Air Force Acquisition Law: Recapturing Acquisition Excellence

BY CHAD C. CARTER, MAJOR, USAF

A vital part of the Air Force’s team approach to acquisition is its cadre of highly qualified acquisition attorneys, who range from part-time contract law advisors to full-time subject matter experts, and who provide legal reviews and manage litigation for contracts ranging from simple purchase orders to mammoth system acquisitions.1

Although the above-quoted passage from The Procurement Lawyer was published in 1998, it applies equally to the Air Force Judge Advocate General’s (JAG) Corps’ current acquisition law support to commanders and clients. The United States Air Force has a longstanding tradition of acquisition law excellence. Whether in time of peace or war, the Air Force relies on its highly skilled team of attorneys and paralegals to ensure that procurements at all levels are conducted legally and ethically.

This article attempts to capture the structure and mission of contemporary Air Force acquisition law practice, and provides an explanation of how and why such practice has been modified since 1998. Before discussing the changes experienced in the post-9/11 period, however, it is important to note first how the Air Force acquisition law corps has remained the same. This article does not seek to duplicate the efforts of the 1998 Procurement Lawyer article cited above, which did an excellent job of setting forth the structure and function of Air Force procurement law practice at that time. Nevertheless, some basic level of review is needed in order to appreciate the current organization of Air Force JAG Corps acquisition law practice.

Similarities to Pre-9/11 Air Force Acquisition Law Corps

The primary legal advisor to the Air Force installation commander on acquisition law issues remains the staff judge advocate (SJA), who is the attorney in charge of the base legal office.2 An SJA typically has a staff of approximately five judge advocates, one of whom usually has some type of specialized training in contracts and fiscal law and may be referred to as the “chief of contract law.”3 The contract law chief works closely with the base contracting squadron to assure that procurements are conducted fairly and in accordance with the law and regulations. Base level (continued on page 31)
I cannot believe it is already time to write my final column. This year has passed extremely quickly. Rather than recount the year, I thought I would explain why I volunteered for the position, and perhaps inspire a reader or two to get more involved. Besides, it is more important that you read Carol Park-Conroy’s column, as incoming chair, than that you read my column, because the future is more important than the past. I will try to keep this short.

Several years back, I had just come off the Council and was struggling to stay involved in the Section. Frankly, I considered dropping out. At the same time, however, my son was creating a club water polo team at the University of California in Santa Barbara, and my daughter decided to change high schools because she wanted to experience what it was like to move and make new friends. These efforts of both my children took courage and persistence. I am certain there were times when each of them wondered what they were doing. Nevertheless, they both achieved their goals by taking chances and getting involved. If they had the courage to get more involved, then why not me?

With the encouragement of Rob Schaefer, I put my name in the hat to be secretary of the Section. You are warned at the time that the leadership ladder is a four-to-five-year commitment. I swallowed hard and said I wanted to do it. I cannot tell you how glad I am that I did. This last year had been one of the most enjoyable years of my professional life. I have had the privilege and the pleasure to work closely with some of the most dedicated people in our profession. I have learned more than I could have ever imagined, and I have made friendships that will last a lifetime.

So, if you are out there reading this and are on the fence, I challenge you to get more involved. I recently met with a high-ranking government official who told me he dropped out of the Section because all he did was read the Public Contract Law Journal. That discussion is partly a message to the Section that we need to get our members more involved, and partly an example of how the failure to get involved leads to one dropping out.

I have found that the more you put into the Sec-
**News from the CHAIR-ELECT**

**CAROL N. PARK-CONROY, CHAIR-ELECT**

What an honor it is for me to serve the Section as its chair for 2011–2012. I enthusiastically look forward to working with you during the coming year to achieve our Section’s goals and objectives. As I conclude committee appointments, I am reminded of the exceptional loyalty of the Section’s members who serve on important committees and task forces and freely devote their time and energy to activities that enhance the federal, state, and local government procurement systems. On this point, let me take this opportunity to urge those of you who are not currently active in the Section to join a committee—or committees—and attend at least one of the Section’s exceptional educational programs. You will find much of interest and reap many professional rewards.

Turning to the coming year, it almost goes without saying that my primary goal is to ensure that the Section continues to provide the highest level of value to all members and to advance the integrity of sound and fairly administered public procurement policies and procedures. Along the way, I will work hard to expand the inroads that have been made by my predecessors in a number of important areas. These include continuing the dialogue with the Office of Federal Procurement Policy (OFPP), encouraging active participation from all segments of our diverse membership, increasing the participation of government lawyers and young lawyers, and promoting the use of new technology to benefit the Section membership.

We were fortunate last year to have been able to participate in productive discussions with OFPP on a variety of matters. The Section will continue to maintain that dialogue throughout the coming year, with such increases in our involvement as are appropriate. In making committee appointments, I have continued my predecessors’ efforts to include leadership representation from the Section’s diverse constituency and, in particular, to seek out representatives from government as well as the younger members of the Section who will be our future leaders. And, speaking of government lawyers, the creation of the Federal, State and Local Government Attorneys Committee last year coincided with the ABAs reduction of membership dues and other initiatives designed to attract more government attorneys. The work of this new committee and membership expansion from the government sector will continue to be a priority.

One of the Section’s many strengths is its ability to provide a balanced analysis of issues related to procurement laws and regulations that is derived from a membership comprised of representatives from private practice, industry, and government. These balanced views are highly respected and will continue to be presented in our comment letters, white papers, and other public communications.

Last year’s implementation of the ABAs new website, which also included the creation of new sites for the ABA Sections, had a rather significant impact upon our Section. While we are growing accustomed to our new website, I think you will agree that we need to devise a better way to post timely information so that it is readily available to those who visit our Section’s site. We will also continue to look at new ways to bring programs and services to the Section’s members through the use of webinars and other technology.

Finally, no look at 2011–2012 could be complete without a peek at next year’s Section programs. The General Program cochairs are two former Section chairs: Michael W. Mutek and Patricia H. Wittie. Both bring a wealth of knowledge and experience to matters of educational programming. The Fall Educational Program and Council Meeting will be held on November 4–5, 2011, in Albuquerque, New Mexico. Please note that the program and meeting are a bit earlier this year, in order to avoid conflicts with the Veterans Day holiday. The Fall Program cochairs are Ann Donohue, Kevin Mullen, and Al Purdue. Preliminary planning is well underway and the program is sure to be of substantial interest and value to all attendees.

The 18th Annual Federal Procurement Institute is scheduled for March 22–24, 2012, in Annapolis, Maryland. The FPI cochairs are Agnes Dover, Dan Graham, and Robin Ricketts. We are aware that the Loews hotel facilities are feeling the strain of the FPI’s successes over the years, but our contract has been signed for 2012 and we promise to accommodate everyone who wants to attend. Again, please note that there is a slight change in the date—this time, scheduling the FPI a little later in the month of March. The program year concludes with the ABA Annual Meeting in Chicago, Illinois, on August 4–6, 2012. Cochairs for the 2012 Annual Meeting Program are Gerry Doyle, Elizabeth Grant, and Heather Kilgore Weiner.

Regarding the State and Local Symposium that has traditionally been held during May, a task force headed by Missy Copeland is in the midst of evaluating a number of exciting alternatives that we hope will take the symposium to new levels of participation and success. Outgoing Chair Don Featherston devoted much energy to state and local procurement matters and significantly expanded the Section’s relationships with the ABA Section of State and Local Law, the National Association of State Procurement Officials (NASPO), and the National Institute for Gov-

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OCIs in Construction Contracting: Bumps in the Road Ahead

BY DANIEL F. EDWARDS

On April 26, 2011, proposed new regulations relating to organizational conflicts of interest (OCIs) and access to nonpublic information were published in the Federal Register for comment. The proposal makes substantial changes to the existing OCI rules, reflecting President Obama’s call for increased transparency in government, but also recognizing that not all potential OCIs are the same. Each situation requires a case-by-case, fact-specific analysis.

This article examines the current state of OCIs within the setting of federal construction contracting, and explores how the proposed new rules may change the way OCIs are handled for construction projects in the future.

OCIs (Re)Defined

An organizational conflict of interest arises where a contractor’s role in one or more contracts bears a relationship to another contract. As currently written, FAR 2.101 states, “[o]rganizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.” Applying this definition, the Government Accountability Office (GAO) and the Court of Federal Claims have identified three categories of significant OCIs: (1) impaired objectivity; (2) unequal access to information; and (3) biased ground rules. Each type may arise in the context of a construction project.

In the proposed rules, the FAR Council has removed “unequal access to information” from the definition of OCI and replaces it with a new term, “nonpublic information.”

The council has drafted an entirely new Subpart 4.4—“Safeguarding Information Within Industry”—that includes policies and principles for maintaining fair competition in light of one contractor’s access to nonpublic information.

The other two categories of OCIs in the current framework (impaired objectivity and biased ground rules) effectively remain, but the proposed rules define them much more comprehensively than do the current definitions in FAR 2.101. The discussion of OCIs in the proposed rules is shifted to policy considerations involving the nature of the harm that OCIs may cause. The proposed rules categorize OCIs according to the perceived harm—whether to the government’s business interests alone, or to the integrity of the competitive procurement system overall. Despite this shift in the focus of the discussion, situations that created one of these two categories of OCIs under the existing regime would still create OCIs under the proposed new system. However, the proposed system will now permit the government to accept performance risk from OCIs, but only where the potential harm is limited to the government’s own business interests and not to the integrity of the competition.

In addition, under the proposed rule, coverage of OCIs has been moved from FAR Subpart 9.5 to a new Subpart 3.12. With the change, Part 3 is also renamed “Business Ethics and Conflicts of Interest,” an apparent concession to commentators who objected to the inclusion of OCI rules within the FAR part devoted to “improper” business practices.

In addition to reorganizing and refining definitions relating to OCIs, the proposed rules more clearly define the contracting officer’s responsibilities for identifying, analyzing, and addressing OCIs prior to issuing a solicitation, during evaluation of offers, and at the time of contract award, including the awarding of individual task orders. The new rules also define and provide guidance on avoidance, neutralization, and mitigation strategies intended to protect the government’s interest and the integrity of the competitive bidding system (previously lacking in Subpart 9.5).

OCIs on Construction Projects

On construction projects, there are frequently several contractors and subcontractors working for the government to deliver a new structure, building, or other improvement. For most projects, this will include design professionals (and their subconsultants) for the preparation of plans and

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* “Top Sheet” is used in construction and other fields to denote a condensed overview of essential information about a bid or project. The Construction Division’s Top Sheet articles are similarly crafted to be succinct examinations of key aspects of a case, law, or other issue.
specifications, and construction companies (and their subcontractors) to actually construct according to the plans. Sometimes design and construction functions are combined in a single design-build contract.

In some instances, the government may also employ program managers to oversee a series of projects from concept to completion. The government may also employ construction managers to coordinate construction, perform constructability reviews of the plans and specifications, and coordinate and evaluate the performance of the construction contractors.

Within a single company, construction professionals often have skill sets that overlap among these different roles. Large engineering and construction firms often have the capacity to perform all of these services, as well as geotechnical evaluation, materials testing, and environmental assessment. Construction industry participants also frequently enter into joint ventures that may be project-specific or may contemplate a broader scope of pursuits. For companies with multiple capabilities and multiple forms of business enterprises, OCIs create an ever-present danger that prior work may preclude current or future projects.

Comprehensive compliance programs rarely exist within the construction industry (as contrasted with major defense contractors). For contractors that perform a mix of federal, state, and local government construction projects, as well as private construction and design work, the additional overhead costs of these compliance systems are prohibitive. This is particularly true since so much construction work is awarded on the basis of “low bid.” Moreover, expanding or creating new compliance programs in the current economic environment is not palatable.

When and How OCIs Should Be Identified

Under the current rules governing OCIs, contracting officers must “identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible,” and “avoid, neutralize, or mitigate significant potential conflicts before contract award.” However, the current regulations in FAR Subpart 9.5 provide no guidance on how this should be done.

Under proposed FAR 3.1206-2(a), the contracting officer would now make an “initial assessment” of whether or not the nature of the work has the potential to create an OCI. This initial assessment applies not only to the contemplated solicitation, but also to “foreseeable future contract[s],” so that potential awardees can make their proposals with their “eyes open,” knowing that today’s bid may limit future opportunities. With this knowledge, bidders should have a greater opportunity to employ mitigation or avoidance strategies to keep themselves eligible for those future awards.

In the federal construction arena, most government construction projects are designed by outside consultants retained under the Brooks Act. Normally, only the smallest, simplest projects are designed in-house. As a result, almost all federal construction projects involve at least two contractors: a designer and a constructor. Any time a government project involves more than one contractor, the project creates the potential for OCIs.

Even where one solicitation is for pure design of a new project, existing relationships between designers and construction contractors (such as those paired on design/build teams) can create an appearance that “a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than those of the Government.” This is also true for pure construction projects, where the construction contractor may want to employ the government’s design firm as a subcontractor for the creation of shop drawings, design of a sheeting and shoring system, inspections, or other work.

Because of the nature of construction, it seems likely that contracting officers who apply the new rules will conclude during the initial assessment that most, if not all, construction projects create a potential for OCIs. Under the proposed rules, the contracting officer’s next action is to decide whether the potential OCI merely creates a risk to the government’s business interests or whether it also creates a risk to the integrity of the competitive procurement process.

One OCI risk that the contracting officer may identify is the risk of “biased ground rules.” In this type of OCI, a government contractor may have the opportunity to write plans and specifications or a statement of work so as to favor that contractor (or affiliated entities) in a subsequent construction contract (as either a prime or subcontractor). By its nature, a “biased ground rules” OCI implicates the integrity of the competitive bidding process.

A second OCI risk would be that subsequent inspections, evaluations, or administration and revision of drawings during performance of a follow-on construction contract could impair a contractor’s objectivity in rendering advice to the government. These “impaired objectivity” OCIs can also implicate the integrity of the competitive bidding process, if the extent and depth of the relationships between construction industry firms is substantial enough that their financial interests are linked.

In either case, under proposed FAR 3.1206-2(b)(3), in preparing solicitations, the contracting officer will need to identify contractors (including subconsultants) that participated in the preparation of plans and specifications, and may also include provisions prohibiting those contractors from competing for future awards. For example, the design engineering firm could not compete on the resultant construction project. The contracting officer would also include another proposed FAR clause in the contract, FAR 52.203-XX, which would require offerors to identify organizational conflicts of interest to the government.

Practically speaking, the self-identification of OCIs by larger organizations creates new and difficult compliance issues. Unlike typical law firms that maintain a thorough database of existing clients and matters, this is not the way in the construction industry. Moreover, the interrelation-
ships in the construction industry make the undertaking even more challenging. Consider, for example, a multidisciplinary engineering and construction firm that is hired as a subconsultant to create conceptual design documents for the mechanical portion of a project. The construction project will be in Europe, but the project is being designed under an indefinite delivery/indefinite quantity (IDIQ) contract with the US Army Corps of Engineers, New England District, due to budgetary limitations. Four years after the firm’s original work is complete, the Corps, European District, seeks bids for a construction manager for a group of related projects, including the project for which the original conceptual design was created. In the meantime, the same firm that served as a subconsultant has acquired a German firm that specializes in construction management.

When the construction management solicitation is issued, the contracting officer should identify the consultants and subconsultants for the original design project. If this is done, potential offerors should have adequate information to self-identify the project as one that creates an OCI. But will this information be available within the government? Does the government currently have adequate data for construction projects through which its contracting officers can fulfill their obligations under the proposed rule to identify “any contractors that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates?” If that initial design information is not provided by the government, or if the contractor’s prior role is something other than design (such as program support services for a major defense installation project), then the onus on construction industry contractors to self-identify OCIs is substantial.

For these multidisciplinary engineering and construction firms, is it practical to create a robust database that will identify the design work in sufficient detail so that the OCI can be recognized? If it is not, to what standard will the offeror’s conflict database system be held? Here, one concern is liability under the civil False Claims Act.

In the construction community, avoidance techniques are probably best suited to address OCIs occurring between program managers and subsequent designers or builders. Under United States v. Science Applications Int’l Corp., the United States Court of Appeals for the D.C. Circuit held that an “implied certification” can create a basis for liability under the False Claims Act. Should the burden to investigate the existence of OCIs be on the government or the contractor? How broad should the contractor’s duty to inquire be? What are the minimum requirements for a conflict database system to preclude a finding of reckless disregard under the False Claims Act?

If adopted in their current form, the proposed rules will likely increase the amount of attention that OCI issues get from both the government and the construction community. With the increased effort to identify and analyze OCIs, there is a strong chance that administrative costs will be high. Fortunately, the proposed new regulations for addressing OCIs greatly improve the current structure, even if their application will be widened.

Addressing OCIs

Under the current rules, contracting officers must award a contract to the “apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated.” Under the existing system, FAR Subpart 9.5 provides no information on how to mitigate OCIs, thus creating uncertainty and inconsistency. Fortunately, the proposed rules provide new guidance, and they do so without completely abandoning existing analyses and practices.

Because nonpublic information is removed from the OCI framework under the new rules, the focus is on the existing OCI categories of “impaired objectivity” and “biased ground rules.” The new rules provide four methods for addressing OCIs: (1) avoidance; (2) limitation on future contracting; (3) mitigation; and (4) acceptance of risk.

The proposed rules identify avoidance as an action taken by the government to prevent work performed under a current contract from creating an OCI on a future contract. Here, the primary focus is on carefully drafting statements of work to eliminate or limit the subjective judgment that a contractor will exercise in performing the current contract. Avoidance can also be achieved by requiring firewalls and internal controls before any subjective judgment is exercised, so as to isolate that judgment from tainting future acquisitions. (This differs from mitigation, which may permit a firewall to isolate participants in the current procurement from OCIs arising from a past procurement.) Also, an offeror may be excluded from a current procurement because of an OCI with the contractor or its affiliate.

In the construction community, avoidance techniques are probably best suited to address OCIs occurring between program managers and subsequent designers or builders. By writing statements of work for services at a high level that do not involve program budgeting or selection of specific project delivery systems, contracting officers may be able to keep their program managers in the pool of contractors. Especially where firewalls are created within a program management office, the qualified engineering and construction industry

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firm may still be able to compete for construction or construction management contracts falling under the umbrella of the program.27

The proposed rules also permit the creation of forward-looking limitations on future contracting, or “neutralization.”28 Under this technique, a contractor affirmatively agrees to forgo certain future contracting opportunities because of the work performed on the current procurement. Such limitations must be for a reasonable duration and end at a determinable point in the future. The neutralization technique is beneficial because it allows design and construction contractors to focus on a particular market segment (e.g., design or construction management) to the preclusion of others and build their internal capabilities accordingly.

Using this technique, firms that participate on the front end of a construction project would not participate on the back end during subsequent construction. Because this technique necessarily limits the potential contracting pool, a best practice would be for the government to combine neutralization with avoidance through internal barriers or firewalls so that only a specific, firewalled segment of the contractor’s business is shut out of the competition for the construction work. The government and contractors should be careful to ensure that subconsulting and design-build teaming affiliations between a designer and a contractor do not preclude either from competing on separate pieces of unrelated procurements within the government through a strong interconnection of their financial fates.

Mitigation under the new rules is broken down into three broad forms: (1) requiring that work affected by an OCI be subcontracted; (2) requiring internal barriers (such as firewalls, nondisclosure agreements, and senior level compliance monitoring); and (3) obtaining advice from multiple sources.29

Within the realm of project design and construction OCIs, mitigation techniques are difficult to implement. First, both design activities and construction activities need to be integrated and coordinated across all disciplines in order to make the project successful. As a result, any subconsulting and subcontracting requirements would still be closely tied to management and control by the prime consultant or contractor. Therefore, a contractual segregation of responsibility in a technical sense would not eliminate the perceived harm caused by the OCIs.

Second, creation of internal barriers deprives the contractor of its best resource for problem solving and deprives the government of the resulting performance benefits. Internal barriers may only be useful where a contractor is involved on the front end of a project in a purely programmatic way (e.g., advice regarding broad topics such as the size and layout of a new complex), so that other divisions of the firm can participate in either design or construction of the individual facilities without having a competitive advantage.

Third, obtaining multiple opinions (such as engineering opinions) creates additional cost for the government, without substantial benefit. For this reason, this form of mitigation is not likely to be a successful strategy in the context of construction projects.

Finally, the government can address an OCI by accepting the risk, but only if the risk relates solely to the government’s business interests. The government cannot accept OCI risk to the integrity of the competitive acquisition process.30 Because construction OCIs most commonly arise when a particular contractor or firm seeks to be involved in multiple, sequential stages of the construction process (program, design, construction, inspection/testing, management), most construction OCIs will implicate the integrity of the process. Any involvement in more preliminary stages of the construction project will arguably create a competitive advantage in a later stage of the project, thereby undermining procurement integrity.

Except for highly specialized projects, the multitude of qualified firms and companies operating in construction suggests that the government will not need to accept the risk of OCIs for its construction projects.

**Nonpublic Information**

Under the existing rules, “unequal access to information” (or contractor access to nonpublic information) is defined and treated as an OCI, the same as “impaired objectivity” and “biased ground rules.”31 Unequal access OCIs exist if “a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.”32 In other words, there are two predicates: (1) the information must be nonpublic, and (2) access to it must confer a competitive advantage.33

In unequal access cases, the OCI or potential OCI must be established by “hard facts,” not merely innuendo or suspicion.34 If hard facts establish the existence of an unequal access OCI, then the party possessing the competitively advantageous information may be denied the award of a contract.35

Under the proposed rules, nonpublic information is broadly defined to include government or third-party information that is either: (1) exempt or protected from disclosure under applicable law; or (2) has not been disseminated to the general public.36 “Experience” obtained by incumbent contractors is not intended to be treated as “nonpublic information,” but there is little to distinguish where the line should be drawn between incumbent experience on the one hand, and information on the other.37

Although the new rules on OCIs require the contracting officer to “address” OCIs, the new rules on nonpublic information instead require “resolution.”38 In order to resolve unequal access issues, contracting officers are directed to include solicitation provisions that require offerors to “state whether they are aware of anyone in the corporate organization, including affiliates, who has gained access to nonpublic information relevant to the acquisition that was made available by the Government.”39

This new requirement raises substantial administrative
issues for large engineering and construction companies. Earlier, we discussed how the requirement to identify OCIs involving biased ground rules or impaired objectivity could necessitate the creation of a conflict database to track construction projects and relationships. For the proposed non-public information rules, the breadth of required disclosure is even greater.

First, offerors would have to identify who within the organization (including affiliates) has any information regarding the acquisition. For each person with information, the source of that information would need to be determined, i.e., was the information obtained from the government or from other sources. Next, a determination would need to be made whether the information was actually nonpublic or obtained through public or non governmental sources. Only if neither of these techniques is possible will an offeror be disqualified from competition.43

In short, it appears that this new rule would require offerors to poll their entire workforce by describing a project and asking whether anyone has any knowledge about it. For anyone responding affirmatively, the information would need to be examined to see if it triggers the disclosure requirement. The risk of failing to disclose nonpublic information (or wrongly concluding that information was “publicly” acquired) may create yet another risk of false claims liability.44

Fortunately, access to nonpublic, competitively sensitive or advantageous information can be resolved through either dissemination to all bidders or through firewalls within the offeror’s organization.42 Only if neither of these techniques is possible will an offeror be disqualified from the competition.43

**Conclusion**

As with any new rule, the proposed rules for OCIs and nonpublic information have the potential to do both harm and good within the federal construction industry. The improved definitions and better overall guidance for contracting officers should ultimately help create more certainty in situations involving OCIs and nonpublic information. By creating a more proactive OCI system that requires contracting officers to consider how today’s procurement could create OCIs on future procurements, the government has taken a positive step forward.

However, if the new system will require contractors to invest significant time and resources to create internal conflict-of-interest databases and fulfill new disclosure requirements, then the new rules may be too onerous. For construction contractors, the new rules are not merely an extension of their existing business systems. Implementing systems to identify and report OCIs and instances of employee access to nonpublic information will increase contractor costs and may reduce competition by driving qualified contractors away from the federal marketplace. For federal agencies, the administrative burden and cost is likely to be substantial as well. Finally, by increasing contractor costs and discouraging competition, the new OCI system threatens to substantially increase what the government pays for construction.

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**Endnotes**

4. FAR 2.101.
7. Proposed FAR Subpart 4.4.
8. Id.
9. Proposed FAR 2.101(b)(2) ("Organizational conflict of interest means a situation in which – (1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor’s proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government; or (2) A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.").
14. FAR 9.504(a)(1).
17. Proposed FAR 2.101.
20. Proposed FAR 52.203-XX.
24. FAR 9.504(e).
27. An example of a major program support project is the support contract for the Joint Guam Program Office, which is responsible for transferring marines from Okinawa to Guam under the Defense Policy Review Initiative.
31. FAR 9.504-4.
33. Aetna, supra note 5.
35. Aetna, supra note 5.
38. Proposed FAR Subpart 4.4.
41. See e.g., SAIC, supra note 22.
42. Proposed FAR 4.402-4(c)(1), -(2).
43. Proposed FAR 4.402-4(c)(3).
The Revised and Updated DFARS Ground and Flight Risk Clause

By Donald J. Carney

On June 8, 2010, the United States Department of Defense (DoD) implemented significant changes to the DoD Federal Acquisition Regulation Supplement (DFARS) provisions and clauses implementing DoD’s longstanding policy of limited self-insurance for the risk of contractor military aircraft operations. The Defense Contract Management Agency (DCMA) initiated these changes, which included merging the DFARS 252.228-7001 (Sept. 1996) Ground and Flight Risk Clause and the DFARS 252.228-7002 (Sept. 1996) Aircraft Flight Risk Clause (AFRC) into one clause applicable to all aircraft contracts “for clarity and consistency.” The result was the new DFARS 252.228-7001 (June 2010) Ground and Flight Risk Clause (GFRC).

DoD also took the opportunity to make other changes relevant to aerospace contractors. It increased contractors’ deductibles under most fixed-price contracts, required prime contractors to flow down the GFRC to lower-tier contractors, and highlighted the fact that several categories of insurance costs connected with contractor operation of military aircraft under cost-reimbursable contracts are unallowable. The new GFRC also recognized and addressed developments in the aerospace industry, such as the increased use of commercial item and service contracting in military aircraft operations and the increased use of unmanned aerial vehicles (UAVs).

This article discusses some of the key changes in the new GFRC compared to the prior contract clauses, and identifies some of the compliance and contract administration issues relevant to aerospace government contractors.

DoD’s Policy of Limited Self-Insurance

For several decades, DoD’s contracting policy has been to self-insure for the risk of loss of contractor aircraft ground and flight operations, based on the premise that the self-insurance risk of loss presented is less than the costs of commercial insurance. The comptroller general explained that this policy is based on the proposition that “the Government is financially able to absorb its maximum probable loss and the fact that its risks are spread so widely as to result in a minimal statistical probability that losses will exceed insurance premiums over a reasonable period of time.” It therefore should be “less costly” for the government to assume the risk of loss than to purchase insurance, since purchased insurance costs would include not only policyholder losses, but selling, administrative, and other expenses as well.

The DFARS currently implements this policy by including a prescriptive provision directing the contracting officer to use the GFRC in “all solicitations and contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft,” subject to certain exceptions discussed further below. According to DoD, there is a “fairly even split” between fixed-price and “flexibly-priced” contracts involving military aircraft. Most of the contracts for aircraft repair, overhaul, and maintenance are flexibly-priced, and those contracts are “typically where the bulk of damage arises that results in liability assessments” against contractors.

The government assumes the risk of loss in contracts including the GFRC for aircraft “to be delivered to the Government,” including aircraft in the process of being manufactured, disassembled, or reassembled, “provided that an engine, portion of a wing, or a wing is attached to a fuselage of the aircraft.” It also applies to aircraft furnished by the contractor to the government under the contract, either before or after government acceptance. Since the GFRC results in government assumption of the risk of loss of property prior to delivery to the government under a fixed-price contract, the GFRC differs from the general Federal Acquisition Regulation (FAR) policy that the risk of loss remains with the contractor until acceptance. Even where a progress payment is made by the government, and results in title to progress payment inventory vesting in the government, the government typically does not bear the risk of loss. This variance from the general FAR policy of risk of loss on the contractor is traceable back to the perceived economy associated with self-insurance. As the Government Accountability Office (GAO) has explained: “We believe it is also appropriate to apply self-insurance . . . in some circumstances, to property being manufactured by contractors for the Government, where the cost of insurance would be passed to the Government through the contract price.”

In other words, the government self-insures aircraft that are the property of the contractor prior to delivery so as to avoid the inclusion of potentially exorbitant insurance costs in the price paid.

The GFRC also applies to aircraft furnished by the government to the contractor under the contract, whether in a state of disassembly or reassembly. It includes all government property installed, in the process of installation, or
Contractor Obligations

By accepting the GFRC in its contract, a contractor agrees to be bound by the aircraft operating procedures contained in the combined regulation/instruction entitled Contractor’s Flight and Ground Operations in effect on the date of contract award. As the ASBCA has explained, the government assumes risks “which generally entail unusually high insurance premiums if the risk were to be assumed by the contractor. In turn the Government goal was to reduce the risks by exercising certain controls,” most notably the combined regulation/instruction.

To comply with the combined regulation/instruction, the contractor must develop procedures that are approved by the government flight representative (GFR). The contractor’s procedures are to be “separate and distinct from industrial or quality procedures” and are to “describe aircraft operating procedures.”

The government assumes the “risk of damage to, or loss or destruction of aircraft”: (1) in the open, (2) during operation, and (3) in flight.

Government’s Assumption of Risk of Loss

Subject to certain conditions, under the GFRC, the government assumes the “risk of damage to, or loss or destruction of aircraft”: (1) in the open, (2) during operation, and (3) in flight. The GFRC defines “in the open” to mean wholly outside of the buildings on the contractor’s premises or other places described in the schedule. While aircraft to be delivered by the contractor are “in the open” only when outside of the contractor’s buildings, such as hangars, aircraft furnished by the government to the contractor are treated differently, and are “in the open” at all times when in the contractor’s care, custody, or control, regardless of location, whether assembled or disassembled. “During operation” means operations and tests of the aircraft and its installed equipment, accessories, and power plants, while in the open or in motion. “Flight” means any flight demonstration, flight test, taxi test, or other flight made in the performance of the contract, or for safeguarding the aircraft, or previously approved in writing by the contracting officer.

The government’s assumption of the risk of loss for aircraft “in the open” continues unless the contracting officer finds that (1) the contractor has failed to comply with the combined regulation/instruction, or (2) that the aircraft is in the open under unreasonable conditions and the contractor fails to take prompt corrective action. If the government finds a contractor noncompliant, certain notice procedures apply. If the contracting officer finds that the contractor failed to promptly correct the cited conditions or failed to correct the conditions within a reasonable time, the government may terminate its assumption of risk. If the government terminates its assumption of risk, the contractor assumes the risk of loss, will not be paid any insurance costs by the government, and the “liability provisions of the Government Property clause of the contract are not applicable to the affected aircraft.” In other words, the FAR 52.245-1 Government Property Clause implementing the government’s policy that contractors generally, with certain exceptions, are not held liable for losses for government property under cost-reimbursement, time-and-material, labor-hour, and fixed-price contracts awarded on the basis of submission of cost or pricing data, would not apply. Moreover, even if the government terminates its assumption of risk under the GFRC, the contractor remains obligated to comply with all GFRC provisions, including the combined regulation/instruction.

The government’s assumption of risk is subject to the contractor’s share of loss and deductible under the current GFRC. As discussed below, the contractor assumes and is responsible for its share of the loss, which is the lesser of the first $100,000 of loss or damage to the aircraft resulting from each separate event, except for reasonable wear and tear and to the extent damage is caused by negligence of government personnel, or 20 percent of the price or estimated cost of the contract. The deductible applies to each “event,” which the ASBCA has interpreted to mean loss or damage resulting from “one proximate, uninterrupted and continuing cause.”

Exclusions from the Government’s Assumption of Risk of Loss

Several exclusions apply to the government’s self-insurance policy. Like the Government Property Clause, the GFRC clause makes the contractor liable for any damage, loss, or
destruction of aircraft resulting from willful misconduct or lack of good faith of any of the contractor's managerial personnel to maintain and administer a program for the protection and preservation of aircraft. This standard requires more than mere negligence. For example, in *Fairchild Hiller Corp.*, the ASBCA sustained a contractor's appeal of a contracting officer's denial of a contractor's request to be relieved of liability for damage to a USAF C-130 aircraft that burned when in the contractor's custody for inspection and repair. While the ASBCA agreed that the contractor was negligent on the day of the fire, and that its safety program was less consistent, careful, and effective than was necessary, the record did not support a finding that the contractor failed to meet sound industrial safety procedures. The government also failed to prove that contractor management subordinated responsibility for safety to other goals to an extent that one could find willful misconduct or lack of good faith in regard to safety concerns.

The government's assumption of risk also does not extend to losses sustained during flight if either the flight or flight crew members have not been approved in advance by the GFR. Under the GFRC, the government also does not assume the risk for wear and tear, unless the wear and tear is the result of other loss, damage, or destruction covered by the clause. The wear and tear exclusion does not apply to government-furnished property if the damage is reasonable wear and tear or "results from inherent vice, e.g., a known condition or design defect in the property." The GFRC excludes losses covered by insurance. It also excludes losses sustained while the aircraft is being worked on where the damage or loss is a direct result of the work unless such damage, loss, or destruction would be covered by insurance that would have been maintained by the contractor but for the government's assumption of the risk. Also excluded are damages during the course of transportation by rail, or via public streets, or highways, except for government-furnished property.

Prior DoD Ground and Flight Risk Clauses

From the early 1960s until the new rule in June 2010, DoD implemented the contractor aircraft operations self-insurance policy through two separate clauses that addressed two different circumstances. According to DCMA, the government's intention was to have one or the other clause apply to any particular contract, except in very limited circumstances, presumably when a military aircraft contract contained both fixed-price and cost-reimbursement contract line items, or "CLINs." The pre-2010 GFRC applied only to negotiated fixed-price contracts for aircraft production, modification, maintenance, repair, or overhaul. A second clause, the AFRC, applied to cost-reimbursable contracts. While the GFRC dealt with contractor property, the AFRC was primarily intended to be used in contracts involving the furnishing of aircraft to the contractor by the government, particularly cost reimbursement contracts. The AFRC could also be used in fixed-price contracts where the GFRC was not used and contract performance involved the flight of government-furnished aircraft.

The two clauses had three major differences. First, while the GFRC applied to aircraft in the open, in operation, or in-flight, the AFRC applied only in-flight. Second, the clauses contained different deductibles. Under the GFRC, with the exception of damage, loss, or destruction in flight, the contractor assumed the risk of the first $25,000 of loss or damage to aircraft in the open or during operation. By contrast, the AFRC included a provision that the "loss, damage, or destruction of aircraft during flight in an amount exceeding $100,000 or 20 percent of the estimated cost of this contract, whichever is less, is subject to an equitable adjustment when the contractor is not liable" under the Government Property Clause and the flight crew members had been approved by the GFR. The equitable adjustment was to be made to the estimated cost, delivery schedule, or both, and in the amount of fee to be paid to the contractor. The AFRC was also a limited deviation from FAR policy, which as described above generally states that contractors are not held liable for loss of government-furnished property unless certain exceptions apply. This policy is implemented contractually in the Government Furnished Property Clause. The AFRC included a deductible to share some of the risk of contractor flight operations.

Third, the clauses differed regarding how to handle contractor insurance costs. In the GFRC, the contractor warranted that the contract price "does not and will not include, except as may be authorized in this clause, any charge or contingency reserve for insurance covering damage, loss, or destruction of aircraft." The AFRC contained no requirement regarding the contractor insurance costs.

DCMA Identified Several Problems Under the 1996 GFRC and AFRC

By 2007, DCMA perceived several material problems with DoD's implementation of the self-insurance policy through the 1996 versions of the GFRC and AFRC. DCMA is constantly involved in administering contracts for military aircraft subject to the self-insurance policy, since DCMA normally administers contracts at sites not physically located on a military base, such as contractor facilities. DCMA concluded that the GFRC and AFRC were, among other things, not being correctly included in aircraft contracts,
DCMA was particularly concerned with the possibility that contractors were actually better off if the government found contractors noncompliant with the combined regulation/instruction.
under FAR Part 12 procedures nor to commercial derivative aircraft that are to be maintained to Federal Aviation Administration (FAA) airworthiness standards when the work will be performed at a licensed FAA repair station. Like the prior provision, the GFRC also does not apply where a non-DoD customer (including a foreign military sale customer) has not agreed to assume the risk of loss or destruction of, or damages to, aircraft.

The final rule also contained several new provisions reflecting DCMA's concerns with the complexity, consistency, and effect of the GFRC. These provisions are of varying degrees of significance to aerospace government contractors and are discussed in detail below.

**Increase in Fixed-Price Contract Deductible from $25,000 to $100,000**

One significant change for aerospace contractors in the revised GFRC is the deductible level of $100,000 for all DoD aircraft contracts, including fixed-price contracts that previously were subject to a $25,000 deductible. The regulatory history of this specific provision suggests that the DoD placed simplicity over well-founded economic analysis when it adopted this provision for all aircraft contract types.

In January 2007, prior to recommending the proposed revised GFRC, DCMA looked into current industry practices regarding deductibles for aircraft liability, hangarkeeper's liability, and similar insurance coverages under the GFRC in the form of a contractor insurance/pension review by the DCMA Contractor Insurance/Pension Division (deductibles CIPR). DCMA noted that the deductible applicable to fixed-price contracts increased from $1,000 in the 1991 version of the GFRC to $25,000 in 1996. DCMA's review concluded that "$25,000 seems to be the median of deductibles for property damage under hangarkeeper's insurance policies that are very roughly comparable to the terms" of the GFRC clause, aside from certain outlier examples. Based on this initial assessment, DCMA's insurance experts did "not see any compelling reason to change the amount at this time" of the fixed-priced deductible. Moreover, DCMA concluded that the $100,000 deductible under the AFRC "if anything, seems to be higher than that typically seen in our samples" of insurance policies.

Notwithstanding the findings of the deductibles CIPR, DCMA's initially proposed rewrite of the GFRC in April 2007 included a deductible of $50,000, or 20 percent of contract costs for all military aircraft contracts. As discussed above, DCMA justified the amount to deter unsafe contractor practices on fixed-price contracts. When DoD published the proposed rule, however, the proposed deductible increased to $100,000 for all aircraft contracts.

While an industry representative commended DoD's efforts to streamline the DFARS in general, it protested the increase to $100,000 as potentially too high. It noted that while "historically most contractors engaged in the types of contracts that would utilize the Ground and Flight Risk Clause have been large business concerns," the revised GFRC could negatively impact small businesses. Specifically, small subcontractors, which "do not have program resources to absorb an increased share of loss," could effectively be excluded from these contracts. The result would be that only large companies willing to assume a greater share of loss would compete for these contracts, and small businesses with innovative solutions and lesser financial means would be excluded. Industry therefore recommended modifying the maximum share of loss to $50,000, "so as not to exclude small businesses with which a prime contractor may wish to partner."

DoD rejected the $50,000 maximum deductible as "inequitable and counter-productive." With only very general references to its review of military aircraft contracts, DoD disagreed that raising the liability limit would disproportionately disadvantage small businesses. In specific, DoD contended that "most of the small businesses participating in these contracts do so as [cost-type contract] repair, overhaul, and maintenance prime contractors," and therefore were already subject to the $100,000 maximum limitation. DoD alternatively noted that small businesses were commercial subcontractors that DoD apparently concluded would not be subject to the revised GFRC in the future. During internal deliberations, DoD also noted that "DoD aircraft tend to be much more expensive than those in private industry," and that the $100,000 deductible "adjusts the deductible to recognize the magnitude of the contract to which the deductible relates." DoD's application of a $100,000 maximum deductible to fixed-price contracts under the revised GFRC does not appear sufficiently justified based on the regulatory record.
$100,000 deductible was necessary to deter unsafe practic- es. In increasing this threshold to $100,000, DoD’s position should have been supported by more specific evidence estab- lishing the reasonableness of the amount. Nevertheless, contractors, particularly small contractors, must now assess whether participating in fixed-price military aircraft con- tracts is worth the risk of a potential unreimbursable loss of $100,000 under the revised GFRC.

**Mandatory Flowdown Provision**

Another material change is the new requirement that the GFRC be flowed down in all subcontracts. In specific, para- graph (m) states that the “[c]ontractor shall incorporate the requirements of [the GFRC], including this subpara- graph (m), in all subcontracts.” After DoD published the proposed rule including the flowdown requirement, an aerospace industry group objected that the manda- tory flowdown requirement was overbroad, and needed to provide more flexibility in requirements imposed on sub- contractors. The commenter pointed out that there “may

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**The new GFRC not only compels the requirements of the clause to be flowed down to subcontractors; it also changes the liability arrangement for damages when covered aircraft are in the possession or control of a subcontractor.**

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be requirements within the clause that are inappropriate for some small subcontractors under certain conditions,” and proposed that “some flexibility on imposing all of the requirements of this clause on all subcontractors be rec- ognized” in the mandatory flowdown requirement. The industry concern regarding the flowdown provision was perhaps not specific enough to persuade DoD.

DoD rejected this industry concern, and in so doing ap- peared to miss the point of the comment. DoD responded to the comment by noting that the combined regulation/in- struction itself provides “adequate flexibility to address the commenter’s concern.” Furthermore, stated DoD, “the Instruction’s standard for contractor procedures is sim- ply that they be ‘safe and effective,’” and that any subcon- tractor “in possession or control of a government aircraft should have ‘safe and effective’ procedures in place.” DoD apparently failed to realize that the commenter was ad- dressing the entirety of the somewhat complex GFRC, not simply the combined regulation/instruction. Industry was therefore not arguing with the need for safe and effective procedures, but rather with the inflexibility of application of a DFARS clause that, as DMCA has agreed, has both safety and contract components.

The new GFRC not only compels the requirements of the clause to be flowed down to subcontractors; it also changes the liability arrangement for damages when covered aircraft are in the possession or control of a subcontractor. Under the 1996 GFRC, when an aircraft was in the possession or control of a subcontractor, the subcontract did not, with the written approval of the contracting officer, provide for relief from each liability, the subcontractor was not relieved of liability for any resulting damage, loss, or destruction. In the absence of the contracting officer’s written approval, the subcontract was required to contain provisions requiring the return of the aircraft in good condition when received or for the utilization of the property in accordance with the provisions of the prime contract. The clause required the prime contractor to enforce liability against the subcontrac- tor pursuant to the subcontract’s terms for the benefit of the government.

By contrast, the new GFRC does not relieve a contractor from liability for damage, loss, or destruction of aircraft while in the possession or control of a subcontractor, absent the contracting officer’s approval of such relief. New GFRC paragraph (g) entitled “Subcontractor possession or control,” states that the “Contractor shall not be relieved from liability for damage, loss, or destruction of aircraft while such aircraft is in the possession or control of its subcontractors, except to the extent that the subcontract, with the written approval of the Contracting Officer, provides relief from each liability.” It states in a second sentence that, absent the contracting officer’s written approval of relief, “the subcontract shall contain provisions requiring the return of aircraft in good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract.” Thus, the new GFRC makes a contractor liable to the government for damage, loss, or destruction occurring while aircraft are in the possession of a subcontractor, unless a contractor obtains advance, written approval from the contracting officer for relief of liability under the subcontract.

The new paragraph (g) appears to create an overly nar- row scope of contractor relief from liability while aircraft are in the possession or control of a subcontractor. Relief should also extend to a contractor that has flowed down the GFRC to the extent that the conditions for the government’s self-insurance identified in paragraph (d) are satis- fied by a subcontractor while aircraft are in the subcontrac- tor’s possession or control. Revision of paragraph (g) in this manner would maintain the contractor’s liability for dam- ages to the government if a subcontractor caused damage, loss, or destruction to an aircraft, but not where a subcon- tractor has (1) maintained compliance with the combined regulation/instruction and (2) not held aircraft in the open under unreasonable conditions (i.e. circumstances where the government’s general policy is to agree to assume the risk as described in paragraph (d)).
Additionally, the second sentence of paragraph (g) appears to be a vestige of the 1996 GFRC that did not include the flowdown provision and therefore should be deleted. The paragraph (m) flowdown provision now necessitates the incorporation of the GFRC requirements in all subcontracts, including the requirement to be bound by the combined regulation/instruction governing flight and ground operations. Given the new GFRC’s emphasis on flowed down the GFRC to subcontractors, paragraph (g) should more clearly and effectively address liability for damage occurring while aircraft are in the possession or control of subcontractors.

In summary, aerospace contractors must ensure that they flow down the GFRC in their subcontracts to both comply with paragraph (m) and to impose the contractual requirement of compliance with the combined regulation/instruction, among other terms, on subcontractors.

Unallowability of Insurance Costs

The 2010 version of the GFRC includes new provisions emphasizing that certain costs relating to insurance against the contractor’s share of loss under cost-reimbursement government contracts are unallowable. This provision relates directly to the DCMA’s intent that duplicative contractor insurance costs be borne by the contractor, not the government, to avoid undercutting the benefits that should be accruing to the government under its self-insurance policy. Aerospace contractors need to be aware of this restriction and to ensure that their operations and disclosure statements comply with this restriction.

The new GFRC identified five separate types of unallowable aircraft operation insurance costs. In relevant part, the clause states as follows:

The costs incurred by the contractor for its share of loss and for insuring against that loss are unallowable costs, including but not limited to –

(i) The Contractor’s share of loss under the Government’s self-insurance;
(ii) The costs of the Contractor’s self-insurance;
(iii) The deductible for any Contractor-purchased insurance;
(iv) Insurance premiums paid for Contractor-purchased insurance; and
(v) Costs associated with determining, litigating, and defending against the Contractor’s liability.

This provision is in stark contrast to the prior AFRC clause, which did not expressly address the allowability of these types of costs relating to cost-reimbursement contracts. As discussed above, however, FAR 31.205-19 arguably already made these costs unallowable. In any event, since these insurance costs are plainly now unallowable, they cannot be included in costs for reimbursement and are subject to disallowance by the cognizant contracting officer. Moreover, to the extent a contractor includes these costs as an indirect cost in cost rate proposals or statements of costs, the contractor risks exposure to penalties. Specifically, where an indirect cost is expressly unallowable under a FAR cost principle or executive agency supplement like the DFARS, the penalty under FAR 42.709-1 is equal to the amount of the disallowed costs allocated to the cost-reimbursement contracts, plus interest. If the indirect cost was determined to be unallowable “for that contractor” before proposal submission, the penalty is two times the amount of disallowed allocated costs plus interest. The inclusion of unallowable costs is also potentially subject to other administrative, civil, and criminal penalties.

It is therefore incumbent upon aerospace government contractors to ensure that the types of insurance and other costs identified as unallowable under the new GFRC do not appear either in direct cost submissions or indirect cost rate proposals or statements of costs. While the rules applicable to the reimbursement of insurance costs under cost-type contracts have received new emphasis under the new GFRC, the GFRC rule requiring contractors to promise not to include insurance charges to fixed-price contracts have remained unchanged. Under fixed-priced contracts, contractors warrant that the price of these contracts will not include any charge or contingency reserve for insurance.

UAVs Included at Contracting Officer’s Discretion

One of the policy issues relating to the GFRC is the inclusion of unmanned aerial vehicles (UAVs) under the clause. Unmanned aerial systems (referring to both UAVs and their supporting systems) programs of the military services have experienced significant growth in recent years. DCMA included UAVs in the list of aircraft with contracts that should include the GFRC and that are covered by the terms of the revised GFRC. The revised GFRC also revised the definition of “flight crew member” to include “any pilot or operator of an unmanned aerial vehicle.”

One of the DCMA’s own field representatives raised a concern regarding the inclusion of UAVs in the proposed revised GFRC. The representative suggested that the clause should not be applied to smaller UAVs, stating:

228.370 appears to require the Ground and Flight Risk Clause for all aircraft including unmanned aerial vehicles without taking into account size, cost, or ceiling which vary tremendously. The use of the GFRC appears to be a costly overkill in cases of small/micro unmanned aerial vehicles.

This somewhat conclusory comment did not explain what it meant by “costly overkill.” It is unclear whether the commenter meant that it was an error to include micro-UAVs among aircraft that would require costly insurance, or that it was overly burdensome administratively and contractually to track such aircraft pursuant to the GFRC, or that the costs of compliance were otherwise unjustified. The question of coverage of micro-UAVs under the GFRC does not appear to be inconsequential based on the numbers of these systems alone. For example, as of March 2010 the GAO reported that the military services have acquired more than 6,100 Group 1 unmanned aircraft (aircraft weighing 20 pounds or less).

The DoD did not share the commenter’s concern be-
cause of the flexibility afforded to the contracting officer under the DFARS. More specifically, in responding to the comment DoD stated that “DFARS 228.370(b)(2)(i) allows tailoring of the definition of ‘aircraft’ to appropriately cover atypical and ‘nonconventional aircraft’ but also allowed contracting officers to omit small/micro UAVs from that definition, in coordination with the program office.” DoD acknowledged that, while the respondent’s concerns could be legitimate in some cases, these concerns should be addressed during the preaward phase on an individual contract basis. There is sufficient flexibility in the approval process for the clause to recognize unique requirements or the absence of standard ground and flight operation requirements for small/micro UAVs.122

While DoD’s response appears to recognize that the GFRC may indeed be more than is reasonably required for small/micro UAVs, it is unclear by what standard contracting officers should evaluate whether to include the GFRC in contracts for such systems.

Since it appears that the importance of UAVs will continue to grow based on recent trends, DCMA may have to revisit this issue in the future to provide more concrete guidance on the applicability of the GFRC to these systems. For the time being, aerospace contractors whose contracts cover UAVs will need to be aware of how the government is dealing with the risks of such aircraft in their contracts on a case-by-case basis.

Conclusion

DoD’s revisions to the GFRC and its prescriptive provision have simplified how DoD implements its limited self-insurance policy for contractor operations involving military aircraft, while at the same time imposing increased obligations on contractors. DoD’s approach also increases potential contractor exposure to ground and flight risks. At the same time, DoD has highlighted the unallowability of certain risk-related costs under cost type contracts where the GFRC applies. Aerospace government contractors need to be aware of these changes and respond accordingly in their proposals and compliance plans. Moreover, aerospace contractors should be aware of these risk-shifting issues as the industry continues to evolve and increasingly uses new technologies such as UAVs.123

Endnotes

1. 75 Fed. Reg. 32645 (June 8, 2010).
2. DFARS 252.228-7001 (June 2010). Under the current GFRC, deductibles are the lesser of $100,000 or 20 percent of the estimated contract cost. DFARS 252.228-7001(f)(1) (June 2010). Previously, deductibles were $25,000. See 75 Fed. Reg. 32645 (June 8, 2010).
Ground and Flight Risk Clause (May 23, 2007), at 3.


The second is the NASA FAR Supplement 1852.228-71, Aircraft Flight Risks (December 1988) Clause prescribed in the NASA FAR Supplement at 1828.311-270.

50. DCMA Memo at 2.
51. DFARS 228.370(b)(1) (effective Dec. 15, 1998; superseded June 8, 2010).
52. DFARS 228.370(c)(1) (effective Dec. 15, 1998; superseded June 8, 2010).
53. Id.
54. DFARS 228.370(c)(2) (effective Dec. 15, 1998; superseded June 8, 2010).
56. DFARS 228.22-7001(c) (Sept. 1996).
57. DFARS 228.22-7002(d)(1) (Sept. 1996).
58. DFARS 228.22-7002(d)(2) (Sept. 1996).
59. FAR 45.104. The contractor does assume the risk of loss on fixed-price contracts not requiring cost or pricing data. FAR 45.107(a)(1)(i), (a)(2)) and FAR 52.245-1 (Alternate I) (Aug. 2010).
60. FAR 52.245-1 (Aug. 2010).
61. DFARS 228.22-7001(g) (Sept. 1996).
63. DCMA Memo at 1.
64. Id. at 3.
65. Id. at 1.
66. Id. at 2.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. DFARS 228.22-7001(c)(4)(iii) (June 2010).
73. DCMA Memo at 2.
74. Id.
75. Id.
76. Id. at 1.
77. Id.
79. 75 Fed. Reg. 32642 (June 8, 2010).
80. 75 Fed. Reg. 32642, 32645 (June 8, 2010), citing new DFARS 231.205-19.
81. DFARS 228.370(b)(1)(ii)(June 8, 2010).
82. DFARS 228.370(b)(1)(ii), (iv) (June 8, 2010).
83. DFARS 228.370(b)(1)(iii) (June 8, 2010).
85. Id. at 2.
86. Id.
87. Id.
89. Letter from Aerospace Industries Association (AIA) to DARS (Feb. 4, 2008).
90. Id. at 1–2.
91. Id. at 2.
92. 75 Fed. Reg. 32642, 32644 (June 8, 2010).
93. Id.
94. Id.
96. DFARS 228.22-7001(m) (June 2010).
97. Letter from AIA to DARS at 3.
98. Id.
99. 75 Fed. Reg. 32642, 32644 (June 8, 2010).
100. Id.
101. DCMA Memo at 2.
102. DFARS 228.22-7001(f) (Sept.1996).
103. Id.
104. Id.
105. DFARS 228.22-7001(g) (June 2010) (emphasis added).
106. Id.
107. This analysis of the GFRC subcontracting-related provisions also reflects discussions with Dr. Douglas N. Goetz, CPPM, CF, GP Consultants, Inc. (former Defense Acquisition University professor).
108. DCMA Memo at 1.
109. DFARS 228.22-7001(e)(5) (June 2010).
110. FAR 42.801, 42.803 (Apr. 2011).
111. FAR 42.709(a)(1), (2) (Apr. 2011).
112. FAR 42.709-1(a)(1) (Apr. 2011).
113. FAR 42.709-1(a)(2) (Apr. 2011).
114. FAR 42.709-1(b) (Apr. 2011).
115. DFARS 228.22-7001(h) (June 2010).
117. DFARS 228.370(b)(2)(i)(June 2010); DFARS 228.22-7001(a)(1) (iv) (June 2010).
118. DFARS 228.22-7001(a)(5) (June 2010).
119. Comment on DARS-2007-0077, DCMA Springfield, Picatinny, NJ.
120. GAO-10-331 at 6.
121. 75 Fed. Reg 32642 (June 8, 2010).
122. Id. at 32642-43.
Thursday, August 4

Please click on CLE PROGRAMS in the following link for the complete listing of available CLE offerings that begin on Thursday, August 4: http://www2.americanbar.org/annual/pages/default.aspx

Friday, August 5

10:30 a.m. to 12:00 noon
ABA CLE Centre Showcase Program: “Implicit Bias” and the Myth of Equal Justice
Room 701A, 700 Level, MTCC, South Building
Primary Sponsor: Section of Litigation

Human judgment involves two different mental processes: intuition and deliberation. Both are essential to good judgment; and intuition can be surprisingly accurate. However, people often rely too much on intuition alone. Judgments made in the justice system are no different. Headlines trumpeted “racial profiling” with the 2009 arrest of Harvard Professor Henry Louis Gates, Jr., after he pushed his way through the jammed front door of his home. But unconscious (implicit) bias is not limited to law enforcement, or even to the criminal justice system. Through a review of the controversial “Gates-gate” incident and other high-profile cases, as well as provocative new empirical research, this highly-interactive multimedia presentation will engage the audience using TV news video and hand-held “voting” technology to probe how implicit bias based on gender, race/ethnicity, and a whole host of other individual traits—including, for example, age, national origin, height, weight, sexual orientation, socio-economic class, immigration status, and mental or physical disability, in addition to overall physical appearance and attire—distort judgment in both civil and criminal cases, in the courtroom and beyond.

10:30 a.m. to 12:00 noon
ABA CLE Centre Showcase Program: 9/11—A Decade Later, and A World Apart
Room 701B, 700 Level, MTCC, South Building
Primary Sponsor: Section of International Law

The tragic events of 9/11 forever altered the Manhattan skyline, but other effects in the United States and elsewhere around the world have been even more profound, raising dramatic and unprecedented issues implicating virtually every area of the law—international trade, national security, privacy and civil liberties, criminal justice, immigration and employment law financial regulation, insurance and taxation, media and communications law, transportation, science and technology, intellectual property rights, healthcare, education, energy, government contracts and procurement, international human rights, foreign relations, police powers and emergency preparedness, the law of war, military justice, and the roles of lawyers and the courts. Mark the 10th anniversary of the 9/11 attacks with this “Dream Team” of experts in an engaging and thought-provoking roundtable exploration of how the legal landscape has changed over the past decade and what the future is likely to hold. This is a complimentary CLE program.
Saturday, August 6

7:00 a.m. to 8:15 a.m.

**Council Breakfast**
City Hall, 2nd Floor
Executive session. For 2010-2011 and nominees for 2011-2012 Section Officers and Council Members only

8:30 a.m. to 12:00 noon

**Council Meeting**
Dominion Ballroom, 2nd Floor
Open to all Section members

12:00 noon to 2:00 p.m.

**Section Luncheon and Annual Alan E. Peterson Lecture**
Civic Ballroom South, 2nd Floor

Luncheon Speaker:
Daniel I. Gordon
Administrator
Office of Federal Procurement Policy
Washington, DC

This year’s Luncheon is made possible by the following Sponsors who have contributed to help defray its expenses:

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2:00 p.m. to 2:15 p.m.

**Annual Section Business Meeting**
Civic Ballroom South, 2nd Floor
Includes election of Officers and Council Members for 2011-2012 and other Section business

Presiding:
Donald G. Featherstun
2010-2011 Section Chair
Seyfarth Shaw LLP
San Francisco, CA

2:15 p.m. to 3:45 p.m.

**2011-2012 Section Leadership Brainstorming Session**
Civic Ballroom South, 2nd Floor

4:00 p.m. to 5:30 p.m.

**Acquistion Reform and Engineering Issues Committee Meeting**
Conference Room G, Mezzanine

4:00 p.m. to 5:30 p.m.

**Battle Space and Contingency Procurements Committee Meeting**
Conference Room H, Mezzanine

4:00 p.m. to 5:30 p.m.

**Cybersecurity, Privacy and Data Protection Committee Meeting**
Conference Room B, Mezzanine

4:00 p.m. to 5:30 p.m.

**International Procurement Committee Meeting**
Conference Room C, Mezzanine

4:00 p.m. to 5:30 p.m.

**State and Local Procurement Division Meeting**
Conference Room E, Mezzanine

4:00 p.m. to 5:30 p.m.

**Technology and Electronics Communications Committee Meeting**
Conference Room D, Mezzanine

6:30 p.m. to 8:30 p.m.

**Section Reception**
The National Club
303 Bay Street, between Adelaide and King on Bay Street

Advance reservations and payment of guest tickets must have been received by CDS/TP by July 15.

This gracious social gathering for Section members and their guests, and honoring the incoming Section Chair, is made possible through the generosity of the following Sponsors who have contributed to defray its expenses:

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The Rule of Law evolves to adapt to changing times as new technologies enable the legal environment to function—in-house contractor lawyers and agency counsel. Our panel of experienced in-house and agency counsel will share insights into the roles they play, the challenges they face, and how they work together to resolve complex legal issues. "Feel My Pain"—Why Serving as Contractor In-House Counsel or Government Agency Counsel Requires More Skill Than Ever

What are the most pressing legal demands faced by in-house and agency counsel in their jobs today? In the next 5 years, what will be the greatest legal challenges facing in-house and agency counsel? What are the most pressing substantive issues facing in-house and agency counsel today? What do in-house counsel like and dislike about service provided by outside counsel? What are the likes and dislikes of agency counsel about interaction with contractor counsel?

Gail D. Zirkelbach, Moderator
McKenna Long & Aldridge LLP
Denver, CO

Lorraine Romero
General Counsel
Thales Raytheon Systems
Fullerton, CA

Maureen T. Kelly
Senior Counsel
Northrop Grumman Information Systems
McLean, VA

Todd J. Canni
Associate General Counsel
Department of the Air Force
Washington, DC
Women Lawyers of Achievement
21st Annual Margaret Brent
12:00 noon to 2:00 p.m.

Cybersecurity—Legal Frontiers and Cyber Pioneers in the Information Security Realm
As two Senate leaders on cybersecurity stated, “The time to combat cyber terror was yesterday.” Skyrocketing cyber attacks by organized crime, foreign enemies, and other hackers have wreaked havoc on both the public and private sectors—up to $1 trillion in damages and lost secrets, over 500 million personal records compromised in security breaches, and national security secrets spilled—with the threat of a digital Pearl Harbor as the ultimate nightmare. The coming year will be pivotal as both the public and private sectors confront escalating cyber threats, navigate tougher cybersecurity laws and rules, and answer to expanding oversight.

◆ What legal exposure do agencies and contractors have for security breaches, cyber technology failures, and unauthorized information access and sharing—and what legislative fixes are needed?
◆ Will the drive for tighter information security jeopardize privacy, transparency, and basic civil liberties?
◆ Do due-process protections and administrative remedies exist for contractors unfairly unplugged from federal networks or otherwise denied opportunities in the burgeoning federal marketplace?
◆ What are the top cybersecurity priorities—legislative, executive, and private sector—for the coming year?

David Z. Bodenheimer, Moderator
Crowell & Moring LLP
Washington, DC

Jeffrey E. Greene
Senior Counsel, Senate Homeland Security and Governmental Affairs Committee
Washington, DC

Jacob Olcott
Counsel, Senate Commerce, Science, and Transportation Committee
Washington, DC

12:00 noon to 2:00 p.m.
21st Annual Margaret Brent Women Lawyers of Achievement Awards Luncheon
Exhibit Hall F/G, 800 Level
Metro Toronto Convention Centre, South Building

CLE Program: Government Contracting Opportunities Abroad—Rewards Await for Those Who Are Diligent
Dominion Ballroom North, 2nd Floor

“Hear Ye! Hear Ye! Appropriations for U.S. government procurement to be slashed! Read all about it!” The headlines ring out with a less than optimistic sound for U.S. government contractors. Attractive opportunities beckon from our neighbor to the north, Canada. At the same time, the international procurement community in developed countries is working hard to install the type of vehicles for transparency that define the U.S. procurement system, such as the bid protest. Our group of specialists will share much to assist those who will listen.

Canadian Government Contracting Issues
Canadian public procurement is big business. Over CDN $100 billion is spent annually by all levels of government departments and agencies in Canada. Many U.S. corporations see countries like Canada as fertile selling grounds for the myriad of goods and services they offer. Despite the many linkages and similarities in our economy and government purchasing practices, some important differences do exist. This panel of distinguished experts will help navigate some of the treacherous waters presented by cross-border commercial activity.

◆ Bidding and contracting in a foreign country: Issues to consider, legal pitfalls to avoid
◆ The role of the Canadian Commercial Corporation in U.S. government contracting—Overview, issues and opportunities, Canadian public procurement—What U.S. lawyers should know when their clients venture north of the 49th parallel to bid on government contracts
◆ When foreign companies come looking to buy U.S. companies involved in defence or national security contracting activities: Impact of the Exon-Florio legislation, recent examples and best practices when providing legal advice to companies.

Gerry H. Stobo, Moderator
Borden Ladner Gervais LLP
Ottawa, Canada

James W. Stephenson
Assistant General Counsel
Northrop Grumman Corporation
Linthicum, MD

Barbara Milsaas, Q.C.
Borden Ladner Gervais LLP
Ottawa, Canada

Jacques Greffe
Vice President—Defence Procurement
Canadian Commercial Corporation
Ottawa, Canada

James D. Rosener
Pepper Hamilton LLP
New York, NY

International Public Procurement: A Worldwide Update
We are in the midst of an era in which national procurement systems continue to evolve and at the same time harmonize. This session will assess key legal developments in the U.S., Canadian, Chinese and European procurement systems, as well as multilateral developments relating to the WTO GPA and UNCITRAL. In addition to providing background regarding each system, the panelists will also focus on legal issues contractors face when competing for work under systems other than their own. Specific topics will include:

◆ How to best “learn the system” and compete outside your home turf
◆ Opportunities and legal challenges created by increased harmonization
◆ The growth of transparency: the evolution of the bid protest mechanism in various countries
◆ Teaming and subcontracting across borders
◆ Managing ethical and corruption risks across various legal jurisdictions
Monday, August 8

7:00 a.m. to 7:30 a.m.

Construction Division Program Continental Breakfast
Dominion Ballroom South, 2nd Floor

This continental breakfast is included in the ABA All-Access CLE Badge or CLE Program Ticket used for the program that follows:

7:30 a.m. to 9:00 a.m.

CLE Program: Over There, Over There—Construction Contracting with the Federal Government Overseas
Dominion Ballroom South, 2nd Floor

This 90-minute CLE program and 7:00-7:30 a.m. continental breakfast are made possible by our Gold Sponsors—FTI Consulting and The Kenrich Group LLC—and our Silver Sponsors—Smith, Currie & Hancock LLP and Smith Pachter McWhorter PLC—whose contributions have helped to defray its expenses.

The Department of Defense (DoD) and the Department of State (DoS) have been the biggest customers of U.S. construction contractors for significant overseas construction projects as a consequence of “winning the peace” in Iraq and Afghanistan. Panelists will address such important legal issues as the consequences and claims arising from the high degree of changes due to demands by “end users;” the high risk of termination for default or convenience due to political considerations and/or changing objectives and their legal effect; the law applicable to contingency and emergency construction; the mitigation of special war risks; and what constitutes an event of force majeure in a war zone.

◆ Legal and practical issues commonly affecting contract administration and performance
◆ Inside and outside perspectives for the U.S.-based contractor
◆ Risk analysis and legal consequences for the private contractor
◆ Transition from MILCON/DOS contracts to AID
◆ Special legal and other issues with respect to limitations on contingency and MILCON funding
◆ Statutory and other legal authority for DOD construction

9:00 a.m. to 12:00 noon

CLE Program: Compliance for Contractors—Enhanced Exposures That Require Redoubled Efforts
Dominion Ballroom North, 2nd Floor

Two of the most effective fraud prevention and enforcement tools continue to evolve, and with their evolution comes greater exposure for those who contract with the U.S. Government and governments abroad. Enforcement actions under the Foreign Corrupt Practices Act (“FCPA”) have grown enormously in recent years; the FCPA has become the “tool of choice” for many enforcement officials. Meanwhile, the civil False Claims Act (“FCA”) continues to morph through legislation and judicial fertilization into a more vivid landscape for redress. What's next?

The Expanded Reach of the Ubiquitous Foreign Corrupt Practices Act

Anti-corruption enforcement is growing worldwide and companies conducting business internationally need to be concerned about more than just the FCPA. Enforcement actions by the United States DOJ and SEC and the resulting penalties have increased exponentially. Canada and the United Kingdom are ramping up their enforcement efforts. Companies are focused on enhancing and finding effective ways to manage the risks of corruption and are struggling to control activities of agents, representatives, distributors and contractors in their ever-expanding global markets.

◆ What are the priorities and considerations of government enforcement officials?
◆ How are Canada and the U.K. ramping up their efforts?
◆ What are the key issues under the U.S., Canadian, and U.K. laws and enforcement regimes?
◆ What are the considerations when dealing with State-owned entities?
◆ How do companies meet the challenge of controlling activities of agents, representatives, distributors and contractors in the ever-expanding global markets of the companies?
◆ How can past cases help companies identify and manage risk?
The False Claims Act—A Changed Landscape

In three separate pieces of legislation since 2009, Congress has either “clarified” or “changed” several important provisions of the False Claims Act. The statutory modifications affect several of the substantive liability provisions, putting to rest debates over whether the Act included a “presentment” requirement and the appropriate standard of “materiality,” legislatively overruling the Supreme Court’s Allison Engine decision, and broadening the scope of the “reverse false claims” provision. In addition, Congress enacted changes to the “public disclosure” bar, broadened the Act’s anti-retaliation provision, and modified several other important procedural provisions.

◆ How significant are changes to the “reverse false claims” provision, especially when considered with the FAR’s mandatory disclosure requirements?
◆ What will be the effect of the expansion of DOJ’s authority to issue Civil Investigative Demands?
◆ What are some innovative approaches DOJ has been using to investigate FCA cases?
◆ Can we expect increased use of the FCA against companies performing U.S. Government contracts outside the United States?

Robert L. Vogel, Moderator
Vogel Slade & Goldstein LLP
Washington, DC

Michael D. Granston
Deputy Director, Commercial Litigation Branch
U.S. Department of Justice, Civil Division
Washington, DC

Joan Hartman
Assistant U.S. Attorney
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Susan Strawn
President
Taxpayers Against Fraud
Washington, DC

David M. Nadler
Dickstein Shapiro LLP
Washington, DC

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SBA Overhaul of 8(a) Rules Provides Additional Flexibility for Joint Ventures, But May Increase Risk for Large Contractors Partnering with 8(a) Firms

By John R. Prairie

The Small Business Administration (SBA) recently completed its first comprehensive revision to the 8(a) Business Development (BD) Program in more than 10 years. The changes will affect many small businesses applying for and participating in the 8(a) BD Program, but will have a significant impact on many large businesses as well. The federal government purchased nearly $20 billion in goods and services through 8(a) contracts in FY2009. With shrinking agency budgets and a sluggish economic recovery in the commercial sector, large companies are increasingly looking to get a piece of these 8(a) contracting dollars by partnering with 8(a) firms. By participating in the SBA’s Mentor/Protégé Program, for example, a large business mentor can compete for 8(a) contracts as part of a joint venture with its small business protégé.

The SBA’s overhaul of the 8(a) Business Development Program made several significant changes to the rules governing joint ventures and the Mentor/Protégé Program. Several of these changes—including allowing joint ventures to be awarded three contracts in two years and streamlining the SBA’s approval of new opportunities—will increase flexibility and efficiency, and decrease administrative costs, for joint venture partners. Other changes, however, may increase risks for large businesses partnering with 8(a) firms. In light of recent high-profile matters focusing on the percentage of work performed by small businesses under set-aside contracts, the new requirement that 8(a) joint venture partners perform at least 40 percent of the work done by the joint venture could lead to increased scrutiny and enforcement in this area. In addition, the 8(a) rules now permit the SBA to take certain actions, including debarment, against a mentor that fails to provide the agreed-upon business development assistance to its protégé.

This article discusses the changes to the SBA’s rules governing joint ventures and the Mentor/Protégé Program, as well as the impact these changes may have on large businesses that partner with 8(a) firms.

Joint Ventures

The “Three in Two” Rule. Under the SBA’s rules, a joint venture is an entity of limited duration. Specifically, the prior regulation limited a joint venture to submitting no more than three offers over a two-year period. The SBA made two significant changes to this requirement. First, the revised regulation allows a specific joint venture to be awarded three contracts within a two-year period. Second, the SBA clarified that the partners to a joint venture could form a second joint venture that could be awarded three additional contracts, and a third joint venture that could be awarded three more. The revised rule notes, however, that at some point such a longstanding relationship could lead to a finding of general affiliation among the joint venture partners.

The SBA also clarified when it will determine whether the three contract awards in two years requirement has been met. Once a joint venture is awarded its first contract, the SBA will measure compliance with the “three in two years” rule as of the date a concern submits a written self-certification that it is small as part of its initial offer, including price. As such, a joint venture could ultimately be awarded more than three contracts without the SBA finding affiliation between the joint venture partners if the joint venture received two or fewer contracts as of the date it submitted one or more additional offers, which thereafter resulted in one or more additional contract awards.

The new “three in two” rule is a welcome change for contractors participating in joint ventures with small businesses. Under the prior rule, joint venture partners were forced to be very strategic about which opportunities they chose to pursue because they were limited to submitting three proposals in two years. While it was common for joint venture partners to enter into additional joint ventures after reaching the three proposal limit, creating additional joint ventures was an unnecessary administrative burden, particularly for 8(a) joint ventures, which must be approved by the SBA. The ability to submit multiple proposals (and potentially receive multiple awards) once a joint venture has already been awarded two contracts will provide joint ventures additional flexibility in selecting opportunities to pursue.

While the new rule expressly permits contractors to enter into multiple successive joint ventures, it cautions that “at some point . . . such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.” Notably, the SBA stated...
that concerns could be found affiliated with each other on this basis “even in the 8(a) mentor/protégé joint venture context.”11 This is significant because joint venture partners that also participate in the Mentor/Protégé Program generally operate under the assumption that they cannot be found affiliated based on assistance received under an SBA-approved mentor/protégé agreement.12 It is uncertain whether a finding of affiliation between a mentor and protégé on this basis would be upheld, however, because the SBA’s statement was in the explanatory text only, and was not included in the final regulatory text.

Ostensible Subcontractors. The final rule also clarifies that the “ostensible subcontractor” rule applies not only at the time of size certification, but also during contract performance.13 Thus, if a subcontractor performs “primary and vital requirements of a contract,” the prime contractor and the subcontractor will be treated as affiliates for size purposes.14 If the two firms exceed the applicable size standard in the aggregate, the contractor cannot continue to certify as small for that contract or for any task order under that contract.15 This change will require small and large businesses that team together outside of the joint venture context to be more diligent about the assignment of work during contract performance to ensure that the large business subcontractor does not perform “primary and vital requirements” of the contract. It is uncertain what impact this change will ultimately have, however. While the SBA can generally rely on a firm’s competitors to protest the award of a small business set-aside contract where it appears that a small business is unusually reliant on a large business subcontractor, procuring agencies have historically not closely tracked which firm performs the work after award.

8(a) Joint Ventures. The final rule made four amendments to the requirements for joint ventures performing 8(a) contracts. Several of these changes have the potential to significantly alter the relationship between 8(a) and non-8(a) joint venture partners.

Profit Received by the 8(a) Firm. The revised rule provides that the 8(a) participant(s) in an 8(a) joint venture must receive profits from the joint venture “commensurate with the work performed by the 8(a) Participant(s).”16 Under the prior rule, the 8(a) participant(s) were required to receive at least 51 percent of the profits, regardless of the amount of work they performed.17 This is a welcome change for large businesses that joint venture with 8(a) firms. The prior rule made little sense in light of the fact that the 8(a) firm(s) were not required to perform 51 percent of the work. The rule often discouraged legitimate non-8(a) firms from participating as joint venture partners in the 8(a) program because they often performed 60 percent or more of the contract, but only received 49 percent of the profits. It is worth noting, however, that the rule may not have much of an impact where the joint venture is established as a separate legal entity. In that case, the final rule requires that the 8(a) participant own at least 51 percent of the entity and receive profits from the joint venture “commensurate with ownership interests in the joint venture.”18

Performance of Work Requirement. The final rule requires that the 8(a) participant(s) in a joint venture for an 8(a) contract perform at least 40 percent of the work done by the joint venture.19 The 40 percent requirement applies to unpopulated joint ventures and joint ventures populated only with one or more administrative personnel.20 The work performed by the 8(a) firm(s) under these types of joint ventures must be “more than administrative or ministerial functions so that they gain substantive experience.”21 For joint ventures populated with individuals intended to perform contracts awarded to the joint venture, each 8(a) participant in the joint venture “must demonstrate what it will gain from performance of the contract and how such performance will assist in its business development.”22 This marks a significant departure from the prior rule. Previously, the 8(a) participant in an 8(a) joint venture was required to perform “a significant portion of the contract,” rather than a specific percentage of the work.23 While this standard was somewhat ambiguous, it provided flexibility to joint venture partners in allocating the work under 8(a) contracts. By adopting a bright-line 40 percent rule, the SBA has arguably provided better guidance to contractors and contracting officers as to what should be expected of the 8(a) firms. But the rule may prove difficult to administer in practice.

To begin, the new rule requires that in addition to performing 40 percent of the work performed by the joint venture, the 8(a) participant must perform “more than administrative or ministerial functions.”24 This standard is just as ambiguous as the “significant portion” test. The revised rule may also have the effect of significantly increasing the amount of work that must be performed by the 8(a) joint venture partner. Under the prior rule, the 8(a) firm may have been able to perform only 25 percent of the work while still complying with the “significant portion” rule. The new 40 percent standard could also prove particularly difficult to meet under construction contracts where, outside of a joint venture, an 8(a) prime contractor would be required to perform only 15 percent of the work under the contract.25 In light of the increased scrutiny of this issue by
the SBA and procuring agencies, a bright-line percentage of work test may also make it easier to take enforcement actions against joint venture partners that are not in strict compliance with the 40 percent rule.

The new rule will also require each 8(a) firm that performs an 8(a) contract through a joint venture to report to the SBA how the performance of work requirements were met on the contract.26 While this new reporting requirement appears relatively innocuous on its face, it could be significant in light of the increased focus by the SBA and procuring agencies on the percentage of work performed by small businesses under set-aside contracts.

**SBA Approval of Joint Venture Agreement.** The final rule provides that once the SBA approves an 8(a) joint venture agreement for one 8(a) contract, it only has to approve addendums to that agreement setting forth the performance requirements for a second or third 8(a) contract award.27 This is a positive change that will lead to increased efficiency and decreased administrative burden for 8(a) joint ventures. Under the new rule, joint venture partners will be able to respond quickly to opportunities with short turnaround times without waiting for the SBA to reapprove an entire joint venture agreement.

**Mentor/Protégé Program.** The final rule also contains several notable changes to the regulations governing the SBA’s Mentor/Protégé Program, including:

- Requiring that assistance that is to be provided through a mentor/protégé relationship be consistent with the protégé firm’s SBA-approved business plan;28
- Placing an absolute limit of three protégés per mentor;29
- Allowing a firm seeking to be a mentor to submit federal income tax returns, audited financial statements, or Securities and Exchange Commission filings in order to demonstrate the firm’s favorable financial health;30
- Allowing nonprofit business entities to be mentors;31
- Clarifying that the benefits derived from the mentor/protégé relationship end once the protégé firm graduates from or otherwise leaves the 8(a) BD Program;32
- Allowing a protégé to have a second mentor where it demonstrates that the second relationship pertains to an unrelated secondary NAICS code, the first mentor does not possess the specific expertise that is the subject of the mentor/protégé agreement with the second mentor, and the two relationships will not compete or otherwise conflict with each other;33
- Excluding a protégé from becoming a mentor while retaining its protégé status;34
- Precluding the approval of a mentor/protégé relationship where the 8(a) participant has less than six months remaining in its program term;35
- Allowing a joint venture between a mentor and protégé to be treated as small for federal subcontracts;36
- Clarifying that a mentor/protégé agreement must be approved by the SBA before the two firms can submit an offer as a joint venture to take advantage of the special exception to the six requirements for that procurement.37
- Requiring that in order to receive the exclusion from affiliation for non-8(a) procurements, a joint venture between a mentor and protégé must comply with the performance of work requirements for 8(a) joint ventures, including the requirement that the 8(a) concern perform 40 percent of the work performed by the joint venture;38 and
- Clarifying the procedures for requesting reconsideration of the SBA’s decision to deny a proposed mentor/protégé agreement.39

The majority of these changes make sense and simply clarify the SBA’s existing practices. Although the three-protégé rule is couched as a “limit,” it may actually have the effect of increasing the pool of available mentors, as most large business mentors currently have only one protégé. Department of Energy (DoE) contractors figure to be the greatest beneficiaries of the change allowing joint ventures between a mentor and protégé to be treated as small for federal government subcontracts. DoE has a significant amount of contracting activity go through government-owned, contractor-operated (GOCO) facilities, and the contracts between the GOCO and a contractor technically are subcontracts. Finally, while requiring joint ventures between a mentor and protégé for non-8(a) procurements to comply with the performance of work requirements for 8(a) joint ventures makes sense, it will impose additional burdens on these entities that did not exist under the prior rule.

**Consequences for “Bad” Mentors.** By far the most significant change to the regulations governing the SBA’s Mentor/Protégé Program is the addition of consequences for a mentor that fails to provide the assistance it agreed to provide in its mentor/protégé agreement.40 Under the final rule, where the SBA determines that a mentor has not provided to the protégé firm the business development assistance set forth in its mentor/protégé agreement, the SBA will notify the mentor of such determination and afford the mentor an opportunity to respond.41 The mentor must respond within 30 days of the notification, explaining why it has not provided the agreed-upon assistance and setting forth a definitive plan as to when it will provide such assistance.42 If the mentor fails to respond, does not supply adequate reasons for its failure to provide the agreed-upon assistance, or does not set forth a definitive plan to provide the assistance:

- The SBA will terminate the mentor/protégé agreement;
- The mentor will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor/protégé agreement; and
- The SBA may recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture in order to encourage the mentor to comply with the mentor/protégé agreement. Where a protégé firm is able to independently complete performance of any such contract, SBA may also authorize a substitution of the protégé firm for the joint venture.43
Finally, the new rule provides that the “SBA may consider a mentor’s failure to comply with the terms and conditions of an SBA-approved mentor/protégé agreement as a basis for debarment on the grounds . . . that the mentor has not complied with the terms of a public agreement under 2 C.F.R. § 180.500(b).”

The addition of penalties, including potential debarment actions, for a mentor that fails to provide the agreed-upon assistance to its protégé increases the risk for large businesses partnering with 8(a) firms. While the SBA likely already had the ability to take some, if not all of these actions against “bad” mentors, expressly providing for them in the regulations may signal the SBA’s intent to subject mentors to increased scrutiny in the future. In order to protect themselves, mentors must be sure to make good faith efforts to provide the assistance called for in their mentor/protégé agreements and to carefully document all assistance provided to a protégé.

On balance, the SBA’s amendments to the rules governing the 8(a) Business Development Program are good news for large businesses that participate in the program through joint ventures with 8(a) participants and in the Mentor/Protégé Program. The changes to the joint venture rules will increase efficiency, decrease costs, and provide better guidance regarding the amount of work that must be performed by the 8(a) firm. While some of the changes will increase the risks of partnering with 8(a) firms, these risks are manageable for large businesses as long as they understand and follow their obligations under the SBA’s rules.

Endnotes
4. 76 Fed. Reg. 8251 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 121.103(h)).
5. Id.
6. Id.
7. Id.
8. Id. The final rule also contains three examples in the regulatory text demonstrating the application of the new “three in two” rule. 76 Fed. Reg. 8251-52 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 121.103(h)).
10. 76 Fed. Reg. 8251 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 121.103(h)).
13. 76 Fed. Reg. 8252 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 121.404(g)(4)). An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contractor, or of an entity under which the prime contractor is usually reliant. 13 C.F.R. § 121.103(h)(4) (2011). A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. Id.
14. 76 Fed. Reg. 8252 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 121.404(g)(4)).
15. Id.
19. 76 Fed. Reg. 8261 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.513(d)). The final rule does not change the requirement that the joint venture (not the 8(a) participant(s) alone) is responsible for meeting the applicable percentage of work required by 13 C.F.R. §§ 124.510 & 125.6 (2011). Id.
21. Id.
22. Id.
27. 76 Fed. Reg. 8262 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.513(e)(2)).
29. 76 Fed. Reg. 8262 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(b)(2)). The final rule provides, however, that “generally a mentor will not have more than one protégé at a time.” Id.
30. 76 Fed. Reg. 8262 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(b)(3)). Previously, a firm seeking to become a mentor was required to submit its federal tax returns for the last two years. 13 C.F.R. § 124.520(b)(3) (2011).
31. 76 Fed. Reg. 8262 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(b)).
32. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(d)(1)(iii)). The final rule makes clear, however, that the parties remain obligated to complete performance of the contract: “Leaving the 8(a) BD program, or terminating the mentor/protégé relationship while a protégé firm is still in the program, does not, however, affect contracts previously awarded to a joint venture between the protégé and its mentor. In such a case, the joint venture continues to qualify as small for previously awarded contracts and is obligated to continue performance on those contracts.” Id.
33. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(c)(3)).
34. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(c)(4)). To become a mentor, a protégé must first terminate its mentor/protégé agreement with its mentor. Id.
35. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(c)(5)).
40. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(h)).
41. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(h)(1)).
42. Id.
43. Id.
44. 76 Fed. Reg. 8263 (Feb. 11, 2011) (to be codified at 13 C.F.R. § 124.520(h)(2)).
This is my last issue as editor in chief of The Procurement Lawyer. During the past four years, I have reviewed, as either the primary or secondary editor, 63 “substantive” articles (not including the “News from the Chair,” “News from the Chair-Elect,” and “News from the Committees” columns). Those articles have addressed topics as varied as the intersection of government contracts and bankruptcy law; qui tam and other False Claims Act issues; public-private partnerships; energy savings performance contracting; DCAA executive compensation reviews; the European Defense Procurement Initiative; drafting and enforcement of teaming agreements; the Canada-US (or, if you prefer, the US-Canada) agreement on government procurement; contractor recovery of IR&D costs; Buy American rules (under the Recovery Act and otherwise); federal “green building” initiatives; the women-owned small business program; and the role of intellectual property in the recent economic stimulus, to name just a few.

During my tenure, The Procurement Lawyer has also noted happy times and sad times for the Section: the former include the memorable surprise 65th birthday celebration for Section Director Marilyn Neforas following the 15th Annual Federal Procurement Institute in Annapolis, Maryland, in March 2009, while the latter include reports on the passing of Section members and luminaries of public contract law such as Eldon “Took” Crowell, Judge Eileen Fennelly, O.S. “Sparks” Hiestand, and Craig Orthmer. And we have even featured a few pieces that were humorous and thought-provoking by turns, such as Mike Love’s tongue-in-cheek “na(t)ive analysis” of the fictitious “FEC Military Commissions Act,” and, of course, the inimitable “Pensive Poser” series.

Throughout my four years, I have consistently been impressed by the scholarship and writing of our contributors. I have been gratified to play a part in the production of one of the ABA’s best section newsletters. At the same time, through editing every article that has been published in The Procurement Lawyer during those years, I have added immeasurably to my own store of knowledge of public contract law and related disciplines.

When my predecessor, Mark Langevin, published his last “Letter from the Editor” in the Summer 2007 issue, he encouraged every member of the Section to consider writing at least one article for The Procurement Lawyer every two years, “so that, perhaps one day, its editorial board will have the unhappy task of informing an author . . . that there simply is not sufficient space in the next issue to accommodate his or her excellent piece.” I am happy (and unhappy, of course, for some authors’ sakes) to report that we have had to do exactly that on several occasions in the past four years. Nevertheless, I echo Mark’s sentiment and plea from August 2007: please consider contributing an article or two to The Procurement Lawyer over the course of the next few years. You will enjoy and benefit from the experience.

I cannot adequately express my thanks to everyone who has assisted me during my tenure as editor in chief, but I can at least try. First, my thanks to all those who have served on the editorial board of The Procurement Lawyer during the past four years, and especially to Perry Cockerell, Herman Levy, Nicole Owren-Wiest (our current senior editor and incoming editor in chief), Kate Swisher, and Rick Webber, all of whom I could always depend on to accomplish whatever was necessary to put out good issues.

An extra special vote of thanks goes to our ABA Publishing team in Chicago: designer Mary Anne Kulchawik and our incomparable editor, Mary Ann Dadisman. Mary Ann is the only ABA editor with whom I worked on The Procurement Lawyer, but I have no doubt that she’s the very best they have to offer. I knew I could always rely on Mary Ann’s experience, good humor, inside knowledge, and plain old common sense to get us through every crisis (most small, very few large) to produce a quality product with every issue.

I also want to express my most sincere gratitude to Marilyn Neforas, our Section director and fount of ABA corporate knowledge, for her help in dealing with the bureaucracy, her practical advice, and, not least, all the material she herself contributed to our newsletter (what we call, affectionately, “Marilyn’s stuff”). Thanks also to the Section chairs with whom I’ve worked—Pat Meagher, Mike Mutek, Karen Manos, and Don Featherston—for their guidance and good counsel, and for (almost) always meeting their “News from the Chair” deadlines. I enjoyed working with them all.

Even with a good editor in chief, an excellent editorial board, and an outstanding ABA Publishing team, a section newsletter is ultimately only as good as the articles that are published in it. During my tenure on The Procurement Lawyer, I was blessed to have a willing and able cadre of authors who submitted consistently thoughtful and well written articles. I hope that every member of our Section—and other practitioners outside the Section as well—will continue to support my successor, Nicole Owren-Wiest, at the same or an even higher level of excellence, so that The Procurement Lawyer continues to be one of the very best ABA section newsletters, and continues to reflect the high standards of the Section of Public Contract Law.

John A. Burkholder is editor in chief of The Procurement Lawyer. He is of counsel in the Los Angeles office of McKenna Long & Aldridge LLP.
presumptions in question to computer software. It would improperly imposes noncommercial item data rights clauses and marking requirements on subcontracts for commercial items, again exceeding the narrow scope and purpose of the above provisions.

First, the Section noted that the predicate for the proposed rule is 10 U.S.C. § 2321(f)(2), as revised by NDAA for FY 2007 and 2008. The Section respectfully contended that the proposed rule went well beyond the scope and purpose of the above provisions.

Second, the Section contended that the proposed rule improperly imposes noncommercial item data rights clauses and marking requirements on subcontracts for commercial items, again exceeding the narrow scope and purpose of the authorizing statute. Third, the Section contended that the proposed rule improperly imposes the procedures and presumptions in question to computer software. It would add subsection (f) to the clause at DFARS 252.227-7019; there is no statutory basis for this. Fourth, the proposed rule would create separate standards for civilian and DoD agencies, a situation the Section contended might dissuade some commercial item suppliers from contracting with DoD agencies or contractors or even cause them to leave the government marketplace altogether. A question and answer period followed.

Fern then called on guest speaker Kirsten Koepsel to discuss the Aerospace Industries Association (AIA) comments on the same proposed rule. First, the AIA letter observed that the proposed rule eliminates “the overlap between the Commercial Rule and the Major Systems Rule regarding COTS but it does not eliminate the overlap of the Commercial Rule and the Major Systems Rule regarding all other commercial items.” The AIA called for exempting all commercial items along with COTS items in order to simplify the procurement system, protect industry’s rights in technical data and computer software developed at private expense, and eliminate the overlap between the commercial rule and the major systems rule.

Second, the AIA strongly disagreed with several provisions of the proposed rule that delete 10 U.S.C. §§ 2320 and 2321 from the list of laws inapplicable to procurement of commercial items pursuant to section 34 of the Office of Federal Procurement Policy (OFPP) Act, as amended by the Federal Acquisition Streamlining Act (FASA). The AIA contended that removal of the provisions in question violates the clear intent of section 34. Third, the AIA took issue with proposed DFARS 227.7102-4(b) and 227.7103-6(a) in that they “would impose non-commercial technical data rights clauses and marking requirements on any commercial item contract so long as the Government has paid ‘any portion of the developmental costs’ of the commercial item. These changes go well beyond implementing section 802(b) of the NDAA for FY2007 and section 815(a)(2) of the NDAA for FY2008 and will have a detrimental impact on contractors that provide DoD with access to critical technology.”

Guest speaker John McCarthy noted that the proposed rule gives a very narrow definition of whether an item is commercial or nondevelopmental; John agreed that the proposed rule overreached the statutory definition. For example, if the government contributes $1 to development, the item no longer would be considered to have been developed exclusively at private expense, a draconian result without congressional mandate.

Fern urged IP Committee members to volunteer to prepare comments on the proposed rule, DFARS Case 2010-D001, Patents, Data, and Copyrights; the Section ultimately provided comments by letter dated December 27, 2010.

Meeting of the Intellectual Property Committee, February 17, 2011:
In pertinent part, the Federal Circuit upheld the district court in its grant of a motion to reverse the award of damages and for a new trial on that issue. In question was the figure of 25 percent of the value of the product that the jury used in arriving at its verdict. The jury based its verdict on the testimony of the plaintiff’s expert witness.

The Federal Circuit noted that it had “passively tolerated” the 25 percent rule of thumb, but never formally approved its use in that “the issue was never squarely before the court.” The court cited Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 589 (1993), in which the US Supreme Court interpreted Federal Rule of Evidence 702 to require “that expert testimony be based on a ‘firm scientific or technical grounding.’ . . . Where the testimony does not adequately tie a general rule to the specific facts of a case, the evidence and testimony is inadmissible.” The preferred measure of damages under section 1498(a), Jim said, is the “reasonable royalty” analysis. Jim predicted that the retrial will be a “battle of the experts,” and expressed doubt that the 25 percent rule will apply any more.

As background, Jim noted among other matters that section 1498(a), which is applicable to actions against the government for infringement, has provisions somewhat different from those of 35 U.S.C. § 271 (hereinafter “section 271”), which is applicable to actions against private parties. Although section 1498(a) “does not allow for actions against the Government for inducement and contributory infringement or infringement through infringement of product by process claims,” it does allow action against the government for its authorization and consent to uses of a patented invention.

Cochair Fern Lavallee then turned to the mistrial granted in Pegasus Imaging Corp. v. Northrop Grumman Corp., et al., Case No. 8:07-CV1937-T-27EAJ, Order (M.D. Fl., Tampa Division, Jan. 11, 2011). Judge Whittemore granted a motion for mistrial because of jury misconduct: exposure of jurors to extrinsic evidence and “a derogatory comment about the Plaintiff’s motives,” and, contrary to the court’s instructions, discussion and debate on the part of jurors of material matters.

Fern then opened a discussion of section 824 of the National Defense Authorization Act for FY 2011. Subsection (a) requires the secretary of defense to “review guidance [of] the military departments on the implementation of [10 U.S.C. § 2320(e)] to ensure [consistency] with the guidance issued by the Under Secretary. . . . Such guidance shall be designed to ensure that the United States - (1) preserves the option of competition for the production and sustainment of systems or subsystems . . . developed exclusively with Federal funds, [and], (2) is not required to pay more than once for the same technical data.”

Fern characterized the statutory language as flawed, saying that apparently the idea behind section 824 arose from then-Reps. Ike Skelton and Gene Taylor in 2009: If the government buys something, it owns the data relating to it. Several other committee members continued discussion on the meaning of section 824 but could only agree that that it is ambiguous. Fern said that at the next committee meeting we would, among other matters, continue discussion of section 824.

For more information on this and other committees, visit the Section’s website at www.americanbar.org/groups/public_contract_law and click on “Committees,” on the left-hand navigation bar.

Nominating Committee Announces Slate

The Nominating Committee (Karen L. Manos, James A. “Ty” Hughes, and Annejanette Heckman Pickens) has announced the following slate of candidates for 2011–2012:

- **Vice-Chair:** Sharon L. Larkin
- **Secretary:** Stuart B. Nibley
- **Budget and Finance Officer:** David G. Ehrhart
- **First Section Delegate:** Allan J. Joseph

Under Article VI, Section 1, of the bylaws, the chair-elect, Carol N. Park-Conroy, becomes chair of the Section, and the vice-chair, Mark D. Colley, becomes chair-elect without any further action by the Council or by the Section membership.

**Council Members** (three-year terms beginning August 6, 2011):
- Alison L. Doyle
- Daniel P. Graham
- Steven L. Schooner
- Candida Steel

**Young Lawyer Council Member** (two-year term beginning August 6, 2011)
- Daniel E. Chudd

The slate will be presented at the Section’s annual business meeting on August 6, 2011, in Civic Ballroom South, 2nd Floor, at the Sheraton Centre Toronto in Toronto, Canada.
contract attorneys also provide business counseling to commanders and contracting officers, informing them of not merely whether they can take a certain contracting action but whether they should take it.

Installation, numbered air force, and major command SJs, like all other Air Force judge advocates, are appointed by the Judge Advocate General of the Air Force (TJAG). TJAG performs statutory duties that include professional supervision of all Air Force judge advocates and providing legal advice to Air Force leadership that encompasses, inter alia, advice on acquisition-related matters. Also advising Air Force leadership on acquisition law matters is the Deputy General Counsel of the Air Force for Acquisition. The deputy general counsel “provides advice on acquisition policy, major systems acquisitions, and commercial space launch matters, oversees the legal support provided to program managers on all Air Force acquisition programs, and provides advice on privatization and outsourcing issues.”

The Air Force Materiel Command (AFMC), headquartered at Wright-Patterson Air Force Base, Ohio, is the major command charged with procuring major weapons systems for the Air Force. The AFMC commander’s legal advisor is the AFMC Staff Judge Advocate. Within the AFMC staff judge advocate’s office is the Acquisition Law Division, which advises Headquarters AFMC on acquisition matters, and oversees resolution of command-wide acquisition law issues. The AFMC Law Office is a field operating agency of the AFMC staff judge advocate’s office. It provides legal advice on specialized procurement issues, such as major systems acquisition, procurement integrity, ethics, fraud, government-owned real estate management, and intellectual property.

The military and civilian attorneys of the Contract Law Division of the AFMC Law Office serve as program counsel to the Aeronautical Systems Center, the Air Force Research Laboratory, and the Air Force Security Assistance Center. The acquisition law professionals at Wright-Patterson Air Force Base are highly experienced, and are relied upon to provide advice on some of the most expensive and challenging procurements of the Air Force.

While a large part of the organizational structure at the time of the 1998 article is still in place, much has changed. These changes came about due to the unique challenges faced by the Air Force in the post-9/11 environment. Because of budgetary constraints involved in fighting two wars simultaneously, the Air Force needed to become more efficient and eliminate wasteful spending. Air Force leadership turned to the private sector for ideas.

**Air Force Smart Operations 21 and JAG Corps 21**

In November 2005, the Secretary of the Air Force identified as a goal the implementation of corporate “lean” principles to improve the quality of Air Force processes. The secretary elaborated on this goal in March 2006 when he announced the inception of Air Force Smart Operations 21 (AFSO 21), “a dedicated effort to maximize value and minimize waste in [Air Force] operations.” It allows the Air Force to “remain [. . .] focused on what’s important to mission accomplishment . . . while continuously improving all we do.” As such, AFSO 21 is not a rote procedure with a defined end state. Rather, it is a continuous process of re-evaluating and improving the manner in which business is conducted. Successful implementation of AFSO 21 results in a “leaner, more modern, and more flexible” Air Force.

In March 2006, the Air Force Chief of Staff directed another change consistent with the continuous process improvement guidance: the implementation of JAG Corps 21. This plan is “an integrated package of major initiatives [to] transform the JAG Corps for the 21st century. . . . [T]he most revolutionary series of changes . . . since the JAG Department was established” in 1949. It is an “expansive and fast-moving enterprise-level transformation program” for the Air Force JAG Corps, designed to “make steady improvements in how [to] deliver legal services to the Air Force, from the warfighter to the individual Airman needing legal assistance.”

At the heart of JAG Corps 21 are certain fundamental principles. These include: enhancing the ability of the JAG Corps to provide legal services to commanders and airmen, providing SJs with better tools to supply advice without interfering with the SJA-commander relationship, maintaining JAG Corps professional development, continuing legal support to operators and warfighters in the field, maximizing technology to improve legal services, and institutionalizing conditions that foster continuous improvement to JAG Corps processes.

Pursuant to JAG Corps 21, field support centers were to be established to provide “reachback” specialty guidance and technical expertise to base legal offices and deployed judge advocates in multiple areas of law, such as claims, environmental, operations & international, labor, and contracts. Initially, the JAG Corps proposed to establish contract law field support centers along geographical lines within the continental United States consistent with an Air Force-wide plan to regionalize the contracting function. The plan to regionalize contracting, however, after much study and debate, was ultimately declared inefficient and unworkable by Air Force leadership and the regional contract law field support center concept was abandoned. A better solution was needed.

**Recapturing Acquisition Excellence**

Government Accountability Office (GAO) protests involving the KC-X tanker and the CSAR-X helicopter competitions that resulted in decisions unfavorable to the Air Force, along with reports of other inefficiencies and budget overruns in the Air Force acquisition process, led the Secretary of the Air Force and the Chief of Staff to issue a joint memorandum in 2009 that ordered implementation of the Acquisition Improvement Plan. This plan serves as the “strategic framework for the critical work of modernizing and recapitalizing [Air Force] air, space and cyber systems.”

The two leaders declared that “[t]he United States Air Force is committed to recapturing acquisition excellence.”
excellence by rebuilding an Air Force acquisition culture that delivers products and services as promised—on time, within budget and in compliance with all laws, policies and regulations.25

The Acquisition Improvement Plan identifies five major areas in which the Air Force will focus its acquisition improvement efforts. These areas are: the revitalization of the Air Force acquisition workforce, improvement of the requirements generation process, instilling budget and financial discipline, improving Air Force major systems source selections, and establishing clear lines of authority and accountability within Air Force acquisition organizations.26

In response to this challenge to recapture acquisition excellence, Lieutenant General Richard C. Harding, the Air Force TJAG, announced the stand-up of the Air Force Acquisition Law and Litigation Directorate on October 1, 2010.27 The directorate oversees Air Force Legal Operations Agency contract law and litigation and the operation of two subordinate acquisition law field support centers, the Contract Litigation Field Support Center and the Contract Law Field Support Center.28

The Contract Litigation Field Support Center, located in the National Capital Region, assumed the duties once held by the now-defunct Contract Appeals Division of the AFMC Law Office as well as the contract litigation-related mission of the Commercial Litigation Division of the Air Force Legal Operations Agency.29 This field support center is responsible for GAO bid protest defense, Armed Services Board of Contract Appeals litigation, and other acquisition-related federal court litigation.

The Contract Law Field Support Center, also located in the National Capital Region, provides reachback expertise and support to base legal offices and deployed contract law attorneys; acquisition fraud counsel supporting contracting, [the Air Force Office of Special Investigations], [the Deputy General Counsel of the Air Force for Contractor Responsibility] and U.S. Attorneys; source selection and acquisition support for Air Force programs; team[s] with [the Deputy General Counsel of the Air Force for Acquisition]; and, serve[s] as the legal counsel for the new Air Force Commodities Councils, which buy services and goods for the entire Air Force.30

The services provided by the Contract Law Field Support Center include those of the type specifically envisioned for field support centers in the early days of JAG Corps 2L. This field support center “provide[s] specialized technical expertise and support to field SJAs. SJAs continue to provide the advice to client-commanders; the [field support center] simply enable[s] and enhance[s] that advice with sophisticated technical expertise.”31

In addition to reachback support for the bases and the deployed environment, the Contract Law Field Support Center contributes in the other key areas listed in the quote above. It provides centralized support to Air Force acquisition fraud issues from investigation through litigation.32 Another division of this field support center provides reachback and supplemental support for source selections and acquisitions to the major commands and air staff as needed.33 Finally, the Enterprise Sourcing Branch of this field support center is the responsible legal advisor to the Air Force Enterprise Sourcing Group, which manages strategic acquisition of goods and services for the Air Force.34

The creation of the Air Force Acquisition Law and Litigation Directorate and its two field support centers led to Air Force acquisition law’s elevation to the air staff level.35 The new structure now provides this specialized area of law with the long overdue visibility, support, and career growth necessary to enhance acquisition excellence and help fulfill the goals of the Acquisition Improvement Plan.36 This combination has enabled a better focus on client needs, a better focus on career development and growth for Air Force acquisition law practitioners, and better integration of Air Force legal efforts.37 With the incorporation of the aforementioned changes, Air Force acquisition law practice can now serve as a model for the entire government procurement community.

**Air Force JAGs with contracts and fiscal law training are a hot commodity in the deployed environment, as the Air Force is currently deploying the lion’s share of attorneys supporting contracting activities in the US Central Command area of responsibility.**

Air Force attorneys are not the only JAG Corps members contributing to acquisition excellence. AFMC has recently begun an in-residence contract law training course for Air Force paralegals. The goal of the course is to provide first-
of its kind contract law-focused paralegal training with an additional focus on related areas (e.g., fiscal law, ethics, fraud, and government contract-related Freedom of Information Act issues). After attendance at the course, paralegals are immediately placed to work as integral members of the base level acquisition law team, just as paralegals have always been valuable members of military justice, claims, and legal assistance teams. Base level attorneys and paralegals are now working together to guide commanders and contracting officers all the way through the acquisition cycle, from need identification to contract closeout.

Conclusion
The foregoing is a very brief description of the offices and personnel involved in the Air Force’s procurement law practice. Their goal is to provide responsive, accurate advice to a diverse group of clients and to afford them the maximum possible flexibility as the Air Force advances into the twenty-first century.

Air Force attorneys are in the trenches every day seeking to promote fairness and exercise good business judgment in addition to providing commanders with the best possible legal advice.43

From AFSO 21 to JAG Corps 21; from Wright-Patterson Air Force Base to Washington, D.C.; from the Acquisition Improvement Plan to the JAG Corps on the battlefield, much has changed, but much has stayed the same in Air Force acquisition law practice over the past 13 years. As was the case in 1998, the Air Force continues to rely on its corps of highly trained and experienced attorneys for thorough and discerning counsel on procurement issues. Although there have been missteps and challenges in the post-9/11 environment,44 Air Force leadership designed a remedy plan and the JAG Corps responded. Air Force JAGs, civilian attorneys, and paralegals continue to work together to recapture acquisition excellence. “The sun is rising on the Acquisition Law Enterprise and there is a great future ahead of us.”45

Endnotes
2. A base SJA usually has a higher-headquarters functional reporting chain that consists of both numbered air force and major command SJAs. Numbered air force and major command legal offices typically have at least one experienced procurement lawyer on staff.
3. Depending on the structure of each particular office, the chief of contract law may also hold other titles (e.g., chief of environmental law, labor law, etc.), or may hold an all-embracing title such as chief of civil law or chief of general law. The chief of contract law’s level of acquisition training can vary from attendance at the Army’s two-week Contract Attorney’s Course (more likely for a base level acquisition attorney) to an LLM in procurement law (more likely at the numbered Air Force and major command levels).
6. See The Department of the Air Force General Counsel, Acquisition—SAF/GCQ, at http://www.safgcq.hq.af.mil/organizations/gcq/index.asp (last visited Jan. 3, 2011) (“Attorneys in this division provide advice and assistance on acquisition, technology, and logistics matters. The office provides advice on acquisition policy and contracting procedure and participates in planning, source selection, execution of major acquisition programs and oversight of contract related litigation.”). See also Whalen & Preston, supra note 1, at 13. The general counsel’s office also contains other divisions that may opt on acquisition-related matters, such as the Deputy General Counsel for Contractor Responsibility; the Deputy General Counsel for Fiscal Law, Civilian Personnel, and Ethics; the Deputy General Counsel for International Law; and the Deputy General Counsel for Installations and Environmental Law.
9. The AFMC Acquisition Law Division consists of six attorneys and one paralegal.
10. The AFMC Law Office is staffed by 57 attorneys and 17 paralegal and administrative personnel. It provides advice on contact actions in support of the Aeronautical Systems Center’s major systems acquisition programs, the Air Force Research Laboratory’s technology programs, and the Air Force Security Assistance Center’s foreign military sales cases. The law office manages AFMC Acquisition Integrity Program fraud cases and provides legal support on all AFMC housing and real estate privatization projects. It also provides oversight to the command’s intellectual property law services, including patent prosecution and copyright, trademark, technical data, and technology transfer advice for the Aeronautical Systems Center and the Air Force Research Laboratory, and provides Air Force-wide administration of the Invention Secrecy Act.
11. The Contract Law Division of the AFMC Law Office consists of four branches: the Fighter and Bomber Branch, the Research and Specialized Contracting Branch, the Mobility and Aircraft Systems Branch, and the Intelligence, Surveillance and Reconnaissance Branch. The Contract Law Division is staffed by 31 attorneys and two paralegal and administrative personnel.
14. Letter to Airmen, Michael W. Wynne, Secretary of the Air Force (Mar. 8, 2006):

AFSO 21 is a leadership program for commanders and supervisors at all levels, looking at each process from beginning to end. It doesn’t just look at how we can do each task better, but asks the tougher and more important question: Why are we doing it this way? Is each of the tasks relevant, productive, and value added? In other words is it necessary at all? With AFSO 21, we will march unnecessary work out the door—forever.

17. Id.
18. Policy Memorandum, The Judge Advocate General’s Corps, subject: TJAGC Standards – 1 (Mar. 10, 2010), para. 7. JAG Corps 21 contains three major elements: the cultural attitude of continui-
ously improving legal services, senior leadership’s willingness to implement changes to improve processes, and field support centers that provide backhaul and specialized training.


JAG Corps 21’s core proposals will establish a series of field support centers (FSCs) within the JAG Corps. The FSCs will consolidate certain legal functions at centralized or regional locations and will provide specialized backhaul capability for field staff judge advocates. This reorganization will not only enhance field support in these specialized areas, it will enable staff judge advocates assigned to field commanders to focus on operational legal support. Additionally, the JAG Corps will expand the scope of its core missions and implement a series of reengineering efforts intended to streamline its work and organization.

. . . .

These JAG Corps 21 initiatives will significantly enhance the capacity of The Judge Advocate General to provide legal support to the Air Force under 10 U.S.C. §§ 806 and 8037. They will improve legal capabilities available to commanders and Airmen in the field, fully support the Air Force mission, and help accomplish immediate and long-term Air Force objectives. Some of the initiatives will yield manpower savings and others will enhance effective processes and eliminate those that are redundant or no longer necessary.

Id.


22. See IAT Memo, supra note 21 (“[T]he initial approach raised concerns from key stakeholders regarding significant personnel moves, infrastructure and process shortfalls, and lessons learned from recent Air Force transformations.”).


24. Id.

25. Id. Chief of Staff Schwartz also mentioned “recapturing acquisition excellence” as one of his top five priorities for the future.


27. See Acquisition Improvement Plan Memo, supra note 23.

28. See E-mail from Lt. Gen. Richard C. Harding, The Judge Advocate General, to Members of The Judge Advocate General’s Corps, subject: Acquisition Law and Litigation Directorate (AF/JAQ) (Oct. 1, 2010) (on file with author) (hereinafter TJAG E-mail). See also E-mail from AF/JAG, to Members of The Judge Advocate General’s Corps, subject: TJAGC Online News Service (Nov. 17, 2010) (quoting Col. Mark S. Teskey, Director of the Acquisition Law & Litigation Directorate) (on file with author) (hereinafter Online News Service E-mail).

The newly created AF/JAQ is TJAG’s direct contribution to the acquisition community and establishes a critical lynchpin in the Air Force-wide effort to achieve the SECAF’s and CSAF’s vision of “recapturing acquisition excellence.” The directorate was created as the Air Force’s contract law and litigation clearing house with a broad charter and significant responsibilities. . . .

Id.

29. See TJAG E-mail, supra note 27.

30. See TJAG E-mail, supra note 27.

31. See Online News Service E-mail, supra note 27 (”Both field support centers are the execution and action arms for commercial litigation and contract law, providing backhaul support for the field and in the AOR.”).

32. See Whalen & Preston, supra note 1, at 12 (“The Contract Appeals Division represents the Air Force in all contract disputes litigated before the [Armed Services Board of Contract Appeals].”). See also Wise, supra note 21, at 30.

33. TJAG E-mail, supra note 27.

34. JAG Corps 21 Implementation Memo, supra note 16, Attachment, at 3.

35. See E-mail from Col. Mark S. Teskey, Director of the Acquisition Law & Litigation Directorate, to author, subject: Air Force Acquisition Law & Litigation Directorate (Jan. 3, 2011) (on file with author) (hereinafter AF/JAQ E-mail).

36. See id.

37. See id.

38. All mid-level Air Force judge advocates (i.e., senior captains and junior majors) have the opportunity to apply for selection to an Air Force-funded LLM program. Currently, Air Force judge advocates obtain procurement law LLMs from the Judge Advocate General’s Legal Center and School in Charlottesville, Virginia, and the George Washington University in Washington, D.C.

39. See E-mail from Professional Development Directorate, Office of the Judge Advocate General, to author (Dec. 2, 2010) (on file with author) (hereinafter AF/JAX E-mail).

40. See AF/JAQ E-mail, supra note 32.


42. See AF/JAQ E-mail, supra note 32.

43. See id.

44. See id.

45. See Online News Service E-mail, supra note 27 (quoting Col. Teskey).

A proposal to increase the workforce by over 2,000 employees (247 officers, 11 enlisted, and 1,804 civilian) is currently under consideration for the critical areas of systems engineering, cost estimating, program management, contracting, logistics, financial management, and legal. If approved, all new military authorizations would be added in FY10 and civilian authorizations added between FY10 and FY13.

Id. See also AF/JAX E-mail, supra note 39 (citing the Acquisition Improvement Plan as a basis for the additional funding); E-mail from David E. Sprowls, Chief, Strategic Plans and Policy Division, Office of the Judge Advocate General, to author (Nov. 23, 2010) (on file with author) (hereinafter AF/JAX E-mail). According to Sprowls, there will be funding for additional TJAGC Online News Service LLMs in subsequent fiscal years as well.

Id. This is emblematic of the effort to rebuild and fortify the military acquisition law corps.

46. See AF/JAQ E-mail, supra note 32.


49. See supra note 23 and accompanying text.

50. See Online News Service E-mail, supra note 27 (quoting Col. Teskey).
CHAIR’S COLUMN
(continued from page 2)

I say, get involved, it will pay off.

In closing, I want to thank everyone who has worked so hard this year. Every officer, Council member, committee member, and Section member has provided so much support that I could go on for pages describing it all. Let me just say that it has been a privilege to work with you all. I will never forget all that you have done.

In particular, I would like to thank Carol Park-Conroy, Mark Colley, Sharon Larkin, and Dave Ehrhart, the officers. As Section chair, I learned to rely on their advice and counsel. More importantly, I believe I have made four close friends for life. I also want to thank my partners at Seyfarth Shaw LLP for supporting me over the last several years as I climbed the Section ladder from secretary to chair. I could not have done it without their support and patience.

I could not end this column without thanking my administrative assistant, Janine McDermott, for all of her efforts, from preparing all those welcoming letters to committee chairs to creating some 500 separate letters to promote the State and Local Procurement Symposium. She did all that on top of her daily routine of taking care of multiple insanely busy attorneys in our office. We have worked together for more than 15 years and I have always told her that if she gets a job somewhere else, let me know because I am going with her. If there was ever a year she could have left, this was it, but she stayed and I am eternally grateful.

I also need to thank my wife and family. Over the last 20-plus years, there have been quarterly weekends away from them as I pursued my passion for the Section. I could not have done that without their support and understanding. Also, as I noted above, my children provided me with the motivation to become the chair, and they continue to amaze me with their accomplishments and courage. My wife has supported me for more than 27 years now, and has been especially patient this last year as many weekends have evaporated into trips to the office to make up for time spent on Section business. Thanks, gang, never a dull moment.

Last, but not least, I must thank Marilyn Neforas. Until you are chair, you do not begin to understand how much she really does behind the scenes and how lucky the Section is to have her as our Section director. I will truly miss our almost daily phone calls as she kept me on my toes and focused on the basics. In addition, I will miss the late-night e-mails, well after close of business, that she sent on some important topic that I had forgotten. She is the anchor of our Section. She, in particular, is one of the reasons that I will never forget this year. It has been a privilege to work with someone who cares so much about her job and this Section.

My last formal note will be to wish Carol Park-Conroy all the best in her year as chair. She and I became friends when we served on the Council together. During that time, we talked about different ideas to make the Section better. I am not certain either of us realized that some day we would both be chair. We found that we thought alike and there is no one I would rather turn over the chair position to than Carol. I want all of you who supported me this last year to stay involved and do all you can to make Carol’s year as enjoyable as this last year has been for me. Thank you all, again. I hope you take up my challenge and get more involved. Maybe some day you can write a column like this one. 

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CHAIR-ELECT COLUMN
(continued from page 3)

Environmental Purchasing (NIGP). The Section remains committed to expanding the membership and activities of our State and Local Procurement Division.

All in all, the 2011–2012 term promises to be busy and exciting. I welcome your thoughts, comments, ideas, and suggestions throughout the year as we work together to achieve the Section’s goals and objectives. You can reach me at (703) 282-3392 or carolparkconroy@gmail.com.

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Coming Attractions

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
18th Annual Federal Procurement Institute and Open Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD

BY MELISSA J. COPELAND

Contains a summary of purchasing laws and processes for all 50 states, written by individuals knowledgeable in each state's laws and processes, and includes:

- A listing of purchasing laws and regulations
- Descriptions of purchasing methods
- An explanation of
  - bid protest procedures
  - contract claims processes, and
  - administrative and judicial review

Those involved in state procurement—government officials, contract administrators, attorneys, and contractors—will find the information in this Guide to be invaluable.