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UP FRONT

RULES & REGULATIONS

CASES & DECISIONS

★ **REMINDER** ★

THE GOVERNMENT CONTRACTOR will not be published the week of Labor Day. The next issue (No. 34) will be dated September 10, 1997.

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POINT/COUNTERPOINT • Debate On Extension Of "Other Transactions" Authority

"Other transactions" are contractual mechanisms that are not subject to either the statutes and regulations specifically applicable to the procurement system, or to Governmentwide regulations governing standard assistance relationships. While subject to fiscal laws and statutes of general applicability, other transactions allow for a basically deregulated approach to Government-sponsored research and development.

Originally authorized only for the Defense Advanced Research Projects Agency for science and technology projects, other transactions authority, which is granted by 10 USC § 2371, was intended to permit the Government to obtain dual use technology on a cost-shared basis. Accordingly, two restrictions on the authority were imposed: (1) the Government should pay no more than 50% of the total amount; and (2) the authority should be used only where the use of a standard contract, grant, or cooperative agreement is not feasible or appropriate.

Other transactions authority has been extended several times. Section 845 of the National Defense Authorization Act for Fiscal Year 1994 authorized DARPA to use other transactions to carry out prototype projects directly relevant to weapons or weapon systems, and it eliminated the two restrictions noted above for those types of projects. This authority in turn has been extended beyond DARPA to include the military departments and other Department of Defense elements designated by the Secretary of Defense.

The authority to conduct prototype projects as other transactions under § 845 expires in 1999, but there have been legislative efforts to extend the authority to other types of work and to other agencies and departments. Is now the right time to make the § 845 authority permanent and extend it into the production regime? Here are two opposing views, presented by **Richard Dunn**, General Counsel of DARPA, and **C. Stanley Dees**, a partner in the Washington, DC law office of McKenna & Cuneo, LLP, and an Advisory Board member of THE GOVERNMENT CONTRACTOR.

★ **Mr. Dunn**—Initially, it is fair to ask what issues in the Government research and development system the use of other transactions is designed to address. The list of issues below is neither comprehensive nor definitive, merely illustrative. Many of them are interrelated and most stem from the highly regulated nature of the current procurement system. They set the stage for a discussion of how other transactions may address these issues while the traditional system does not or indeed is part of the problem:

(1) Major weapons systems take too long to develop and cost too much.

(2) Unlike the Cold War era, today civilian technologies are often more advanced than those available to the military.

(3) The defense industry is shrinking, consolidating, and becoming increasingly isolated from the broader national industrial base.

(4) Many large commercial firms which annually invest billions of dollars in R&D refuse to do business with the Government through the traditional procurement process.

(5) Small, high technology, or start-up companies, representing some of the most innovative ideas, are often unable or unwilling to do business with the Government through the traditional process.

(6) Emerging national security threats will require the Government to do business with companies that are not part of its traditional R&D industry base (e.g., biological warfare defense-pharmaceutical and biotechnology companies).

(7) Collaborative relationships (including relationships among competitors), which have proven to be a powerful way to perform R&D, are difficult if not impossible to create using only the prime/subcontractor relationship of the traditional procurement system.

(8) The Government procurement system often dictates "one size fits all" solutions while R&D requires flexibility and innovation.

(9) Government-imposed business, accounting, and auditing practices (which the Government ultimately pays for) constitute an initial barrier to entry to firms considering doing Government-funded R&D work for the first time.

(10) Government required business practices, prime/subcontractor relationships, and flowdown clauses inhibit defense contractors from estab-

agreement of the parties. This is the opposite of a true "contract" system and is indeed a highly regulated purchasing system. R&D to be truly effective requires something more. Under the other transactions or "freedom of contract" mode of doing business, key areas such as intellectual property, foreign access to technology, dispute resolution, project management processes, property administration, and disposition are open to negotiation. Optimum solutions rather than the one answer dictated by laws and regulations can often be found.

While competition is a worthy goal, competition in Government contracts is more of a dictated process than a worthy principle. The required process often undermines the principle it is intended to effectuate. Thus, while the Government seeks "full and open competition," many firms are unable or unwilling to do business with the Government and thus do not compete. Government required practices, all ostensibly established for a good reason, are costly. They discourage broader participation in the Government's R&D program and ultimately mean that the Government pays more for what it gets with no cost-benefit analysis as to the utility of its imposed practices. Other transactions permit the flexibility to experiment with innovative forms of competition as well as to look for less costly alternatives to traditional Government oversight and audit methods.

Traditional defense contractors entering into § 845 prototype projects may have no incentive to dismantle their current Government-approved business systems, but they can benefit at the subtier level by establishing new strategic relationships with small, innovative, or strictly commercial firms. This in turn may encourage defense contractors to adopt improved business practices.

Rationale for Extending § 845—At DARPA we have barely scratched the surface of § 845's potential. Some of the techniques DARPA has used include an open and streamlined solicitation process with industry briefings and industry comments on the solicitations. Maintaining a competitive environment through rolling downselects at various phases of the program is another technique that is used. The agreement itself is definitized at each downselect phase to address key issues of that phase. There is no felt need to agree on all terms and conditions in a five-year program at the very beginning, as long as a competitive environment is maintained.

Techniques that have been utilized in the traditional procurement process (price as an independent variable, integrated product/process development, and others) can reach their full potential under the flexibility of § 845. In 1986, the Packard Commission strongly emphasized increased use of prototyping so that DOD could "fly and know how much it will cost before we buy." This is the rationale for § 845 prototyping authority. While the authority may have usefulness to build X-planes and technology demonstrators, its real power will be demonstrated when a prototype project flows seamlessly into a production program preserving the innovations, schedule, and cost savings introduced during the prototype project. DARPA prototype projects are typically joint programs with one of the services, but DARPA will not be involved in production programs. Thus, service use of § 845 is essential.

Without other transactions authority, or broad and vital waiver authority for follow-on production programs, the problems involved in transitioning a § 845 project with innovative business practices and commercial terms and conditions into production under the Federal Acquisition Regulation will undoubtedly be difficult. With such authority, DOD will have two complementary systems for developing new weapons. Under such circumstances a true test of the highly regulated purchasing approach versus the freedom of contract approach can be made. The U.S. and DOD deserve the opportunity for such a test. Encouraging the services to use § 845, extending the authority beyond 1999, and providing transition authority for follow-on production are all needed to take full advantage of the potential benefits of § 845.

★ **Mr. Dees**—Much of Mr. Dunn's articulate praise for other transactions highlights the undeniable benefits of other transactions for science and technology (§ 2371 other transactions). Principal among these is DOD's need to gain access to high technology not available through standard procurement contracts. Section 845 authority provides the added benefits of promot-

cumstances is it appropriate to provide for cost sharing in the development of weapons and weapon systems; and should contractors be at risk for significant amounts of contractor funds in the development phase of a weapon or weapon systems under fixed-price arrangements or guaranteed prices for production units. Without clear restrictions written into binding regulations, there is the clear potential that DOD can repeat the ruinous scenarios encountered with the total package procurement initiative of the 1960s and the fixed-price R&D (Lehman-Paisley) initiative of the 1980s.

Those problems led to certain safeguards that now apply in the traditional procurement of development of major weapon systems. The principal safeguard within DOD is Directive 5000.1, which was first issued in 1971 by then-Deputy Secretary of Defense David Packard, in response to the failed total package procurement practices of the 1960s. With respect to the early phases of a major weapon system acquisition program, these directives have expressly rejected the use of fixed-price undertakings for development because of the inherent costs and technical risks in such efforts. Inequitable fixed-price contracts impose harsh burdens of cost sharing on industry.

As noted, § 845 as amended does not require cost sharing or place the risk of cost growth on the contractor or require the contractor to agree to fixed-price options for production quantities. However, cost sharing is being utilized, and the adoption of a cost-share approach for prototype other transactions could present precisely the same problem and precisely the same risk to industry as inappropriate fixed-price R&D contracts. If unexpected obstacles are encountered in the development of the prototype, and the non-Government partners are required to continue performance, they may flounder and ultimately fail. At that point, as history has shown, the Government's interests may also suffer, because it may be deprived of its investment and its required weapon system. Inevitably, claims and litigation will follow.

The solutions to these potential problems are relatively simple. *First*, there should be a presumption against cost sharing in the development of a prototype of a weapon or weapon system. Cost sharing, if any, should be limited to an amount comparable to the relative amount of commercial benefit which the contractor may receive. *Second*, the present practice of permitting either party to terminate the transaction should become an absolute requirement. This right should apply also to any purported guarantee of a fixed price for follow-on or production quantities before the prototype phase is completed. *Third*, DOD should be required to promulgate regulations governing the use and content of other transactions, with appropriate distinctions between the basic authority under § 2371 and the prototype authority under § 845.

Application of Statutes: On December 14, 1996, the Under Secretary of Defense issued a guidance memorandum listing approximately 19 statutes that potentially did not apply to other transactions (see 39 GC ¶ 2). This memorandum was apparently based on the relatively simple concept that since other transactions were not "contracts," statutes which placed requirements on contracts or contractors were not applicable. The list of statutes included the Competition in Contracting Act, the Contract Disputes Act, Public Law 85-804, authorization for indemnification of R&D contractors, the Procurement Integrity Act, and the Anti-Kickback Act. It should be clear that such an approach will not withstand close analysis. While other transactions may not be standard procurement contracts, any law school student will be able to prove that an other transaction is in fact a contract. Accordingly, the analysis of what statutory requirements apply to other transactions must be much more sophisticated. Better yet, Congress should give some indication of the requirements which it intends to avoid by use of other transactions. There may be a significant difference between the requirement for an examination of records clause and the availability of Public Law 85-804.

Extending Other Transactions Authority Beyond DARPA—When § 845 was amended by § 804 of the National Defense Authorization Act of 1997, the authority to use other transactions to acquire prototypes related to weapons or weapon systems was extended to the military departments and other components of DOD to be designated. Is this a good idea? The answer

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GSAR Final Rule On Commercial Items Retains Postaward Audit Rights

Despite vigorous opposition from vendors, the General Services Administration has retained the Government's postaward audit rights in its final rule prescribing commercial item acquisitions under the Multiple Award Schedule Program (62 Fed. Reg. 44517, Aug. 21, 1997). The final rule maintains the Government's postaward audit authority to ensure compliance with specific contract provisions, such as those dealing with price reductions, the industrial funding fee, and overbillings, and it retains limited postaward audit authority of pre-award information provided during price negotiations. In addition to this audit authority, the rule retains other requirements that have been identified by the private sector as imposing significant risks on schedule vendors.

GSA initiated this rule to simplify and streamline the process for awarding and administering MAS contracts and to bring GSA's policies and procedures for the MAS Program in line with the Federal Acquisition Streamlining Act of 1994 and the Clinger-Cohen Act of 1996. The long-awaited rule finalizes, with a few changes, the interim amendments to the GSA Acquisition Regulation issued in February 1996 (see 38 GC ¶ 125).

GSA believes that by making the changes embodied in the final rule it has removed many of the barriers to participation by both large and small business concerns, including small disadvantaged and women-owned small business concerns. "The rule is a very positive development, removing legitimate sources of criticism about the way GSA has run the MAS Program," Office of Federal Procurement Policy Administrator Steven Kelman stated. Despite the Government's intent, however, reaction to the rule has been overwhelmingly negative.

"The final rule is disappointing," said Ron Hutchinson, who represents schedule vendors and who is a partner in the Washington, DC law office of Doyle & Bachman and Chair of the American Bar Association Public Contract Law Section's Commercial Products and Services Committee. "While GSA has made great strides in reforming the MAS Program to make it easier for agencies to order from the schedule contracts, GSA has failed to make any real strides in reducing the significant risks that schedule vendors face in connection with the underlying schedule contracts," he explained.

In addition to retaining a postaward audit provision to ensure compliance with certain contract provisions, and limiting postaward audits of proposal information, the final rule (1) retains the Most Favored Customer pricing requirements, (2) maintains the Government's ability to make price adjustments, and (3) reduces the information/data required of offerors seeking to obtain MAS contracts.

Postaward Audit Rights—Under the final rule, every schedule contract will contain a postaward audit clause granting GSA the right to audit for overbillings, billing errors, and compliance with the clauses on price reductions and the industrial funding fee. This postaward audit right may be exercised at any time by GSA for up to three years after the date of final payment under the schedule contract.

The private sector has harshly criticized GSA's position that it has the ability to conduct postaward audits of preproposal information, claiming that access to pre-award data after contract award conflicts with commercial practices and language in the Clinger-Cohen Act (see 38 GC ¶ 432). In response to this concern, the final rule deletes the contract clause that automatically provides postaward audit rights for pre-award pricing information in every schedule contract. Instead, GSA expects to shift its emphasis to the use of pre-award audits of information submitted in support of price negotiations as the mechanism for verifying information submitted by offerors.

Notwithstanding this change, GSA believes that there may be a limited number of circumstances which warrant a contractual right to conduct postaward audits of information provided during negotiations. Thus, the final rule provides that, on the basis of a likelihood of significant harm and with the approval of the Senior Procurement Executive, the Contracting Officer may modify the postaward audit clause to per-

While the rule eliminates the requirement that offerors certify sales data as current, accurate, and complete, it puts offerors on notice of the Government's expectations for data submissions. Under the final rule, any and all information submitted by the vendor is deemed to be "accurate, current, and complete as of 14 days prior to the date it is submitted."

Effective Dates—The final rule contains a number of statements on effective dates that are subject to varying interpretation. They are that: (1) the rule is optional for solicitations issued before December 19, 1997, and mandatory for solicitations issued on or after that date; (2) the rule is optional for all new solicitations and open season solicitations issued under the MAS Program after August 21, and mandatory for solicitations issued on or after December 19; (3) to the maximum extent practical, solicitations for commercial items and open season solicitations that have been issued but where no contract has been awarded shall be amended to conform to the rule, and (3) existing MAS contracts that will expire more than three years after the August 21 effective date shall be modified to conform to the rule.

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DOD Faces "Year 2000" Challenges, GAO Warns

Unless it acts quickly, the Department of Defense could malfunction or produce incorrect data processing information beginning with the turn of the century, the General Accounting Office warned in several recently issued reports. The "Year 2000" problem, resulting from the inability of computer programs to interpret the correct century in dates using only two digits to indicate the year, threatens to undermine DOD's mission. For example, GAO noted, Defense Finance and Accounting Service systems may be unable to (1) pay millions of active and retired military and civilian personnel accurately and on time, (2) pay millions of contractors and vendors, or (3) perform accounting for DOD's worldwide operations.

In its August 11 report, titled *Defense Computers: DFAS Faces Challenges in Solving the Year 2000 Problem* (AIMD-97-117), GAO found that DFAS has developed a Year 2000 strategy based on a generally accepted five-phase Government methodology (see 39 GC ¶ 252). GAO noted that DFAS has assigned accountability for ensuring that Year 2000 efforts are completed, established a Year 2000 systems inventory, implemented a quarterly tracking process to report the status of individual systems, estimated the cost of renovating systems, begun assessing its systems to determine the extent of the problems, and started to renovate and test some applications.

Despite these efforts, several critical issues remain, according to GAO. *First*, DFAS has not identified all critical tasks for achieving its objectives, or established milestones for completing all tasks. *Second*, DFAS has not performed formal risk assessments of all systems to be renovated, or ensured that contingency plans are in place in the event that renovations are not completed in time or fail to operate properly. *Third*, DFAS has not identified all system interfaces, including those of external users who have established system connections with DFAS, and has completed written interface agreements with only 230 of 904 interface partners. *Fourth*, DFAS has not adequately ensured that testing resources will be available when needed to determine whether all operational systems are compliant before 2000.

GAO recommended that DFAS take every possible measure to mitigate these risks and ensure that finance and accounting operations are not disrupted. GAO noted that the risk of failure is increased because of DFAS' reliance on other DOD components, such as central design activities and military services.

GAO's August 13 report, *Defense Computers: Improvements to DOD Systems Inventory Needed for Year 2000 Effort* (AIMD-97-112), echoes the concerns of its report on DFAS. A critical step in solving the Year 2000 problem, GAO noted, is to conduct an enterprise-wide inventory of information systems for each business area. This inventory is particularly important for DOD, GAO pointed out, given the tens of thousands of systems and many interfaces among systems owned by the services and DOD agencies.

GAO found that at present, the Defense Integration Support Tools (DIST) database, which

on the basis of the number of hours to be provided rather than on the task to be performed.

Year 2000 Compliance—FAC 97-01 ensures that information technology products acquired and used by agencies after December 31, 1999 will be able to process date related data into the next century. The final rule on this directs that solicitations and contracts must require Year 2000-compliant technology, or require that non-compliant information technology be upgraded to be compliant in a timely manner. One of the changes made to the rule as issued in its interim version (see 39 GC ¶ 7) is that the final rule defines Year 2000-compliance as including not only computer date fields that must distinguish between 20th and 21st century dates, but also time fields.

Small/Disadvantaged Businesses—By an interim rule, FAC 97-01 makes a number of revisions to the Small Business Administration's procurement assistance programs. The rule (1) increases the threshold over which COs may appeal the award of a Certificate of Competency from $25,000 to $100,000, (2) updates the names of SBA offices involved in processing certificates, and (3) implements the requirement that compliance with the limitations on subcontracting be considered an element of responsibility. Comments (citing FAR Case 96-002) are due October 21.

In another section of FAC 97-01, a final rule updates the definition of "small disadvantaged business concern" to reflect new categories of individuals considered to be socially and economically disadvantaged. Another final rule clarifies eligibility and procedural requirements for procurements under the Small Business Act 8(a) program (this final rule made several changes to an interim rule issued last December, see 39 GC ¶ 5).

Cost Provisions—FAC 97-01 also contains a number of provisions amending FAR Part 31. Adopting without change an interim rule issued last December (see 39 GC ¶ 6), it deletes the definition of automatic data processing equipment (ADPE), all references to ADPE, and the cost principle concerning ADPE leasing costs (FAR 31.205-2). According to the regulators, a separate ADPE cost principle is no longer necessary because computer hardware costs are no longer a significant expense in the current technological environment, and the "Rental Costs" cost principle (FAR 31.205-36) adequately protects the Government's interest.

Additionally, FAC 97-01 finalizes without change an interim rule published last December (39 GC ¶ 6) that removes the prohibition on the calculation of foreign differential pay based directly on an employee's specific increase in income taxes resulting from assignment overseas.

Another final rule amends FAR 31.205-22, "Lobbying and political activity costs," by making allowable the costs of any lobbying activities to influence local legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract. This final rule again adopts a December 1996 interim rule without change (see 39 GC ¶ 5).

Environmentally Sound Products—By a final rule, amendments have been made to the FAR to reflect the Government's preference for the acquisition of environmentally-sound and energy-efficient products and services, and to establish an affirmative procurement program that favors items containing the maximum practicable content of recovered materials. The rule adds definitions of "new" and "reconditioned," deletes the definitions of "material" and "other than new" (in contrast to a May 1995-issued interim rule that amended those definitions, see 37 GC ¶ 312), and clarifies the policy on acceptability of used, reconditioned, or remanufactured supplies, and former Government surplus property proposed for use under a contract. In addition, a new contract clause is added that requires contractors operating Government-owned or leased facilities to establish cost-effective waste reduction programs.

Construction—Adopting without change an interim rule published last December (see 39 GC ¶ 5), the FAC eliminates the requirement that covered contractors under the Walsh-Healey Public Contracts Act must be either the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract. This repeal of the "manufacturer" or "regular dealer" requirement implements § 7201 of the Federal Acquisition Streamlining Act of 1994, as it amended the Walsh-Healey Act, and con-

best value and results in the lowest overall cost alternative. The final rule will allow COs to place an order over the threshold, even if further price reductions are not offered, so long as the order is deemed appropriate.

COs also are given guidance in seeking price reductions under the final rule. There may be instances, the rule states, when ordering offices will find it advantageous to request a price reduction. For example, when the CO finds a schedule supply or service elsewhere at a lower price, or when a blanket purchase agreement is being established to fill recurring requirements, a price reduction may be advantageous. The final rule, however, clarifies that contractors are not required to pass on to all schedule users a price reduction extended to an individual agency for a specific order.

In addition, the final rule clarifies that competition concerns need not be a factor in placing orders against Multiple Award Schedules. Amended FAR 8.404 states that "[o]rders placed, pursuant to a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued pursuant to full and open competition." Thus, when placing orders under the schedule program, ordering offices need not seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides.

New guidance to COs in placing orders also states that orders exceeding the micropurchase threshold should be placed with the contractor that provides the "best value." In selecting the item representing the best value, COs can consider special features of the supply or service that are required for effective program performance and that are not provided by comparable supply or service, trade-in and warranty considerations, maintenance availability, probable life of the item compared to the life of a comparable item, past performance, and environmental and energy efficiency considerations.

The final rule, which is effective October 21, also reassigns schedule contracts for Automatic Data Processing/Telecommunications to GSA's Federal Supply Service. It additionally supplies new coverage on the GSA Advantage! program.

★ **Note**—(1) The four-part standard for placing orders above the maximum order threshold may raise concerns addressed by the General Accounting Office in *Komatsu Dresser Co.*, Comp. Gen. Dec. B-246121, 92-1 CPD ¶ 202, 34 GC ¶ 207. The "requote arrangements" clause struck down in *Komatsu* provided that only suppliers included on the Federal Supply Schedule could compete for requirements exceeding the largest Maximum Order Limitation available from any particular vendor. The Comptroller General held that by only permitting Federal Supply Schedule vendors to compete in acquisitions exceeding the MOL, the "requote arrangements" clause barred competition for those larger acquisitions by firms that do not desire to compete for a schedule contract, which is inconsistent with the CICA requirement for full and open competition. Moreover, the Comptroller General found that the requote procedure also violated CICA because awards under that procedure would not ensure that the Government obtains the larger (over MOL) quantity at the lowest cost (rather than merely the lowest cost available from schedule vendors).

The final rule requires only consideration of other schedule contractors before an order could be placed that exceeds the maximum order threshold. Accordingly, the concerns noted by the Comptroller General in *Komatsu*—that nonschedule contractors would be prevented from competing—may be raised by the final rule.

(2) One day before the issuance of this FAR rule, GSA issued final amendments to its Acquisition Regulation in an attempt to streamline the process for awarding and administering Multiple Award Schedule contracts. For an analysis of that final GSAR rule, see 39 GC ¶ 422 in this issue.

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DFARS Interim Rule Encourages Use Of SPI In New Procurements

Previously accepted block changes in management and manufacturing processes may be used in place of military and federal specifications in new contracts, according to a new interim rule

lation Supplement to reflect the October 1 expiration of certain statutory restrictions on the acquisition of nondomestic machine tools and powered and nonpowered valves (62 Fed. Reg. 44224, Aug. 20, 1997). The final rule being corrected was effective November 15, 1996 (see 38 ¶ 554).

(e) Past Performance—DFARS Proposed Rule Withdrawal—The Department of Defense has withdrawn a proposed Defense Federal Acquisition Regulation Supplement amendment that would have required the use of past performance as an evaluation factor for acquisitions exceeding $100,000 by July 1, 1997 (62 Fed. Reg. 44247, Aug. 20, 1997). Instead of following this accelerated schedule that was proposed two years ago (see 37 GC ¶ 602), DOD has organized a Past Performance Integrated Process Action Team (IPT) to resolve numerous policy issues relating to the collection and appropriate use of past performance information. With the withdrawal of the proposed rule, DFARS Case 95-D715 has been closed. A new DFARS case will be opened after the IPT develops its recommendations.

(f) Reimbursement for Indirect Costs—DFARS Proposed Rule—The Director of Defense Procurement is proposing to amend Defense Federal Acquisition Regulation Supplement 231.205-71 to provide additional guidance on defense capability preservation agreements (62 Fed. Reg. 44248, Aug. 20, 1997). Section 808 of the National Defense Authorization Act for Fiscal Year 1996 permits the Department of Defense to enter into a "defense capability preservation agreement" with a contractor if such an agreement would help achieve the policies set forth in 10 USC § 2501(b), namely, defense reinvestment, diversification, and conversion (see 37 GC ¶ 337). These agreements permit contractors to claim certain indirect costs, attributable to their private sector work, as allowable costs under defense contracts. DFARS 231.205-71 was added by interim rule last year (see 38 GC ¶ 237). This proposed rule revises DFARS 231.205-71 to add additional guidance for evaluating requests for defense capability preservation agreements and cost reimbursement rules to apply if DOD enters into such an agreement. Comments (citing DFARS Case 96-D303) are due October 20.

(g) Contractor Insurance/Pension Reviews—DFARS Proposed Rule—The Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation Supplement to revise guidance pertaining to the conduct of contractor insurance/pension reviews (62 Fed. Reg. 44249, Aug. 20, 1997). This past March, a Department of Defense Inspector General report found that billions of dollars of Government-funded pension assets are not adequately reviewed (see 39 GC Issue 18, Notables). In response to this finding, the proposed rule would amend DFARS Subpart 242.73 to (1) more clearly define the requirements for conducting contractor insurance/pension reviews, (2) eliminate the requirement for conducting a review every two years, and (3) require the performance of special reviews under certain circumstances. Comments (citing DFARS Case 97-D012) are due October 20.

(h) Environmental Product Identification—Information Collection—GSA Notice—The General Services Administration has submitted to the Office of Management and Budget a request to review and approve a reinstatement of a previously approved information collection requirement concerning the identification of products with environmental attributes (62 Fed. Reg. 44279, Aug. 20, 1997). The information collection is used to assist agencies in ordering products that have environmental benefits. The reporting burden for this collection is estimated to average 12 minutes. Comments on the burden estimate or this information collection are due October 20.

(i) Revised Nonforeign Overseas Per Diem Rates—DOD Notice—The Department of Defense has issued Civilian Personnel Per Diem Bulletin Number 197, listing revised per diem rates prescribed for Government employees for official travel in nonforeign areas outside the continental U.S., including Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, and Possessions of the U.S. (62 Fed. Reg. 44655, Aug. 22, 1997). The revised rates are effective September 1.

What about nonconstruction contract situations? In *National Micrographics Systems, Inc. v. U.S.*, 16 FPD ¶ 72 (Fed. Cl. 1997), a subcontractor who supplied a computer system to the National Security Agency tried to argue that, by including certain language in its ticket delivering the computer to the NSA, (a) it acquired a valid and enforceable security interest and lien under state law, and (b) NSA's retention and refusal to pay for the system constituted a compensable "taking" of the subcontractor's security interest and lien pursuant to the Fifth Amendment of the U.S. Constitution.

In rejecting that claim, the Court of Federal Claims found that the subcontractor's attempt to reserve a security interest in the computer system was "directly at odds" with the cases refusing to enforce state liens against Government-owned property. The express terms of the prime contract provided that title to the computer would vest in the Government upon its delivery by the subcontractor. See Federal Acquisition Regulation 52.245-5(c)(2). The Court found *Armstrong v. U.S.*, 364 U.S. 40 (1960), 2 GC ¶ 349, to be distinguishable because the subcontractor in that case (unlike the one in *National*) had acquired its security interest before the Government took title to the property involved.

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Comp. Gen. Examines Solicitation's Proposal Page Limitation In Deciding Offeror's Compliance With Description And Documentation Requirements

The Defense Information Systems Agency requested proposals on a fixed-price, indefinite delivery contract to provide end-to-end switched voice, switched data, integrated services digital network and dedicated transmission services to Department of Defense users throughout the state of Hawaii for a 10-year period. DISA received proposals from only GTE and AT&T. The agency's evaluation of those proposals found GTE's technical proposal superior to AT&T's, while the latter's management proposal was found to be superior to GTE's.

After finding that AT&T's proposal represented an added compliance risk of $1.1 million to the Government, the agency decided that the risk was more than outweighed by the fact that AT&T's evaluated price was $46 million lower than GTE's. Accordingly, the agency concluded that AT&T's lower-priced proposal represented the best value to the Government and, on that basis, awarded it the contract.

In protesting that award to the U.S. Comptroller General, GTE points out that the solicitation's proposal preparation instructions and evaluation criteria required that offerors describe and document their approaches to satisfying the solicitation requirements. GTE contends (among other things) that AT&T's proposal did not satisfactorily demonstrate compliance with the solicitation requirements for such things as specified "military unique" features, the Defense Switched Network Integrated Management Support System interface, the critical assured service, and the network management system.

The Comp. Gen. notes that, because the contracting agency is responsible for evaluating offeror-submitted data and deciding whether it is sufficient to determine the proposal's acceptability, the agency's determination in this regard will not be disturbed unless it is unreasonable. Here, DISA had a reasonable basis for determining that AT&T had provided sufficient proposal information to demonstrate compliance with the solicitation requirements.

The solicitation simply did not require that a proposal be found noncompliant for any requirement for which it failed to provide what the evaluators believed to be a complete discussion. In this connection, the Comp. Gen. emphasizes that, whereas there were more than 1,300 technical requirements for which offerors had to show compliance, the solicitation limited technical proposals to 800 pages. When the complexity of the information transfer system and the length and detail of the functional requirements specifications are considered together with this page limitation, the Comp. Gen. does not find it unreasonable to expect that (1) offerors would not fully discuss and describe their compliance with each and every solicitation requirement and (2) the agency would accept an

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Federal Circuit Reverses COFC On Contract Liability Effect Of Presidential Policy Change

In January 1984, contractor entered into a contract with the National Aeronautics and Space Administration under which NASA agreed to exert its "best efforts" to use its space shuttle program to launch two of contractor's satellites between the contract date and September 1995. More specifically, the contract contained (1) an Article XV requiring that NASA provide the launch services "to the extent consistent with... U.S. law and published policy," and (2) an Article IV stating that NASA would provide those services "in accordance with the U.S. policy governing assistance approved by the President...on August 6, 1982." That policy provided (among other things) that the priority and scheduling of non-U.S. payload launchings would be dealt with on the same basis as U.S. launchings.

However, when the space shuttle Challenger exploded in 1986, the President later that year issued a revised policy announcing that NASA would no longer be in the business of launching commercial spacecraft. Based on this revised policy, NASA informed contractor that it would not launch contractor's satellites. Contractor thereupon filed a suit in the Court of Federal Claims asserting that NASA's action constituted (among other things) a breach of its contract. In an earlier decision in this case, the COFC denied contractor's claim on several grounds. See 15 FPD ¶ 4, 34 Fed. Cl. 703 (1996), 38 GC ¶ 239.

Now, after first rejecting the COFC's ruling that contractor had failed to exhaust its administrative remedies, the U.S. Court of Appeals for the Federal Circuit (in a 2-1 decision) reverses the remainder of that court's decision as follows.

Termination—The contract contained an Article VII giving NASA the right to terminate the agreement for any of several reasons, including a determination that it was required to do so for "reasons beyond NASA's control"—a phrase that was defined as including "acts of the U.S. Government other than NASA, in either its sovereign or contractual capacity." The Government argues that NASA effectively terminated the contract in accordance with this provision because of the President's 1986 directive.

The Federal Circuit, however, finds that the Government never made a written determination that the President's directive was a reason beyond NASA's control that *required* it to terminate the contract. On the contrary, NASA steadfastly maintained that the contract was still in existence and was not being terminated.

The COFC seems to have held that, notwithstanding NASA's contrary protestations, the Government constructively terminated the contract because Article VII *allowed* it to do so. The Federal Circuit rules that this conclusion is inconsistent with *Hughes Communications Galaxy, Inc. v. U.S.*, 12 FPD ¶ 73, 998 F.2d 950 (Fed. Cir. 1993), 35 GC ¶ 556, and *American Satellite Co. v. U.S.*, 12 FPD ¶ 62 (Fed. Cir. 1993), 35 GC ¶ 556 (Note)—cases which involved essentially the same contract terms.

In those decisions, the Federal Circuit rejected the Government's contention that the President's 1986 decision to cease launching commercial payloads was a sovereign act for which the Government was not liable. Instead, the Court held that, regardless of the sovereign acts doctrine, the contracts shifted to the Government responsibility for changes in its launch priority and scheduling policy.

In this case, the COFC in effect ruled that the same policy change for which *Hughes* and *American* held the Government contractually liable permits the Government to terminate the contract. While *Hughes* and *American* left open the possibility that, on remand, the Government might be able to raise "another defense" that might prevail, the Federal Circuit rules that it did not thereby open the door to a defense that—like the COFC ruling in this case—patently conflicts with its interpretation of the contract involved.

Waiver—The contract contained an Article V stating that contractor would not make a claim against the Government "for the nonperformance or improper performance" of launch and associated services. Such an exculpatory provision, observes the Federal Circuit, must be narrowly and strictly interpreted. Interpreted in this way, the clause simply holds the Government harm-

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