For more than 15 years, the federal government has had a statutory goal of awarding 5 percent of federal contracts to women-owned small businesses (WOSBs). Not once has that goal been met on a government-wide basis.1 By 2000, nearly five years after enactment of the statutory 5 percent goal, WOSBs were receiving only 2.3 percent of the $200 billion in federal contracts awarded annually. The failure to achieve this goal represented a loss to WOSBs of more than $5 billion in annual contract revenue.

In response to these dismal statistics and other evidence that women-owned businesses did not have an equal opportunity to participate in federal contracting, Congress passed the Women's Equity in Contracting Act.2 The legislation sought to promote contracting opportunities for women-owned small businesses by first directing the Small Business Administration (SBA) to conduct a study to identify those industries in which women-owned small businesses were underrepresented. It also authorized contracting officers to restrict competition to women-owned small businesses in those industries identified by SBA as underrepresented by WOSBs. President Bill Clinton signed the act into law on December 21, 2000. The following month, however, President George W. Bush took office, and the new administration had a different agenda.

Implementation of the Women's Equity in Contracting Act was put on the slow track at SBA under President Bush and consequently languished. Using its own resources, SBA conducted a study of women-owned businesses in an attempt to determine the industries in which they were underrepresented. A draft study and proposed procedures were completed in September 2001 but never published. Rather, in 2003, SBA sought an independent review and referred the study to the National Academy of Sciences, where it sat for nearly two years. In 2005, the academy declared the SBA study flawed and recommended that a new study be conducted using revised methodology. After soliciting proposals, SBA contracted with the RAND Corporation in February 2006. The resulting RAND study was published in April 2007.3

In the meantime, the US Women's Chamber of Commerce, after a September 2004 meeting with the SBA administrator in which he purportedly stated that “this Administration has no intention of implementing this program,” and that “the goals in the Act are meaningless,” filed a lawsuit in US District Court in Washington, D.C.4 The complaint alleged that SBA's delay in completing the congressionally-mandated study and establishing procedures to implement the women-owned business program violated the Administrative Procedure Act, because the

(continued on page 18)
In 2009-2010, the Public Contract Law Section was marked as an A-3. This translates into a “Core” category with a “Satisfactory” ranking. Frankly, once we focused on the ranking, we were all disappointed we had not received a “Core” category, “Exceptional” ranking.

As luck would have it, the Section was preparing its

(continued on page 22)
Fraud Counterclaims in the Court of Federal Claims: Not so Fast, My Friend

By Elizabeth W. Fleming and Rebecca Clawson

This article is about 130 years of legal error. It’s about a single case repeatedly cited in error. It’s also about the difference between a holding and dicta. Finally, it’s about the absence of developed case law governing the constitutional right of a litigant to a trial by jury in the United States Court of Federal Claims (COFC). In this article, we will explain that there is in fact no authority for the pursuit of fraud counterclaims in the COFC. We will further explain that a litigant defending against an allegation of the tort of fraud has a right to a jury trial under the Seventh Amendment. Because the Court of Federal Claims cannot provide a jury trial, a fraud action cannot lawfully proceed as a counterclaim against a plaintiff pursuing judicial review under the Contract Disputes Act of 1978 (CDA).1

Historical Perspective

Litigation of claims and counterclaims in the Court of Federal Claims and its predecessors occurred long before the Wright brothers flew at Kitty Hawk. In 1880, the US Supreme Court rendered a decision in McElrath v. United States.2 McElrath had a pay issue related to the characterization and timing of his discharge as a lieutenant in the US Marine Corps. Ultimately, the secretary of the navy decided that Lt. McElrath had been erroneously dismissed from the marines in 1866, but the secretary accepted McElrath’s resignation as of 1873, resulting in a dispute over some seven years of pay. After the issue made its way through the bureaucracy, the comptroller general eventually issued something akin to a paycheck to McElrath for half-pay of a first lieutenant for the period. McElrath, heedless to the caution that a bird in the hand is worth two in the bush, petitioned the United States Court of Claims for full pay. The United States, now the defendant in a lawsuit and not an administrative paymaster, decided that Lt. McElrath was due no pay at all for that period of time and counterclaimed for the half-pay already granted—and won.

Even though this case had nothing to do with fraud, any other tort, or any other common law action, and even though this case well predates the Seventh Amendment jurisprudence that developed in the federal courts during the twentieth century, it has been cited repeatedly as authority for the proposition that the United States may counterclaim for anything it wants in the COFC, including the tort of fraud, the constitutional right to a jury trial notwithstanding. This point requires a brief outline of what is a “holding” and what is “dicta” when evaluating any case authority for its stare decisis effect on the matter at hand.

In a law review article only a philosophy major could love, Michael Abromowicz and Maxwell Stearns evaluated every aspect of what “holding” and “dicta” really mean.3 Fortunately for those who find the deconstruction of these kinds of truths more boring than watching a parked car, we can summarize the point we need to make here as follows. The easiest situation to analyze involving “holding” versus “dicta” is the very one we examine in this article: “when a judicial statement transparently implicates facts not involved in the case, courts generally take any conclusions drawn from such discussions to be dicta.”4 There is ample authority on this very point, even predating Lt. McElrath’s pay problems. For example, in Carroll v. Carroll’s Lessee,5 the Supreme Court held:

> And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens v. The State of Virginia,6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of Marbury v. Madison. And Mr. Chief Justice Marshall said, “It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented.”

Thus, the McElrath opinion might say that a plaintiff in the Court of Claims is subject to “any set-off, or counterclaim, which the government may assert,”7 but the term “any” in this opinion only applies to the set-off in that particular case—a pay issue—which was most certainly not a counterclaim sounding in the tort of fraud. Once the term “any”

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as used in McElrath is subjected to this analysis, an entire line of case law becomes suspect, as described in more detail below. The fact is that there is no controlling legal authority on the specific issue of whether a plaintiff in the Court of Federal Claims can demand a trial by jury in defending a counterclaim based in the tort of fraud.

The Right to Trial by Jury in a Civil Case

The Seventh Amendment to the United States Constitution says:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

It is clear, then, that there is a viable constitutional right to trial by jury in a civil case in American jurisprudence. Commentators have used the term “historical test” to summarize the following rule: If the action before the court is one that would lie in law, as opposed to equity, for a remedy in money damages, in eighteenth-century England, then the parties have a constitutional right to trial by jury. This is true even if the cause of action, albeit statutory, has a basis in the English common law. Fraud is an action in tort for damages at the common law. The Rules of Practice before the Court of Federal Claims do not provide for a jury trial, and therefore the United States cannot lawfully plead a counterclaim in fraud in that court.

Justice Scalia’s concurring opinion in City of Monterey v. Del Monte Dunes includes an outline of the fundamentals of Seventh Amendment jurisprudence. In that case, the court held that the litigant had a Seventh Amendment right to trial by jury on its claim for damages under 42 U.S.C. § 1983. The court outlined a two-part analysis for determining a right to a jury trial. First, is there a statutory right? Second, if there is no explicit statutory right, is there a constitutional right? For a constitutional right to accrue the cause of action must have been one that was tried at law at the founding of the United States, or analogous to one that was. The court determined that section 1983 did not carry a specific right to a trial by jury, so it reached the constitutional question. Starting with the obvious fact that section 1983 did not exist at the time our country was founded, the court held that because an action based on that statute basically sounds in tort for damages at common law, the litigant has a constitutional right to a trial by jury under the Seventh Amendment.

The government normally pleads the following causes of action in a fraud counterclaim in the COFC:

- a violation of the False Claims Act (31 U.S.C. § 3729-3733);
- a “special plea in Fraud” (under 28 U.S.C. § 2514);

None of the statutes cited above provides an explicit right to a trial by jury, although it is clear from the legislative history of the Contract Disputes Act, as well as from early practice under that statute, that Congress expected that fraud actions would be severed from contract disputes procedures and brought in United States district court, which would clearly entitle the defendant to a jury trial. In early practice, because the Department of Justice has sole authority as an executive agency over civil fraud, fraud issues were frequently severed from CDA proceedings and filed in district court. In fact, the boards of contract appeals— as distinct from the COFC—have “refused” to hear the issue of fraud, but have frequently continued to process contract claims by severing the fraud element from the claim. Furthermore, if a board decides a case in which the government contends that fraud is present, the contractor probably will not collect any amount to which it ultimately may be entitled until the fraud allegation is resolved.

Even absent an explicit or implied right to a trial by jury in a matter involving statutory fraud, it is clear that fraud is, and always has been, a tort at common law. As such, a litigant defending allegations of fraud has a constitutional right to a jury trial. If the Supreme Court can find a tort action in common law under section 1983, then it is certainly appropriate for the Court of Federal Claims to find a tort action for counterclaims based upon fraud.

Now that we have established the right to a jury, we must explore whether, and how, that right can be lawfully waived. As a general proposition, a presumption exists against a valid waiver of a right to jury trial, because the right is fundamental and “can only be relinquished knowingly and intelligently.” Nevertheless, specific waivers of the right to a jury trial have been enforced in the courts.

The COFC and its predecessors have found valid waivers of a contractor’s right to trial by jury as against counterclaims for breach of contract and offset of funds since McElrath. Each of those cases involved a counterclaim based on the contract in question or the pecuniary issue at the heart of the plaintiff’s initial suit; none of the cases involved a counterclaim in tort. Accordingly, for all the reasons stated above, none of those cases is valid authority on this particular issue. Finally, every single one of those cases involves a holding that the plaintiff waived its right to jury trial by its own conduct and not by an express provision in a contract that preceded the litigation itself. This is indeed an important distinction.

In fact, in the body of law in the federal courts regarding the validity of a party’s waiver of its right to a jury trial, each of the reported decisions involves the court’s enforcement of a jury trial waiver contained in a contract between the parties that existed prior to the litigation. In all of the cited cases, the parties negotiated a jury trial waiver, in their business contract, before litigation, at arms-length, and when those parties were knowledgeable in the subject matter of the business involved. In such situations, the courts have held that the waivers were made knowingly, intelligently, and voluntarily.

Only the United States Court of Appeals for the Fed-
eral Circuit (Federal Circuit) and the various incarnations of the Court of Claims have found a waiver of the right to a jury trial by conduct alone. In Seabord Lumber Co. v. United States, the Federal Circuit found that Seabord had, in its contract with the government (a type of contract that is often described as a “contract of adhesion”), agreed to a disputes procedures that did not include trial by jury. This is an interesting way to avoid the constitutional issue and completely ignores the body of law in the federal courts that not only requires a valid jury trial waiver to be knowing, intelligent, voluntary, and specific, but also puts the burden of proof as to a waiver on the party trying to enforce the waiver. In any event, the Seabord court did not have before it a counterclaim based in fraud.

It is more than a leap of faith to say that a plaintiff pursuing a CDA contract claim has made a knowing, intelligent, voluntary, and specific waiver of its Seventh Amendment right to a jury trial by contractual agreement, or by its conduct, to resolve issues in tort without a jury. In Federal Acquisition Regulation (FAR) Part 33, which governs the resolution of protests, disputes, and appeals concerning contracts with the federal government, the only mention of fraudulent claims is as follows:

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

If the entire FAR references the concept of fraud only in this provision, and in the outline of debarment and suspension criteria found in FAR Part 9, it is entirely unreasonable to construe that a party seeking to resolve a contract dispute waives its right to a jury trial on a counterclaim for fraud.

This is the key: Fraud is a tort, not a contract action. In City of Monterey, the court’s opinion, both the majority and the concurrence by Justice Scalia, places enormous significance on the fact that the section 1983 claim involved an action in tort. A tort is defined as a “civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages.” This means that it is necessarily and tautologically true that a breach of contract is not a tort, and that a tort is not a breach of contract.

Thus, even if a plaintiff in the Court of Federal Claims did effect a valid waiver of jury trial for an action in contract by using the CDA dispute procedures, it would not likewise effect a waiver of jury trial for an action in tort. (There are contrary, nonbinding, holdings in the Court of Federal Claims. In BMY-Combat Sys. Div. of Harco Corp. v. United States, for instance, Judge Tidwell ruled that BMY did not have a Seventh Amendment right to a trial by jury in the COFC. Nevertheless, Judge Tidwell’s ruling is not binding precedent for that court.)

Procedural aspects

This legal issue is less of an exercise in counting angels on the head of a pin than one might be led to believe. As several legal commentators have observed, the Department of Justice has increased its focus on fraud counterclaims. Also, the COFC is increasingly finding fraud liability. This trend seems to come as a result of the decision in Daewoo Engineering & Construction Co. v. United States. In Daewoo, the plaintiff contractor allegedly included in its certified claim losses that had not occurred at the time of certification under the CDA. The government made a fraud counterclaim in the COFC. The Federal Circuit ultimately held that Daewoo committed fraud, thereby forfeiting its claims and subjecting itself to statutory fraud damages.

The implications of this trend are daunting, and the jury trial issue may have to come before the trial judges of the COFC several times before it is fully litigated before the Federal Circuit, and, ultimately, the Supreme Court. One may lose one’s motion to dismiss the fraud counterclaims.

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at the COFC, as we did. As a next step, a COFC judge can certify a question for interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292. If one loses the motion at the trial court, and the judge declines to certify the issue for interlocutory appeal, the recourse is to wait for a final judgment, take the normal course of appeal to the Federal Circuit, and revisit the jury trial issue at that point. In the meantime the client has been subjected to a trial and judgment on multiple damages and the agency involved may have initiated debarment proceedings.

Each of these circumstances can adversely affect a contractor's cash flow, its perceived responsibility to receive contract awards, and its ability to meet bonding requirements for further work. These items may motivate a plaintiff to settle a matter on unfavorable terms. Accordingly, it may make sense to consider filing a petition for a writ of mandamus to the Federal Circuit. The authority for such a writ lies in the All Writs Act, 28 U.S.C. § 1651, and the procedures to be followed can be found at Rule 21 of the Federal Rules of Appellate Procedure.

Conclusion

We think it is wrong of the Court of Federal Claims to rely on the authority of McElrath to allow a government counterclaim in fraud to proceed in a contract dispute case when the plaintiff demands a jury trial on the tort of fraud pursuant to the Seventh Amendment. It is to be hoped that another similar case in the COFC will end differently, or, more to the point, that the Federal Circuit, or the Supreme Court, may someday consider the issue on appeal, and reach the correct result.  

Endnotes

2. 102 U.S. 426 (1880).
4. Id. at 1074.
5. 57 U.S. 275 (1853).
6. Id. at 287.
7. 102 U.S. 426 at 440.
10. Id.
13. Id. at 708.
15. See, e.g., JOHN CIBINIC, JR., RALPH C. NASH, JR. & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 1240-42 (4th ed. 2006); see also S. Rep. 95-1118, 95th Cong., 2d Sess. 1978, 1978 U.S.C.C.A.N. 5235 (“If such cases do arise and are thus handled in the courts, other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency Board or in the Court of Claims where the claim originated.”).
16. CIBINIC, NASH & NAGLE at 1241.
18. 37 Am. Jur.2d, Fraud and Deceit, § 12 (“An action for fraud and deceit is of common law origin.”).
23. See Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171 (2d Cir. 2007) (waiver found enforceable); First Union National Bank v. United States, 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001) (burden of showing waiver to be both knowing and intelligent falls on party seeking enforcement of waiver). Interestingly, at least one court that has found a valid waiver noted, in dicta, that where a contract is silent on waiver of the right to a jury trial, Federal Rule of Civil Procedure 38 applies and the right is intact. See IFC Credit Corp. v. United Business & Industrial Credit Union, 512 F.3d 989, 993 (7th Cir. 2008). In the Court of Federal Claims, there is no equivalent to Rule 38.
24. 903 F.2d 1560.
25. Id. at 1567.
26. Of course, there are sovereign immunity issues intricately intertwined with the law governing the resolution of government contract disputes under the Disputes clause. The point of this article is that sovereign immunity issues do not apply when the United States becomes a party plaintiff in a lawsuit. Thus, an exposition of the sovereign immunity implications in government contract law far exceeds the scope of this article.
27. FAR 33.209.
28. 586 U.S. at 709, 727-28 (“There is no doubt that the cause of action created by § 1983 is, and always was, a tort claim.”).
29. BLACK’S LAW DICTIONARY 1626 (9th ed. 2009).
31. West Coast General Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994) (“Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court.”).
34. See Salman Ranch, Ltd. v. United States, 573 F.3d 1362 (Fed. Cir. 2009) (trial judge certified for appeal ruling on applicable statute of limitations).
35. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (mandamus appropriate remedy where jury trial denied by trial court); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470 (1962) (federal courts of appeal responsible to grant mandamus to protect the right to trial by jury); In re Lockheed Martin Corp., 503 F.3d 351 (4th Cir. 2007) (petition for writ of mandamus is proper challenge to denial of jury trial); Myers v. U.S. District Court for the District of Montana, 620 F.2d 721 (9th Cir. 1980) (issues writ after timely jury trial demand denied at trial court); Bruce v. Bohannon, 436 F.2d 743 (10th Cir. 1970); Berdalsky v. Caffe, 161 F.2d 499, 501 (2d Cir. 1947) (“There can be no doubt of our power in such a case to issue a writ of mandamus.”).
FAR in the LEED in Going Green

By Stanley A. Millan

The US government owns approximately 445,000 buildings and leases another 57,000. Operating this massive portfolio, which encompasses over 3.3 billion square feet of floor space, requires substantial resources each year. In Fiscal Year 2002, these federal facilities used a total of 404 trillion BTUs of energy at a cost of approximately $4.7 billion, making the federal government the single largest energy user in the United States. Buildings are also significant contributors to greenhouse gas emissions. This article discusses federal green buildings and procurement practices related to them.

The Energy Independence and Security Act of 2007, Public Law No. 110-140, mandates that beginning in 2010 new and remodeled federal buildings “reduce fossil fuel generated energy consumption by 55 percent as compared to 2003 and one hundred percent by 2030.” Executive Order 13423 requires agencies to reduce total energy consumption by 3 percent each year for a total decrease of 30 percent (on a 2003 baseline) by 2015. More recently, President Obama issued Executive Order 13514, which declares as a matter of policy that:

Federal agencies shall increase energy efficiency; measure, report, and reduce their greenhouse gas emissions from direct and indirect activities; conserve and protect water resources through efficiency, re-use and storm water management; eliminate waste, recycle and prevent pollution; leverage agency acquisitions to foster markets for sustainable technologies and environmentally preferable materials, products and services; design, construct, maintain and operate high performance sustainable buildings in sustainable locations; strengthen the vitality and livability of the communities in which federal facilities are located; and inform federal employees about and involve them in the achievement of these goals.

Executive Order 13514 also requires that the head of each federal agency implement high-performance sustainable federal building design, construction, operation and management, maintenance, and deconstruction. The policy aims to ensure that federal buildings entering the planning phase in 2020 and later be designed to achieve zero net energy by 2030, and to incorporate federal leadership in high-performance and sustainable buildings into all new construction, major renovations or repairs, and alteration of federal buildings. Additional objectives include managing existing federal buildings in a way that will reduce water and energy consumption, and finding alternatives to renovation as a means of reducing deferred maintenance.

The executive order further directs agencies to prioritize actions based on a full accounting of both economic and social benefits and costs, to drive continuous improvement by annually evaluating performance, extending or expanding projects that have net benefits, and reassessing or discontinuing under-performing projects. The objective of the order is to maximize the effectiveness of the government’s sustainability efforts by placing the burden of prioritizing and monitoring progress on individual agencies. All federal agencies have been given the same targets and deadlines, but each agency has been left to determine its own approach to actually complying with these mandates.

As a result, many agencies have turned to frameworks developed by third parties to aid in the design and construction of high-performance buildings. Among larger agencies, the most popular model is the US Green Building Council’s Leadership in Energy and Environmental Design (LEED).

For instance, the General Services Administration (GSA) has a sustainability design program and a way to evaluate and measure achievements that mandates that all new construction projects and substantial renovations must achieve LEED certifications. GSA also states that projects are encouraged to exceed the “silver” and “gold” standards established by LEED. The Department of Energy has also reported that many other government agencies, including the Department of Defense and NASA, have used LEED to foster sustainability in new buildings in the recent past. Implementing agencies under Title IV, Subtitle C of the Energy Independence and Security Act—the Department of Energy, GSA, the Office of Management and Budget,
and the Environmental Protection Agency—are also carrying out their responsibilities to direct and assist other federal agencies in meeting the act's high-performance federal building requirements. In addition, Title V of the American Recovery and Reinvestment Act of 2009 includes funding for green buildings.

**LEED Process**
Developed by the US Green Building Council, LEED focuses on earning credits and meeting prerequisites in several areas: generally sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor air quality, innovation and design, and regional priority. LEED includes rating systems for operation and maintenance of existing buildings, leases for commercial interiors, new construction, the core and shell aspects of buildings (such as mechanical, electrical, plumbing, and fire protection systems), homes, and neighborhoods. New construction ratings apply as interim LEED standards for schools, retail spaces, and health care facilities.

LEED applicants must meet various prerequisites. Achieving various optional credits is rewarded with positive points. For example, LEED for newly constructed buildings gives maximum credit points for the following areas:

- Sustainable sites (26 points);
- Water efficiency (10 points);
- Energy and atmosphere (35 points);
- Materials and resources (14 points);
- Indoor air quality (15 points);
- Innovation and design (6 bonus points);
- Regional credit (4 bonus points).

The LEED rating system thus awards a maximum of 110 points in these various credit areas. Basic LEED certification requires a rating of 40 points, while 50 points qualifies for silver certification, 60 points for gold certification, and 80 points for platinum certification. LEED information can be used as a green tool even if certification is not sought.

The LEED process involves registration with the US Green Building Council, credit interpretation requests, application for certification, possible appeals, and maintenance. Some programs (such as homes and neighborhood developments) are more complex. LEED decertification or revocation by the Green Building Certification Institute is possible down the line if an owner fails to abide by minimum program requirements—for example, if the owner does not comply with environmental laws or does not share data on energy and water use when requested. LEED certification is rarely revoked, but situation may change as a result of increasing criticism.

It has been estimated that LEED silver certified projects generally cost 2 to 4 percent more than traditional building projects. This relatively small impact on cost of construction is obtained if the project design is integrated with green features, but not, however, when green features are added only as an afterthought. Thus, LEED theoretically has a low initial cost impact and promises overall rewards through utility savings and comfort.

Integration is often thwarted because government design specifications are prepared without a full LEED team's support. Hiring expert subcontractors and establishing a target green products list are often accomplished late. “Build to spec” contracts may leave the construction contractor holding the bag, and often there are too many competing “stovepipe” organizations to educate after the fact. Submittal reviews and expanded LEED/safety meetings can help. True integration in the initial design stage, involving construction contractors for preconstruction services, will help avoid later conflicts. In that event, change orders, value engineering proposals, and even tear-outs can be minimized or eliminated during construction.

**LEED Credits**
Points for sustainable sites are awarded for such steps as protecting open habitat, access to public transportation, alternative transportation (for example, bicycles, car pools, and electric cars), connectivity to services (groceries or pharmacies and the like), redevelopment of brownfields, storm water management, and reduction of light pollution and “heat island” (both from roof and non-roof) effects. Some credits are more suitable for urban locations (such as connectivity), while others can be more readily obtained for open locations (such as protection and restoration of habitat), and a few are driven by site size (storm water management, for example). Many credits are often results rather than drivers of site selection, such as redevelopment of brownfields. Light pollution prevention (facing fixtures inward or turning lights off at night) is often viewed negatively at military institutions due to safety and security concerns.

Water efficiency involves such steps as landscaping, efficient use of water-capturing and rain water, reduction of process water and indoor use of water, and innovative water treatment technologies, such as wetland infiltration. Historically, most LEED applications have sought water-efficient landscaping or reduction in water use. Few applicants have attempted innovative wastewater technology.

Energy and atmosphere involves such steps as energy efficiency, renewable energy, reduction in demand for energy, building orientation, and measurement and verification of systems. This credit was not historically pursued in most LEED cases, other than by minimal cost reduction. Strategies usually involved energy load reduction (right-sizing, actual load analysis, insulation improvements, sun-shading, heat recovery, and so forth) and improved equipment efficiency (for example, duct size). However, renewable energy is gradually becoming more of an accepted pursuit.

Materials and resources involve such steps as sustainable purchasing, salvaging of existing buildings, management of recycled goods, management of construction waste, and responsible use of forest products or regionally harvested materials. Most applicants pursue credits for construction waste management and recycling of local building content.

Indoor environmental quality involves such steps as
green cleaning, reduction or elimination of contaminating products (low volatile organic compound releases), lighting controls, thermal comfort controls, providing daylight and views, and user comfort surveys. The most popular credits sought are those banning smoking indoors or near entrances, monitoring of outdoor air delivery, increased ventilation, management of indoor air quality both before and during construction, use of low emitting “green” materials (paints, carpets, and so forth), inclusion of entry grates, and enhanced lighting controls. The innovation in design and local priority credits are more variable.

**How Do LEED Green Buildings Fit into the Procurement Law Context?**

**Minimum Needs**
The first question asked—whether by the person drafting government specifications during planning or an anxious bidder who views green building specifications as restrictive of competition—is whether LEED exceeds the government’s minimum needs. In other words, is the government buying a Rolls Royce when a jeep will do? For instance, Federal Acquisition Regulation (FAR) section 11.103 allows an agency to require offerors to demonstrate, among other things, market acceptance. This includes situations where the agency’s minimum need is for an item that has demonstrated reliability and a record of performance or product support. In developing relevant criteria, the contracting officer must ensure that the solicitation reflects the agency’s “minimum need”.

Governing statutes and regulations allow contracting agencies discretion in determining their minimum needs and in selecting the appropriate methods for accommodating them. Government procurement officials are generally in the best position to know the government’s actual needs and the best way to draft appropriate specifications to meet those needs. Not every contractor will necessarily be skilled in green buildings, but theoretically all owners or contractors can hire lawyers, architects, engineers, and construction managers who are skilled in the area. A federal agency is required to specify its needs in a manner designed to achieve full and open competition, only to the extent that is necessary to satisfy its needs. Without a showing that competition is unduly restrictive, agencies are permitted to determine how best to accommodate their needs, and the Government Accountability Office (GAO) in handling bid protests will generally not substitute its judgment for that of the agency. In particular, the GAO has recognized that, in a case of a solicitation that relates to health and safety concerns, an agency has discretion to set its minimum needs so as not to achieve just reasonable results, but to achieve the most reliable and effective results possible.

Since buildings consume 40 percent of our nation’s energy and raw materials, and emit about 40 percent of greenhouse gases, it would seem that an agency’s agenda to reduce and mitigate these potential impacts from federal buildings certainly is supportive of environmental health and safety. An agency’s concern here is highlighted by the Environmental Protection Agency’s findings that greenhouse gases threaten the health and welfare of current and future generations. The LEED process in energy and atmosphere can reduce greenhouse gases emitted by federal buildings by encouraging reduced energy use and renewable energy. The process can also help address possible droughts caused by climate change through the water efficiency credits in the ratings system.

Energy and atmosphere is only one of the LEED credits that an applicant may be awarded. Therefore, unless a solicitation focuses on energy and atmosphere, as well as other relevant LEED criteria, a potential bidder could “game” the system if it promises a LEED certification, absent substantial energy and atmosphere credits. Then the “green” specifications could entirely or substantially fail to meet the government’s minimum needs. In that sense, LEED may test the minimum needs doctrine.

**High Quality and Cost Realism**
Moving further into the acquisition process, the next question would be: how can the federal government be sure that it is hiring a qualified “green” contractor? Obviously, quality counts, but agencies must give consideration to budget restraints. According to the GAO, long-term funding and capital budgeting issues—specifically the need for recognizing capital costs up front in the federal budget—will continue to pose challenges to the agency’s ability to meet all statutory high-performance requirements for federal buildings.

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**The first question asked is whether LEED exceeds the government’s minimum needs. In other words, is it buying a Rolls Royce when a jeep will do?**

The federal procurement process takes into account unreasonably high or excessive costs and prices. Price and quality trade-offs are typical evaluation factors. However, realistic costs must also enter the picture, because uninitiated offerors may propose prices that are unrealistically low or a “buy-in” to the green market. A cost realism analysis under FAR 15.404-1(d) involves the process of independently reviewing and evaluating specific elements of a proposal and determining whether estimated costs are realistic, reflect a clear understanding of the solicitation, and are consistent with the unique methods of performance and materials in the contractor’s technical proposal. Although cost realism is usually used in connection with cost reimbursement contracts, a cost realism analysis may also be used in competitions for fixed-price contracts when there are new requirements that may not be fully understood.
by competing offerors, when there are unique quality concerns, or when past experience indicates that a contractor’s cost and price estimates have resulted in shortfalls. A cost realism analysis determines whether an offeror’s proposed prices are too low. For an agency to be able to conduct such an analysis, the agency must set forth a realistic estimate of costs as a factor in the evaluation of proposals; otherwise the agency could face a substantial protest.

**Past Performance**

In addition, evaluation of an offeror’s past performance should be a solicitation requirement in accordance with FAR 15.305(a)(2). Information about past performance is a vital indicator of an offeror’s ability to perform a contract successfully. Again, the solicitation should describe the approach the agency will use for evaluating past performance, including how offerors with no relevant history will be evaluated and what opportunity will be provided to offerors to identify past or current green contracts. The government should also specify that offerors must tell the contracting officer about the contractor’s success in meeting LEED requirements on other building contracts. All of this will give the soliciting agency information with which to evaluate the competence of various “green” offerors on green building contracts.

**Performance-Based Acquisitions**

LEED performance is sometimes questioned. Some institutions mistakenly focus only on the LEED certificate, and not on the follow-up. Other problems include a divergence between operations and capital improvement budgets, failure to adequately educate facility managers on green operating manuals, using toxic chemicals to clean items that incorporate low volatile organic compounds (VOCs), and a general lack of LEED project integration. Commissioning requirements (pre-trouble-shooting to make sure energy systems work), enhanced commissioning credits, and comfort survey credits also will help before and during occupancy. LEED existing building standards are also more performance-based.

Underperformance is another issue that may plague federal green buildings during the actual administration of the construction contract or after completion. What if the building does not produce the savings that were proposed? It is important to note that LEED certification does not automatically guarantee performance. Although decertification is possible if a LEED-certified building does not live up to its LEED standards, that potential is hardly the same as performance-based acquisition. Such contracting is set forth in FAR Subpart 37.6. For instance, the Department of Energy utilizes energy-saving performance contracts to allow federal agencies to accomplish energy-saving objectives without incurring capital cost.

The standard model government contracts that specify a building, set the price, and award the contract to the lowest responsive/responsible bidder or lowest priced, technically qualified offeror may have to change. The change would be to a model based on adhering to a schedule, achieving a LEED rating, and obtaining operational efficiency through the design quality standards. The process would be measured by the offeror’s ability to achieve the environmental quality standards that have been established. Benchmarks for that standard have to be created, including past performance, LEED performance objectives, and rewards. Specifying energy and atmosphere credits, achievement, and measurement and verification, for instance, could be one performance level.

**Warranties**

Finally, moving to contract close-out and possible claims, the “Inspection of Construction” clause at FAR 52.246-12 comes into play. That clause provides at subsection (i) that the government shall accept, as promptly as practicable, after completion and inspection, all work required by the contract or that portion of the work the contracting officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the government’s right under any warranty or guaranty.

Thus, when the contract is close to being completed, if the government accepts a building and makes final payment, the government’s right to claim afterwards that the work was defective is limited. The bar does not act as a defense if there are latent defects, fraud, or warranty issues involved. Accordingly, because the operational efficiency of the building will take some time to demonstrate after completion, the government, in order to reserve its rights, should require a certification in the prime contract that the LEED standards will be met and should also negotiate a warranty that the work will provide the water efficiency, energy efficiency, clean indoor air and so forth, as mandated in the contract, for longer than one year. In other words, the LEED design requirements will have to meld into a performance and special warranty requirement. If there is failure to achieve LEED certification or if the building does not perform as stipulated, the government would preserve its rights for a time. “Green-washing” will not be allowed. This reservation puts LEED on the proper pedestal, one of establishing performance-based objectives.

Recent litigation against LEED has drawn attention to perceived LEED performance drawbacks. Claims include antitrust allegations that LEED is supplanting many local building codes, undermining marketplace competition, and obscuring proven standards that reduce energy use and carbon dioxide emissions. This also relates to federal “green” standards and orders. The lawsuit, whatever its merits, highlights the expense and complexity of LEED and its potential failures. Though atmosphere and energy are not the only aspects of LEED, the lawsuit could be a tipping point to push valid concerns into a problematic cycle of litigation. More LEED integration upfront, more commissioning during construction, and more measurement and verification during and after contract performance will be a cure.
Conclusion
The federal government is "going green," which means the country has to go green with it. Part of being green shapes the procurement process, and the government has long used its procurements to shape social policy. LEED-certified buildings are only one step in this new era. Recent initiatives taken by GSA reveal that it plans to require its more than 600,000 vendors to report their emissions of greenhouse gases, probably to establish goals for reducing carbon dioxide. In addition to devising federal procurement processes for LEED certification, tracking systems, verifications, learning curves, and additional procurement training are needed to accomplish that goal. This is just the beginning. These changes show that if you are not far in the LEED, you are well behind.

Endnotes
2. Id. at 10, 12.
3. Id. at 12.
7. Id. at § 2(g).
8. Id.
9. Id. at § 1.
11. Id.
13. Id.
18. Available at www.usgbc.org. For instance, on regional credit, the New Orleans downtown has priority for site selection in the following areas: brownfields, restoration and protection of habitat, storm water, minimum energy performance, and construction waste management.
19. Certain LEED categories of buildings have special credits—for example, commercial interiors have lease credits, neighborhood developments have “smart growth” and neighborhood pattern credits, and homes have linkage and location credits and possible negative overall credits if built too large (under the home size adjustment chart).
20. Registration costs vary between $900 and $1,200 per project. The cost of applying for a LEED rating starts at $2,000, and goes up based on U.S. Green Building membership status and square footage of the building. Additional costs are required for commissioning, energy modeling, and “before and after” design calculations.
24. Langdon, supra note 22, at 12.
25. Langdon, supra note 22, at 15.
27. Langdon, supra note 22, at 18-19.
29. FAR 11.103(b).
30. FAR 11.103(c); see also Ralph Nash and John Cibinic, Formation of Government Contracts, Chapter 3, Section V, at A.3.a (CHC 2005), reprinted online by Lexis at CCH Nash and Cibinic eSeries.
32. Id.
33. Id.
34. Id.
38. See GAO-10-22, supra note 15, at 23.
39. Id.
40. FAR 15.404-1(d).
41. See Chris Cheatham, Green Building Law Update, GSA Stimulus Bids Far Lower Than Expected (July 24, 2009). This article deals with low bids for LEED-certified buildings, setting the stage for litigation, in Cheatham’s opinion.
43. Chris Cheatham, Green Building Law Update, GSA Building Under Performs (Sept. 9, 2009). See also Mireya Navarro, Some Buildings Not Living Up to Green Label, N.Y. Times, Aug. 30, 2009. A federal building in downtown Youngstown, Ohio, is LEED-certified, used extensive natural light to illuminate offices and had a white roof for cooling, but it did not score high enough to qualify for the Energy Star label. The building’s cooling system, a major gas guzzler, was the problem. In addition, the design earned points for native landscaping rather than structural energy-saving features.
44. Commonly thought of as the deceptive use of public relations or marketing to promote a misleading perception of environmental “friendliness.”
46. See “Warranty of Construction” clause, FAR 52.246-21.
48. Stuart D. Kaplow, GSA Greenhouse Gas Emissions Reduction Plan to Impact 600,000 Vendors, Legal Library (July 2010).
A Primer on Prime Contractor-Subcontractor Disputes Under Federal Contracts

By James F. Nagle and Jonathan A. DeMella

The federal government spends more than $500 billion a year on contracts.1 More than 50 percent of that total works its way down to subcontractors. Thus, disputes between prime contractors and their subcontractors on federal contracts are relatively common, but may nevertheless contain some issues unfamiliar even to the experienced government contractor or government contract lawyer.

Applicable Law
Certainly, the subcontract itself can identify the applicable body of law that will be used to interpret it. If the prime contractor and the subcontractor are both California corporations and the contract is formed and performed in California, it would be logical for the parties to agree that California law will apply. Frequently, however, the parties will designate “federal procurement law” as the body of law used to interpret the subcontract.2

Federal procurement law typically means the decisions of the federal forums in the area: the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims, the applicable boards of contract appeals, and, in certain circumstances, the Government Accountability Office.3 At one time, there were numerous agency boards: the Armed Services Board of Contract Appeals (ASBCA), which deals with appeals from the Department of Defense agencies and the Corps of Engineers, NASA, the CIA and a few other departments; and the Civilian Board of Contract Appeals (CBCA), which in January 2007 replaced such former agency boards as the General Services Administration Board of Contract Appeals and the boards of the Departments of Energy, Interior, Health and Human Services, Transportation, and Veterans Affairs.4

Federal procurement law also includes the regulations set forth in the Federal Acquisition Regulation (FAR), which can be found at Title 48 of the Code of Federal Regulations (CFR), Chapter 1, and the agency supplements that are also in Title 48 of the CFR. For example, Chapter 2 of Title 48 is the Defense Federal Acquisition Regulation Supplement (DFARS). Chapter 9 is the Department of Energy Acquisition Regulation (DEAR)—another example of an agency’s supplemental regulation. The FAR and its supplements implement numerous statutes that apply to federal procurements, such as the Contract Disputes Act of 1978, the Truth in Negotiations Act, the Competition in Contracting Act, and the Buy American Act.

Choosing federal procurement law to govern a subcontract makes sense for two reasons. First, the prime contractor will often want to be bound by the same set of rules upstream (to the government) and downstream (to the subcontractor); the prime does not want to be caught in the middle and face the danger of inconsistent results.5 Second, it is common that federal contract clauses are “flowed down” in the subcontract. While relatively few clauses are mandatorily flowed down,6 it is prudent for the prime contractor to flow down such clauses as the Changes7 and Termination8 clauses, and a host of others.

Even if a particular state’s law is the applicable law for the agreement between the prime contractor and its subcontractor, very often the parties will have to brief the trial judge on the meaning of an “equitable adjustment,” “allowable costs,” or a “component” under the Buy American Act. These definitions have already been established by numerous federal court and board cases involving federal procurement law.

If the subcontract does not designate which law will apply, a judge may sometimes fill the void by designating federal procurement law as the applicable law.9 This is done relatively rarely and normally only in the case of national defense or Department of Energy contracts where a judge may decide that uniform law across all 50 states must apply.

Besides the applicable statutory, regulatory, and case law, it is critical that counsel for the subcontractor review the prime contract with the government because the subcontract often states that the subcontractor will be bound by all of the terms and conditions in the prime contract. This very common clause is frequently inappropriate, however, such as when the prime contract with the government is a cost-reimbursable construction contract and the subcontract in question is a fixed-price supply contract. Such fundamental discrepancies are frequently overlooked.10

Pass-Through or “Sponsored” Claims
Regardless of which law applies to the subcontract, the prime contractor may agree fully with the subcontractor’s

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claim that, for example, the government’s specifications were defective, a differing site condition was discovered, or that the government interfered with performance of the work. In these situations, because there is no privity of contract between the subcontractor and the government, the subcontractor will submit its claim to the prime.

Often a subcontractor does not want to litigate with its prime because it recognizes that the prime was not at fault, or the prime is on shaky financial ground and may not have the resources to pay the claim, or both.11 In that event, the subcontractor will present a claim to the prime contractor and request that it be “passed through” or “sponsored” by the prime to the government. Although the prime is often very anxious to pass through a claim, sometimes the prime demurs because it has very little or no faith in the subcontractor’s claim as to the narrative or costs, or because the prime does not want to pass a problem on to the government customer with which it wants to do more business. If the prime does not sponsor the claim, almost certainly it will be locked in litigation or arbitration with the subcontractor; if it does sponsor the claim, it must take a variety of procedural steps. Unless the subcontract covers the point, the prime must enter into an agreement with the subcontractor that defines the parties’ obligations.

First, the prime will want to negotiate with the subcontractor something like the following:

We both agree that the government specifications/interference/change caused your increased costs. Let’s submit this to the government and whatever amount the government ultimately agrees to pay (from the contracting officer, the Board of Contract Appeals, the Court of Federal Claims) will be in full satisfaction of your claim.

In other words, if the subcontractor’s claim is for $1 million but the contracting officer or the appropriate federal forum concludes that the claim is only worth $300,000, the prime wants the subcontractor to accept that $300,000 in complete satisfaction of its claim and never to seek further money from the prime. Understandably, subcontractors are often reluctant to do this. Their contention would be “our contract is with you. Whether you get reimbursement from the government is immaterial. We refuse to let you walk out.”12

Despite this potential obstacle, very often the parties will agree to the pass-through, with or without this release, for three reasons. First, the prime contractor may not be financially viable enough to make the payment. Second, the subcontractor may need the full cooperation of the prime, not only in terms of sponsoring the claim but also for providing witnesses and documents, and other tactical considerations. Third, the terms of the subcontract may give the prime the right to attempt to pass the claim through, and so the subcontractor may have no choice. In any event, there frequently will be a haggling process in which the parties work out a joint prosecution agreement or a joint defense agreement, including a release.

The prime contractor sponsors the subcontractor’s claim by bringing an appeal on the subcontractor’s behalf or by permitting the subcontractor to bring an appeal in the contractor’s name. FAR 44.203(c) explicitly allows such “indirect subcontractor appeals.” It provides:

Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor’s right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor’s behalf. The clause may also provide that the prime contractor and subcontractor shall be equally bound by the contracting officer’s or board’s decision. The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at 52.233-1, Disputes.

The right of a subcontractor to appeal in the name of a prime contractor has been affirmed, even when the prime has neither paid the claim nor admitted liability, as long as the claim is made in good faith.13 The prime must not have already waived its right against the government. Such waivers occur surprisingly often when the prime issues a final release to the government in return for final payment or issues a release on a claim before ensuring that all the claims from affected subcontractors have been submitted.14

Although a prime contractor may sponsor the claim of a subcontractor, the subcontractor does not have privity of contract with the government and is not a proper party before a board of contract appeals. In Zenith Data Systems, for example, the ASBCA denied a prime contractor’s request to add its subcontractor as a “co-appellant.”15 After a termination for default, a surety took over and entered into a subcontract with the original contractor to complete the job. On appeal, the default termination was overturned and converted to a termination for convenience. The ASBCA held that it did not have jurisdiction over that part of the termination settlement proposal covering costs incurred while the contractor was acting as subcontractor to the surety because the claim was not sponsored by the surety.16

Certification
In the federal system, for claims of more than $100,000, the contractor must certify that: (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of the contractor’s knowledge and belief; (3) the amount requested accurately reflects the amount for which the contractor believes the government is liable; and (4) the signer is duly authorized to certify the claim.17 If the prime is prudent, it will require the same certification from the subcontractor, but this alone is not sufficient. The prime itself must certify the subcontractor’s claim. That puts the prime on the horns of a dilemma.

First and foremost, the prime may not have intimate knowledge of the facts and certainly will not know as much
about the subcontractor’s books as it does about its own. The prime may have some doubts about the claim on legal or factual grounds. Fortunately for prime contractors, the United States Court of Appeals for the Federal Circuit has provided an escape route. In *United States v. Turner Construction Co.*, Turner was the prime contractor and had earlier recommended to the government that the claim of its subcontractor, Johnson Controls, be denied. Later, not willing to be caught in litigation with Johnson, Turner sponsored the claim to the government.

The government tried to dismiss the claim because of the earlier rejection, but the Federal Circuit disagreed. The court stated “the certification requirement requires not that the prime contractor believe the subcontractor’s claim to be certain, but that the prime contractor believe that there is good ground for the claim.” The court’s rationale was partly premised on the recognition of the prime’s inability to be as intimately aware of the facts and numbers as its subcontractor.19

**The Severin Doctrine: Is Government Potentially Liable?**

Sponsored claims are permitted only if the prime contractor is liable to the subcontractor and can charge the cost of the subcontractor’s claim to the government, or can make a claim against the government based on the subcontractor’s actual or anticipated recovery. This is known as the Severin doctrine.

The Severin doctrine states that if the prime contractor has not paid the subcontractor, and has no possible liability to the subcontractor on the claim (e.g., because the subcontractor has released the prime), the prime has suffered no harm at the hands of the subcontractor and the subcontractor has released the prime, which the prime would include within a billing to the government. The prime may have some doubts about the claim on legal or factual grounds. Fortunately for prime contractors, the United States Court of Appeals for the Federal Circuit has provided an escape route. In *United States v. Turner Construction Co.*, Turner was the prime contractor and had earlier recommended to the government that the claim of its subcontractor, Johnson Controls, be denied. Later, not willing to be caught in litigation with Johnson, Turner sponsored the claim to the government.

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The *Severin* doctrine states that if the prime contractor has not paid the subcontractor, and has no possible liability to the subcontractor on the claim (e.g., because the subcontractor has released the prime), the prime has suffered no harm at the hands of the subcontractor and cannot pass the claim through to the government.20 Judges have narrowed the doctrine by strictly interpreting any release or exculpatory clause. If the release or exculpatory clause is anything less than “iron-clad”21 and does not completely free the contractor from liability, sponsorship will be permitted. Even when the subcontract provides that the contractor will pass subcontractor claims through to the government but will have no further liability, it has been held that the Severin doctrine does not bar the claim.22 Further, a clause that relieves the prime of responsibility to the subcontractor for price increases, damages, and additional compensation as a consequence of delay does not necessarily preclude the prime contractor from recovering against the government on behalf of its subcontractor.23

A subcontractor can assure itself of the right to pursue the government by entering into an agreement that establishes the conditional liability of its prime contractor. In *W.G. Yates & Sons Constr. Co. v. Caldera*, both Yates, the prime, and IDC, the subcontractor, pursued their claim against the government under a Liquidation and Consolidation Claim Agreement (LCCA). Under the LCCA, Yates agreed to sponsor IDC’s claims to the contracting officer and, if necessary, to the ASBCA. In the event that they prevailed on their claim, the parties agreed that Yates would pay IDC whatever Yates recovered from the government for IDC’s losses. In exchange for the assurances that it made to IDC, Yates received a promise from IDC to pay Yates’s repurchase costs regardless of the board’s decision. Applying the *Severin* doctrine, the Army sought dismissal of Yates’s claim because Yates “[bore] no real liability to IDC for IDC’s damages.” The Federal Circuit determined that, under the subcontract and the LCCA, Yates could not “avoid liability if it receiv[ed] payment from the government for its damage,” so Yates was “conditionally liable” to IDC. The court affirmed the ASBCA’s holding that Yates had standing to bring suit “on behalf of IDC for IDC’s damages and expenses.” The court also affirmed that Yates had standing to sue on behalf of IDC for the excess repurchase costs that Yates had recovered from IDC.

Although the *Severin* doctrine has infrequently precluded sponsored claims, it still has vitality in those cases where the contractor has not paid the subcontractor and is not even conditionally liable.25 In *George Hyman Constr. Co. v. United States*, the subcontractor executed a general release in favor of the contractor. The court found that this release was unconditional and held that sponsorship was not permitted. The court rejected the contractor’s argument that the parties had not intended to include the particular claim in the release. It also rejected a later release excepting the claim. The court held that, even if the later release were binding under state law, sponsorship would not be permitted because it depended on “continuing,” not “revived” liability.

**Privity**

To avoid the pass-through process, very often subcontractors will try to allege privity with the government. This is an extremely difficult task. It is against the government’s policy to deal directly with subcontractors.27 As a result, direct subcontractor claims are very rare.

The government will try to maintain the rule of privity as much as possible. In 2007, the government had prime contracts with approximately 169,000 different contractors.28 That is a very large, but manageable, number. If subcontractors (which, under the FAR, normally means subcontractors at any tier) were included, millions of entities would have the ability to sue the government directly. Unless the government has agreed to make joint checks to the prime contractor and the subcontractor,29 had the prime assign the subcontract to the government,30 and specifically designated the prime as the government’s purchasing agent,31 subcontractors have no right to use the disputes process in their own name, but can sue the government only if their claims are sponsored by the prime contractor.32

There is one other notable instance in which the standard privity rules may be relaxed: when the prime has not been paying the sub, but the government has paid the prime. This resulted when Congress discovered that, very often, the subcontractor would perform the work and send a bill to the prime, which the prime would include within a billing to the government. The government would pay the prime promptly, but the prime would then put the money into an interest-
bearing account for 60, 90, or 120 days and then pay the sub without any interest. During that time, if the subcontractor approached the government to complain, the government would very often simply dismiss the sub saying there was no privity. When Congress became aware that the government was essentially making interest-free loans to prime contractors, it passed a statute, now implemented at FAR 32.112-1, that allows the subcontractor to contact the contracting officer. In such event, the contracting officer may take one of the following actions: encourage the prime to get current with the sub; withhold further payments to the prime until it becomes current with the sub; or refer the matter to other appropriate authorities. These authorities may be criminal investigators, on the basis that the prime's failure to pay the sub violates its certifications of payment to the government and constitutes a false claim.

**Contract Termination Issues**

If the government concludes that continued performance of a contract is no longer in its best interest, it has the right to terminate the contract for its convenience. Generally speaking, a subcontractor has no contractual rights against the government upon the termination of a prime contract.

FAR 49.108-8 states that when the government terminates a contract for convenience, the prime is obligated to assign all “rights, titles and interest” under any subcontract that is terminated because of the termination of the prime contract, when the TCO (termination contracting officer) determines that such assignment is in the government’s best interest. The FAR also provides the government the right to settle and pay any settlement proposal arising out of the termination of subcontracts. This is not to say it is the government’s obligation to settle and pay proposals; rather, the general rule is that the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines it is in the government’s best interest, the TCO may settle the subcontractor’s proposal using the same procedures used by the government for the settlement of prime contract terminations.

If a subcontractor obtains a final judgment against the prime (or reaches a settlement with a prime) in connection with a contract termination, the FAR instructs the TCO to treat the amount of such judgment or settlement as a cost of settling with the prime, provided the prime has taken certain steps to limit the amount of the subcontractor’s rights to recover what the government deems fair and reasonable. These steps include, for instance, reasonable efforts by the prime to include a clause in the subcontract excluding payment of anticipatory profits or consequential damages and to settle with the subcontractor, and diligent efforts by the prime to defend against any lawsuit or assist the government in such suit, if the government has assumed control of the defense.

**Miller Act**

As most federal contractors and subcontractors are aware, payment and performance bonds must generally be secured before commencing work on federal or state public construction projects. The Miller Act, 40 U.S.C. §§ 3131-34, was enacted in 1935 to require that such bonds be in place on federal projects exceeding $100,000 in value. These statutory requirements are implemented at FAR Subpart 28.102. In addition, most state and local governments have adopted similar legislation, often referred to as “Little Miller Acts.”

In theory, a performance bond is issued to protect the government from increased costs in the event the prime contractor runs into problems during performance. By contrast, a payment bond is issued to protect subcontractors and suppliers in the event they are not paid by the prime.

The Miller Act provides that the payment bond protection applies to first-tier subcontractors, or those subcontractors and suppliers that contract directly with a prime. In addition, certain second-tier parties that supply labor or materials directly to a subcontractor performing work are protected. Second-tier parties that contract with a material supplier rather than with a subcontractor, and subcontractors and suppliers further down the chain, however, do not receive Miller Act protection. The question of whether a party is a subcontractor or a material supplier—and whether that party falls under the protection of the Miller Act—has been extensively litigated and is an issue of continuing debate.

The Miller Act contains specific notice requirements for parties seeking its protection. Although first-tier subcontractors and suppliers are not required to provide notice of a claim to the prime contractor, second-tier claimants must give written notice of the claim within 90 days after the last day labor or materials are furnished. The notice must contain both the amount claimed and the name of the party to which the material or labor was provided.

As a consequence, dispute resolution between the prime contractor and the subcontractor will see another party in the room: the surety. This does not fundamentally change the process, but it may add an extra step.

**Conclusion**

Unique aspects of law and practice affect prime contractor-subcontractor disputes arising out of federal projects and drastically impact the handling and outcome of these matters. It is especially problematic for practitioners who do not regularly deal with federal contracts but whose clients, perhaps because of the recession, are venturing into that arena, either as primes or subcontractors. Shepherding the prime in its dealing with the government is difficult enough, but advising on federal subcontracting adds an additional level of complexity. We hope that this article and the articles, cases, and treatises we have cited will help practitioners navigate through this minefield.

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**Endnotes**

1. See www.usaspending.gov.
2. See, e.g., Sulzer Bingham Pumps, Inc. v. Lockheed Missiles and Space Co., 947 F.2d 1362, 1365 (9th Cir. 1991).
This subcontract shall be governed by and construed in accordance with the law of U.S. Government contracts as set forth by statute and applicable regulations, and decisions by the appropriate courts and Board of Contract Appeals. To the extent that the law referred to in the foregoing sentence is not determinative of an issue arising out of the clauses of this subcontract recourse shall be to the law of the State of California.


5. For this reason, many prime contractors also insert subcontract clauses by which subcontractors agree (1) to stay the prosecution of any claims against the prime that are passed through by the prime to the government, and (2) to be bound by the results of any dispute proceedings between the prime and the government concerning the pass through claim.

6. Some that are, include the Audit clause, FAR 52.215-2, and the Equal Opportunity clause, FAR 52.222-25.

7. E.g., FAR 52.243-1.
8. E.g., FAR 52.249-1.
9. E.g., American Pipe & Steel Corp. v. Firestone Co., 292 F.2d 640, 644 (9th Cir. 1961); New SD, Inc. v. Rockwell Inter. Corp., 79 F.3d 953, 955 (9th Cir. 1996).
10. It is amazing how often no one considers this until it is too late.

64. During the first preliminary conference call, the arbitrator said he would like to get a copy of the prime contract. The subcontractor’s representatives said they would like one too because they had never seen it. This was long after they had agreed to be bound by it.

11. As noted above, the subcontractor may have agreed that any claim that relates to the government’s conduct or the design may be passed through to the government, and that the subcontractor shall be bound by the results of any dispute proceedings between the prime and the government concerning the pass through claim.


15. Zenith Data Sys., ASBCA No. 49611, 98-1 BCA ¶ 29,721. See McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (board has no jurisdiction over appeal by prime contractor on behalf of its subcontractor after prime withdrew its sponsorship).

17. FAR 52.233-1.
18. 827 F.2d 1554, 1561 (Fed. Cir. 1987).

19. Accord Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994), reh’g denied (Jul 07, 1994); Alvarado Constr., Inc. v. U.S., 32 Fed. Cl. 184 (1994) (citing Turner and Transamerica v. United States, 973 F.2d 1572 (Fed. Cir. 1992) (case subsequently overruled in part on different point of law) (“In Transamerica and Turner, the Federal Circuit recognized that a contractor often will not have the same quality of information about a subcontractor’s costs as it does about its own costs. The court also recognized, in effect, that [41 U.S.C.] Section 605(c)(1) does not require a contractor, prior to submitting a certified claim covering subcontractor costs, to secure an equivalent level of certainty as to the government’s liability for the subcontractor costs as it would have for a claim covering the contractor’s own costs.”).

22. Castagna & Son, Inc., GSBCA No 6906, 84-3 BCA ¶ 17,612; see also Folk Constr. Co. v. United States, 2 Cl. Ct. 681 (1983); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985).

23. Castagna & Son.

24. 192 F.3d 987 (Fed. Cir. 1999).

25. See James Reeves Contractor, Inc. v. United States, 31 Fed. Cl. 712 (1994) (arbitration binding under state law operated to deny subcontractor’s claim against contractor without reservation).

26. 30 Fed. Cl. 170 (1993), aff’d, 39 Fed. Cl. 1197 (Fed. Cir. 1994) 27. See FAR 44.203(b)(3), which prohibits contractors offering from giving their consent to “subcontracts obligating the contracting officer to deal directly with the subcontractor.”


29. In D&H Distributing Co. v. United States, 102 Fed. Cl. 542 (Fed. Cir. 1996), the court found that a subcontractor had a third-party beneficiary relationship with the government when the contracting officer had modified the prime contract to make the contractor and the subcontractor joint payees. In addition, despite the statutory prohibition on the assignment of rights in government contracts, the court found that the contract modification at issue could be viewed as a valid assignment of payment rights from the contractor to the subcontractor because the contracting officer assented to the assignment. The government’s subsequent failure to make payments according to the modified contract was a breach entitling the subcontractor to damages. Note, however, that this decision has been significantly restricted by the Federal Circuit in Winer v. FloorPro, Inc., 570 F.3d 1367 (Fed. Cir. 2009). In that case, a subcontractor sought payment directly from the government on the basis that it had a third-party beneficiary relationship with the government pursuant to a contract modification by which the government agreed to issue joint checks to FloorPro, the subcontractor, and the prime contractor. Following D&H Distributing, the ASBCA concluded that the government was liable to FloorPro for breaching the payment provision in the modification. On appeal, the Federal Circuit disagreed, reasoning that the waiver of sovereign immunity under the Contract Disputes Act (CDA) is strictly construed and that, because FloorPro was not a “contractor” within the meaning of the CDA, it could not maintain a direct claim against the government. The Federal Circuit distinguished its earlier decision in D&H Distributing, which it acknowledged had similar facts, on the basis that the Tucker Act jurisdiction under which the subcontractor claims in D&H Distributing were raised is broader and more accommodating of direct subcontractor claims than the CDA, which was the jurisdictional basis for FloorPro’s claims.

30. See FAR 49.108-8, United States v. Georgia Marble Co., 106 F.2d 955 (5th Cir. 1939) (court found that government entered into implied contract to pay subcontractor for material government took from subcontractor).

31. Direct subcontractor claims have been permitted if the contractor is an agent of the government. See, e.g., Kern-Limerick v. Scurlock, 347 U.S. 110 (1954). Here, too, the likelihood of a contractor’s being considered an agent of the government is remote. In United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983), aff’d, 827 F.2d 1554 (Fed. Cir. 1987), the court held that a contractor that served as a construction manager was not, for that reason, an agent of the government. The court stated that the contractor was not a purchasing agent, there was no contractual designation of an agency relationship with the government, and the government was not bound to pay the subcontractor directly. See also United States v. New Mexico, 455 U.S. 720 (1982) (contractors operating government facilities had substantially independent role in making purchases, were not agents of the government, and, therefore, were not immune from taxation).


33. FAR 49.108-5.
the ASBCA relied on statutory authority, much as do the courts; he further noted that the pertinent ASBCA rule is virtually the same as Federal Rule of Civil Procedure 26(a). Discussion followed David and Peter’s presentation. Fern then turned to the proposed rule in DFARS Case 2010-D001, Patents, Data, and Copyrights. He sought volunteers to draft comments. Cochair Holly Svetz said that she would draft them, and cochair Herman Levy offered to edit them. Holly noted that in pursuing the proposed rule, she noticed computer software under the definition of limited rights; the government may not release it except for emergency repairs. The government will not, however, give away manufacturing processes, as the idea is to protect American industry. Holly observed that computer software never had a comfortable home. Nevertheless, she noted that in matters developed exclusively with government funds, the government gets unlimited rights.

Meeting information: The committee generally meets bimonthly (lunch served). Contacts: cochairs Fernand A. Lavallee, (202) 799-4401, e-mail fernand.lavallee@dlapiper.com; Herman D. Levy, (703) 698-5246, e-mail hdlleditor@aol.com; Mary E. Shallman, (562) 797-2233, e-mail mary.e.shallman@boeing.com; and Holly Emrick Svetz, (703) 394-2261, e-mail hsvetz@wcrs.com. For more information on this and other committees, visit the Section website at www.abanet.org/contract/home/html, and click on “Substantive Committees” on the left-hand navigation bar.
delay was unreasonable. In its November 30, 2005, decision denying the government’s motion to dismiss, the court found that SBA “had sabotaged, whether intentionally or not, the implementation of the procurement program” and that the “almost five years delay is unreasonable.” The court ordered SBA to submit within 45 days a schedule to implement the program.

SBA finally published a proposed rule on December 27, 2007. After waiting for seven years for SBA to implement the law, women’s groups and their supporters were not pleased with SBA’s proposed rule. They reacted swiftly in condemning the new rule as wholly inadequate and insulting to women business owners. Barbara Kasoff, the national president of Women Impacting Public Policy, called it a “lump of coal,” and stated that the proposed rule “demonstrates that women business owners are not important to this administration or the political process.”

Although a number of provisions in the proposed rule raised concerns, two provisions in particular drew the most critical scrutiny. First, the proposed rule limited the WOSB program to four industries, finding that women were underrepresented only in (i) national security and international affairs, (ii) coating, engraving, heat treating and allied activities, (iii) household and institutional furniture and kitchen cabinet manufacturing, and (iv) certain motor vehicle dealers. Second, the proposed rule required federal agencies to conduct additional studies to determine if the agency itself had engaged in discrimination against women-owned businesses in the past. Only if past discrimination were found to have occurred could the WOSB program be applied to the agency’s contracting activities on a going-forward basis.

Critics stated that this requirement would frustrate congressional intent by requiring a much more stringent standard than the intermediate scrutiny standard that applies to the WOSB program. Others doubted agencies would make findings of discrimination as to their own conduct, because such findings could open the door to discrimination lawsuits. Thus, it appeared as though the requirement for a finding of past discrimination by a federal agency effectively killed the WOSB program before it ever began.

The efforts of the women business owners who had lobbied for years for a women’s contracting program now turned toward preventing final adoption of SBA’s proposed rule. In addition to mobilizing women business owners to submit comments to SBA objecting to the proposed rule, women’s groups threatened to return to court to stop implementation of the proposed rule. They also sought and obtained support from Senator John Kerry, Congresswoman Nydia Velazquez, and other influential members of Congress. Senator Kerry issued a statement calling the proposed rule “a slap in the face to women business owners.” Congresswoman Velazquez, the chairwoman of the House Small Business Committee, called the proposed rule “downright insulting.” In July 2008, the Senate Appropriations Committee voted to block implementation of SBA’s proposed program by including a provision in the 2009 Financial Services and General Government Appropriations Act (S. 3260) that prohibited the expenditure of any funds to implement the WOSB program under the proposed rule. The proposed rule was finally killed in March 2009, when President Obama signed the FY 2009 spending law.

The Final Rule
On October 7, 2010, nearly 10 years after Congress passed the Women’s Equity in Contracting Act, SBA issued a new final rule to implement the WOSB program. The rule identifies 83 industries in which WOSBs are underrepresented (a disparity ratio between 0.5 and 0.8) or substantially underrepresented (a disparity ratio that is less than 0.5) in federal contracting. The proposed rule relies on the same RAND Corporation study commissioned by SBA in 2006, but employs a combination of both the “share of contracting dollars” and “share of number of contracts awarded” analyses to identify the underrepresented and substantially underrepresented industries, collectively referred to as “eligible industries.” In its initial proposed rule identifying only four eligible industries, SBA had applied only the “share of contracting dollars” analysis.

The rule implementing the WOSB program takes effect on February 4, 2011, and has generally been well received. Women’s groups are especially pleased that the rule identifies 83 eligible industries compared to the four enumerated in the previous proposed rule. The elimination of the requirement found in the earlier proposed rule that an agency must find that it engaged in prior discrimination against women-owned businesses in awarding contracts is also viewed as a critical change.

As a whole, the provisions of the rule represent a leap forward after years of stationary idling and backpedaling, but further steps towards full implementation of the spirit and language of the 2000 Act may yet be needed. Nevertheless, in conjunction with the requirements of the Act, the rule creates opportunities for women—who make up 30 percent of the nation’s business owners—to participate in a small share of federal contracting, in which they now receive less than 3.5 percent of awards. The rule enables the implementation of the 2000 Act, previously rendered inert, through the provisions summarized below.

Small Business Requirement. The WOSB program is restricted to small businesses. Accordingly, it is a threshold requirement for a firm to be eligible to participate in the program that it be a small business under SBA size standards specified at 13 C.F.R. Part 121.

US Women-Owned and Controlled Requirement. A firm participating in the program must be owned and controlled by women who are US citizens. The regulations specifically provide that the firm must be “not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.”
Ownership. For partnerships, at least 51 percent of each class of partnership interest must be “unconditionally owned” by one or more women, and the ownership must be reflected in the firm’s partnership agreement. “Unconditional ownership” means that the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another. A corporation must have at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding unconditionally owned by one or more women. A limited liability company must have at least 51 percent of each class of member interest unconditionally owned by one or more women.16

Control. The requirements for control of the WOSB provide some of the more unique provisions of the rule. They reflect the legitimate need to guard against firms attempting to qualify for WOSB status when the woman is merely a figurehead for the company. Some commentators, however, believe that SBA has gone too far in defining what women business owners who participate in the program can and cannot do when running their businesses. The rules addressing control are:

- The management and daily business operations of the concern must be controlled by one or more women. This means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more women.
- A woman must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern.
- The woman who holds the highest officer position of the concern must manage it on a full-time basis, must devote herself full-time to the business concern during normal working hours, and must not engage in outside employment that prevents her from devoting sufficient time and attention to daily business.
- The woman who is a manager need not have the technical expertise or possess the required license to en-

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We gratefully acknowledge the generosity of the following firms whose contributions will help defray the costs of all of the Section’s quarterly receptions this year:

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gage in the fundamental activities of the concern. She may still be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical experience. However, if a man possesses the required license and has an equity interest in the concern, he may be found to exercise control over it.

The regulations also require one or more women to serve as general partners in a partnership, one or more women to serve as management members in a limited liability company, and one or more women to control the board of directors of a corporation. If the firm is seeking to qualify as an economically disadvantaged WOSB, as discussed below, the firm must be owned and controlled by one or more women who are economically disadvantaged.17

Economically Disadvantaged Status. A WOSB that seeks status as an economically disadvantaged WOSB, referred to as an EDWOSB, has additional criteria to meet: its woman business owner(s) must satisfy particular requisites to be deemed economically disadvantaged. The rule establishes a presumption of economic disadvantage if the adjusted gross yearly income of the woman business owner averaged less than $200,000 for the two most recent tax years preceding WOSB certification. SBA views the straight line numerical figure as easier to comprehend and implement while avoiding any appearance of unfair treatment as statistics for one tax year are compared to an income level for another tax year. The presumption may be rebutted by, among other things, a showing that the two-year average income level of more than $200,000 was unusual and not likely to be repeated in the future. Several commentators have stated that the $200,000 maximum in the rule is too low, or that other methodologies can more accurately assess economic status.

In addition to a maximum adjusted gross income, the rule includes two additional requirements for successfully claiming economic disadvantaged status. First, the personal net worth of the woman business owner must be less than $750,000. Excluded from the determination of personal net worth are an equity interest in a primary personal residence, income received from an EDWOSB that is an S corporation, LLC, or partnership, and amounts in legitimate retirement accounts. Second, the fair market value of the woman business owner’s total assets must be less than $6 million. This includes her primary residence and the value of the business but excludes legitimate retirement accounts. In addition, assets transferred to an immediate family member within two years will be attributed to the woman business owner unless the transfer was made for educational, medical, or other form of essential support, or in recognition of a special occasion. In one of the more controversial aspects of the rule, the SBA may consider a spouse’s financial situation in assessing the woman’s access to capital and credit with respect to the economic disadvantage determination.18

Certification. Certification is required as of the time of initial offer. The rule provides two alternatives for certification. First, a WOSB can submit a third-party certification from a state government, local government or third-party certifying entity approved by SBA. The representations and self-certifications are effective for one year, and must be updated as necessary, but at least annually. SBA plans to post online the process it will follow to approve third-party certifiers, as well as a list of approved certifiers, at a later date.

Alternatively, a firm may self-certify its status as a WOSB or EDWOSB. In order to self-certify, the business owner must submit documents establishing her gender and US citizenship (e.g., passport, birth certificate) and certain documents related to her business (e.g., articles of incorporation, stock certificates). If the business also claims economically disadvantaged status, the business owner must complete and submit SBA Form 413, Personal Financial Statement. The rule provides that the contracting officer may accept the third-party certification if there has been no protest or other credible information that calls into question the offeror’s eligibility as a WOSB or EDWOSB and the entity has submitted all of the required documents.

SBA is planning to establish a repository to house documents supporting self-certification as well as third-party certificates. The rule provides that, until the repository is available, the business owner, if the apparent successful offeror, must provide a copy of the documents directly to the contracting officer prior to award of the contract.

Contract Amounts. Under the Women’s Equity in Contracting Act, the contracting officer may restrict competition for any contract to WOSBs if the anticipated contract award price (including options) does not exceed $5 million for manufacturing contracts and $3 million for all other contracts.19 The rule reflects the statutory provision.

Several commentators have noted that these amounts are too low to result in meaningful contract awards to WOSBs, but they recognize that increasing the amounts would require legislative action. On May 24, 2010, Senators Olympia Snowe and Kristen Gillibrand introduced legislation that would remove the contract award maximums. The bill, S. 3399, is known as the Fairness in Women-Owned Small Business Contracting Act of 2010.20

Eligible Industries. The rule provides that contracting officers are allowed to restrict competition to WOSBs and EDWOSBs for contract awards in 83 industries. As noted, this provision is based on the findings of the RAND Corporation, in a study commissioned by SBA, that identified 38 industries in which WOSBs are substantially underrepresented and an additional 45 industries in which WOSBs are underrepresented. The eligible industries are identified by their four-digit NAIC code. In the 38 industries identified as substantially underrepresented by WOSB contractors, the contracting officer may restrict competition to two or more WOSBs. There is no requirement that WOSB firms competing for a contract in a substantially underrepresented industry also be economically disadvantaged. In the 45 industries identified as underrepresented by WOSB contractors, however, the contracting officer may only re-
strict competition to two or more EDWOSBs.

The rule includes a list of the 83 eligible industries. SBA plans to post the list on its website and make it available at SBA local offices and on the General Services Administration’s website. The rule does not mandate the updating of the list of industries in which women-owned businesses are found to be underrepresented or substantially underrepresented, and SBA’s position is that it post updates as accurate and timely data becomes available. The Fairness in Women-Owned Small Business Contracting Act of 2010 addresses this point by requiring an update every five years.

Eligibility Examination. Under the rule, SBA has discretion to perform eligibility examinations to verify a concern’s eligibility as a WOSB or an EDWOSB. Eligibility examinations will be used to verify eligibility at any time, including when the concern certifies its status, when it submits an offer, or when it is awarded a contract. SBA also intends to use eligibility examinations as a way to combat fraud and abuse by, among other things, conducting random examinations of WOSBs and EDWOSBs.

Protests. As with any socio-economic set-aside, it is important that there be a mechanism for challenging a company’s eligibility for contract award under the WOSB program. The availability of a status protest serves as a deterrent to ineligible firms’ certifying their status and improves the integrity of the program.

The rule provides that an “interested party” may protest the WOSB or EDWOSB status of the presumptive successful offeror on a contract set aside for WOSBs or EDWOSBs. “Interested party” is defined as: (1) a concern that submits an offer for a specific WOSB or EDWOSB requirement; (2) the contracting activity’s contracting officer; or (3) SBA. Any other party that wishes to challenge another firm’s eligibility must submit the information to the contracting officer in an effort to persuade him or her to initiate a protest. Alternatively, the information may be submitted to SBA with a request that it conduct an examination of the firm’s status under SBA regulations, codified at 15 C.F.R. § 127.603(d).

A protest based on the claim that the firm is not a small business constitutes a size status protest and must be filed and prosecuted under Part 121 of the SBA regulations. Other challenges to eligibility are considered status protests and are filed and prosecuted under Part 127. In either case, the protests must be in writing and filed no later than five business days after notice of the intended award.

Any WOSB or EDWOSB status protest received by the contracting officer must be forwarded to SBA along with a referral letter setting forth a description of the procurement and copies of relevant documents. Upon receipt of the protest, SBA will decide whether to process the protest or dismiss it. A protest may be dismissed if is found to be premature, untimely, nonspecific, or based on nonprotestable allegations. SBA may, however, consider the allegations in a dismissed protest in determining whether to conduct an examination of the protested concern.

The protested concern will be notified of any protest that is not dismissed by SBA within five business days and will be required to submit relevant documentation to respond to the basis of the protest and verify its eligibility for award. In general, the protest will be decided within 15 business days after it is received. The contracting officer may, however, grant SBA an extension of time. If the SBA receives an extension, the contracting officer may nevertheless award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will harm the public interest.

Unlike protests to the Government Accountability Office (GAO), where remedial action in the event of a successful protest is only recommended by GAO to the contracting agency, the rule sets forth definitive action that must be taken by the agency in the event a status protest is sustained. If SBA determines that the firm is not a WOSB or an EDWOSB, the contracting officer may not award the contract to that firm. If the contract was awarded prior to SBA’s determination that the firm is not eligible, then the contracting officer must terminate the award, unless the agency has made a written determination of an immediate need to award the contract.

In addition, if SBA sustains the protest, it will require the concern to remove its EDWOSB or WOSB designation on both the Central Contractor Registration (CCR) and the Online Representations and Certifications Application (ORCA). Concerns that falsely self-certify or otherwise misrepresent their status as an EDWOSB or a WOSB are subject to suspension and debarment as well as penalties under administrative regulations and civil and criminal statutes, including the False Claims Act and the Small Business Act. The SBA’s determination on a protest may be appealed to SBA’s Office of Hearing and Appeals in accordance with Part 134.

As these provisions demonstrate, under renewed impetus, SBA has in large measure remediated the narrow application of its previously proposed rule. Although not perfect, the rule will finally allow women-owned small businesses to begin to receive the benefits encapsulated in the Women’s Equity in Contracting Act that was signed into law in 2000.

Conclusion

Women business owners have waited 10 years for the SBA to implement the Women’s Equity Contracting Act to address the lack of opportunities for women-owned small businesses to obtain federal government contracts. The SBA’s WOSB rule issued on October 7, 2010, finally establishes a program that is a legitimate attempt to implement the act. Moreover, the WOSB program will help open the door to the $200+ billion federal marketplace for women-owned small businesses. While the current administration remains committed to moving the WOSB program forward, legislative action is required for expansion of the WOSB program by abolishing the contract award ceiling of $5 million for manufacturing contracts and $3 million for all other contracts, eliminating the requirement
of economic disadvantage for WOSB contract awards in underrepresented industries, and providing for the award of sole-source contracts. In addition, women business owners must recognize that there remains the formidable hurdle of persuading contracting officers—most, if not all, of whom have competing concerns—to exercise their discretion to set aside contracts for restricted competition and award to woman-owned small businesses.

Endnotes
18. 13 C.F.R. § 127.203.
23. 15 C.F.R. § 127.600.
24. Id.
25. 15 C.F.R. § 127.601.
26. 15 C.F.R. § 127.603(c).

CHAIR’S COLUMN
(continued from page 2)

annual report to the PEPC. Carol Park-Conroy and Mark Colley worked with Marilyn Neforas to prepare an outstanding submission to the PEPC. I must say, the emotion exhibited by my fellow officers when we focused on the ranking the section received in the prior year was rewarding to watch. After answering some follow-up questions from the PEPC we anxiously awaited a ranking. I am thrilled to report our ranking jumped to A-1, the highest ranking possible. My deepest thanks to Carol Park-Conroy, Mark Colley, and Marilyn Neforas for the great work they did on this report.

The second stage of our effort internal to the ABA was to obtain a meeting with Jack Rives, the new executive director of the ABA. In our meeting with him, we described our section, and extended to him an invitation to attend our Federal Procurement Institute in Annapolis, Maryland.

Boston Fall Program
I am pleased to report that our Fall Program—“Intellectual Property in Government Agreements: What You Didn’t Learn in Kindergarten”—was a huge success. We had almost 70 people at the practicum on Thursday night. We had the largest “in person” attendance at a fall program in 10 years. Furthermore, for the second time, the section broadcast most of the program over the Internet. We had more than 50 people attend “virtually” from around the country. If you were one of them, let me know how the presentations came through.

I want to thank Mary Shallman of Boeing and Holly Svetz of Womble Carlyle Sandridge & Rice for putting the program together. They did a terrific job.

Fall Council Meeting
I want to highlight several things that occurred at the Council meeting on Saturday morning. We had our first “Skype” presentation. Dan Chudd of the Young Lawyers Committee reported on a study his committee is doing for how the Section can use technology better to reach our members. Dan was in Washington, D.C., but called in using Skype technology and we projected the video feed onto a large screen. It was a creative way to participate in the Council meeting. My thanks to Dan and Kate Swisher, who worked out the logistics.

In a similar vein, Aaron Silberman reported on efforts to take the Section paperless. Aaron was able to link to the Internet and bring up examples of the Construction Forum website for the Council to review. As a result of the committee’s work, the Council voted to provide program materials for the next three programs in electronic format along with a hard copy. We will then review how it worked to see if we can go paperless going forward.

Kate Swisher did an excellent presentation on the Small Business Jobs Act of 2010 and the final rules implementing the
Women-Owned Small Business Federal Contract Program. Pete Dungan (Young Lawyers Division liaison to the Section) and Robert Wu (2010 diversity scholarship recipient) made a presentation on the Department of Defense Guidance Memorandum entitled “Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity on Defense Spending.” It was great to see two new members of the Section make such a good presentation.

State and Local Procurement
As I have noted in my prior columns, state and local procurement is an area of emphasis for me in my year as the chair. Missy Copeland, Gerald Wimberly, and Keith McCook are really stirring the pot this year. Missy is focused on completing a 50-state summary of procurement laws. With luck, it will be published this year. Keith McCook is working with the National Association of State Purchasing Officials on a plan to help sponsor the Section’s State and Local Procurement Symposium. I hope that we will have that deal in place before my next column.

Finally, Gerard Wimberly is putting together an electronic newsletter focused on state and local procurement issues. If you would like to write an article, send him an e-mail at gwmumberly@mcglinchey.com. We are also in the final planning stages for the State and Local Symposium to be held on May 11-13, 2011, in Sacramento, California.

The Year of the Government Lawyer
In my first column, I proclaimed this as the “Year of the Government Lawyer.” Mike Rose has formed a team of current and former government lawyers to help explore how to make the Section more attractive to government lawyers. Their work is paying off, because at the fall program we had a significant number of government lawyers in the audience who were attending for the first time. I am pleased to report that four attorneys from my prior employer, the Office of General Counsel, Department of the Navy, were among the new attendees.

Best Practices for Service Contracts
I mentioned in an earlier column that Michael Mutek has agreed to chair a task force on Best Practices for Service Contracts. Michael has formed a committee but is still looking for members, particularly government members. If you are interested in participating, please contact him at michael_w_mutek@raytheon.com.

Technology
Besides the technology efforts mentioned in the paragraphs above on the Fall Council Meeting, you should know that the ABA is changing its website as of February 2011. Our Section’s web page will change as a part of the process. As we get more information about the change, I will pass it on to you. For those of you involved in committee work, I request that you review your committee’s page to see if material can be deleted before it is moved to the new website.

Federal Procurement Institute
This is just a reminder that the Federal Procurement Institute will be held March 3-5, 2011, in Annapolis, Maryland. Michael Hordell and Jeri Somers have put together a two-day program entitled “Procurement Potpourri—Is the System Working?” The full brochure is posted on the Section’s website along with other meeting details. I hope to see you there.

Committee Reports and Committee Support
Each year, the incoming chair has the unenviable task of reviewing committee performance in the prior year, along with appointing chairs to each committee. One thing that is reviewed is whether a given committee is active. If a committee is not active, one has to wonder whether the committee should be discontinued. We ask each committee to file quarterly reports to the Council to keep us apprised of the committee efforts. The dates for filing the reports for the remainder of the year are: April 8 for the May 14 Spring Council Meeting, and June 24 for the August 6 Annual Council Meeting.

If a committee has gone awhile without submitting a report, that committee’s chair or cochairs may receive a call from one of the Section officers to see if the committee should be continued. PL.

Coming Attractions

MARCH 3–5, 2011
17th Annual Federal Procurement Institute and Open Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD

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

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

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

MARCH 22–24, 2012
18th Annual Federal Procurement Institute and Open Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD

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ON THE SHELF!

Best Practices in the Acquisition of a Government Contractor

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