The ICE Suspension and Debarment Program Heats Up

BY MICHAEL J. DAVIDSON AND JENNIFER L. LONGMEYER-WOOD

During 2009, the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) dramatically increased the number of administrative actions taken against contractors that have knowingly hired or harbored illegal aliens. ICE also began to expand its suspension and debarment program into other areas of its enforcement authority, including benefits fraud and procurement fraud. Additionally, DHS adopted the nonprocurement rule, 2 C.F.R. Part 180, which has afforded ICE another avenue to protect the government through suspension and debarment. Although relatively new to suspension and debarment, ICE has rapidly expanded its program and continues to refine its suspension and debarment process as the program matures. Most recently, ICE’s parent agency, DHS, has also initiated a review of its processes and procedures to develop the optimal agency-wide program. This article will review the development of the ICE suspension and debarment program and its unique immigration-based administrative actions, and describe the current program as ICE matures as a full partner in the government’s effort to protect the integrity of the procurement process.

The ICE Program Begins and Expands
ICE took its first debarment action in September 2008 when it notified seven companies that they had been proposed for debarment after it was determined that they knowingly hired illegal aliens. Each of the companies had been “convicted of knowingly hiring unauthorized workers or continuing to employ an alien who is or became unauthorized . . . .” In a statement concerning the proposed debarments, the agency noted that “[b]y using debarment in appropriate circumstances, the federal government can avoid working with businesses that employ an illegal workforce and unscrupulously undercut their competitors to gain an unfair market advantage because of reduced labor costs.”

Significantly, the proposed debarments marked the first instance in which ICE had pursued such an action against a contractor. Although ICE’s predecessor agency, the Im-
(continued on page 14)

Michael J. Davidson and Jennifer L. Longmeyer-Wood are attorneys in the Commercial and Administrative Law Division at the Office of the Principal Legal Advisor of Immigration and Customs Enforcement. Views expressed here are the authors’ own and do not necessarily represent those of U.S. Immigration and Customs Enforcement, the Department of Homeland Security, or the U.S. Government.
Annual Meeting Highlights

A. CLE proposal
Prior to the start of the Section meeting, I had the opportunity to participate in several global ABA meetings involving the chairs-elect. During that process, we learned of a new ABA CLE model proposal involving the CLE support that Sections receive from the ABA. The proposal had several increases in fees to the Sections that were not clear to me, so I made the mistake of questioning them in a meeting with Carolyn Lamm, the ABA president. I was invited, along with the chair-elect of the Tort Trial and Insurance Practice Section, to express our concerns to the Board of Governors of the ABA. Fortunately, before the board meeting, the Sections worked with the authors of the proposal on a compromise. We were able to report to the board our appreciation for such constructive dialogue. The entire process was eye-opening. The good news is that the fees that were of most concern to the Section were removed from the proposal and will be studied going forward.

B. Brainstorming Session
In a break from tradition, we canceled the normal new committee chairs’ training session and instituted a brainstorming session where we had a free and open discussion on issues relating to the Section. The highlight of this effort involved briefings from Daniel I. Gordon, administrator, Office of Federal Procurement Policy, concerning current developments in federal, state, and local procurement law. The opinions expressed here are those of the authors and do not necessarily represent those of the ABA or the Section.

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Navigating the Recovery Act’s Buy American Rule in State and Local Government Construction

By Thomas D. Blanford

The American Recovery and Reinvestment Act, Pub. Law No. 111-5 (the Recovery Act), contains a “Buy American” requirement limiting the use of certain foreign materials on projects paid for with Recovery Act funds. The application of the Buy American provision is very complicated, because the rules to be applied will vary depending upon the agency that is doing the procuring, the materials that are being used, and the country of origin of the materials. As a result, the application of this provision may differ for the same type of project procured by two different public agencies. Procurement officials and contractors should carefully examine the Buy American provision to ensure that they fully understand its applicability to a given project, and to determine whether they can comply or whether a waiver is needed.

Section 1605(a) of the Recovery Act provides:

None of the funds appropriated or otherwise made available by this Act may be used for a 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 can be broken down into three key elements which must be understood to apply the rule: (1) (Project Scope) Recovery Act funds may only be used “for the construction, alteration, maintenance or repair of a public building or public work” if (2) (Product Scope) “all of the iron, steel and manufactured goods used in the project” (3) (Country of Origin Rule) “are produced in the United States.”

The Recovery Act itself does not define these three key elements, but the Office of Management and Budget (OMB), as well as the combined Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the FAR Councils), which jointly are responsible for maintaining the Federal Acquisition Regulation (FAR), have issued interim guidance for the Buy American requirement. This article analyzes the application of section 1605 to state and local government construction projects. The OMB guidance applies most directly to spending at the state and local levels, and thus is the focus of this article, but the FAR Councils’ rules are also a helpful source of guidance for issues as to which OMB has not provided definitive rules.

Determining Whether the Recovery Act’s “Buy American” Rule Applies

To determine whether the Buy American rules apply to a given project, several questions need to be asked. As a threshold matter, the Buy American provisions of the Recovery Act apply only if Recovery Act funds are being used. (Note, however, that if Recovery Act funds are not being used, Buy American restrictions in other laws may still apply.)

Projects Covered: “Public Buildings and Public Works.” The Recovery Act’s Buy American rule only applies to “a project for the construction, alteration, maintenance, or repair of a public building or public work.” OMB’s definitions of “public building” and “public work” are set forth at Title 2 of the Code of Federal Regulations, section 176.140(a):

. . . a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

There are two important considerations to take from this definition. First, the limitation to buildings and public works “of a governmental entity” means that it should...
apply only to improvements owned by a government. As a result, the Buy American provision would not apply to a privately owned project that received Recovery Act funds. Outside of this limitation, however, the scope of the Buy American provision is very broad. It applies to improvements owned at all levels of state and local government, including regional entities such as water districts or transportation districts, and even multistate entities.

Second, the definition of buildings and works is very broad, and includes any “construction, alteration, maintenance or repair of such buildings or works.” In other words, the Buy American rule will very rarely not be applicable to a construction project conducted by a state or local government using Recovery Act funds.

Products Covered: “Iron, Steel, and Manufactured Goods.” Once it has been determined that the project uses Recovery Act funds for a public building or public works project, the next issue is the determination of which goods the Buy American restriction applies to. Section 1605 applies to only two types of goods: iron/steel, and manufactured goods, both of which are defined by OMB.

OMB’s definition of iron/steel is “an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon.” That definition is broad enough to cover virtually all construction-grade steel.

OMB’s definition of a “manufactured good” is:

1. Manufactured good means a good brought to the construction site for incorporation into the building or work that has been—
   (i) Processed into a specific form and shape; or
   (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

The threshold question for “manufactured goods” is thus whether the good is for “incorporation into the building or work.” For example, a manufactured item that is brought to a construction site solely to facilitate construction would not fall within the scope of the Buy American rule. The definition does include, however, any good that is processed into a specific form and shape (e.g., any machinery or equipment), or that is combined with other raw materials to create a material with new properties (e.g., cement and asphalt), so long as the good is incorporated into the public building or public work.

With that understanding of which products are covered by the Recovery Act’s Buy American provision, one can turn to the really difficult issue: applying the country-of-origin rules to determine whether the iron, steel, or manufactured good is to be treated as a U.S.-produced item or as a foreign-produced item.

The Country-of-Origin Rule: “Produced in the United States.” A tricky part of applying any Buy American rule is to determine which “country of origin” test to use. In a world where many products go through a series of production or manufacturing steps in different countries, it is often very difficult to determine the “origin” of a given product. Section 1605 of the Recovery Act merely provides that the iron, steel, and manufactured goods must be “produced in the United States,” but otherwise provides no insight into how the country of origin is to be determined.

There are a variety of possible origin tests, including:
1. the traditional “substantial transformation” test used by U.S. Customs and Border Protection;
2. a “cost of domestic components” test used in FAR Part 25;
3. a “wholly obtained or produced/all manufacturing process” test like that used by the Department of Transportation;
4. the “tariff shift” test being used in recent trade agreements; or even
5. the “Made in the USA” test used by the Federal Trade Commission.

In its interim regulation, OMB gave less than complete guidance on determining country of origin. For iron and steel, OMB adopted the origin test that the Department of Transportation has used for many years. Specifically, the interim regulation provides:

2. All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States.
   (i) Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.

Thus, for iron/steel to qualify as United States produced, “all of the manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.” This is an extremely strict country-of-origin test. It effectively treats as foreign much of the steel “produced” by the U.S. steel industry, particularly steel “produced” west of the Rocky Mountains. For example, the rule means that contractors cannot use steel products that are made in the United States from unfinished or semi-finished foreign steel products such as steel slab or plate. This is the case even though the federal government has recognized for many years that these products undergo a “substantial transformation” when processed in the United States.

Unfortunately, OMB’s interim regulation does not really explain what country-of-origin test applies to “manufactured goods.” On this topic OMB says:

There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States.

A test that requires that the “manufacturing occurs in the United States” is not significantly more precise than section 1605’s requirement that the manufactured goods be “produced in the United States.” While it does indicate that mere assembly in the United States is insufficient, it does not specify which country-of-origin test should be applied.
for the more difficult situations. The OMB rule is enlightening, however, because it clearly states that the requirement applies only to the final product and not to any components or subcomponents. In the absence of specific guidance from OMB, a reasonable and defensible approach for a procurement official or contractor is to utilize the “substantial transformation” test that the FAR Councils have adopted for application of section 1605 at the federal level.

The “substantial transformation” test is intended to identify the country of origin of a product when the product either is manufactured in more than one country, or it incorporates materials, parts, or components from more than one country, or both. It is a fact-intensive analysis directed at determining the country where the most significant manufacturing or processing operation took place; that is, the country in which the imported product was given its essential character. The origin of such a product is that country in which it was last “substantially transformed” into a new and different article of commerce with a name, character, or use different from all foreign materials, parts, and components used in its manufacture. Not surprisingly, whether a product has been substantially transformed is often not clear, and is subject to a variety of interpretations.

### Determining the Impact of International Agreements

Applying the Recovery Act’s Buy American provision would be relatively straightforward if the rules described above were all that need be considered. Unfortunately, they are not. The Recovery Act provides that the Buy American provision is to be applied “in a manner consistent with United States obligations under international agreements.” These international agreements include the World Trade Organization Government Procurement Agreement (GPA) and many other bilateral and multilateral free trade agreements (FTAs). Generally speaking, the United States’ obligation under these agreements is to give end-products of the signatory countries the same treatment afforded to products produced in the United States in a “covered” procurement. If applicable, an international agreement could result in iron, steel, or manufactured goods of a signatory country (e.g., goods that are substantially transformed in that country) being treated the same as U.S.-produced iron, steel, or manufactured goods. Treating the foreign product the same as a domestic product means not only that the foreign product is to be deemed a U.S. product for purposes of applying the Buy American rule, but also that the foreign product should be given the Buy American preference over a foreign product from a nonsignatory country.

The first step in understanding the impact of an international agreement is to determine whether the procurement is subject to such an agreement. Applying the international agreements is very complex, but Appendix B to OMB’s interim guidance provides a list of “U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements.”

This list allows one to determine:
- Whether the procuring agency is a “covered entity” subject to the GPA or another FTA;
- Whether there is a product exclusion that would exempt iron, steel, or manufactured goods from the impact of the GPA or FTAs; and
- What international agreements must be considered.

The accompanying table (page 6) is an excerpt from the appendix published by the OMB on March 25, 2010.

To understand whether an international agreement applies, the first step is to determine whether the procuring agency’s state is contained in the appendix. If the state is not listed, then neither the GPA nor any FTA impacts the application of the Recovery Act’s Buy American rules. Approximately 10 states, along with the District of Columbia, are not identified in the appendix.

If the state is listed in the appendix, the next step is to determine whether the procuring agency falls under the “Entities Covered” list for that state. Not all state agencies are covered. For example, in California all “executive branch agencies” are covered, but other divisions of the State, such as the University of California and California State University systems, are not covered. Moreover, local governments are never covered. If the procuring agency is not a covered entity, then application of the Recovery Act’s Buy American rule is not impacted by any international agreements.

If, however, the procuring agency is a covered entity, the third step is to determine whether the iron, steel, or manufactured good is subject to an exclusion. Product exclusions are listed in the third column in Appendix B. Many states have exclusions for construction services, construction grade steel, or even “goods.” If a product exclusion applies, then the Buy American rule is unaffected by an international agreement; if no exclusion applies, one must consider the impact of the international agreement.

As noted previously, these international agreements generally require that end products from a signatory country receive the same treatment in a covered procurement as a domestic product. The final step is to consider the impact of the GPA and each FTA identified by OMB. These international agreements may or may not have monetary thresholds that limit their applicability. For example, the

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**The Recovery Act provides that the Buy American provision be applied in a manner consistent with United States obligations under international trade agreements.**
GPA covers projects valued at $7.443 million or above. Thus, even if the procuring agency is subject to the GPA and no product exclusion applies, if the project is for less than $7.443 million, then application of the Recovery Act’s Buy American rules is unaffected by the GPA, and the foreign iron, steel, and manufactured goods will not be considered comparable to their domestic counterparts.

In summary, if a potential international agreement is identified that may impact the Recovery Act’s Buy American requirement, one must follow the four steps outlined above to ensure that one is applying section 1605 in a manner consistent with the international obligations of the United States. Once the applicable country-of-origin rule is identified, it will be possible to determine what iron, steel, or manufactured goods are deemed to be products of a relevant signatory country, and, consequently, the products that must be treated the same as domestically produced products.

A review of all of the international agreements is beyond the scope of this article, but a review of how the GPA would apply is informative. The GPA uses the “substantial trans-

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<th>States</th>
<th>Entities Covered</th>
<th>Exclusions</th>
<th>Relevant International Agreements</th>
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<tr>
<td>Arizona</td>
<td>Executive branch agencies</td>
<td>– WTO GPA.</td>
<td>– WTO GPA.</td>
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<td>– U.S.-Chile FTA.</td>
<td>– U.S.-Singapore FTA.</td>
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<td>Arkansas</td>
<td>Executive branch agencies, including universities but excluding the Office of Fish and Game</td>
<td>Construction services</td>
<td>– WTO GPA.</td>
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<td>– DR-CAFTA.</td>
<td>– U.S.-Australia FTA.</td>
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<td>– U.S.-Chile FTA.</td>
<td>– U.S.-Morocco FTA.</td>
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<td>– U.S.-Peru TPA.</td>
<td>– U.S.-Singapore FTA.</td>
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<td>California</td>
<td>Executive branch agencies</td>
<td>– WTO GPA.</td>
<td>– WTO GPA.</td>
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<td>– U.S.-Australia FTA.</td>
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<td>Colorado</td>
<td>Executive branch agencies</td>
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<td>- Department of Administrative Services</td>
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<td>- Department of Transportation</td>
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<td>- Department of Public Works</td>
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<td>- Constituent Units of Higher Education</td>
<td>– U.S.-Peru TPA.</td>
<td>– U.S.-Singapore FTA.</td>
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<td>Delaware</td>
<td>- Administrative Services (Central Procurement Agency)</td>
<td>Construction-grade steel (including requirements on subcontracts); motor vehicles; coal</td>
<td>– WTO GPA.</td>
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<td></td>
<td>- State Universities</td>
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<td>– DR-CAFTA (except Honduras).</td>
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<td>- State Colleges.</td>
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### Slab Produced In… | Final Processing In… | Country of Origin Test | Foreign Steel Product Treated The Same As U.S. Produced?
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GPA Country | GPA Country | Substantial Transformation | Yes
Non-GPA Country | GPA Country | Substantial Transformation | Yes
GPA Country | United States | Substantial Transformation | Yes
Non-GPA Country | United States | “All manufacturing in U.S.” | No

formation” test to determine a product’s country of origin. The FAR defines a “WTO GPA country end product” as an article that—

* * *

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.12

An example of the impact this rule has on the Buy American provision is to consider the foreign-produced steel slab mentioned earlier. Recall that the steel slab was produced in a foreign country and brought to the United States for processing into a finished steel product. Under the Recovery Act’s Buy American provision, the processing in the United States did not render the product “produced in the United States.” But if the GPA applies to the procurement, the country-of-origin analysis changes significantly. The chart (above) shows how the GPA’s substantial transformation test changes the result.

In the first three scenarios, the applicability of the GPA changed the status of the end-product steel from foreign to a product that must be treated the same as U.S.-produced steel. In other words, the results can change on a product-by-product basis depending on the applicability of the GPA or another FTA.

Some states have misinterpreted the impact that compliance with an international agreement has on section 1605. For example, a common misperception is that if the GPA applies to a project, then the Recovery Act’s Buy American rule does not apply. That is not a proper interpretation of section 1605(d) or OMB’s guidance. The applicability of the GPA means that section 1605 cannot be applied in a manner that is inconsistent with the United States’ obligations under the GPA.13 That is to say, section 1605 continues to apply, but it cannot be applied to discriminate against products from the GPA signatory country. The continued applicability of section 1605 is evidenced by OMB’s providing a contract clause for inclusion in solicitations on projects that are subject to international agreements.14

### Waivers of the Buy American Rule

There are three instances in which the head of the relevant federal agency may grant a waiver of the Buy American provision. Specifically, the agency head may do so where:

- application of the Buy American provision would be inconsistent with the public interest;
- the iron/steel or manufactured good is not available in sufficient quantities or sufficient quality from domestic suppliers; or
- the cost of the domestic iron/steel or manufactured good would increase the overall cost of the project by at least 25 percent.15

OMB’s interim guidance details the process for obtaining a waiver. The head of the federal agency awarding the Recovery Act funds may make a project-specific waiver or a waiver applying to a broader category of projects, including a nationwide waiver.16 Waivers may be granted before or after funds are obligated based on the facts that support the need for a waiver. The awarding official will consider any reasonable available information, which should include information provided by the state or local government procuring agency, the contractor(s), and potential domestic and foreign suppliers. Waivers require public notice, including publication in the Federal Register.

A survey of the Federal Register notices describing the waivers that have been granted demonstrates a few clear trends. First, the agency that has granted the most waivers is the Environmental Protection Agency (EPA). EPA has granted more waivers than all other federal agencies combined. Second, far and away the most common basis for a waiver is nonavailability of the product from domestic suppliers. Third, only a few waivers have been granted under the “public interest” exception. Finally, no waivers were granted because the use of domestic iron, steel, or manufactured goods increased the cost of the project by more than 25 percent. This may be because a 25 percent cost increase for the project (not the item or the contract) is a very tough standard to satisfy.

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**EPA has granted more waivers than all other federal agencies combined. And the most common basis for a waiver is nonavailability of the product from domestic suppliers.**
Conclusion
The Recovery Act’s Buy American restrictions have broad applicability and likely apply to almost any state or local public construction project that uses Recovery Act funds. Procurement officials and contractors should carefully review the rules applicable to a given procurement; they should not simply assume the restriction is not applicable because the World Trade Organization Government Procurement Agreement or another free trade agreement may apply. Whenever possible, it is advisable to get country-of-origin certifications from suppliers, so long as such certifications are based on the proper country-of-origin analysis.

Endnotes
1. Recovery Act, § 1605.
2. See FAR Subpart 1.2.
4. The FAR Councils adopted a broader definition that does not require public ownership of the building/work: “Public building or public work means a building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.” FAR 22.401(a).[14][15]
5. 2 C.F.R. § 176.140(a)(3).
6. 2 C.F.R. § 170.140(a)(1).
7. 2 C.F.R. § 176.70 (emphasis added).
9. 2 C.F.R. § 176.70.
12. FAR 25.003.
13. It is also important to realize that state or local projects that involve federal funds for “mass transit and highway projects” are exempt from trade agreements such as the GPA. In such circumstances, the state or local government entity and the contractor must comply with the Recovery Act’s Buy American rule.
14. OMB provided different contract clauses for procuring agencies to use in Recovery Act solicitations. The first clause, 2 C.F.R. § 176.140, is used if the project is not subject to an international agreement. The second clause, 2 C.F.R. § 176.160, is used if the project is subject to an international agreement.
15. Recovery Act, § 1605(b).
16. 2 C.F.R. § 176.100(a).

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When Is No Contract a Contract?

BY PENSIVE POSER, ESQUIRE

I was walking through a light drizzle the other evening, pondering the saying that “[the Lord] sendeth rain on the just and the unjust,” when I began to question why there is such a difference sometimes between regular contract law and government contract law. This was yet another demonstration of my pathology of thinking overmuch about government contract law, which some who are knowledgeable believe has been a major contributing cause of my querulous nature.

The particular difference between “normal” contract law and government contract law that came to mind is found in the Federal Circuit’s decision in Alliant Techsystems, Inc. v. United States, which I had had cause to peruse again that morning. Could the subject matter of the case be any more unique to government contracts? The contract was to “demilitarize” bombs. Did this mean they could now be used for civilian activities, I wondered? Or did this mean to make them potted plant container? Why not “de-bomb” them instead? But such philological quandaries did not seem to matter to the contractor in the case, which just wanted to get rid of the contract because it was losing its shirt performing it.

And that’s where one would have thought that mundane, general contract law would have taken center stage. The government knew a good deal when it had one, and the contracting officer decided to exercise the 100 percent option. Ah, but here’s the rub. When the CO did so, he required performance at a rate greater than that of the original contract (or any subsequent modification).3

“Paydirt!” can’t you just hear the contractor exclaim? “I’m outta this puppy!” The contractor knew that, to be valid, an option exercise must conform exactly to its specified terms. Any step out of bounds by the government invalidates the option and the contract ends. The option does not become part of the contract because the attempted exercise did not conform with the offer and so became a counteroffer, rather than an extension of the contract. This law, I believed, was the same for both government contractors and other types of contracting parties.4

That’s what I believed, that is, before reading Alliant Techsystems. The contractor blissfully told the CO that his option exercise was ineffective. But did the CO agree? No, he did not. He said he hadn’t changed anything all that much. All he’d done was extrapolate the faster pace of performance from prior modifications he had ordered. He wanted

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that great price, and he wanted “de-bombs” now.5 “We’ll see about that,” the contractor said, marching into the Court of Federal Claims for a declaratory judgment that the option was ineffective. “How can I lose?” the contractor must have thought.

I have often questioned why matters don’t seem to go as I had expected, and the contractor here must have wondered the same thing when it got the decision from the trial court. The court fashioned an option of its own making, one that set yet another, different rate of performance from that in the CO’s option exercise.6 The trial court ordered the contractor to keep performing in accordance with this judicially-revised option exercise.7

What was our poor contractor to do? Corbin and Williston told the contractor that this option exercise was no good, no matter what the trial court said, and yet our poor contractor was getting poorer with every “demilitarization” that it performed. And it knew the CO’s option exercise couldn’t just be revised by a court, as everyone knows that a court can’t write a contract for the parties—or at least a different one from what the parties intended—and the CO clearly called for a higher rate of production than the judge specified. Judges just can’t “fix it” for the government when it messes up, can they?

So what did our contractor decide to do? It appealed the decision of the trial court and quit working.8 And, sure enough, the appeals court agreed that the option had not been properly exercised by the CO and had expired, leaving the contractor with no obligations under the CO’s ineffective attempt to exercise it.9

So did our contractor go away happy? Afraid not. Things took an unexpected turn in the appeals court. “What about the disputes clause under the contract?” the appeals court asked. “Did the contractor have obligations under the ‘continue to work’ provision in the disputes clause to keep performing when the CO disputed the contractor’s position that the option had not been exercised effectively?” And, wouldn’t you know it, the appeals court found that the contractor did have an obligation to continue work until a court (like itself) had ruled otherwise. Because it had quit before the appeals court had agreed with it about the option exercise, the court ruled that the contractor was in default under the disputes clause for stopping work too soon.10

“How can I be right and wrong at the same time?” the contractor must have queried, querulously. How, indeed? The contractor argued, as the appeals court recorded it, that the disputes clause and its “continue to work” provi-
sion did not apply “because the option clause, even if properly invoked, would have created a second and separate contract.”11 (One wonders how that would help the contractor, as the “second and separate” contract would have had the same disputes clause as the first.)12 The appeals court quickly disposed of this argument, finding that an option properly exercised just extends the original contract; it does not create a new one.13 “But wasn’t what the contracting officer requested a drastic, cardinal change?” the contractor suggested. The appeals court agreed that that would be bad if it were, but held there was no “drastic modification involved.”14 Thus, the appeals court concluded, the contractor materially breached the contract.15

Now, I must ask, what contract would that be that the contractor supposedly breached? The contractor performed all its obligations under the initial contract. What it did not perform were obligations under the defective option exercise, that is, obligations that never came into existence. And, if, as the court held, there was not an effective option exercise, what is all this talk about an effective exercise extending the initial contract, rather than creating a new one? Isn’t it obvious that there is no contract extension when there is not an effective option exercise? And doesn’t it follow that there is no disputes clause to violate when there is no longer any contract? And why are we talking about cardinal changes at all when there is no longer any contract to be changed?

Can there be a free-floating disputes clause? If so, aren’t they dangerous? Shouldn’t they be demilitarized? And why do they only float in government contracts air space, not normal air space? Shouldn’t the Federal Circuit take its first opportunity to shoot down this particular UFC?16

I wonder. 

Endnotes
1. Matthew 5:45 (King James). This, I am told, is a positive thing, not a negative one, as in, “There will be showers of blessing,” etc.
2. 178 F.3d 1260, reh’g denied, 186 F.3d 1379 (Fed. Cir. 1999).
3. 178 F.3d at 1273-75.
4. See id. at 1275 (citing United States v. T W. Corder, Inc., 208 F.2d 411, 413 (9th Cir. 1953); Uniq Computer Corp. v. United States, 20 Cl. Ct. 222, 231-32 (1990); 3 Eric Mills Holmes, Corbin on Contracts § 11.8 (1996)).
5. 178 F.3d at 1264.
6. Id.
7. Id.
8. Id. at 1264, 1275.
9. Id. at 1273-75.
10. Id. at 1275-76.
11. Id. at 1275.
12. See 48 C.F.R. § 17.201 (in effect at time of contract award to Alliant Techsystems; removed and reserved effective May 11, 2001, see 66 Fed. Reg. 14259 (Mar. 9, 2001)).
14. 178 F.3d at 1276. There was even less of a drastic modification at the lower rate ordered by the trial court, but that was, inconsistently, ignored by the appeals court, although it presumably should have been the relevant consideration under the appeals court’s skewed rationale.
15. Id.
16. Unidentified Flying Clause.
Organized. The first seven focus primarily on the bid through pre-award period, beginning with a discussion of sealed bidding, competitive negotiation, and alternate delivery systems, including indefinite delivery/indefinite quantity (IDIQ) task order contracts and the construction specific design-build contracts and construction management contracts. Fundamental government contract principles—for example, what “best value” means in a negotiated procurement—are discussed and illustrated with cases focusing on construction disputes. Legislative and regulatory history is also covered to provide helpful, historical context when appropriate. A good example of this is the exception from the general rule requiring price competition for the acquisition of design services, and how this led to the passage of the Brooks Architect-Engineers Act, including recent amendments thereto.

Among the more notable features of the book, Chapter 4, “Architect-Engineer Contracting,” is new to the second edition. It discusses in detail the Brooks Act and why, even with the aforementioned exception for the acquisition of professional design services, the architect and engineer must still navigate through a highly regulated procurement and performance process. Specifics of the selection process, with emphasis on the scope of services, funding limits, and the standard of care applicable to architects and engineers, are covered, as well as issues specific to architect-engineer contracts and, significantly, how the federal government’s cost estimate can affect the basis for the funding limitation incorporated into the design services contract.

Chapter 7 is also a “must read” for the novice and experienced practitioner alike. After a review of the Christian doctrine and the standard rules regarding contracting authority, the chapter takes on improper business practices, first focusing on transparency requirements and, specifically, recent mandatory disclosure and internal control provisions, and whistle-blower protections. These sections deal extensively with changes to the FAR that were implemented in 2008, as well as the enhanced protection afforded whistle blowers under the American Recovery and Reinvestment Act of 2009 (ARRA). The chapter continues with an analysis of improper pricing practices and the rules for interacting with
The chapter devoted to “Socioeconomic Issues in Government Contracting” covers a broad range (perhaps a bit too broad) of special government contracting programs such as those administered by the Small Business Administration, and those governed by the Buy American and Trade Agreements Acts, and the Davis-Bacon and Service Contract Acts. It offers a fine general overview and, as the author acknowledges, each program discussed could justify a chapter in itself. That said, given the increasing number of set-aside contracts designated for small businesses and the distinct advantages available to smaller contractors seeking construction work from the federal government (such as through the SBA’s mentor-protégé program), future editions of the book may benefit from more comprehensive treatment in separate chapters placed earlier within the book.

The next several chapters address the substantive and procedural issues common to litigation against the federal government. These include an informative discussion of the difference between an REA and a claim, the prima facie elements of a claim, the importance of the certification required for larger claims, timeliness requirements for presentation of a claim, and what the contractor can expect from the contracting officer in the form of a “final decision.” Also addressed is how to choose the appropriate forum (which the legal practitioner or advisor will find very helpful and thought-provoking), how to get paid if one finds oneself in the enviable position of prevailing against the government, and the extent to which attorney’s fees and expenses are recoverable under the Equal Access to Justice Act. An entire chapter is appropriately reserved for alternative dispute resolution (ADR). In addition to a discussion of the various types of ADR used by the federal government, this chapter addresses the significant differences between negotiating with a government representative and a private owner, perhaps the most significant being the government representative’s motivation to protect the public purse and how this affects the negotiation process.

The following chapters address the problems that most frequently arise in construction contracting: defective specifications and delay, suspension of work, acceleration, and disruption. In addition to covering basics such as the Spearin doctrine, there is an interesting and timely discussion devoted to the interaction between design-build contracting and the government’s implied warranty, which advises that a properly administered design-build contract transfers the risk of design insufficiency from the owner to the design builder. This will certainly be significant (and frustrating) to any contractor that has endured an overactive and overbearing design review process that not only departs from the contract terms, but also essentially transforms the contract from design-build to the more traditional design-bid-build model, in which the government, not the contractor, should be responsible for any defective specification. The chapter on delay is equally engaging and informative. “Time is money” sets the tone and, after a brief introduction of basic delay concepts, the chapter pro-

federal employees; notably, a contractor new to federal procurement will find that certain practices otherwise permissible in the private sector—for example, offering a gratuity to an owner as a showing of goodwill—are illegal when dealing with employees and officials of the federal government.

The succeeding chapters cover issues that arise during performance, prior to the pre-litigation (i.e., “request for equitable adjustment,” or REA) and litigation period. Where the introductory chapters center on traditional government contract concepts, many of the chapters that follow build on traditional construction concepts or, at the very least, concepts common to commercial and government construction, such as changes, differing site conditions, inspection, acceptance and warranties, and termination for default. Consistent with the book’s general theme, however, such commonality of issues does not necessarily mean that the commercial contractor will know what to expect when dealing with the government, and these chapters appropriately address and highlight the distinctions.

For instance, the chapter on changes discusses the contracting officer’s extensive, and at the same time rather circumscribed, authority to issue change orders, as well as the elements and types of “constructive changes” typical to government construction contracting, such as interpretation of and inconsistencies between specifications and drawings, defective specifications, inspection and testing, limits on or changes to contractor means and methods, constructive acceleration, breach of implied duties, and the cumulative impact of many changes. The chapter covering differing site conditions (DSCs) offers a thoughtful synthesis of the law from the various courts and boards of contract appeals interpreting the DSC clause, and flows into various “practical issues” that the contractor and practitioner must consider when pressing a DSC claim. The chapter covering termination for default includes a practical comparison of FAR and American Institute of Architects (AIA) default termination provisions, a list of contractor defenses, and a discussion of the government’s burden of proof for sustaining a default termination.

For the most part, the remaining chapters in this section of the book address issues specific to government contracting that arise in the course of performance—issues with which the commercial construction contractor may not be familiar. The chapter on payment and acceptance covers the legal and practical significance of government acceptance, the various exceptions to the finality of acceptance, and the warranty provisions on which the government can rely to protect itself from defects after acceptance. Chapter 11, “Payment and Contract Funding,” addresses satisfaction of requirements under the Prompt Payment Act, limitations on the obligation of government funds set forth in the Anti-Deficiency Act (and the special exceptions available to agencies such as the Army Corps of Engineers to obligate the full price of a contract in advance of appropriations), the government’s right to set off or withhold funds, and the procedures by which contract debt collection occurs.
ceeds to define and describe the various categories of delay in government contracting, including excusable delay, compensable delay, and unexcused delay, discussing the implications of each upon the contractor.

The next two chapters address pricing of claims and overhead costs. Notably, this section discusses standards of proof required of the successful claimant and is appropriately punctuated by the cautionary tale (read, horror story) likely known to all who have ever even contemplated the certification of a claim to a contracting officer, *Daewoo Engineering & Construction Co. v. United States*, in which the U.S. Court of Federal Claims imposed $50.6 million in damages on a contractor that filed a $64 million inflated (and false) claim against the federal government. The chapter on overhead costs complements its predecessor by focusing on how the contractor can best capture and recover overhead as part of any claim or REA. Sources of law controlling recovery of overhead are introduced and explained, including a discussion of the longstanding *Eichleay* formula and the several prongs that must be established for recovery. This chapter’s strength is best seen in its organized and clear presentation of an arguably complex and confusing, but nonetheless significant, element of contract damages, and will undoubtedly prove to be a go-to source for any contractor contemplating a claim that includes project or home office overhead.

The book’s final chapters cover issues unique to public procurement, as well as issues that, although present in private construction, warrant coverage because of the special rules that apply in public procurement situations, such as the rules regarding subcontracting. Complementing the chapter on subcontracting is a separate chapter devoted to surety bonding, which significantly expands on the discussion of the Miller Act in the preceding chapters and reviews the various statutes and regulations requiring bid, payment and performance bonds on federal construction projects. A discussion of the types of claims covered by the Miller Act, and the payment bond defenses available to the surety against payment bond claimants offers further practical guidance.

Fraud, funding, and federal grants are discussed in the book’s final three chapters. The discussion on fraud opens with an overview of the recent trend in private contracting to throw in all claims when confronted with a dispute—actual, potential, and perhaps overstated—to see what will fall out, and then well-advisedly warns of the disastrous consequences awaiting the contractor that utilizes this approach against the federal government—witness *Daewoo*. The special concerns of qui tam litigation, as well as a basic outline for defending against a False Claims Act (FCA) claim and the other antifraud statutes that commonly arise in an FCA action offer welcome practical guidance. Keeping current, the chapter closes with a discussion of the recent FAR requirement that contractors have a written code of business ethics and conduct, and makes a number of helpful recommendations for avoiding civil and criminal FCA and other fraud actions.

In view of the massive increase in U.S. military spending since the publication of the first edition in 2003, as well as the recent passage of the ARRA, the editors of the second edition wisely included a chapter devoted to funding and related issues regarding federal government construction outside the United States. This discussion aims to provide lawyers with a fundamental understanding of the fiscal, statutory, and regulatory legal regime applicable to military construction and, particularly, military construction outside the continental United States (OCONUS). The chapter opens with an interesting overview of the constitutional authority to fund U.S. military operations (including construction projects), followed by a discussion of the legislative framework regulating that funding, emphasizing the three fundamental limitations on expenditure of funds: purpose, time, and amount. This framework is then discussed within the context of Department of State and Department of Defense (DoD) authorizations and appropriations, the primary means by which Congress has provided funds necessary for DoD to fund its worldwide contingency operations, including the global war on terror and combat-related construction.

The book’s last chapter addresses federal grants, a topic also new to the second edition. The chapter first identifies the important laws and regulations controlling federal grant programs and, in turn, the effect of those laws on state and local contracting efforts supported by such programs. State and local procurement under federal grants is also addressed, including basic procurement procedure, the difference between discretionary and mandatory grants, federal clauses and provisions required in state and local contracts supported by federal grants, and conditions regarding the proper use of grant funds. The chapter closes with an important discussion of the recent expansion of the FCA that now covers contractors receiving federal grant funds, and a brief statement on where contractors can find construction project grants.

Notwithstanding my positive response to this book (which should be evident from the foregoing comments), there is always room for improvement, and such is the case here. Perhaps most significant, future editions may benefit from the increased input of its editors to lend greater flow and cohesion across the chapters. Although this may not necessarily assist the more experienced practitioner occupied with a pointed research topic—a task for which this book is well suited—the less experienced practitioner,
consultant, or contractor will undoubtedly benefit from
the editors’ keen insight in linking, distinguishing, and
synthesizing the broader concepts facing the construc-
tion contractor that contemplates working for the federal
government. If the editors succeed in doing that, I believe
the larger and more significant themes critical to an un-
derstanding of federal construction contracting will be ap-
propriately emphasized and allow the reader to come away
with a sharper impression of the “big picture.”

That said, it is only on rare occasions that events align in
such a way as to offer a particular insight that one might miss
or fail to appreciate under slightly different circumstances.
It so happens that my deadline for this review fell within
the same week during which I had the opportunity to hear
senior leaders of the Naval Facilities Engineering Command,
the Air Force Center for Engineering and the Environment,
the General Services Administration, and the Corps of
Engineers speak to the Associated General Contractors of
America on the most current and pressing issues affecting
federal construction. With the substance of “Federal Gov-
ernment Construction Contracts” fresh in my mind, I found
that the issues most on the minds of our government’s lead-
ers who are responsible for overseeing military and civil con-
struction—for example, the increasing use of design-build,
the use of construction management or “early contractor
involvement contracts,” and funding for extensive construc-
tion in Guam, to name but a few—were often anticipated
and addressed by the editors and authors of this second edi-
tion. A stronger confirmation of this book’s relevancy and
near- and long-term usefulness would be difficult to imagine.
I, for one, know that it will continue to be among my prima-
ry sources for legal authority when I confront issues involv-
ing construction for the federal government.

ICE
(continued from page 1)

migration and Naturalization Service (INS), had authority
to debar companies for immigration related misconduct,
INS’s worksite enforcement strategy “focused primarily on
the use of civil fines to gain employer compliance.”

ICE has taken several steps to formalize its suspension
and debarment program. Recently, the agency established
a separate Office of Suspension and Debarment under the
head of contracting activity (HCA), who also serves as the
suspension and debarment official (SDO). Further, ICE
has appointed an attorney to serve as senior legal advisor
on suspension and debarment issues. Both the Office of
Suspension and Debarment and the senior legal advisor
work closely with ICE’s Office of Investigations agents in
the field to monitor cases recommended for suspension and
debarment.

Additionally, ICE has designated representatives to
the Interagency Suspension and Debarment Committee
(ISDC). The Duncan Hunter Defense Authorization Act
for Fiscal Year 2009 authorized the ISDC to coordinate
lead agency designations, an important development in
government-wide coordination of suspension and debar-
ment. This was a significant development in the immigra-
tion context, given the numerous types of businesses that
could become involved in immigration employment viola-
tions. Unlike some forms of misconduct that may impact
only a single agency or industry, immigration-related mis-
conduct may cross a wide range of industries or agencies.
“Undocumented workers . . . have been found working in
airports, nuclear power plants, chemical facilities, and mili-
tary installations,” among other locations.

Currently, the vast majority of ICE suspension and de-
barment referrals are related to violations of the employ-
ment provisions of the Immigration and Nationality Act
(INA), which is codified at Title 8 of the United States
Code. Indeed, the ICE program complements the current
administration’s “work-force enforcement strategy of target-
ing employers who knowingly hire unauthorized labor . . . .”
The agency has been aggressive in its approach to ensuring
the present responsibility of contractors involved in INA-
related misconduct. Between April 2009—when ICE im-
plemented its new work-force enforcement strategy—and
late November 2009, ICE “debarred 45 businesses and 47
individuals, up from one during the same period in 2008 . . . .”
In the first half of fiscal year 2010, ICE had already exceeded
the number of administrative actions it pursued against
contractors during the prior fiscal year.

The History of Immigration-Based Actions
Federal Acquisition Regulation (FAR) 9.406-2(b)(2) pro-
vides that a debarring official may debar “[a] contractor,
based on a determination by the Secretary of Homeland
Security or the Attorney General of the United States,
that the contractor is not in compliance with Immigration
and Nationality Act employment provisions (see Executive
Order (EO) 12989, as amended by Executive Order 13286).
Such determination is not reviewable in the debarment
proceeding.” President Clinton issued Executive Order
12989 on February 13, 1996. The order followed the arrest
of 22 unauthorized workers at the Marine Corps’ Camp
Lejeune, North Carolina. Reiterating the policy of enforc-
ing the nation’s immigration laws, EO 12989 was designed
to “promote economy and efficiency in Government pro-
curement.” Positing that stability and dependability were
important elements of economy and efficiency,” EO 12989
assumed that a contractor employing unauthorized aliens
has an unstable and less dependable workforce because
such “contractors cannot rely on the continuing availabil-
ity and service of illegal aliens.”

Significantly, President Clinton ordered that, as a mat-
ter of procurement policy, the executive branch should not contract with employers that had violated those portions of the INA “prohibiting the unlawful employment of aliens.” Further, once the attorney general determined that a contractor had violated the INA’s employment provision, such a determination was to be forwarded to the relevant contracting agency, whose head “shall consider the contractor or an organizational unit for debarment” as well as any other appropriate action prescribed by the FAR. 

Executive Order 12989 also provided that the attorney general’s determination was not reviewable in any subsequent debarment proceeding, that the scope of any debarment normally should be limited to the contractor’s specific non-compliant organizational units, and that the period of debarment “shall be for one year,” although that period could be extended upon a determination of continuing violation of the INA’s employment provisions.

In Section 19 of EO 13286, President George W. Bush amended EO 12989, providing enforcement authority to the secretary of Homeland Security. And on June 6, 2008, President Bush issued EO 13465, which required government contractors to utilize e-Verify to confirm the status of persons hired for, or employees assigned to work on, a government contract. This shift in the focus of enforcing the immigration laws was apparent in the title of amended Executive Order 12989, which was now changed to “Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions and Use of an Electronic Employment Eligibility Verification System.” The preamble of the amended EO 12989 focused on ensuring that federal government contractors were in compliance with immigration laws through the use of a DHS-designated electronic employment verification system. Specifically, the current preamble states:

It is the policy of the executive branch to enforce fully the immigration laws of the United States, including the detection and removal of illegal aliens and the imposition of legal sanctions against employers that hire illegal aliens. . . . Where a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration laws imposes a direct risk of disruption, delay, and increased expense in Federal contracting. . . .

. . . It is the policy of the executive branch to use an electronic employment verification system because, among other reasons, it provides the best available means to confirm the identity and work eligibility of all employees that join the Federal workforce. Private employers that choose to contract with the Federal Government should meet the same standard.

**Current Suspension and Debarment Regime**

Implementing Executive Orders 12989 and 13286, FAR 9.406-2(b)(2) provides, as noted above, that a contractor may be debarred for violations of the INA’s employment provisions “based on a determination by the Secretary of Homeland Security or the Attorney General of the United States.” This determination is not reviewable as part of the debarment proceedings. Further, EO 12989 adopts the broad definition of “contractor” found in FAR subpart 9.4. Finally, EO 12989 requires that a debarred contractor be placed “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.”

Executive Order 12989 lists noncompliance with INA sections 274A(a)(1)(A) and 274A(a)(2) as the basis for debarment. These sections prohibit the knowing hiring or continued employment of an unauthorized alien. Currently, ICE may pursue an INA-based debarment for several different reasons, including:

- Conviction for knowingly hiring unauthorized workers;
- Conviction for continuing to employ an alien who is or becomes unauthorized;
- Conviction for engaging in patterns and practices of knowingly hiring or continuing to knowingly employ unauthorized workers; and,
- Issuance of a final order for a civil fine which reflects unlawful hiring or continuing to hire unauthorized workers.

Although the primary focus of ICE’s suspension and debarment efforts is on INA-related employment violations, ICE is not exclusively concerned with such violation. FAR 9.406-2 provides other causes for debarment, such as contract fraud, antitrust violations, false statements, and tax evasion, among others. Similarly, ICE has taken administrative action against contractors for misconduct unrelated to the INA. Most recently, DHS, of which ICE is a component, has taken several steps to strengthen its suspension and debarment procedures, including requiring contracting officers to evaluate all terminations for default or for cause for possible referral to the component SDO, and mandatory consideration of such referrals by the SDO.

**Determination Process**

Executive Order 12989, as amended, provides that “the procedures established pursuant to 8 U.S.C. § 1324a(e) should be used to investigate whether a contractor, or its organizational unit, has not complied with the INA’s employment provisions, including the use of any required hearings when making such a determination.” Under the procedures established pursuant to section 1324a(e), ICE investigates employers for potential violations of the INA’s employment provisions.

On November 6, 1986, the Immigration Reform and Control Act was signed into law, which made it illegal for employers to hire or recruit unauthorized aliens, required employers to verify the identity and employment eligibility of their employees, and created criminal and civil sanctions for violations. The purpose of this legislation was to reduce the enticement of employment in the United States and, thereby, reduce the level of illegal immigration. Section 274A(b) of the INA, codified at 8 U.S.C. § 1324a(b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. Employers are, therefore, required to
have employees complete the Employment Eligibility Verification Form I-9 (Form I-9).\textsuperscript{26}

To enforce this requirement, ICE may issue a notice of inspection to an employer. This is the first step in the process that may lead to the issuance of a notice of intent to fine (NIF), a warning notice, or a finding that the employer is in compliance with 8 U.S.C. § 1324a(b) (requiring the completion of a Form I-9 for all employees). The purpose of the notice of inspection is to identify any substantive or technical violations and instances of the employer’s knowingly hiring and/or continuing to employ unauthorized aliens that might result in the issuance of a NIF or warning notice.

If the Form I-9 inspection reveals evidence of the presence of unauthorized aliens within the employer workforce, ICE will take affirmative and timely steps to address the issue. The presence of unauthorized aliens may be indicative of criminal culpability on the part of the employer, or may indicate that the unauthorized alien committed criminal acts, such as providing fraudulent immigration documents or assuming the identity of a U.S. citizen (i.e., presenting a false or stolen Social Security number), in order to gain employment. An NIF will be issued:

• in the instance of the employer’s knowingly hiring and/or continuing to employ unauthorized aliens;
• when unauthorized aliens were hired as a result of substantive paperwork violations;
• when there is any evidence of fraud in completion of the Form I-9 on the part of the employer (e.g., backdating);
• in the instance of a failure to prepare and present violations;
• in an instance where the employer was previously the subject of an educational visit, a warning notice, or a NIF; or
• in an instance where the employer was notified of technical violations and failed to correct them within the allotted 10-day period.\textsuperscript{27}

Debarment Determinations

As noted earlier, FAR 9.406-2(b)(2) provides that the determination of contractor noncompliance with the INA’s employment provisions is not reviewable. Although the INA violation determination is not subject to review, the debarment decision itself remains a discretionary act. Indeed, FAR 9.406-1 specifically provides that “[t]he existence of a cause for debarment, however, does not necessarily require that the contractor be debarred. . . .” The debarring official must consider “the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors. . . .”\textsuperscript{28}

If the ICE debarring official determines that debarment is an appropriate remedy, the length of the debarment period will be determined by the specific cause for the action. Debarments under the authority of FAR 9.406-2(b)(2), for noncompliance with the INA’s employment provisions, “shall be for one year” unless extended for continued noncompliance.\textsuperscript{29} Continued INA noncompliance may result in extended debarment periods of one-year increments.\textsuperscript{30} Should ICE proceed under a different or alternative cause for debarment, the presumptive three-year period should apply unless the seriousness (or lack thereof) of the misconduct and other considerations warrant a longer or shorter debarment period.\textsuperscript{31} Conversely, ICE will also entertain properly supported requests to reduce the length or extent of a debarment. See FAR 9.406-4(c).

The current version of EO 12989 provides that “the scope of the debarment generally should be limited to those organizational units of a Federal contractor that the Attorney General finds are not in compliance with the INA employment provisions.”\textsuperscript{32} The executive order’s presumption of debarment limited in scope to an organizational unit differs from the parallel FAR provision. In contrast, FAR 9.406-1(b) presumes debarment of all organizational units: “Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities.”

Administrative Compliance Agreements and Voluntary Disclosure

When contractors voluntarily disclose bases for debarment, it is often in an attempt to avoid possible debarment. Clearly a primary motive for contractors to come forward is to seek an alternative to debarment. From the agency perspective voluntary disclosure identifies potential misconduct of which the agency is unaware and such action may be indicative of a contractor’s good-faith effort to “do the right thing.” ICE will analyze the specific facts of each disclosure and determine whether the contractor’s action merits an alternative other than debarment. Even with voluntary disclosure, contractors are required to work with ICE and fully disclose what they know and when they discovered the facts that led the contractor to come forward and make the disclosure. Disclosure should not be based on information already known to or previously disclosed in any government investigation. If ICE should enter into an agreement, the document memorializing the agreement will clearly state the facts of the voluntary disclosure, specific corrective and/or disciplinary action, and restitution, if appropriate. The end result of any agreement is to ensure that the contractor modifies its behavior both to comply with the law and, concomitantly, to be a presently responsible contractor.

ICE uses administrative compliance agreements (ACAs) as one type of vehicle to accomplish the twin goals of compliance with the law and assurance of present responsibility. Although not specifically addressed in the FAR, ACAs “are within agencies’ general authority to determine with whom they contract.”\textsuperscript{33} Such agreements may require the admission of misconduct, restitution, management changes, compliance programs, training, audits, access to contractor records, or similar provisions.\textsuperscript{34} In exchange, the agency may forego debarment, but generally reserves the right to take future administrative action if the contractor breaches the ACA or engages in additional misconduct.\textsuperscript{35}
Conclusion
Although relatively new to the suspension and debarment community, ICE has rapidly expanded its program over the last two years and continues to refine its processes and procedures as the program matures. Because immigration violations may occur across a very wide spectrum of industries, the potential scope of ICE’s reach is extremely broad. 

Endnotes
2. Id. at 230.
3. Id. at 229.
4. Id.
9. Id.
11. Holland, at 268.
13. Id.
14. Id.
15. Id. at 6092.
16. Id.
20. Id. at Section 4(e).
21. EO 13286 at Section 1.
22. Fact Sheet at Question 4.
Enforceability of Teaming Agreements

BY ROBERT G. HANSEMAN AND CATHERINE KIDD

Teaming agreements have become increasingly common in government contracting. These agreements enable companies to compete for contracts that could not be efficiently performed by a single company, such as consolidated contracts that require a wide-ranging variety of skills. But what happens when team members no longer have the same priorities, or have a falling out due to one member’s recognition that it could more profitably obtain its teammate’s services elsewhere? Even worse, what happens if one team member uses the other’s name and reputation only as a part of a premeditated “bait and switch”? This article will examine the options available to a “jilted” team member.

FAR 9.602 and 9.603

In the context of government contracting, teaming agreements may take one of two forms: (1) “[t]wo or more companies form a partnership or joint venture to act as a potential prime contractor,” or (2) “[a] potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.” Federal Acquisition Regulation (FAR) 9.603 articulates a general policy of recognition of “the integrity and validity of contractor team arrangements.” The reasons underlying this policy are pragmatic, and are set forth in FAR 9.602 as follows: “Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to [c]omplement each other’s unique capabilities[,] and [o]ffer the Government the best combination of performance, cost, and delivery for the system or product being acquired.”

Despite the utility of entering into teaming agreements, they are not readily enforceable by a disappointed team member. Accordingly, disappointed parties have sought redress for breaches of teaming agreements under a variety of legal theories, including: (1) breach of contract; (2) breach of preliminary agreement and duty of good faith and fair dealing; (3) promissory estoppel; and (4) unjust enrichment. As will be explained below, cases advancing the latter three causes of action have met with limited success, particularly with respect to the remedies available to the disappointed contractor.

Breach of Contract

Although breach of contract has proved to be the theory most likely to bring success to a disappointed team member, the nature of teaming agreements renders it difficult to prove the essential elements of an enforceable contract. Generally speaking, these essential elements are: (1) intent to be bound; (2) consideration; and (3) definite terms, including price, quantity, and duration. Because teaming agreements involve numerous contingencies, the existence of the first and third elements are often in doubt in cases in which a disappointed party asserts a breach of contract claim.

Despite doubt regarding the parties’ intent to be bound and the definiteness of terms, a teaming agreement may constitute an enforceable contract. For example, in ATACS v. Trans World Communications, the United States Court of Appeals for the Third Circuit held that the teaming agreement, which provided that ATACS would assist Trans World in preparing its bid and that Trans World would work exclusively with ATACS on the project, was enforceable. In that case, the government of Greece sought bids to manufacture communications shelters for its army. Both ATACS and Trans World considered bidding independently on the project as the prime contractor; each, however, concluded that it would be unsuccessful going it alone. Accordingly, the parties agreed that Trans World would bid as the prime contractor, with ATACS as the main subcontractor. The parties’ agreement resulted in a winning bid, but the arrangement fell apart when Trans World revealed that it had been soliciting other proposals for the subcontract and requested that ATACS lower its price.

When Trans World later chose another company as its main subcontractor, ATACS responded by bringing an action asserting, among other things, breach of contract. With respect to the first element—intent to be bound—the court noted that “[t]he record contains numerous correspondences by both parties clearly indicating their ‘intent to team’ and work exclusively with each other in preparation for the project.” In addition, Trans World represented in its proposal to the government that ATACS “constituted part of the ‘team’ that would undertake the project.” With respect to the third element—definiteness of terms—the court found that ATACS’ promise to assist in bid preparation and to work exclusively with Trans World in exchange for good-faith negotiation of the subcontract was sufficiently definite. In so finding, the court emphasized that the team-
ing agreement did not contain a provision “indicating that the terms of their teaming agreement were subject to final execution of the subcontract.”

Similarly, in EG&G v. The Cube Corporation, a Virginia state court held that the teaming agreement, which provided that EG&G would substantially assist in preparing Cube’s bid in exchange for being named the key subcontractor, was enforceable. In that case, NASA and the Navy sought bids for “the procurement of operations and maintenance support services” at one of NASA’s flight facilities. The procurement was a small business set-aside. Independently, neither EG&G nor Cube could successfully bid on the procurement, because EG&G did not qualify as a small business, while Cube lacked the necessary experience. Accordingly, the parties entered into a teaming agreement, under which EG&G would assist Cube in preparing its bid and Cube would award EG&G the subcontract. As promised, EG&G expended significant resources assisting in the preparation of the winning bid. After Cube won the contract, however, the parties were unable to reach agreement regarding the terms of the subcontract. Specifically, EG&G and Cube were unable to agree on the rate at which EG&G’s compensation would be capped.

When Cube sent EG&G a letter stating that because the parties had reached an impasse, the temporary letter subcontract under which EG&G had been performing would be allowed to expire, EG&G brought an action for specific performance of the teaming agreement. With respect to the first element of EG&G’s claim, the court held that the agreement evidenced an intent to require more than good-faith negotiations toward a final subcontract, emphasizing that the agreement provided that EG&G “would” be awarded the subcontract in exchange for EG&G’s bid preparation services. In addition, the language of the teaming agreement and statements in proposals submitted to the government indicated that the parties would work as a team on the project. With respect to the third element, the court held that the teaming agreement was sufficiently definite. The agreement specified the terms of the work to be performed by EG&G to the extent that they were known to the parties at the time the agreement was executed. In addition, the proposals submitted to the government “clearly stated the scope and nature of the work that EG&G was to perform as subcontractor.” Finally, the teaming agreement provided the general method by which EG&G was to be compensated for its work under the subcontract.

Even when a teaming agreement is found to be enforceable, however, as in ATACS and EG&G, it may be difficult for a disappointed party to prove breach of the agreement. For example, in Ulliman Schutte Construction v. Emerson Process Management Power & Water Solutions, the United States District Court for the District of Columbia granted summary judgment in favor of Emerson with respect to Ulliman Schutte’s breach of contract claim. The parties had agreed to join forces to bid on a contract to upgrade the District’s Blue Plains Wastewater Treatment Plant. The teaming agreement provided that Ulliman Schutte “would perform the subcontract based on: (1) the requirements of the [prime contract]; (2) [Emerson’s] Standard Terms; and (3) any modifications to the requirements and terms of the [prime contract] or the Standard Terms ‘as negotiated and mutually agreed upon’ by [Emerson] and [Ulliman Schutte].” Significantly—and fatally for Ulliman Schutte—the agreement also provided that the parties would be released from their obligations in the event of failure to negotiate any terms of the subcontract.

When the parties failed to agree on the payment terms of the potential subcontract, Ulliman Schutte brought several contractual and quasi-contractual claims against Emerson. The court implicitly found that the teaming agreement was enforceable, and explicitly found that it authorized Emerson’s insistence on a payment schedule that was consistent with the primary contract and its standard terms, and that the parties’ failure to reach agreement released Emerson from its obligation to award the subcontract to Ulliman Schutte. The court rejected Ulliman Schutte’s contention that the teaming agreement was only partially integrated and thus susceptible of proof by parol evidence that Emerson had previously agreed to the payment terms advanced by Ulliman Schutte. Specifically, the court observed:

[Ulliman Schutte’s] argument that the [teaming agreement] is only partially integrated, and thus is susceptible of parol evidence, appears at first blush to have some force. It is, after all, undisputed that the [agreement] expressly contemplated further negotiation on certain topics—most critically, the scope of work to be subcontracted to [Ulliman Schutte]—thus, the argument goes, the [agreement] could not have constituted the parties’ entire agreement. However, this argument conflates the parties’ intent in entering the [agreement] with their intent in drafting a subcontract; these documents have related but distinct purposes. In signing the [teaming agreement], the parties did not intend to enumerate the workscope details—those details were left for later negotiations and would be memorialized in the eventual subcontract. Their purpose in securing the [teaming agreement] was more limited: They sought to set forth conditions under which they would work together to bid on the [prime contract], and—as evidenced by the title of the document itself—under which their mutual promises of exclusivity would remain binding.

Finally, even assuming that the existence of an enforceable agreement and breach has been found, it may be difficult for a disappointed party to prove damages resulting from the breach. Although such difficulty may result in an award of specific performance of the teaming agreement, it may also result in an award that merely compensates the disappointed party for the value of services rendered in bid preparation. For example, in ATACS, the court concluded that lost profits were not the appropriate measure of damages because “‘significant obstacles’ stood in the way of an agreement on the subcontract’s price, and . . . [ATACS] had not presented sufficient evidence that further negotiations would prove fruitful.” Therefore, the court remanded
The theories of breach of preliminary agreement and breach of the duty of good faith and fair dealing have not proved to be viable alternatives to those unable to prove breach of contract.

Teaming agreements; rather, such agreements tend to condition award of the subcontract on successful negotiation of its terms. Assuming such definite language is not included in the agreement, it is far more difficult for a disappointed party to prevail on a breach of preliminary agreement and duty of good faith and fair dealing claim than on a breach of contract claim. Therefore, although breach of contract remains the most attractive theory available to a disappointed party, its success is by no means guaranteed.

Breach of Preliminary Agreement
To date, the theories of “breach of preliminary agreement” and breach of the duty of good faith and fair dealing have not proved to be viable alternatives to disappointed parties who are unable to prove breach of contract. As an initial matter, some states do not recognize a separate cause of action for breach of the duty of good faith and fair dealing. Accordingly, in disputes governed by the law of these states, that theory does not permit recovery for damages in the absence of an enforceable teaming agreement. Moreover, as discussed in the preceding section, it may be difficult to prove that the teaming agreement satisfies the traditional elements of a contract.

In disputes governed by state law that does recognize preliminary agreements, however, it appears that a typical teaming agreement likely will be found to constitute an enforceable preliminary agreement. New York law, for example, provides that an “agreement to agree” may be enforceable as a “Type II” preliminary agreement that binds the parties to “make a good faith effort to negotiate toward the ultimate objective.” In determining whether an agreement constitutes a Type II preliminary agreement, New York courts analyze “(1) whether the intent to be bound is revealed by the language in the agreement; (2) the context of the negotiations; (3) the existence of open terms; (4) partial performance; and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions.”

In Trianco v. IBM, the United States District Court for the Eastern District of Pennsylvania held that the parties’ teaming agreement, which provided that Trianco would assist IBM in preparing the bid and that the parties thereafter would in good faith negotiate the terms of the subcontract, was an enforceable Type II preliminary agreement. Analyzing the relevant five factors, the court found that the teaming agreement evidenced an intent to be bound, was subject to numerous contingencies, did not contain too many open terms, was partially performed, and was “in keeping with the customary nature of teaming agreements.” The court further found that the preliminary agreement was supported by adequate consideration: the promise of good-faith negotiations and the right of first refusal to perform the subcontract.

Given that the teaming agreement was an enforceable preliminary agreement, both parties were bound to negotiate the terms of the subcontract in good faith. Trianco, however, did not assert breach of the duty of good faith and fair dealing as a cause of action, presumably because the parties extensively, albeit unsuccessfully, negotiated the terms of the subcontract. Accordingly, Trianco sought relief under several quasi-contractual theories. The court’s finding of an enforceable preliminary agreement barred those claims, and left Trianco without a remedy. Trianco demonstrates that in the absence of a failure to negotiate, a finding of an enforceable preliminary contract often will bar, rather than provide a basis for, a disappointed party’s claims.

Finally, even when breach of preliminary agreement and breach of the duty of good faith and fair dealing are available and are asserted by a disappointed party, those theories may be difficult to prove. For example, in Ulliman Schutte, the court held that, even assuming that state law imposed a duty to negotiate in good faith, Ulliman Schutte failed to demonstrate a breach of that duty. Specifically, Emerson’s insistence on payment terms that were authorized by the primary contract and its Standard Terms did not constitute a failure to negotiate in good faith, and the teaming agreement’s provision releasing the parties from their obligations in the event of unsuccessful negotiations was “a far cry from [an] unequivocal promise . . . to negotiate the proposed transaction to completion.”

Promissory Estoppel
Disappointed team members that have advanced the theory of promissory estoppel have also been unsuccessful in obtaining relief. As a preliminary matter, some states do not recognize promissory estoppel as a cause of action. Accordingly, in disputes governed by the law of such states, promissory estoppel would clearly not permit recovery of damages or costs incurred in reliance on unfulfilled promises made in the context of negotiating a teaming agreement.

Even where promissory estoppel is recognized, however, it is unlikely to afford relief to the disappointed party. Generally speaking, states that recognize promissory estoppel as
a cause of action require a showing of the following: “(1) a clear and definite promise; (2) a reasonable expectation by the defendant that the offer will induce action or forbearance on the part of the plaintiff; (3) actual and reasonable action or forbearance by the plaintiff; and (4) detriment to the plaintiff which can only be avoided by the enforcement of the promise.”

The first element—a clear and definite promise—may prove difficult to demonstrate in the absence of an enforceable written teaming agreement. For example, in the appellate decision in Trianco, the Third Circuit held that Trianco’s failure to prove the existence of a binding agreement that IBM would award the subcontract to Trianco also doomed its promissory estoppel claim. Specifically, the court found:

The District Court dismissed [the promissory estoppel] claim because Trianco did not allege that IBM made an express promise to award it a subcontract at the prices Trianco proposed. We agree with this conclusion. . . . Here, Trianco’s claim that IBM clearly and unambiguously promised Trianco a subcontract at a certain price is contradicted by the terms of the Teaming Agreement, which states in no uncertain terms that Trianco’s receipt of a subcontract was subject to future negotiations on price.

The fourth element—detriment to the plaintiff that can be avoided only by enforcement of the promise—may also be an insurmountable obstacle. For example, in Abt Associates v. JHPIEGO Corp., the United States District Court for the District of Maryland granted summary judgment in favor of JHPIEGO with respect to Abt’s claim for promissory estoppel. As an initial matter, the court held that the claim was barred because the plaintiff failed to request specific performance of JHPIEGO’s promise to enter into a formal teaming agreement. The court further found that even if Abt had requested this relief, the claim still would have failed. The court reasoned:

[Abt Associates] has not produced evidence showing any demonstrable detriment suffered by it. [Abt] contends that its reliance upon JHPIEGO’s alleged promise to enter into a formal contract forced it to forego joining a competing team . . . . However, as noted hereinafore, competent evidence does not exist in this record that these factors resulted in actual detriment to [Abt]. [Abt’s] claim is therefore speculative at best. Had [Abt] joined a competing team, there is no guarantee that this other team would have received the Award.

The reasoning applied in Trianco and Abt Associates suggests that it is extremely difficult for a disappointed team member to successfully bring a claim for promissory estoppel. Under the reasoning of Trianco, to the extent that a claim for breach of contract fails because the teaming agreement provides for future negotiations regarding award of the subcontract, a claim for promissory estoppel will likewise fail absent the demonstration of a clear and unambiguous promise.

Moreover, under the reasoning of Abt Associates, damages for promissory estoppel are rendered speculative by award of the contract to the former teammate, rather than to the competing company with which the disappointed party would have teamed in the absence of the former teammate’s promises. As a practical matter, however, a disappointed party is far more likely to commence litigation if it has been deprived of a concrete, rather than hypothetical, opportunity to perform a subcontract. That is, it is more likely that a disappointed party will bring suit when the former teammate is the successful bidder. One reason is that in such situation, damages for breach of contract are more readily ascertainable. Thus, it appears that a claim for promissory estoppel is likely to be successful in factual circumstances in which a claim for breach of contract is not, and vice versa.

**Unjust Enrichment**

Although a disappointed party’s claim for unjust enrichment was unsuccessful in a decisive majority of the cases surveyed, in at least two cases a disappointed party received limited relief via such a claim. Generally speaking, unjust enrichment requires a showing of the following: “(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.”

Unjust enrichment appears to be a viable alternative to a breach of contract claim only when award of the contract to the former teammate clearly would not have occurred absent the disappointed party’s services. For example, in International Cargo Management Specialists v. EG&G Dynatrend, the United States District Court for the District of Columbia found that although the plaintiff (ICMS) failed to demonstrate the existence of an enforceable contract with Dynatrend, it could recover the reasonable value of its services under a theory of unjust enrichment. The court found that ICMS provided the following valuable services to Dynatrend: (1) identification of the contract opportunity; (2) development of significant portions of the technical proposal; and (3) expertise in dealing with the government agency. The court also accepted plaintiff’s valuation of the benefits conferred, which focused on “comparable transactions, namely a joint venture agreement between [Dynatrend and

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*A clear and definite promise may prove difficult to demonstrate in the absence of an enforceable written teaming agreement.*
another company, to submit a proposal on the [contract] when it [was] rebid.68

Under the reasoning of International Cargo, and in light of the wealth of cases dismissing unjust enrichment claims in the context of failed teaming agreements, it appears that a claim of unjust enrichment is likely to be successful only when the former teammate is awarded the contract, and such award clearly would not have been made in the absence of the disappointed party’s services. As a practical matter, proving these circumstances likely would require seeking the cooperation of the contracting officer, who may be reluctant to testify against the party that is currently performing the contract. Moreover, to the extent that any enforceable agreement governs the disappointed party’s provision of services, a claim for unjust enrichment will be barred. Finally, even assuming that the claim is available to the disappointed party, it is important to note that the measure of damages will be limited to the value of services provided.

Conclusion
A written contract is essential to ensure the enforceability of a teaming agreement and to provide a disappointed party with the full range of remedies necessary to fully redress damages arising from breach of the agreement. If your client is a subcontractor or junior partner in a teaming agreement, you should ensure that:

- the teaming agreement is embodied in a signed writing;
- the teaming agreement contains a favorable choice of law provision;
- the teaming agreement relates to one particular project;69
- the teaming agreement specifically delineates each team member’s functions in creating the proposal and performing under the contract;
- the teaming agreement provides that your client will be awarded the subcontract, rather than that the parties will negotiate the subcontract; and
- your client is named as a teammate, and its role is

In Memoriam
Eileen P. Fennessy (1948-2010)

Judge Eileen Patricia Fennessy died on Friday, July 9, 2010, after a two-year battle with leukemia. Eileen was born in Lowell, Massachusetts, on November 22, 1948. She graduated from St. Mary’s High School in Lawrence, Massachusetts, and then attended Emmanuel College in Boston, where she received her B.A. degree in 1970. She went on to earn a J. D. from Suffolk University Law School, where she was a member of the law review, in 1973.

Eileen Fennessy embarked on her law career in Boston, and in 1976 she joined the Office of General Counsel, Department of the Navy (Navy OGC) in Washington, D.C. While at Navy OGC, she worked in the Naval Air Systems Command, the Litigation Division, and the Naval Facilities Engineering Command. Eileen left Navy OGC to join the Civil Division of the Department of Justice, but she reached what she considered the pinnacle of her career when she became a judge at the Department of Transportation Board of Contract Appeals in 1988, where she was the vice chair and deputy chief judge until 2007. That board was eventually merged into the Civilian Board of Contract Appeals.

During her exceptional career, Eileen received many awards and commendations, such as the Department of Justice Special Commendation for outstanding service. She was a member of the American Bar Association’s Section of Public Contract Law, the Board of Contract Appeals Judges’ Association, and the Association of Women Judges, as well as the Massachusetts, Virginia, and Washington, D.C., bars. Eileen absolutely loved her law career. Her illness forced her to retire in 2009, a decision she held off making until the very last day the paper work was due.

Over the years, many of Eileen’s professional colleagues became her devoted lifelong friends, due in no small part to her contagious zest for life. She was always interested in others. She was a genuine, charming, and feisty woman with a wonderful sense of humor and a smile and laugh like no other. She had many groups of overlapping friends, with whom she socialized often, and traveled extensively. Eileen was a voracious reader who also loved gardening, shopping, cooking, eating, entertaining friends, singing, and traveling. She was a member of the Alexandria Choir from 1999 to 2005, performing regularly in their semiannual concerts. She was fortunate to travel throughout Europe, Japan, China, and Russia, and added to their semiannual concerts. She was fortunate to travel throughout Europe, Japan, China, and Russia, in addition to frequent visits to Ireland, England, and Paris with her family and friends.

Eileen Fennessy is survived by her partner of more than 10 years, Peter McCahill, of Alexandria, Virginia; her mother, Mary E. Fennessy; her sister, Mary Ellen Fennessy McDermott, and Mary Ellen’s husband, William McDermott, of North Andover, Massachusetts; her nephew, Patrick McDermott; and Peter’s daughter, Scarlett McCahill, of Philadelphia. PL

—Contributed by Carol Park-Conroy, Jeri Somers, and Don Featherstun
specifically delineated, in bid proposals and communications with the government.

In the event that a written teaming agreement was not executed or is somehow defective, however, a range of alternative theories, such as breach of preliminary agreement, breach of the duty of good faith and fair dealing, and unjust enrichment, may provide limited relief to a disappointed party.  

Endnotes

1. Michael W. Mutek, Contractor Team Arrangements—Competitive Solution or Legal Liability: The Deskbook for Drafting Team Agreements 1 (2006).
2. Id. at 3–4.
3. FAR 9.601.
6. ATACS, 155 F.3d at 668.
7. Id. at 662.
8. Id.
9. Id.
10. Id. at 663–64.
11. Id. at 664.
12. Id. at 668.
13. Id.
14. Id.
15. Id.
17. Id. at 635.
18. Id.
19. Id. at 636.
20. Id. at 637–38.
21. Id. at 641–43.
22. Id.
23. Id. at 643.
24. Id. at 649.
25. Id.
26. Id. at 652.
27. Id.
28. Id. at 652–53.
30. Id. at *2.
31. Id. at *28.
32. Id. at *4–5.
33. Id. at *12–13.
34. Id. at *28–29.
35. Id. at *35.
36. Id. at *34.
37. EG&G, 63 Va. Cir. at 657.
38. ATACS, 155 F.3d at 670.
39. Id. at 671.
43. 583 F. Supp. 2d. at 657 (quotation marks and citation omitted).
44. Id. at *8.
45. Id. at 659–60 (noting that the teaming agreement expressly provided that the parties were bound to negotiate the subcontract in good faith, and the agreement would terminate if such negotiations were unsuccessful).
46. Id. at 660 (“[T]he potential award of the subcontract to Trianco was conditioned on IBM winning the contract. The contingency of the relationship, including factors that could not be determined at the time of the initial negotiations . . . reinforces [the] argument that this is a binding Type II agreement requiring further negotiations.”).
47. Id. at 662.
48. Id. at 662–63 (finding that Trianco partially performed the teaming agreement by assisting in preparation of the bid).
49. Id. at 663.
50. Id. at 664.
51. Id. at 665.
52. Id. at 657 (“parties cannot demand performance of the ultimate objective in a Type II preliminary agreement, but they can demand good faith negotiation toward a final contract”).
54. Id. at *66–67 (quotation marks and citation omitted).
55. See, e.g., W.J. Schafer Assocs., Inc. v. Cordant, Inc., 493 S.E.2d 512, 521 (Va. 1997) (“Today, however, we hold that promissory estoppel is not a cognizable cause of action in the Commonwealth, and we decline to create such a cause of action.”).
56. W.J. Schafer, 493 S.E.2d at 521.
57. See, e.g., Abt Assocs., 104 F. Supp. 2d at 536 (Maryland law adopting four-part test set forth in Restatement (Second) of Contracts § 90(1)).
59. Id.
60. Abt Assocs., 104 F. Supp. 2d at 536.
61. Id.
62. Id.
63. Id.
64. See, e.g., Trianco, 2009 U.S. App. LEXIS 22213, at *9 (unjust enrichment claim dismissed because there was an enforceable preliminary agreement between the parties); Saber Solutions, Inc. v. Protech Solutions, Inc., No. 06-4922, 2009 U.S. Dist. LEXIS 88705, at *34 (D.N.J. Sept. 25, 2009) (unjust enrichment claim dismissed because there was no dispute that a written contract existed); Quandry Solutions, 2009 U.S. Dist. LEXIS 31459 at *54 (“Several courts have ruled that parties to failed contract negotiations may not rely on unjust enrichment to recover negotiation-related expenses. In such cases, each party seeks to advance its own interest in obtaining a valuable contract and any benefit conferred on the other party is incidental to that goal.”), Abt Assocs., 104 F. Supp. 2d at 535 (unjust enrichment claim dismissed because plaintiff’s decision not to join a competing team was not a benefit conferred on defendant, and any damages would be speculative).
67. Id. at *34–35.
68. Id. at *36.
69. In the event that your client is eligible for small business set-asides, this step will ensure that the client does not inadvertently become affiliated with the other team member and thus become ineligible for set-asides.
The Mandatory Disclosure Rule represents a “sea change” in the way that government contractors must do business. This Guide—the first publication devoted to the Mandatory Disclosure Rule—provides crucial guidance to all government contractors, lawyers, and compliance personnel, as well as federal grant recipients, accountants, and academics. Assembled by participants from the federal government as well as private industry, it provides key insights into government expectations concerning application of the Mandatory Disclosure Rule. In short, this is an indispensable resource for any entity doing business with the government or receiving government grants.

The Guide to the Mandatory Disclosure Rule provides authoritative guidance concerning:

- What kinds of misconduct must be reported
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- What kind of “full cooperation” the government expects
- How to preserve confidentiality and privileges when making a disclosure
- How to structure company compliance programs and internal controls
- What effect will disclosures have on past performance evaluations

Best Practices in the Acquisition of a Government Contractor

This manual is an essential source for anyone working on an acquisition of a company that performs government contracts. Written by a diverse group of experts who have participated in a large number of government contractor sales and purchases, Best Practices in the Acquisition of a Government Contractor examines the full range of issues in the acquisition process, including: the due diligence process and the recommended scope of government contracts review; cost issues peculiar to government contracts; claims, disputes, and bid protests; adequacy of the target’s government contracts compliance program; antitrust reviews and approvals; Exon-Florio approvals and the requirements of classified contracts; and anti-assignment statutes, novations, guarantees of performance, and restructuring. The manual provides practical answers to the questions that frequently arise in these acquisitions, including more than 90 “Best Practice” tips that the expert authors have developed from their wide-ranging experience with many transactions. It also contains exemplars of important acquisition documents, such as due diligence checklists, representations and certifications, performance guarantees, and novation agreements.
commercial pricing practices.” Reviewing the most favored customer provisions and price reduction policies and provisions in the context of current commercial pricing practices.

Larry discussed the Advisory Panel Final Report (February 2010). First, the final report recommends that the “Administrator eliminate the Price Reduction Clause [PRC] from MAS program services contracts” and remove the PRC from MAS supply contracts in phases. The final report notes the slightly different mechanisms as between MAS service and supply contracts. Larry noted that section 803 of the National Defense Authorization Act (NDAA) of 2002 required competitive awarding of all task and delivery orders over $100,000, and that section 863 of the NDAA of 2009 extended the section 803 requirements to civilian agencies. He opined that the PRC is an anachronism and may be a trap. Competition, he urged, is the best means to achieve fair and reasonable prices. The final report also recommends that the “Administrator issue clear and consistent guidance to implement the price objective for GSA schedules” for both services and products, and that prices “be reasonable not only to the basis of award customer but to the commercial marketplace as well.”

Larry then turned to disclosure of the basis for determining fair and reasonable prices. The final report recommends that the “Administrator disclose the basis upon which the contracting officer determines that the MAS program contract prices for both services and supplies are fair and reasonable.” Nevertheless, the “procedures/process must ensure that GSA does not disclose proprietary pricing information outside of the government, and [that] it addresses who has access to the information.”

A question and answer period followed. Questions raised included: definition of “most favored customer”; authority of the MAS program head to effect changes; unifying the present organization of the MAS program, which presently is in four portfolios; and role of the IG.

Cochair Kevin Maynard then briefly discussed the following regulatory matters:

1. Notice of proposed policy letter, Department of the Navy Preferred Supplier Program, 75 Fed. Reg. 29324 (May 25, 2010);
2. DFARS proposed rule, Cost and Software Data Reporting System, 75 Fed. Reg. 25165 (May 7, 2010);
3. FAR proposed rule, Terminating Contracts, 75 Fed. Reg. 28228 (May 20, 2010);
4. DFARS proposed rule, Presumption of Development at Private Expense, 75 Fed. Reg. 25161 (May 7, 2010);
5. DFARS proposed rule, Organizational Conflicts of Interest in Major Defense Acquisition Programs, 75 Fed. Reg. 20954 (Apr. 22, 2010);
6. FAR final rule, Federal Award Recipient Performance and Integrity Information System, 75 Fed. Reg. 14059 (Mar. 23, 2010);
7. FAR final rule, Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items, 75 Fed. Reg. 13414 (Mar. 19, 2010);
8. FAR final rule, Extension Use of Simplified Acquisition Procedures for Certain Commercial Items, 75 Fed. Reg. 13413 (Mar. 19, 2010); and

Kevin then briefly discussed the following cases:

1. Vetr Corp., Inc., B-402519, 2010 WL 1951194 (C.G. May 14, 2010);

Meeting information: The committee generally meets bimonthly (lunch served). Teleconferencing connections are available to those outside the Washington, D.C., area. Contacts: Kevin Maynard, (202) 719-3143, e-mail kmaynard@wileyrein.com; and Roger Waldron, (202) 263-3797, e-mail rwaldron@mayerbrownrowe.com. For more information on this and other committees, visit the Section Web site at www.abanet.org/contract/home/html, and click on “Committees” on the left-hand navigation bar. PCL
CHAIR’S COLUMN
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The results of those presentations have been captured in a series of minutes that will be posted on our Web site. I do not have room to list them all here, but the idea of this effort was to make the Section more proactive in identifying issues before they arise so that we can get out in front of the topic, rather than just reacting to proposals of others. One concrete result of this session was the formation of a task force to study the best practices for service contracting. Michael Mutek has agreed to chair this effort with the goal of producing a white paper that describes best practices that could be adopted to improve service contracting at the federal level.

C. Unnoticed Contributions of the ABA and the Legal Opportunity Scholarship Fund

Another unique non-Section meeting that I attended was a planning session for chairs-elect. The meeting was impressive in a very unusual way. At the meeting a young woman lawyer was presented who had been the recipient of a law school scholarship by the Legal Education Scholarship Fund. That alone was not particularly inspiring, but her story certainly was. As she began her story, you could tell she was a bright, articulate attorney. Little could you tell the obstacles she had overcome. She had been raised in foster homes all her life. She had been arrested for various crimes, including prostitution, at one or another time in her life. According to her, some of the only people who seemed to care for her were her legal advocates in the foster care system. Along the way, her story was brought to the attention of the Legal Education Scholarship Fund, and she eventually was provided a scholarship to law school and was now working in the court systems as an advocate for foster children. The story was quite inspiring.

D. Margaret Brent Luncheon

Over the last three years, as I have served as an officer of the Section, I have tried to make it a point to attend the Margaret Brent Awards Luncheon. The first time I attended was when our own Ruth Burg received the award. For those of you who have never attended, I commend it to you next year. This year was the 20th annual luncheon and the careers of five outstanding women attorneys were celebrated. As a father of a daughter, I listened with deep attention to the stories of each of the awardees. It is definitely worth the time of all to attend.

Federal, State, and Local Government Procurement Attorneys

To implement the theme I set forth in my first column, “The Year of the Government Lawyer,” I created the new Federal, State, and Local Government Procurement Attorneys Committee. The purpose of this committee is to focus on the needs of government attorneys who want to participate in the Section. Mike Rose came to me several months ago with a plan to attract government attorneys to our group. I was impressed with his plan and asked him to implement it by chairing the new committee. I hope if Mike asks you to help him, you will support his efforts.

Mike is already reaching out to individual attorneys with a goal of having a plan in place and starting to implement it by our November meeting.

State and Local Division Reorganization

Over the past 20 years, I have participated in the State and Local Division of the Section. For a variety of reasons, this group has been comprised of a handful of attorneys dedicated to the practice of procurement law at the state and local level. We have historically tried to have a Section representative report on the activities in each of the states. A significant amount of effort has been put into that model with, frankly, limited success. After discussing the issue with a variety of practitioners in this field, I found the consensus to be that the state-by-state model created a significant amount of administrative effort with little or no substantive return. In order to marshal our efforts, I have jettisoned the system based on state chairs so that we can focus our resources on substantive topics.

The State and Local Procurement Division will now be organized around substantive areas of law. We will continue our State and Local Bid Protests, State Grant Law, State and Local Legislation and Regulation Coordination, State and Local Model Procurement Code, and State Law Database committees, and I hope that we can consolidate the efforts of our members around these topics. I consider the number one goal of the Section to be the creation of products and services for our members. With that goal in mind, we would like to publish a monograph of the 50 state procurement law surveys being updated by Missy Copeland’s State Law Database Committee. In addition, we hope to do the same with Bryan Arnold’s Legislation and Regulation Coordination Committee’s 50-state survey of false claims statutes. We are also looking at commenting on California’s Judicial Council’s draft civil jury instructions for construction cases, which have recently been forwarded to the Section for comment.

In addition to these two efforts, we plan to reach out more aggressively to publicize our Section in state bar associations that may include groups of procurement lawyers. We have already reached out to the National Association of State Purchasing Officials (NASPO). For the past two
years, the Section has honored the NASPO Cronin Award winner for state procurement excellence. We have provided a letter of recognition and paid for that state’s purchasing director to attend the next spring State and Local Procurement Symposium. This year, we were fortunate that NASPO was holding its annual meeting in Washington, D.C., so Carol Park-Conroy, our chair-elect, was able to attend the meeting and present the letters in person. This effort has led to increased discussions between the two organizations on how we can better coordinate our activities.

Similarly, we have reached out to the National Institute of Government Purchasing (NIGP). It is in the process of defining principles of procurement for its members; we have provided the organization with the ABA Principles of Procurement for consideration, and we are supporting NIGP’s efforts to recruit attorneys to help it complete its effort. We will be posting on our Web site the NIGP letter requesting attorney volunteers. We hope that our members will take the time to support these efforts.

I would be remiss if I failed to highlight the Sixth Annual State and Local Procurement Symposium to be held in Sacramento, California, on May 11-13, 2011. We ask not only that you plan to attend the symposium yourself, but also that you make known to your clients and to state and local practitioners that this event will be held next spring.

Technology
As a practitioner who does not live “inside the Beltway,” I think it is essential that the Section use technology to permit members from around the country to participate in our activities. As such, I have asked all of the committees to look for ways to better use technology. Hopefully, some of the committee meetings will progress from simple call-in capabilities to webinar presentations and even perhaps an occasional video conference. In addition, since our Web site is a key tool for us, I have requested committee chairs to ensure that their pages on the site are current. We are also making arrangements to make significant portions of our fall and spring programs available live on the Internet. Look for more details about this in our brochures for those programs. Finally, in this area, I have asked the Young Lawyers Committee to look into how the Section can better use technology to get our message and products out to our members using social media, or any other form of technology that they can identify. If you are interested in supporting this effort, please contact our Young Lawyers’ Committee chairs, Dan Chudd at dchudd@jenner.com or Jerry Miles at jerry.miles@kbr.com.

Fall Program: Intellectual Property Issues in Government Agreements
I chose this topic because I find it fascinating. There are very few government contracts attorneys who understand the complexities of trade secret and patent law. Similarly, there are very few commercial IP lawyers who understand the government contract rules relating to technical data rights, computer software, and patents. Add to this confusion the prime contract-subcontract world, and you have a labyrinth that is difficult to navigate. Our fall program on November 12 is designed to help sort out the issues and provide practical advice to deal with this area. As a crowning touch, Judge Paul Michel, the just retired chief judge of the Federal Circuit, has agreed to be our luncheon speaker. We hope you can attend.

Tributes to Recently Deceased Section Members
In our summer edition, Stan Johnson and John Burkholder wrote a beautiful tribute to Eldon “Took” Crowell. In this edition, you will see a similar tribute to Judge Eileen Fennessy. I thought I would add my personal observations about both of these Section members.

“Took” Crowell: My only contact with “Took” Crowell occurred as a young lawyer when I attended a speech he gave. It was like nothing I had ever seen before, or since. He pretended to be both a contracting officer and a contractor having a very animated discussion. He alternated taking off and putting on his jacket as he switched roles. He was so enthusiastic in his argument, I thought he was going to hurt himself. In addition, his voice changed pitch depending on which role he adopted. I cannot remember the topic or who won the argument, but I was amazed at the showmanship. This presentation has stuck with me for over 30 years. He had a unique ability to bring an arcane subject alive to the listener. He was a legend in our field.

Judge Eileen Fennessy: Unlike Took, Eileen was a friend and colleague of mine for 30 years. When I first began working at the Office of General Counsel, Department of the Navy, I was new to Washington, D.C., and new to the practice of law. Frankly, I was lost at both. Eileen was a seasoned veteran of at least six years, and she welcomed me into her world of friends and colleagues. She was at the heart of the strong camaraderie that existed in the Litigation Division of the office. Those three years remain some of the best of my career, in large part due to people like Eileen, and my friendship with Eileen did not end when I moved to the West Coast. Almost every trip to D.C. involved at least a call to see how she was. She attended my wedding, and visited my family in San Francisco.

For those of you who did not know Eileen, you missed a gem. She was funny, compassionate, and smart. Others will write of her professional accomplishments, but I wanted to write about the person. She always had a quick laugh at the ready, frequently at her own expense. No one was a stranger long when they came in contact with Eileen. She possessed a true love of life and those who knew her were blessed.

Open Door Policy
I believe the chair of our Section works for the members. As such, it is important that you let me know what you are thinking. The year is short, so please contact me sooner rather than later with any ideas you have. I would love to hear from you. I was thrilled when I got an e-mail from one member after my first column, and I promptly responded. Please feel free to e-mail or call me. ☏
Coming Attractions

**NOVEMBER 11–13, 2010**
Fall Program, “Intellectual Property in Government Agreements—What You Didn’t Learn in Kindergarten,” and Open Council Meeting
Seaport Hotel
Boston, MA

**MARCH 3–5, 2011**
17th Annual Federal Procurement Institute, “Procurement Potpourri—Is the System Working?” and Open Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD

**MAY 12–14, 2011**
6th Annual State and Local Procurement Symposium and Open Spring Council Meeting
Sheraton Grand Sacramento
Sacramento, CA

**AUGUST 5–8, 2011**
Annual Educational Programs and Open Council Meeting
Sheraton Centre
Toronto, Ontario, Canada

**NOVEMBER 4–5, 2011**
Fall Program and Open Council Meeting
Hotel Albuquerque
Albuquerque, New Mexico

**MARCH 22–24, 2012**
17th Annual Federal Procurement Institute and Open Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD