

FEDERAL CONTRACTS: THE YEAR IN REVIEW

BY

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I. NEW STATUTES

The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009) (the Recovery Act) changed the landscape, both financially and legally.

Title XV of the Recovery Act besides appropriating huge sums also covers accountability and transparency. Under Subtitle A, companies receiving contracts funded in whole or in part by ARRA monies will be required to report on a quarterly basis:

- (1) the amount of ARRA funds invoiced for the reporting period;
- (2) a list of all significant services performed or supplies delivered for which the contractor invoiced in the quarter;
- (3) an assessment of the contractor's progress towards completion and expected outcomes or results;
- (4) a description of the employment impact of the work (i.e., jobs created and jobs retained);
- (5) information about subcontracts over a certain dollar threshold awarded under the contract; and
- (6) in certain circumstances, the names and total compensation of each of the five most highly compensated officers of the contractor.

The Recovery Act authorizes the Comptroller General to conduct bimonthly audits and reviews and report on the use of the funds by select States and localities, with the results to be posted on the internet for full public review.¹ The Comptroller General is authorized to examine all

¹ Tit. IX, § 901(a).

records of any transaction that would “directly pertain to” any contract let under the Stimulus Bill, whether that record be of a private contractor or subcontractor, or of a State or local agency.² Agency inspectors general may access records of contractors and grantees, and interview their employees.

Under § 1511, funds made available to State or local governments for infrastructure projects require a certification by the relevant chief executive that the money will be an “appropriate use of taxpayer dollars.” The agency Inspector Generals are required to review any questions concerning the use of stimulus money that are “raised by the public.”

Subtitle B established the “Recovery Accountability and Transparency Board” (referred to in some circles, and herein, as the “RAT Board”) and requires the Board to prepare quarterly and annual reports and maintain a public website, recovery.gov.

The Board is a separate body that is charged by § 1521 with the responsibility “to coordinate and conduct oversight of covered funds.” The statute allows the Chairperson of the Board to be either the Deputy Director of the Office of Management and Budget, or any other person who is appointed by the President and receives the advice and consent of the Senate. The members of the Board are the Inspector Generals for the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Justice, Transportation, Treasury, and the Treasury Inspector General for Tax Administration, and any other Inspector General as designated by the President from an agency using stimulus money.³

The Board has audit and review power that parallels that of the agency Inspector Generals; including the powers granted to the IGs by § 6 of the Inspector General Act of 1978, and can issue and enforce subpoenas with the same powers that are granted under that statute. The Board may conduct public hearings and enter into contracts in support of its investigative work.

² Tit. IX, § 902.

Subtitle D provides protection to state and local government and contractor whistle blowers. Contractors receiving ARRA funds will be prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing certain information, such as gross mismanagement of an ARRA-funded contract or grant, gross waste of ARRA funds, or an abuse of authority related to the implementation or use of ARRA funds, to the government. Contractors will be required to post notices in the workplace of the rights and remedies or whistleblower protections, and to flow down the requirement to all subcontracts. It also requires contracts funded by the Recovery Act to be awarded as fixed-price contracts using competitive procedures, to the maximum extent possible. Exceptions must be posted on the Recovery Board website. Title XVI includes Section 1605 which adds a Buy American Act division and bans use of Recovery Act funds for a project for the construction, alteration, maintenance or repair of public building or public work unless all of the iron, steel and manufactured goods used are produced in the United States.

For ARRA-funded contracts, the Government Accountability Office (GAO) and its agents will have expanded audit authority, which includes the authority to conduct interviews of contractor and subcontractor personnel and to audit commercial item contracts and contracts under the simplified acquisition threshold (two categories of contract not normally audited by the GAO).

The Weapon Systems Acquisition Reform Act, Public Law 111-23, establishes a new DOD Director of Cost Assessment and Program Evaluation to advise the Secretary of Defense on acquisition cost, estimation and analysis.

The Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21 (“FERA”) modifies the False Claims Act⁴ in several significant particulars. FERA was intended in part to bring subcontractors within the ambit of the qui tam provisions. FERA has also rewritten the statutory

³ Tit. XV, § 1522(b)(1),(2).

⁴ 31 U.S.C.A. § 3729.

definition of “claim” to remove any doubt as to its applicability to either contractors or subcontractors.

The Department of Defense Appropriations Act for fiscal year 2010 (H.R. 3326) contains a provision (section 8116) which prohibits the use of funds appropriated by 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, but 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,

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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. EXECUTIVE ORDERS

On January 30, President Obama signed three pro-union executive orders that provide for notification of employee rights under federal labor laws; bar contractors from charging the government for certain costs relating to labor and management disputes; and require service contractors who win follow-on contracts to offer positions to incumbent contractor workers.

On June 6, 2008, President Bush had issued Executive Order 12989 to require all companies who contract with federal agencies to use the Department of Homeland Securities E-Verify System. The order is designed to insure that the federal government only contracts with providers who “do not knowingly employ unauthorized alien workers.” The order also directed amendments to the FAR to insure that contractors who employ illegal aliens shall be considered for debarment or suspension. Implementation of the order is to be carried out in a manner that minimizes “the burden on participants in the Federal Procurement Process.”

Six days later at 73 Fed. Reg. 33374, on June 12, 2008, a new FAR rule was proposed to require certain contractors and subcontractors to use the US Citizenship and Immigration Services Electronic Employment Eligibility Verification (E-Verify) System to insure that their employees are eligible to work in the United States. This implements EO 12989 and applies to both prime and subcontracts over \$3,000. It does not apply to contracts for Commercially Off-The-Shelf (COTS) items or items that would be considered as COTS but for minor modifications. The rule would apply to solicitations issued and

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contracts awarded after the effective date of the final rule, but would only cover employment in the United States. Contractors would have to use the E-Verify System for all newly hired employees and all employees directly engaged in performance of work under federal contracts. That rule became final in FAC 2005-29, but was substantially delayed.

Finally, on September 8, 2009, the Homeland Security Department implemented the long delayed rule requiring most federal contractors and subcontractors to use its E-Verify system to prove employees working on government projects are legally in the country.

The new E-Verify requirements are imposed in a new subpart 22.18-Employment Eligibility Verification and in a new clause, 52.222-54, which will be required in all solicitations and contracts that exceed the simplified acquisition threshold except those that: (1) are only for work that will be performed outside the United States; (2) are for a period of performance of less than 120 days; or (3) are only for (a) commercially available off-the-shelf items; items that would be COTS items but for minor modifications; or items that would be COTS items if they were not bulk cargo or commercial services that are part of the purchase of a COTS item performed by the COTS provider and are normally provided for that COTS item.

B. PRESIDENTIAL POLICY MEMORANDUM

On March 4, 2009, President Obama issued a policy memorandum regarding government contracting to the heads of the executive departments and agencies. To achieve the objective of an efficient and effective procurement process, the President issued the following broad policy objectives:

A preference for firm fixed price contracts

A prohibition against non-competitive contracts, unless their use can be fully justified and their performances monitored to protect the taxpayer

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A limit on the use of cost reimbursement contracts, unless an agency cannot sufficiently allow for a fixed price contract

Increased government capacity to manage the contracting process from start to finish

Insuring that inherently governmental functions are performed by government employees rather than outsourced

C. FEDERAL ACQUISITION CIRCULARS

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.

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FAC 2005-37 74, Fed. Reg. 52846, October 14, 2009 covered several topics.

Item I--Registry of Disaster Response Contractors (FAR Case 2008-035) (Interim) implements the Registry of Disaster Response Contractors provision, section 697 of the Department of Homeland Security (DHS) Appropriations Act, 2007 (6 U.S.C. 796). The Act requires that the Federal Emergency Management Agency (FEMA) establish and maintain this registry. It also requires that the registry include business information consistent with the data that is currently required in the Central Contractor Registration (CCR) with two additional categories added to reflect the area served by the business, and the bonding level of the business concern. The CCR has been updated to include these changes. In addition, the FEMA website has been updated with a link to the CCR search feature which provides access to the disaster response registry. Contracting officers will be required to consult this registry during market research and acquisition planning.

Item II--Limiting Length of Noncompetitive Contracts in "Unusual and Compelling Urgency" Circumstances (FAR Case 2007-008). This final rule amends the FAR to require that contracts awarded under the authority of FAR 6.302-2, Unusual and compelling urgency, may not exceed the time necessary to meet the unusual and compelling requirements, may not exceed the time for the agency to enter into another contract for the required goods and services through the use of competitive procedures, and may not exceed one year unless the head of the agency entering into the contract determines that exceptional circumstances apply. The determination may be made after contract award when making the determination prior to award would unnecessarily delay the award. The rule applies to any contract in an amount greater than the simplified acquisition threshold. The rule implements the requirements of section 862 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417). The rule is intended to strengthen Federal acquisition competition policies.

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Item III--GAO Access to Contractor Employees (FAR Case 2008-026). This final rule allows the Government Accountability Office to interview current contractor employees when conducting audits. The rule does not apply to the acquisition of commercial items; therefore, FAR 12.503 was amended to add the exemption of this rule. This change implemented section 871 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110-417).

Item IV--Use of Commercial Services Item Authority (FAR Case 2008-034) (Interim). This interim rule amends the FAR to implement section 868 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110-417). Section 868 provides that the FAR shall be amended with respect to the procurement of commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. Such services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for these services.

Item V--Limitations on Pass-Through Charges (FAR Case 2008-031) (Interim). This interim rule implements section 866 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110-417) and section 852 of the John Warner NDAA for Fiscal Year 2007 (Pub. L. 109-364). Section 866 requires the Councils to amend the FAR to minimize excessive pass-through charges by contractors from subcontractors, or of tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (i.e., pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value.

This interim rule includes a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract

costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work.

Item VI--Award Fee Language Revision (FAR Case 2008-008) (Interim). This interim rule amends the FAR to implement section 814 of the John Warner NDAA of Fiscal Year 2007 (Pub. L. 109-364) and section 867 of the Duncan Hunter NDAA of Fiscal Year 2009 (Pub. L. 110-417). 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;

(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 award-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.

This FAR change will integrate where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

FAC 2005-36, 74 Fed. Reg. 4058, August 11, 2009, amends FAR subparts 5.1, 5.2, and 7.1 to remove all references to the Federal Technical Data Solution (FedTeDS) System, and refer to the enhanced capabilities of the Government-wide Point of Entry (GPE) system. The FedTeDS system was used to post on-line technical data packages and other items associated with solicitations that required some level of access control. It was interfaced directly with the GPE

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system. In April 2008, the newest version of the GPE was launched. This version incorporated the capabilities of FedTeDS, allowing the FedTeDS system to be retired. This rule will only have a slight impact on Government. It will inform and direct both internal and external users to the new system and website. This rule does not have a significant impact on any automated systems.

This final rule amends the FAR to specifically require the incorporation of FAR clauses 52.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts) and 52.222-44, Fair Labor Standards Act and Service Contract Act--Price Adjustment, in time-and-materials and labor-hour service contracts that are subject to the Service Contract Act.

This FAC also implements in FAR Parts 22, 25, and 52, as appropriate, 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 if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

This final rule implements Section 6 of the Sudan Accountability and Divestment Act of 2007, which requires certification in each contract entered into by an executive agency that the contractor does not conduct certain business operations in Sudan. In addition, in accordance with Executive Orders 13310 and 13448, the Councils added Burma to the list of countries from which most imports are prohibited.

This final rule amends FAR 28.203-3 and 52.228-11 to update the procedures for the acceptance of a bond with a security interest in real property. The FAR has relied on the Department of Justice (DOJ) to provide a "List of Approved Attorneys, Abstractors, and Title Companies". However, DOJ has discontinued maintenance of the List. Replacing the List, DOJ published "Title Standards 2001", establishing the evidence requirements for acceptance of title to real property for individual sureties.

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The rule also provides that in lieu of evidence of title that is consistent with DOJ standards, that sureties may provide a mortgagee title insurance policy in an insurance amount equal to the amount of the lien.

This final rule converts, without change, the interim rule published in the Federal Register at 73 FR 54011 September 17, 2008. No comments were received in response to the interim rule. The interim rule revised FAR 30.201-4(b)(1) and FAR 52.230-1 through 52.230-5 to maintain consistency between the Federal Acquisition Regulation (FAR) and Cost Accounting Standards (CAS) regarding the administration of the CAS Board's rules, regulations and standards.

Effective June 14, 2007, the CAS Board amended the contract clauses contained in its rules and regulations at 48 CFR 9903.201-4, pertaining to the administration of CAS, to adjust the CAS applicability threshold in accordance with section 822 of the 2006 National Defense Authorization Act (Pub. L. 109-163). That section amended 41 U.S.C. 422(f)(2)(A) to require that the threshold for CAS applicability be the same as the threshold for compliance with the Truth in Negotiations Act (TINA).

FAC 2005-35, 74 Fed. Reg. 34206, July 14, 2009, amends the FAR in accordance with Executive Order 13502--Use of Project Labor Agreements for Federal Construction Projects, this final rule amends FAR 36.202(d) to delete references to the revoked Executive Order 13202. The E.O. prohibited executive departments and agencies from requiring or prohibiting Federal Government contractors and subcontractors' entrance into project labor agreements. This rule requires no action on the part of contracting officers.

FAC 2005-34, 74 Fed. Reg. 31556, July 01, 2009 amends the FAR to revise the contractor performance information process. The FAR revisions include changes to FAR Parts 2, 8, 9, 13, 17, 36, 42, and 53. The purpose of this final rule is to ensure that the FAR clearly reflects the use of the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov>; requires the evaluation of past performance for orders

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exceeding the simplified acquisition threshold placed against Federal Supply Schedule contracts, or under a task order or delivery order against a contract awarded by another Federal agency (i.e. Governmentwide acquisition contract or multi-agency contract); recommends past performance information for orders under single agency contracts; consolidates the collection of past performance guidance in Part 42; and, clarifies that the Agency shall identify those responsible for preparing interim and final evaluations.

This interim rule implements Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), which prohibits the award of contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of one. The interim rule addresses solicitations issued after the date of publication using funds appropriated in Fiscal Years 2006, 2007, and 2008, as well.

This final rule amends Federal Acquisition Regulation Subpart 9.4 to clarify the role of the Interagency Committee on Debarment and Suspension when more than one agency has an interest in the debarment or suspension of a contractor. Among other responsibilities, the Interagency Committee on Debarment and Suspension is authorized to resolve issues regarding the agency that will have lead responsibility in initiating a suspension or debarment proceeding. The Committee will also coordinate actions among interested agencies with respect to such action. This rule implements the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Section 873(a)(1) and (2).

FAC 2005-33, 74 Fed. Reg. 28426, June 15, 2009 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. The free trade agreements with Costa Rica, Oman, and Peru join the North American Free Trade Agreement (NAFTA), the Australia, Bahrain, Chile, Morocco, and Singapore Free Trade Agreements, and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with respect to the

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Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, which are already in the FAR.

The threshold for supplies and services is \$67,826 for the CAFTA-DR and \$194,000 for the Oman and Peru FTAs. The threshold for construction is \$7,443,000 for the CAFTA-DR and the Peru FTA and \$8,817,449 for the Oman FTA.

This final rule converts the proposed rule published at 73 FR 19035 on April 8, 2008, to a final rule with one editorial change. This final rule incorporates improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments.

FAC 2005-32, Technical Amendments, 74 Fed. Reg. 22810, May 14, 2009, makes amendments to Federal Acquisition Circular (FAC) 2005-32, published in the Federal Register at 74 FR 14622- 14652, on March 31, 2009, in order to make editorial and correcting changes.

FAC 2005-32, 74 Fed. Reg. 14622, March 31, 2009, amends the FAR as specified below:

Item I--American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Buy American Requirements for Construction Material (Interim) (FAR Case 2009-008)

This interim rule implements the Buy American provision, section 1605, of the American Recovery and Reinvestment Act of 2009. It prohibits the use of funds appropriated for 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. However, section 1605 requires that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements. Moreover, because Congress intended that least developed countries be excepted from section 1605, least developed countries can continue to be treated as designated countries. circumstances.

Item II--American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Whistleblower Protections (Interim) (FAR Case 2009-012)

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Subpart 3.9 of the Federal Acquisition Regulation (FAR) is revised to add section 3.907. Section 3.907 provides procedures for whistleblower protection, when using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

Section 3.907 provides that non-Federal employers are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. A new clause, 52.203-15, is added to require contractors to post rights and remedies for whistleblower protections under Section 1553 of the American Recovery and Reinvestment Act.

Item III--American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Publicizing Contract Actions (Interim) (FAR Case 2009-010)

This interim rule implements the Office of Management and Budget's Guidance, M-09-10, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," dated February 18, 2009, section 6.2. Federal Acquisition Regulation (FAR) Part 4 requires the contracting officer to enter data in the Federal Procurement Data System on any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), in accordance with the instructions at <https://www.fpds.gov> <<http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=https://www.fpds.gov>>. Subpart 5.7 is added to direct the contracting officer to use the Government-wide Point of Entry (<https://www.fedbizopps.gov><<http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=https://www.fedbizopps.gov>>) to (1) identify the action as funded by the Recovery Act; (2) post pre-award notices for orders exceeding \$25,000 for "informational

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purposes only;" (3) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and (4) provide a rationale for awarding any action, including modifications and orders, that is not both fixed-price and competitive, and include the rationale for using other than a fixed-price and/or competitive approach. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

Item IV--American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Reporting Requirements (Interim) (FAR Case 2009-009)

This interim rule implements section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds. The rule adds a new subpart 4.15, and a new clause, 52.204-11. Contracting officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This clause applies to Commercial item contracts and Commercially-Available-Off-The-Shelf (COTS) item contracts as well as actions under the Simplified Acquisition Threshold.

Contracting officers who wish to use Recovery Act funds on existing contracts should modify those contracts to add the clause.

Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

Item V--American Recovery and Reinvestment Act of 2009 (the Recovery Act)--GAO/IG Access (Interim) (FAR Case 2009-011)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to

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implement Sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009.

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 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items," 52-214-26, "Audit and Records-Sealed Bidding," and 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.

Item VI--GAO Access to Contractor Employees (Interim) (FAR Case 2008-026)

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 12 and 52. Clauses 52.215-2, Audit and Records-Negotiation and 52.214-26, Audit and Records-Sealed Bidding are being modified to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule will not apply to the acquisition of commercial items; therefore, FAR 12.503 will be amended to add the exemption of this rule. This change implements Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110-417).

FAC 2005-31, 74 Fed. Reg. 11820, March 19, 2009, amends the FAR to adopt as final, with changes, an interim FAR rule published in the Federal Register at 72 FR 36852, July 5, 2007, amending the FAR to implement the Small Business Administration's (SBA) final rule published on November 15, 2006 (71 FR 66434), entitled Small Business Size Regulations; Size for Purposes of Government-wide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term

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Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations. The purpose of the SBA rule and this FAR rule is to improve the accuracy of small business size status reporting, at the prime contract level, over the life of certain contracts (long-term contracts, novations, acquisitions, and mergers). Contractors are required to represent their size status prior to the end of the fifth year of a contract that is more than five years in duration (long-term contract); prior to exercising any option thereafter; following execution of a novation agreement on any contract; or following a merger or acquisition, regardless of whether there is a novation agreement. A change in the size status does not change the terms and conditions of the contract, but the agency may no longer include the value of options exercised or orders issued against the contract in its small business prime contracting goal achievements.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim final rule amending the Federal Acquisition Regulation (FAR) to harmonize the thresholds for cost or pricing data on non-commercial modifications of commercial items to reflect the Truth In Negotiation Act (TINA) threshold for cost and pricing data.

The Councils are hereby implementing a requirement of the National Defense Authorization Act (NDAA) for FY 2008. Specifically, Section 814 of the Act requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold for cost and 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.

The final rule amends the FAR to correct an inconsistency between FAR 15.206(c) and 22.404-5(c)(3), by revising the language at 22.404-5(c). This change requires the contracting officer to amend solicitations to incorporate new Davis Bacon wage determinations (WD) and furnish the wage rate information only to all offerors that have not been eliminated from the

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competition, if the closing date for receipt of offers has already passed. The revision is necessary to ensure consistency with FAR 15.206(c), and eliminate a possible scenario where incorporation of an updated WD into the solicitation process, could cause an unnecessary and counterproductive reevaluation of proposals already eliminated from competition. This change is consistent with the intent of the Department of Labor regulations, ensuring that the most current WD is placed in the contract at the time of award for compliance at the start of contract performance.

This final rule amends the Federal Acquisition Regulation (FAR) to revise the definition of designated country, adding Liberia and removing Cape Verde. Least Developed Countries form a subset of designated countries. The list of Least Developed Countries is derived from a United Nations list of Least Developed Countries. The United States Trade Representative has updated the list of Least Developed Countries that are treated as designated countries. In acquisitions that are covered by the World Trade Organization Government Procurement Agreement, contracting officers must acquire only U.S.-made or designated country end products, or U.S. or designated-country services, unless offers of such end products or services are not received or are insufficient to fulfill the requirement (FAR 25.403(c)).

This interim rule amends the FAR Parts 26, 31, and 52 to encourage executive agencies and their contractors to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States. This change 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 encourage the contractors, 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 rule is effective for all solicitations and contracts greater than \$25,000 for the provision, service, or sale of food in the United States issued on or after the effective date of the rule.

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FAC 2005-30, 74 Fed. Reg. 2610, January 15, 2009, is one of those hodge-podge regulations which deals with such things as the Federal Procurement Data System, renders inapplicable more laws to the acquisition of Commercially Available Off-The-Shelf (COTS) for items; exempts more service contracts from the Service Contract Act. One matter which may be of no significant importance on the general basis is a requirement now that justification and approval for non-competitive contracts must be made available for public inspection within fourteen (14) days after contract award on the website of the agency and at the government-wide point of entry. In the event of an urgent and compelling basis the justification must be posted within thirty (30) days after contract award.

FAC 2005-29, Fed. Reg. November 14, 2008, is the final rule which implements Executive Order 12989. This final rule inserts a clause into federal contracts that are above the simplified acquisition threshold (basically \$100,000) and have a performance period of at least 120 days, committing government contractors to use the US Citizenship and Immigration Services E-Verify System to verify whether all the contractors new hires, and all employees (existing and new) directly performing work under federal contracts, are authorized to work in the United States. There are some exemptions (commercially available off the shelf items and items that would be COTS but for minor modifications). The final rule requires prime contractors to include the clause in subcontracts over \$3,000 for services or for construction. The government can waive this requirement in exceptional circumstances.

DoD, GSA and NASA issued their final rule, FAC 2005-28, on November 12, 2008, amending the FAR to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. Most notably, the final rule now requires mandatory disclosure of violations and overpayments rather than voluntary disclosure.

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D. OTHER FEDERAL WIDE REGULATIONS

The Treasury rate for interest payments under the Contract Disputes Act or the Prompt Payment Act for the period beginning July 1, 2009, and ending on December 31, 2009, is 4 7/8 per centum per annum. For the period beginning January 1, 2010, and ending on June 30, 2010, the prompt payment interest rate is 3 1/4 per centum per annum.

On October 1, 2008, the Small Business Administration announced, in the Federal Register, its regulations to govern the new Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures. This new rule, effective October 31, 2008, also allows the designation of certain women-owned businesses as Economically Disadvantaged Women-Owned Small Businesses (EDWOSB). Under this new regulation, contracting officers will be able to set contracts aside for bidding solely by Women-Owned Small Businesses. This rule is at 73 Federal Register 56940, October 1, 2008.

In that same Federal Register at 73 Federal Register 57014, October 1, 2008, the SBA issued a proposed rule and sought comments to determine the representation of WOSBs in federal procurement. Once the federal government has completed its review of the comments, this data will enable the federal government to designate those industries in which women-owned small business set-asides are most required.

III. PRE AWARD

A. PROTESTS

GAO bid protest filings increased 17 percent in Fiscal Year 2008 setting a 10-year high.

1. Bid Bond

In *Tip Top Construction, Inc. v. The United States*, CAFC No. 2008-5183, April 29, 2009, the Court affirmed the COFC decision that the bidder did not pledge an acceptable asset. The CO had rejected the bid bond by plaintiff's individual surety which pledged "an allocated portion of

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\$191,350,000.00 of previously, mined, extracted, stockpiled, marketable, coal, ...” In an opinion by Judge Bryson, the court notes “In sum, we agree with the agency that the proffered coal was not an acceptable bid bond asset under the FAR because coal is a speculative asset that is not readily marketable. We also conclude that the contracting officer did not impermissibly refuse to accept a substitute asset, because no valid offer to provide a substitute asset was made by Tip Top’s surety.”

2. Evaluation

Granite Construction Company, B-400706, January 14, 2009, involved a protest challenging the evaluation of protester’s technical proposal as unacceptable. The protest was denied where record demonstrates agency reasonably concluded that protester’s offered small business subcontracting plan did not meet the solicitation’s subcontracting requirements or provide sufficient rationale supporting its lower goals; protester’s arguments amount to mere disagreement with agency’s conclusions.

In *Burchick Construction Company*, B-400342, October 6, 2008, the agency failed to conduct meaningful discussions in a negotiated procurement, where discussions conducted with offerors were limited to cost proposals and did not identify significant weaknesses or deficiencies that the agency had identified in the protester’s technical proposal.

B. SOCIO-ECONOMIC

For the present, it appears the Department of Defense’s (“DOD”) preference program for small disadvantaged businesses is suspended. On November 4, 2008 the Court of Appeals for the Federal Circuit, essentially the Supreme Court of Government contracting, decided *Rothe Development Corp. v. Department of Defense*, 2008 WL 4779586 (Fed.Cir. 2008). The court held unconstitutional the statute that imposes a goal for DOD that 5 percent of federal defense contracting dollars for each fiscal year be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals (10 U.S.C. § 2323 or “Section 1207”).

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The court based this decision on the fact that the statute incorporates the Small Business Act's presumption that Black Americans, Asian Americans, Hispanic Americans, and Native Americans are socially and economically disadvantaged individuals and provides that special assistance should be given to such entities to achieve the 5 percent goal. Because this is a race-based preference, the court used a standard of strict scrutiny to determine whether the statute was constitutional and whether Congress had strong evidence in enacting the law. Essentially, the court held the Congress when reenacting Section 1207 in 2006 did not have a "strong basis in evidence" to support the conclusion that minorities "are currently and have been subject to discrimination in state and local contracting throughout the United States."

This decision was not appealed by the DOD to the United States Supreme Court nor did DOD ask the entire Court of Appeals to re-hear the case. Congress is free to reenact Section 1207 if it so chooses, and the constitutionality of that law, if enacted, will likely depend on the Congressional record regarding its enactment. The Appellate Court specifically stated it would make no pre-judgment regarding "whether any such new enactment will be supported by a strong basis in evidence."

IV. POST AWARD

A. TERMINATIONS FOR DEFAULT

In *McDonnell Douglas Corporation, Plaintiff-Appellant, and General Dynamics Corporation, Plaintiff-Appellant, v. United States, Defendant-Appellee*, CAFC No. 2007-5111, -5131, June 02, 2009, the Federal Circuit affirmed the termination for default of the A-12 contract upheld in the COFC opinion by Judge Hodges. Styling the case as the "American version of *Jarndyce and Jarndyce*", Judge Michel concludes: "This is indeed an unfortunate case for all the parties involved. We realize that the court is not in a position to question the wisdom of the parties in entering this contract and subsequently, in handling problems in this case. Nevertheless, as the

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trial court recognized, ‘the Government rarely terminates fixed-price research and development contracts for default.’” *McDonnell Douglas XIII*, 76 Fed. Cl. at 418. We also observe that the CEOs of both MDC and GD, in a letter dated June 27, 1990, stated that “it was a mistake for the U.S. Navy to stipulate this type of contract and it was a mistake for the contractors to accept it. Both are at fault.” Alas, the law of contracts does not allow us to deviate from established principles of law and equity. We therefore hold that the default termination of the A-12 contract is justified. However, we emphasize that terminating a government contract for failure to make progress when the contract does not specify a completion date is the exception, not the norm. Therefore, we reiterate that the Lisbon test remains good law and our conclusion here is dictated by the unique facts of this case.”

In *ALKAI Consultants, LLC*, ASBCA No. 55581, January 22, 2009, the Board sustained the appeal of a termination for cause finding that the CO misunderstood the required completion date and ordered the contractor to demobilize two weeks before the required completion date. The Board also found that the Army had misrepresented the contents of the digester to appellant and failed to cooperate once the problem was discovered.

American Renovation and Construction Company, ASBCA Nos. 53723, 54038, June 30, 2009, arose from contracting officer’s final decisions revoking acceptance and terminating two design/build contracts for military family housing at Malmstrom Air Force Base (MAFB), Montana, for default. In an 108 page opinion, the Board upholds the termination for one contract concluding “that ARC’s concealment of Maxim’s compaction test reports and its own egregious workmanship defects, critical to knowledge of the quality of the work, were gross mistakes amounting to fraud, justifying revocation of acceptance of the M2 contract.” For the other contract, the Board concludes that revocation of acceptance was not proper because it was not done within a reasonable time. Thus, the government’s acceptance of the M3 contract other than grading and landscaping is final. Since final acceptance precludes the exercise of either a default termination or a convenience

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termination, we set aside the termination for default and deny ARC's request for a convenience termination."

Appeal of Lee Aron Vandyke, PSBCA No. 6150, October 26, 2009. The PSBCA overturns a TFD and assessment of excess procurement costs. The contract was terminated for default based on a clause which provided for termination if the contractor "not reliable, trustworthy or of good character." The CO based his termination on a phone call between appellant and a contract specialist wherein "In a loud, profanity-laced diatribe, Appellant accused the contract specialist of lying. He called her an 'f---ing liar' (Tr. 95) and yelled, 'I want to jump through this phone and strangle you'" The Board finds that the government did not meet its burden, concluding "In considering all evidence in the record bearing on Appellant's character, we find on the positive side that Appellant had performed the contract satisfactorily; that he generally got along with the contract specialist in the past; and that he had not had problems working with other postal employees he encountered in performing his contract (Findings 8, 15). Against this stands the telephone call of October 17 (Finding 10). In that conversation, Appellant's use of abusive, profane language, while not a threat to harm the contract specialist, was rude and inexcusable. It was inconsistent with norms of civil, professional interaction to be expected between contractors and Postal Service employees. However, on balance, we conclude that Respondent has not met its burden of demonstrating by a preponderance of the evidence that the default termination of Appellant's contract was justified by Appellant's conduct during the October 17 telephone conversation. See *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Banks Trucking*, PSBCA No. 3528, 96-1 BCA ¶ 28,132.

B. AUTHORITY TO ORDER CHANGES

In *States Roofing Corporation*, ASBCA Nos. 55500, 55503, December 9, 2008, the Board denied the appellant's claim on a Corps of Engineers contract. It supplied a full-time safety officer allegedly ordered by the resident officer in charge of construction (ROIC). Because the actual

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contracting officer never ordered the extra full-time safety officer or was aware of the alleged order, the Board stated that it was bound by the Federal Circuit's decision in *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007) which held that under the terms of the contract, that only the contracting officer had the authority to modify the contract.

A similar result was achieved in *Sinil Co., Ltd.*, ASBCA Nos. 55819, 55820, August 03, 2009, involving two Army IDIQ contracts in Korea for replacement of security fences and concrete retaining walls. Appellant submitted certified claims for equitable adjustments to off set claims by the Army for overpayment. Appellant claims that the contracting officer's representative (COR) authorized changed and substituted work under the various DOs issued under the two contracts. The Board denied the appeals finding that COR's were not authorized to make changes, there was no ratification by the CO and that appellant had signed releases for DO each payment.

C. SUBCONTRACTORS

In *Donald C. Winter, Secretary of the Navy, Appellant, v. Floorpro, Inc.*, CAFC No. 2008-1407, June 26, 2009, FloorPro was a subcontractor on a Navy contract which was not being paid. The Navy and the prime entered into a mod which provided for payment to be made by check payable to both the prime and FloorPro. Instead, the Navy paid the prime directly. FloorPro appealed to the ASBCA which sustained the appeal finding that FloorPro was an intended third-party beneficiary. The CAFC vacates the ASBCA decision with instructions for the board to dismiss the appeal. The court holds the under the CDA only a contractor in privity with the government may appeal to the Board. The court notes that the case relied upon by the ASBCA, *D & H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996), relied upon the Tucker Act, not the CDA for jurisdiction.

In *The Centech Group, Inc. v. The United States and Tybrin Corporation*, CAFC No. 2008-5031. February 03. 2009, the CAFC affirms the Judge Williams' COFC decision denying injunctive relief to Centech in this Limitation on Subcontracting clause case previously heavily litigated at the

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GAO. The Court agrees that it was rational for the Air Force to follow the recommendation of the GAO that Centech's proposal was unacceptable on its face where the proposal indicated that less than 50% of the work would be performed by Centech.

D. CONTRACT INTERPRETATION

Brink's/Hermes Joint Venture v. Department of State, CBCA No. 1188, July 28, 2009. Contract for guard service at the American Embassy in Athens, Greece. The contract contained a variation in quantity clause which provided for an adjustment if the services varied by more than 25% of the estimated hours. Appellant appeals the denial of its claim for a category of services which was only 3% of the estimated services. The CBCA grants summary relief as to entitlement to appellant for the indirect costs associated with the number of hours below the range that were not ordered. In an opinion by Judge Steel, the Board summarized its holding as "the Variation in Quantity clause in the contract is clear and unambiguous and must be given its plain and ordinary meaning. The type of costs contemplated to be adjusted in accordance with the clause include the indirect and overhead costs sought by Brink's." The Board rejects the argument by the government, citing *Nicon, Inc. v. United States*, 331 F.3d 878, 887 (Fed. Cir. 2003), that no relief was warranted as appellant did not show a government delay noting "That case involved the entirely different principle of the application of the Eichleay formula for recovery of unabsorbed overhead resulting from government-caused delay, not application of a VEQ clause."

E. SOVEREIGN ACT

Conner Bros. Construction Company, Inc. v. Pete Geren, Secretary of the Army, CAFC No. 2008-1188, December 31, 2008. Corps of Engineers contract. Appellant appeals the ASBCA decision which found that the sovereign acts doctrine barred its claim for delay damages when it was banned from areas of 75th Ranger regimental compound at Fort Benning following the terrorist attacks of September 11, 2001. The CAFC affirms the ASBCA decision. Good discussion

of the sovereign acts doctrine including its origin in the 19th century Court of Claims cases and the more recent decisions of the Supreme Court

F. JURISDICTION – PAST PERFORMANCE EVALUATIONS

Todd Construction, L.P., F/K/A, Todd Construction Co., Inc. v. The United States, COFC No. 07-324 C, July 22, 2009.

December 09, 2008. Corps of Engineers contract. Plaintiff challenges the performance evaluation it received at the completion of the contract. The government moves to dismiss for lack of jurisdiction and the failure to state a claim. Judge George Miller denies the motion finding that “the plaintiff has asserted a claim within the meaning of the CDA and that the Court has jurisdiction over plaintiff’s action seeking review of that decision. Before resolving defendant’s motion to dismiss pursuant to Rule 12(b)(6), however, the Court requires further briefing from the parties regarding the scope of its authority to provide relief upon plaintiff’s claim and the standard of review.” Interesting case discussing a “claim” under the CDA and possible relief.

In *Sundt Construction, Inc.*, ASBCA No. 56293, February 23, 2009, the government moved to dismiss an appeal of the government’s performance assessment based on an alleged settlement agreement. Although recognizing that it has consistently held that lacks jurisdiction “to decide appeals from unsatisfactory performance ratings where contract terms are not in issue” the ASBCA denies the motion. The Board finds that there was some sort agreement with the CO and therefore follows *Coast Canvas Products II Co.*, ASBCA No. 31699, 87-1 BCA ¶ 19,678 which “held that the Board had jurisdiction to determine whether the terms of a settlement agreement barred a subsequently issued adverse performance evaluation by the contracting officer.” The Board mentions, but does not discuss, the recent *Todd Construction, L.P., F/K/A, Todd Construction Co., Inc. v. The United States* case at the COFC which did consider a performance assessment.

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G. CLAIMS

In *United Surety & Indemnity Company v. The United States And Selva Construction & Rental Equipment*, Third-Party Defendant, COFC No. 08-791C, January 30, 2009, a performance and payment bond surety, sues to recover payments it made prior to default by the prime and subsequent takeover by plaintiff. Although plaintiff notified the Postal Service that it was making payments, Judge Braden grants the motion by the government to dismiss for failure to state a claim. She holds that “Because United Surety’s November 12, 2002 letter to USPS demanded payment and cited an indemnity agreement between United Surety and the contractor, but failed to provide any evidence or claim of contractor default, USPS owed United Surety no equitable duty at the time the disputed progress payment was issued to Selva and Scotiabank.” Good discussion of equitable subrogation and the requirements that a surety must meet.

Bell BCI Company v. United States, COFC No. 03-1613C, April 21, 2008, is particularly interesting. After construction was well under way, NIH decided to add an additional floor to the building. The plaintiff complied but filed an impact claim for the cumulative effect of the many changes required. The government defended, based on an accord and satisfaction plus counterclaims for liquidated damages. The court found for the plaintiff on most of the issues and noted that the liquidated damages defense had no basis and was only used as a negotiating ploy by the government. Also interesting is the fact that the court denied the government’s accord and satisfaction defense noting that although the contracting officer was listed as a witness, she did not testify. The judge noted: “by her failure to testify, the court may infer that her testimony would not have supported defendant’s position.”

On appeal, *Bell BCI Company, Plaintiff-Appellee v. The United States*, CAFC No. 2008-5087, June 25, 2009, the Court of Appeals vacated several findings by the COFC regarding the release language in contract modifications. The Court of Appeals found that the release absolved

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the government of liability concerning cumulative impact and delay claims. Judge Newman dissents and opens her opinion with this “This case is a compelling illustration of why appellate tribunals should give due weight to the attributes and benefits of the processes of trial, for such processes enable the trial judge to dig deeply into the events, to figure out what happened and what was intended, and to reach a just result. This is no less important in contract cases than in any other area of law, and no less important when the government is a party, for today government business affects a significant portion of the nation’s commerce.”

In *San Carlos Irrigation and Drainage District v. United States*, COFC No. 06-576 C, December 3, 2008, the Court of Federal Claims, although denying both parties’ motions for summary judgment, observed regarding the good faith and fair dealing argument, “If plaintiff establishes by a preponderance of evidence that the challenged actions were unreasonable, the Government cannot elude liability by augmenting plaintiff’s burden to prove personal animus on the part of BIA employees. Incompetence will be sufficient.”

In *Keeter Trading Company, Inc. v. The United States*, COFC No. 05-243 C, February 03, 2009, Judge Bush’s earlier decision overturned the default and reserved the bad faith issue for trial. Judge Bush now finds that the government acted in bad faith and awards breach damages. She notes “the court finds that the AO[Administrative Officer, Yellville, AR postmaster] and the contracting officials interfered with plaintiff’s performance so as to destroy his reasonable expectations regarding the fruits of the contract.”

In *Robinson Quality Constructors*, ASBCA No. 55784, January 06, 2009, “After it completed its contract in 1999, Robinson submitted a \$493,280.82 claim in 2005. The claim was denied and Robinson appealed.” Following *Gray Personnel Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378, the Board dismisses the appeal for lack of jurisdiction as “all of the elements of appellant’s claim are time barred pursuant to 41 U.S.C. § 605(a). as six years had passed since the claim accrued.” The Board rejects the suggestion made by appellant “that the rules relating to application of the six-year

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statute of limitations should depend on the subject matter of the contract or the complexity of the facts.” Good discussion of when a claim accrues.

H. CRIMINAL AND CIVIL LIABILITY

Daewoo Engineering And Construction Co., Ltd. v. The United States, CAFC No. 2007-5129, February 20, 2009. The Court of Appeals for the Federal Circuit affirms Judge Hodge’s opinion in this contract case. The COFC “awarded the government \$10,000 for Daewoo’s False Claims Act violation and \$50,629,855.88 for Daewoo’s Contract Disputes Act violation. *Id.* at 597. It also held that Daewoo’s claims were forfeited under 28 U.S.C. § 2514.” In an opinion by Judge Dyk, the court also rejects all of Daewoo’s arguments.

United States Of America, v. Dolores Mae Arreola, 10th Cir. No. 07-2168, December 08, 2008, affirmed the finding of the district court that a CO employed by Los Alamos National Laboratory (“LANL”) occupied a position of trust and it was therefore proper to increase her sentence for criminal activities.

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