comp B loaded M107 projectiles that it unreasonably withheld from American Ordnance, and breach of the implied duties of cooperation and noninterference. American Ordnance has demonstrated entitlement to 199 days of delay.”

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Regarding the superior knowledge element the Board recognizes the strong resemblance to *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963) noting “There are parallels between the instant appeal and the historic case of Helene Curtis Industries. That specification was found to be misleading, and the government actionably to have withheld information it possessed regarding problematic contract regulated procedures and required ingredients. In both Helene Curtis and here, the government knew but did not disclose that: the government privately had sponsored research; manufacturing the product would be more difficult than the contract revealed; the TDP procedures were not adequate for working with a very difficult component that was uncertain in reaction and required extreme care in handling; and, the contractor in its ignorance would believe the specification to be adequate.”

F. STANDING

Fireman’s Fund Insurance Company, American Home Assurance Company, Fidelity And Deposit Company of Maryland, and Universal Underwriters Insurance Company v. The United States, COFC No. 04-1692C (consolidated with Nos. 08-782C, -783C & -784C), May 26, 2010, involves the Corps of Engineers contract for the Montgomery Point Lock and Dam Project on the White River in eastern Arkansas. Plaintiffs are the sureties who entered into a takeover agreement to complete the project. In a 171 page opinion, which also includes four consolidated cases from the ASBCA, Judge Christine Miller awards plaintiff some \$8,700,000 in damages. Judge Miller rejects the argument by the government that the Federal Circuit’s decision in *Fireman’s Fund Insurance Company v. Gordon R. England, Secretary of The Navy*, CAFC NO. 00-1420, November 27, 2002, precludes the claims that arose before the takeover agreement from the bankrupt original parties noting that the “argument cannot impede consideration of plaintiffs’ claims that were subject to the valid assignment of claims, which included an express reservation of any pre-takeover claims assertable by the Government.”

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She also decides for plaintiff on the issue whether the specifications were design rather than performance specifications concluding that “the pertinent specifications are design specifications.” Citing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010) Judge Miller addresses two claims that the government breached its duty of good faith and fair dealing noting that the duty “encompasses a duty not to hinder contract performance.” The court rejects the claim that “the Corps clearly breached its duty not to interfere with the Joint Venture’s performance by underwriting the Pine Bluff Project’s labor-market-distorting Modification, to the severe detriment of the Montgomery Point Project.” and “holds that the Corps is not liable for the collateral consequences occasioned by a contemporaneous project that ultimately was within the ambit of a separate government agency.” However, Judge Miller does find “that plaintiffs have shown by a preponderance of the evidence that the Corps’s unreasonably delayed response to RFI 787 constituted a breach of its implied duty of good faith and fair dealing.”

Finally in a rather rare holding the court rejects the government’s last minute counterclaim finding that Plaintiffs were entitled to a fair and impartial final decision by the contracting officer. FAR 1.602-2(b). Defendant could not demonstrate that the counterclaim was the product of either [the CO’s] own analysis or that she relied on the technical input of the administrative contracting officer. Her testimony portrayed an orphan decision that she signed because her legal team recommended it. The claim was entirely developed by counsel, with some information from Mr. Clemans, and Ms. Easter acquiesced in Mr. Weisenberger’s guidance. What attention she gave the final decision was not a substantive review and analysis of the claim’s merits or a review of the technical input; rather, she merely understood the nature of the claim asserted in the decision. Such a decision hardly can be elevated to the product of the exercise of the contractor officer’s independent judgment.

In *Thorington Electrical and Construction Company*, ASBCA Nos. 56895, 56987, 56988, 56989, 56990, 56991, 56992, 56993, 56994, 56995, 56996, 56997, 56998, 56999, 57000, July 16, 2010, Travelers, a surety who obtained a judgment against appellant under an indemnity agreement, attempts to intervene in the appeal under principles of equitable subrogation. The Board denies intervention finding there was no valid assignment of claims and that "An action based on equitable subrogation is not available in the Boards of Contract Appeals."

G. WARRANTY

In *Francisco Javier Rivera Agredano and Alfonso Calderon Leon v. The United States*, CAFC No. 2008-5114, -5115, February 17, 2010, appellant purchased a vehicle at auction from the United States Customs and Border Protection. The vehicle was subsequently found to contain narcotics and appellant was imprisoned in Mexico. The COFC opinion found that Custom had breached an implied-in-fact warrant and awarded damages. The CAFC now reverses finding that no implied-in-fact warrant existed and notes that "Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed." The court also notes that "the source of any responsibility on the part of Customs to search vehicles and remove contraband is its regulatory function and a failure to adequately perform this responsibility does not provide a contractual remedy."

H. GOVERNMENT CLAIMS

Job Options, Inc., ASBCA No. 56698, May 20, 2010, involved a Defense Commissary Agency (DeCA), Fort Lee, Virginia, contract for the provision of commissary stocking, storage and custodial services at the Hill Air Force Base Commissary in Ogden, Utah. Appellant appeals seeking recovery of \$63,818.76 deducted by the government for alleged deficiencies in floor maintenance services. The Board sustains the appeal finding that the government did not meet

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its burden of proving the deficiencies. The Board “determined that the QAEs [Quality Assurance Evaluators] drastically overstated the extent and square footage of deficiencies.” The opinion by Judge Peacock also finds that it was “particularly detrimental to the government’s case” that “the ‘primary’ or ‘lead’ government QAE, who conducted approximately 50% of the QA surveillance, failed to appear and testify at the hearing despite a Board subpoena requiring his attendance.”

I. DELETIONS OF WORK

SIGAL Construction Corporation v. GSA, CBCA No. 508, May 13, 2010, involved a contractor’s claims for lost profits when the GSA deleted certain work from a construction contract in order to have that work performed by another firm at a lower price. The project was for the renovation and build-out of the Harry S. Truman Old State Building. The contract provided that certain work would be performed on a lump-sum fixed-price basis while renovation, repair and restoration of certain finishes was bid and to be paid for on a unit-price basis. In awarding the contract to SIGAL Construction Corporation, GSA found that SIGAL's lump-sum fixed price and unit prices were fair and reasonable.

GSA later suspended SIGAL's performance of certain of the unit-priced restoration work and awarded that work to another firm at lower unit prices. SIGAL submitted a claim seeking in excess of \$1.5 million in anticipatory lost profits based upon the GSA improper constructive termination for convenience of the suspended work. GSA denied the claim arguing that the terminated work was not part of the contract and even if it were, there was nothing improper about GSA terminating that work for convenience. SIGAL appealed to the CBCA and the parties filed cross-motions for summary relief.

In ruling on those motions, the Board found that that work was part of the contract. Citing *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996), the Board then found that GSA breached the contract when it deleted needed work simply to get a better price.

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The Board held that SIGAL's damages for the breach are the anticipated profits it would have received had it performed the work it was improperly precluded from performing. While not quite getting us back to the good old days of *Torncello*, this case is a reminder of an important limitation of the government's termination for convenience rights.

In *Dixie Construction Company, Inc.*, ASBCA No. 56880, April 15, 2010, involving an Army requirements contract for paving, drainage, and civil site work, appellant claims it should have been given work awarded to another firm. The government argues that it was not obligated to award appellant the work as it exceeded the \$500,000 maximum ordering limitation in the contract. The ASBCA grants summary judgment for the government on one order in excess of \$814,000, declines a decision on another order of some \$380,000 as there are facts in dispute as to the scope of that order.

J. DISCOVERY SANCTIONS

In *Medtek, Inc., Appellant, v. Department of Veterans Affairs*, CBCA No. 1544, February 04, 2010, appellant appealed the denial of some \$410,000 in claims in "additional expenses to correct a design defect caused by [VA's] engineer, loss of revenue and the necessary legal expenses that [Medtek] had to incur to defend its position." The CBCA grants the government's motion for summary relief. The Board had earlier "imposed on Medtek the sanction that it could not produce evidence which would be responsive to the discovery requests it had not answered, and could not produce evidence in significantly greater detail than the answers it provided to the requests to which it had provided rudimentary information." Primarily as a result of these sanction, the Board finds that appellant has not met its burden in proving its claims.

K. SUM CERTAIN

In *G & R Service Company, Inc. v. General Services Administration*, CBCA No. 1876, July 15, 2010, the CBCA dismisses for lack of jurisdiction the appeal of a claim that used "not to exceed" language finding that the claim was not for a sum certain.

In *J. P. Donovan Construction, Inc.*, ASBCA No. 55335, July 16, 2010, appellant sponsors an appeal of a subcontractor for \$559,764.00 and added to its claim that it "has or will have approximately \$65,000 of additional direct and administrative costs" The government moves to dismiss arguing that the lack of a sum certain divests the Board of its jurisdiction. The ASBCA agrees and dismisses the appeal noting "that Donovan's 7 March 2005 statement, 'Donovan has or will have approximately \$65,000.00 of additional direct and administrative costs that should be added to this [subcontractor] requested amount' failed to state a sum certain, and that such statement resulted in an entire claim that was not in a sum certain. We dismiss the appeal for lack of CDA jurisdiction."

L. ATTORNEYS FEES

In *States Roofing Corporation*, ASBCA No. 55504, January 19, 2010, the Board relied on *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), and would have awarded attorney costs in working on an REA but the contractor did not adequately support the costs. However, the ASBCA, using a jury verdict, did conclude "that SRC is entitled to recover the lump sum amount of \$5,000.00 as the reasonable and allowable costs of in-house labor for proposal preparation/contract administration.'

M. TIME FOR CONTRACTING OFFICER'S DECISION

In *Kelly-Ryan, Inc.*, ASBCA No. 57168, November 29, 2010, the contractor submitted a certified claim on November 24, 2009 for \$36 million. Within sixty days of receipt, the contracting officer notified appellant that a final decision would be issued by November 24, 2010 (one year

later), then later changed that to January 14, 2011. The appellant appealed on a deemed denial basis arguing that the contracting officer's time was unreasonable. The government moved to dismiss as premature or for a stay until the contracting officer issued a decision. The Board denied the motion noting that while the reasonableness of the time to issue a decision is determined on a case-by-case basis, it was not aware of any Board case which had held that a time longer than nine months to issue a contracting officer's decision was reasonable. Moreover, the Board found that "the lack of detail in the contracting officer's affidavit fails to meet the government's burden of demonstrating the reasonableness of the final decision date set by the CO and we, therefore, find the dates to be unreasonable."

2011 YEAR IN REVIEW

4828-2510-0552, v. 1

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