

Government Contract Law in the Twenty-First Century

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Chapter 1 Government Contracting Doctrines

Decisions since *OPM v. Richmond* re: estoppel and laches

Chapter 1, Section B, page 21, Note 4

Also, :

United States ex rel. Jordan v. Northrop Grumman Corp., 2002 U.S. Dist. LEXIS 26622 (C.D. Cal 2002);

Griffin v. Reich, 956 F. Supp. 98 (D.R.I. 1997);

United States v. Manhattan-Westchester Med. Servs., 2008 U.S. Dist. ELXIS 5819 (S.D.N.Y. 2008);

Melrose Assocs., L.P. v. United States, 43 Fed. Cl. 124 (Fed. Cl. 1999)

B. Characteristic Doctrines

2. Law in Statutes, Regulations, and Standard Clauses

After *Appeal of University of California* and its notes and questions, pg. 42, add

5. The Christian Doctrine will be invoked to substitute a correct clause or provision for an incorrect one already included in a contract. 13-11 Briefing Papers 1, 14. Substitution of a correct clause or provision is not limited to circumstances that will benefit the government. In *Bay County, Florida v. United States*, the court determined that the county was an independent regulatory body under DFARS and the presence of a different FAR section in the contract did not negate the county's status as an independent regulatory body. *Bay County, Florida v. United States*, 112 Fed. Cl. 195 (2013).

6. The application of the Christian Doctrine is not limited to the Contracts Dispute Act. 13-11 Briefing Papers 1, 14. In *UMPC Braddock v. Harris*, the court applied the Christian doctrine to incorporate a mandatory FAR flowdown clause into a subcontract in which the government did not have privity of contract. *UPMC Braddock v. Harris*, 934 F. Supp. 2d 238, 241 (D.D.C. 2013).

7. In *Rockies Express Pipeline LLC v. Salzar*, the government argued that the absence of a termination for convenience clause in the precedent agreement excused its refusal to sign the Firm Transportation Service Agreements for the second phase of the project. *Rockies Exp. Pipeline LLC v. Salazar*, 730 F.3d 1330, 1338 (Fed. Cir. 2013). The Federal Circuit disagreed, indicating that the statute authorizing RIK contracts excepts them from the FAR. *Id.* Since RIK contracts are excepted from the FAR, a termination for convenience clause is not required by regulation. If the clause is not required by regulation, the Christian Doctrine is not applicable. The court reiterated that a violation of the Christian Doctrine does not render the contract illegal. Instead, it permits the court to cure the defect and include the clause after the fact.

Chapter 2 Sealed Bids and Competitive Proposals

A. Sealed Bids & Competitive Proposals: Regulations on Responsibility

2. Responsibility

Before *Impresa*, on p. 65, add

A contractor's responsibility is determined by weighing factors such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance and of business integrity and ethics. FAR § 9.103. An agency can optionally add to these general factors a list of “definitive responsibility criteria” which are additional factors the agency will weigh when considering bids for a specific contract. Any definitive responsibility criteria in effect must be made known to the bidder. A contractor will lose the bid if it fails to meet a responsibility requirement from either category. 2005 WL 1876113, 2.

Chapter 2, Section A, Part 2, page 72, Note 4

New cases:

Colonial Press Int'l, Inc. v. United States, 113 Fed. Cl. 497 (Fed. Cl. 2013);

Mg Altus Apache Co. v. United States, 111 Fed. Cl. 425 (Fed. Cl. 2013);

NCL Logistics Co. v. United States, 109 Fed. Cl. 596 (Fed. Cl. 2013);

Ettefaq-Meliat-Hai-Afghan Consulting, Inc. v. United States, 106 Fed. Cl. 429 (Fed. Cl. 2012)

After note 5, on p. 72, add

6. Business ethics and national security. In *MG Altus Apache Co. v. United States*, 111 Fed. Cl. 425, 451 (2013), the court affirmed a program used by the Army whereby a contractor who is non-responsible for national security reasons can undergo a “vendor vetting” process that can result in a classified debarment. Because the proceeding is classified, the contractor receives no notice of its debarment and will henceforth be

unknowingly ineligible for any additional contracts it might bid on. Critics of the procedure argue that it amounts to secret blacklisting of contractors in violation of due process. 55 NO. 30 *Gov't Contractor* ¶ 251. The court in *MG Altus* disagreed, holding that due process considerations must give way to national security concerns in warzone environments. *MG Altus*, 111 Fed. Cl. at 451.

Chapter 2, Section A, subsection 2, at 72

Business ethics and national security. In *MG Altus Apache Co. v. United States*, 111 Fed. Cl. 425, 451 (2013), the court affirmed a program used by the Army whereby a contractor who is non-responsible for national security reasons can undergo a “vendor vetting” process that can result in a classified debarment. Because the proceeding is classified, the contractor receives no notice of its debarment and will henceforth be unknowingly ineligible for any additional contracts it might bid on. Critics of the procedure argue that it amounts to secret blacklisting of contractors in violation of due process. 55 NO. 30 *Gov't Contractor* ¶ 251. The court in *MG Altus* disagreed, holding that due process considerations must give way to national security concerns in warzone environments. *MG Altus*, 111 Fed. Cl. At 451.

Chapter 2, Section A, page 80

Note on Simplified Acquisition

On the 13th day of October, 1994 President Clinton signed into law PL 103-355, commonly known as the Federal Acquisition Streamlining Act. This piece of legislation was the result of a bi-partisan effort to reform the government's way of procuring low cost items. The act defines new rules for contracts divided into three categories: (1)

contracts for \$3,500 or less are defined as “micro-transactions”, (2) contracts over \$3,500 but under \$150,000 are eligible for simplified acquisition procedures, and (3) contracts over \$150,000 are ordinarily not eligible for simplified acquisition procedures. The operative word here, is “ordinarily”, as there are exceptions that alter these amounts at all three levels. In some cases the alterations are considerable. For example, simplified acquisition procedures can be used for contracts up to \$7 million if the supplies or services to be obtained are expected to be commercially available. FAR 13.500. It may seem that \$7 million is no small amount, but its size diminishes when considering that the Department of Defense alone obligated \$285 billion in contracts in 2014.

Before the Federal Acquisition Streamlining Act, parties on both sides of these contracts were feeling the weight of the often onerous burden imposed by the FAR. The extensive requirements found in FAR Ch. 1, Subch. B, Pt. 6 accomplished their intended task of insuring fairness and notice, but, put simply, they were also a lot of work. Beyond their extra hassle, these requirements took time to comply with, causing financial loss for both the government and bidders. The Federal Acquisition Streamlining Act is a piece of legislation that aims to compromise between the necessity for fair play and the desire to lower the governments cost of doing business, thereby maximizing savings. This is done by making the observation that lower cost contracts need not be burdened with the full panoply of requirements imposed on high priced contracts. In understanding the implications of simplified acquisition the analysis is two part: (1) determine if simplified acquisition applies to a given contract, and if it does, the category of simplified acquisition it falls within, and (2) determine the requirements of the applicable category of simplified acquisition. In answering the first step, the key information is the expected

total price of the contract and whether the supply or service is expected to be available from a commercial vendor. In evaluating the second step, a detailed statutory reading of FAR Ch. 1, Subch. C, Pt. 13 is required. What follows is a rudimentary breakdown of the key features of the three categories. However, a complete description of the process is beyond the scope of this text as simplified acquisition is anything but simple. While there are many exceptions that change price limitations, general requirements for each price category are nevertheless illustrative.

The lowest category eligible for simplified acquisition is that of micro-transactions. Micro-transactions are not required to comport generally to the full and open competition found in subchapter six. However, they must comply with required sources of supplies and services in FAR Part 8 FAR 13.201(e). Purchases shall also be distributed equitably among qualified suppliers. FAR 13.202(a)(1). Contracts may not be broken down into smaller amounts merely to allow use of simplified acquisition procedures. FAR 13.003(c)(1). Perhaps most significantly, competitive quotations are not required if the Contracting Officer determines the price is reasonable. FAR 13.202(a)(2). Statute encourages purchases in this category to be made by electronic means as frequently as possible, typically, a government-wide commercial purchase card.

The intermediate category is where general simplified acquisition applies. These contracts are between \$3,500 and \$150,000. Like micro-transactions, this category does not need to comply with full and open competition requirements. All of the requirements of the first category apply in addition to a few more. Most notably, contracts in this range are subject to small business set-aside. This means that if at all possible, all of these contracts should go to small businesses or businesses that are otherwise disadvantaged as

set out in FAR 13.102 such as small businesses, small disadvantaged businesses, women-owned small businesses, HUBZone small businesses, Service-disabled veteran-owned small business, and Veteran-owned small business. This category also requires that RFQs be solicited orally unless oral solicitation is not economical or practical. Additionally, all bids, if from a responsible source, must be considered. And finally, despite the absence of the statutory full and open competition requirements, Contracting Officers shall strive to “promote competition to the maximum extent practicable.” FAR 13.104.

The final category includes contracts over \$150,000. In this category simplified acquisition procedures are simply not available. FAR 13.003(c). However, as previously mentioned, certain exceptions such as commercial supplies or services can increase this upper limit beyond \$150,000.

Chapter 2, Section A. Sealed Bids

3. Process

After *McClure* and its notes and questions, pg. 80, add

4. For purchases under the simplified acquisition threshold the Contracting Officer can use the streamlined procurement procedures in FAR Part 13. *See Global Communications Solutions, Inc.*, B-299044, B-299044.2, 2007 CPD ¶30 (Comp. Gen. 2007). FAR 13.003(a) requires that the agencies use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold. 48 C.F.R. 13.003. FAR Part 13 establishes the threshold for simplified acquisition at \$150,000 (\$6.5 million for acquisitions of most commercial items) and \$3,000 for purchases considered under the micro-purchase threshold. *Id.* The simplified procedures established under FAR Part 13 are designed to

promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors, where the value of the acquisition is less than \$150,000. *See Matter of: Desktop Alert, Inc.*, B- 408707, 2014 CPD ¶ 48 (Comp.Gen. 2014).

When using simplified acquisition procedures, agencies must promote competition to the maximum extent practicable. 10 U.S.C. §2304(g)(3) (2012). To promote competition, agencies must make reasonable efforts, consistent with efficiency and economy, to afford all eligible and interested vendors an opportunity to compete. *Matter of: B & S Transport, Inc.*, B- 40758 9, 2012 CPD ¶ 354(Comp.Gen. 2012). Agencies have a fundamental obligation to have procedures in place not only to receive quotations, but also to reasonably safeguard quotations received and to give them fair consideration. *Id.*

Under FAR §13.106–1(b), contracting officers may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available. 48 C.F.R. 13.106–1. Circumstances where single source solicitation is reasonable include, urgency, exclusive licensing agreements, and brand name or industrial mobilization. *Id.* In cases of single source solicitation, the GAO reviews the decision to limit the procurement to a brand-name for reasonableness. *See Critical Process Filtration, Inc.*, B–400746 *et al.*, 2009 CPD ¶ 25(Comp. Gen. 2009).

Chapter 2, Section B. Competitive Proposals

1. Evaluations

Page 128. After *Bannum* and its Notes and Questions, add

5. *Netstar-1 Government Consulting, Inc. v. United States*, 101 Fed. Cl. 511, upheld a protest because the awardee had potential OCI that was not effectively

mitigated. The opinion is memorable for its florid prose: “Unlike in Homer’s Greece of old, there are no Elysian Fields here, where contractors may go to wipe from their memories information regarding their competitor’s pricing information.”

6. In *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011), the Federal Circuit criticized a GAO holding of potential OCIs, finding an absence of the needed “hard facts” for such a holding.

7. In *PAI Corp. v. United States*, 614 F.3d 1347 (Fed. Cir. 2010), the court found that the contracting officer had taken the required measures regarding potential OCIs. Since the CO found no significant potential conflict existed, she was not required to submit a written analysis pursuant to 48 C.F.R. 9.506(b).

Chapter 2 Sealed Bids and Competitive Proposals

Sealed Bids & Competitive Proposals: Inquiry & Clarification with Patent Ambiguity

Chapter 2, Section B, Part 1, page 110, Note 3

United States v. Schlesinger, 88 F. Supp. 2d 431 (D. Md. 2000);
Metric Constructors, Inc. v. NASA, 169 F.3d 747 (Fed. Cir. 1999);
Golden Mfg. Co. v. United States, 107 Fed. Cl. 264 (Fed. Cl. 2012);
Par Aarsleff A/S v. United States, 121 Fed. Cl. 603 (Fed. Cl. 2015);
Appeal of A.R. Mack Construction Co., Inc., ASBCA No. 50035.

Chapter 2, Section B. Competitive Negotiation

2. Evaluation

After *Lockheed* and its notes and questions, pg. 114, add

3. A cost/technical tradeoff evaluation is vital to any source selection decision using a trade-off basis of award. See *Matter of: Special Operations Group, Inc.*, B-287013, B-287013.2, 2001 CPD ¶ 73(Comp.Gen. 2001). Agencies have broad discretion in making cost/technical tradeoffs, and the extent to which one is sacrificed for the other

is tested for rationality and consistency with the stated evaluation factors. *See Matter of: Sotera Defense Solutions, Inc.*, B- 408587.2, B- 408587.3, B- 408587.4, 2014 CPD ¶ 103 (Comp.Gen. 2014).

Comparative consideration of features in competing proposals is permissible. *See Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044 (Fed. Cir. 1994). If the basis for award stated in the RFP provides for an integrated assessment of proposals, the features to be compared do not need to be given quantifiable evaluation credit under the disclosed evaluation criteria. *See Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044 (Fed. Cir. 1994)

To support the analysis of the decision, documentation provided must include the rationale for any tradeoff made. 48 C.F.R. § 15.308. The government is not required to quantify the tradeoffs that led to their decision. *Id.* In performing the tradeoff analysis, the agency need neither assign an exact dollar value to the worth associated with the technical benefits of a contract nor otherwise quantify the non-cost factors. *One Largo Metro, LLC v. United States*, 109 Fed. Cl. 39, 77 (Fed. Cl. 2013).

Chapter 2, Section B, Part 2, page 118, Note 1

Firstline Transp. Sec., Inc. v. United States, 100 Fed. Cl. 359, (Fed. Cl. 2011)

Chapter 2, Section B, Part 2, page 123, Note 3

Am. Auto Logistics, LP v. United States, 117 Fed. Cl. 137 (Fed. Cl. 2014);
Matter of: Saturn Landscape Plus, Inc., B-297450.3 (2006);

Matter of: JV Derichebourg-BMAR & Associates, LLC., B-407562.3 (2013).

Chapter 2, Section B, Part 2, page 123, Note 3

Sealed Bids & Competitive Proposals: Misevaluation of past performance

New Cases:

Matter of: The Salvation Army Community Corrections Program, B-298866.3 (2007);

Matter of: Al Long Ford, B-297807;
Optimization Consulting, Inc. v. United States, 115 Fed. Cl. 78 (Fed. Cl. 2013);
Textron, Inc. v. United States, 74 Fed. Cl. 277 (Fed. Cl. 2006);
Caddell Constr. Co. v. United States, 111 Fed. Cl. 49 (Fed. Cl. 2013).

Chapter 2, Section B. Competitive Negotiation

2. Evaluation

After *Bannum* and its notes and questions, pg. 128, add

4. Procurement officials have substantial discretion to determine which proposal represents the best value for the government. *Glenn Def. Marine (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 908 (Fed. Cir. 2013). In *Glenn Davis Marine (ASIA) v. United States*, the Federal Circuit affirmed that the evaluation of Glenn Davis Marine's past performance as "less than satisfactory" was not arbitrary and capricious even though each reference rated their performance as "satisfactory" or "better." *Id.* at 909. The court concluded that Navy reasonably compared the reviews of the protestor, which contained negative comments in the narrative portion of the relevant references and inadequate corrective action, to the reviews of the winning contractor, Multinational Logistic Services, which contained no negative feedback. *Id.* The contracting officer determined that although the protestor's final proposal was less than Multinational Logistic Services' final proposal, Multinational Logistic Services' superior past performance and would ultimately provide the best value to the Navy. *Id.* at 908.

Chapter 2, Section C, page 128

Rename the section "Competition in Contracting Act"

After the heading, the first case is :

SAVANTAGE FINANCIAL SERVICES, INC. v. UNITED STATES

595 F.3d 181

United States Court of Appeals, Federal Circuit

Feb. 22, 2010

Before NEWMAN, BRYSON, and PROST, Circuit Judges.

BRYSON, Circuit Judge.

In this pre-award bid protest case, Savantage Financial Services, Inc., challenges the terms of a request for proposals from the Department of Homeland Security (“DHS”). The request sought proposals to implement an agency-wide financial, acquisition, and asset management system. The request required proposers to offer a system that is integrated and currently fully operational within the federal government. Although the Court of Federal Claims had previously enjoined DHS from using an earlier solicitation, the court concluded that the requirements of the new solicitation were not unlawful. Savantage appeals, contending that the new solicitation, like the previous one, unduly restricts competition, in violation of the Competition in Contracting Act (“CICA”), 10 U.S.C. § 2304(a)(1).

I

DHS was established in 2003 through the merger of 22 federal agencies. As a result of the merger, DHS inherited five different financial management software systems and a number of different acquisition management and asset management systems. The use of different financial systems within the agency has caused logistical difficulties and

has been the subject of criticism and concern from federal auditors and lawmakers. As a result, DHS has devoted considerable effort to obtaining an integrated financial, acquisition, and asset management system.

In January 2004, DHS launched its first effort to integrate its financial systems through a project entitled Electronically Managing Enterprise Resources for Government Effectiveness and Efficiency (“eMerge 2”). The plan underlying the eMerge 2 project was to purchase commercial off-the-shelf software products and to integrate them so as to facilitate communication among all the Department's components. That project was a complete failure; in December 2005, after spending \$52 million with no discernible results, the agency abandoned the eMerge 2 program.

DHS initiated its second effort to integrate its financial systems in 2007, through the Transformation and Systems Consolidation (“TASC”) initiative. Its initial request for proposals contained a series of task orders proposing the “migration” of all DHS components to one of two integrated “shared software baselines” already in use within the agency: (1) the Oracle financial management system integrated with the Compusearch PRISM and Sunflower Assets systems, or (2) an integrated system from Systems Applications Products (“SAP”). In response, Savantage filed a pre-award bid protest with the Court of Federal Claims in January 2008. In April 2008, the court ruled in favor of Savantage, concluding that DHS's decision to require migration to the Oracle or SAP financial software systems constituted an improper sole-source procurement. See *Savantage Fin. Servs., Inc. v. United States* (“Savantage I”), 81 Fed.Cl. 300, 308 (2008). The court enjoined DHS from proceeding with its solicitation until it had conducted a competitive procurement. *Id.* at 311.

Following the court's ruling, DHS spent 10 months conducting market research regarding the integration and implementation of financial systems in an effort to develop a new solicitation. The result was a new request for proposals, issued on January 9, 2009, and amended on February 14, 2009. The new request sought a financial, acquisition, and asset management system that “will be provided as an integrated solution that is currently fully operational in the Federal government.” The new TASC procurement was to be conducted as “a full and open competition” in two separate phases: (1) identification of viable offerors through submission of information to DHS; and (2) submission and demonstration of proposals by viable offerors.

That process was halted following the receipt of the first phase submissions, when Savantage filed the present bid protest action with the Court of Federal Claims. Savantage argued that DHS's requirements unduly restricted full and open competition, in violation of CICA, because the requirements effectively eliminated all solutions except for Oracle-based systems. Both parties moved for judgment on the administrative record.

In an April 2009 opinion, the trial court denied the protest, holding that Savantage “ha[d] not met its burden of demonstrating that the requirement of a fully integrated, currently operational system lacks a rational basis” and thus “defer[ring] to the agency's discretion in determining its own needs.” *Savantage Fin. Servs., Inc. v. United States* (“Savantage II”), 86 Fed.Cl. 700, 706 (2009). Savantage appealed to this court.

On appeal, Savantage argues that by requiring a system that is integrated and currently operational in the federal government, the new solicitation unduly restricts competition. Savantage contends that DHS's attempts to justify those requirements are based on conclusory statements lacking factual support in the administrative record.

Savantage further asserts that DHS's requirements effectively guarantee that only the Oracle financial management product (coupled with the PRISM acquisition management and the Sunflower asset management products) will qualify for selection. According to Savantage, the requirements of the new solicitation are pretextual, disguising DHS's efforts to favor Oracle—one of the solutions DHS was enjoined from selecting by specific designation in the prior solicitation.

II

In a bid protest case, an agency's action must be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed.Cir.2005); see also 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A). The court's task is to determine whether “(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.” *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed.Cir.2009). Savantage does not allege a procedural violation, but argues that DHS's restrictions on the solicitation lacked a rational basis and were therefore unlawful.

Contracting officers “are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process.” *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed.Cir.2001). For that reason, procurement decisions “invoke[] ‘highly deferential’ rational basis review.” *CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1354 (Fed.Cir.2008). Under that standard, we must sustain an agency action unless the action does not “evinced[] rational reasoning and consideration of relevant factors.” *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed.Cir.2000). Upon review of the record in this case, we

agree with the trial court that there is a rational basis for the three contested requirements of the new solicitation: (1) that the proposed financial, acquisition, and asset management system be “integrated”; (2) that it be “currently fully operational”; and (3) that it be “currently fully operational in the Federal government.”

With respect to the requirement that the system be integrated, we agree with the trial court that it is “logical that [DHS] would want to ensure its success by seeking a fully integrated system, both on the basis of its own experiences and those of other agencies and departments.” *Savantage II*, 86 Fed.Cl. at 706. As the administrative record amply shows, the failure of DHS's own eMerge 2 project—largely due to the contractors' inability to provide functional integration among components—underscored the risks of building an entirely new system using separate, unintegrated, off-the-shelf components. Internal DHS documents indicate that the Department responded to that failure by rejecting a piecemeal approach and electing to acquire a core financial system pre-integrated with other key systems. As we have held, an agency “has no obligation to point to past experiences substantiating its concerns in order to survive rational basis review ... [as CICA does not require the agency] to supply a historical record of failures to substantiate a risk.” *CHE Consulting*, 552 F.3d at 1355. Nonetheless, DHS's prior “fifty-two million-dollar failure at integration,” *Savantage II*, 86 Fed.Cl. at 705, provides support for its decision to obtain a pre-integrated system.

Savantage contends that there is no justification for DHS's choice of a pre-integrated solution, rather than implementing a core financial system first and then separately integrating and implementing feeder systems. *Savantage* points to evidence that building a fully integrated solution at the outset is more difficult than subsequently

integrating feeder systems into a core financial system, and that a pre-integrated solution is thus more likely to fail. On a question such as whether to implement a pre-integrated system or to build a system by beginning with a core financial system and then integrating other systems afterwards, an agency's preferences are entitled to great weight. As the trial court noted, “competitors do not dictate an agency's minimum needs, the agency does.” *Savantage II*, 86 Fed.Cl. at 706. And determining an agency's minimum needs “is a matter within the broad discretion of agency officials ... and is not for [the] court to second guess.” *Wit Assocs., Inc. v. United States*, 62 Fed.Cl. 657, 662 (2004). We agree with the trial court that Savantage has failed to meet its burden of showing that the agency's decision to require a fully integrated system is so plainly unjustified as to lack a rational basis.

Similarly, DHS's requirement that the financial management, asset, and acquisition system be currently fully operational cannot be considered unreasonable. Having already failed to build an operational system from the ground up, DHS could reasonably prefer a system that is already operating successfully. Savantage's contention that a pre-integrated system is difficult to implement supports DHS's decision to require a system that has been shown to work.

Savantage focuses principally on DHS's final requirement, that the system be currently operational in the federal government. Savantage asserts that the administrative record is devoid of evidence connecting DHS's needs to that requirement of the new solicitation. We disagree.

Contrary to Savantage's suggestion, DHS was not required to synthesize its thinking and its market research into a prelitigation written explanation of the rationale

for each of the solicitation requirements. DHS's rationale for its “in the federal government” requirement is apparent from, and supported by, the agency record. The \$52 million loss resulting from the failed eMerge 2 program, which was discussed in June 2007 testimony before a Senate Committee, prompted DHS to investigate ways to leverage its resources and those of other federal agencies to save money and avoid unnecessary duplication of efforts ... The “process overview” of the new request for proposals explains the need to “leverage the tremendous investment that DHS and the Federal government have made” and to “utilize and reuse work already completed” within the federal government.

* * *

Because we agree with the trial court that DHS has a rational basis for requiring an integrated financial, acquisition, and asset management system that is currently fully operational within the federal government, we uphold the judgment of the Court of Federal Claims.

AFFIRMED.

Chapter 2, Section C, page 128

After the heading and SAVANTAGE

McAFEE INC. v. UNITED STATES

111 Fed. Cl. 696

United States Court of Federal Claims

July 17, 2013

LETTOW, Judge.

In this pre-award bid protest, plaintiff, McAfee, Inc. (“McAfee”) complains of an alleged brand-name, sole-source procurement performed by the United States through United States Department of the Air Force (“Air Force”) in violation of the Competition in Contracting Act (“CICA”), 41 U.S.C. § 3301. McAfee alleges that in a quest to reconfigure and strengthen its network security technology, the Air Force made what amounts to a sole-source selection without the requisite justification. McAfee seeks injunctive relief against the Air Force to prevent the alleged enterprise-wide standardization. Compl. ¶ 5.

FACTS

. . . McAfee software has been used by the Air Force for network security (in concert with software from other companies) over the last fifteen years up to the present day. Id. ¶ 7. If the Air Force's present network-security standardization plans go forward, McAfee effectively will be barred from competing for Air Force network-security contracts because it does not manufacture a program compatible with the Air Force's network-security infrastructure that is tied to a particular sole source.

A. Air Force Cyber Security Architecture

Air Force network security is managed by the Combat Information Transport System (“CITS”), established in the 1990s “as a ground infrastructure modernization program to support the day-to-day information transport needs at fixed base Air Force installations world-wide.” AR 8–329 (AFNet Life Cycle Management Plan). Through CITS, the Air Force implements various discrete programs to achieve satisfactory network security throughout the entirety of its systems. One such program is the Air Force Network Increment 1 program (“AFNet”), which manages system integration, modernization, support, commercial-off-the-shelf equipment purchase, and interim contract support. Id. at 328 to –29.

* * *

B. Next Generation Firewall Selection

Very recently, a new cyber-security technology has appeared on the market, called “next generation firewall” (“nextgen firewall”) technology. See AR 15–526 ([* * *]). Nextgen firewalls were pioneered by a company called Palo Alto Networks, and other tech companies have since followed suit . . . At no point during the relevant periods does it appear that McAfee offered a fully integrated nextgen firewall product. See AR 72–3036 ([* * *]).

1. AFNet modifications.

* * *

As the Air Force was preparing to issue the delivery order for the second AFNet update (the “AFNet Update 2 delivery order”), it received alarming information from one of its technical advisors, MITRE Corporation: MITRE predicted that due to increased

network traffic, AFNet gateway security would experience total failure by April 12, 2012 . . . The AFNet Update 2 Delivery Order was modified to reflect an expedited completion date of March 6, 2012, and included a requirement for both an updated firewall and an updated intrusion prevention system. AR 54–2370, 2377 (AFNet Update 2 Delivery Order). The AFNet Update 2 delivery order was awarded in December 2011. Id. at 2363. Prior to AFNet Update 2, the sixteen Air Force gateways were using intrusion prevention software from McAfee, namely the [* * *]. See AR 57–2742 (General Dynamics Response to AFNet RFP (Dec. 8, 2011)). The firewall in use at the time was designed by another software company, [* * *]. See AR 24–823 (Modification Proposal, (Mar. 9, 2012)). General Dynamics recommended that in light of the expedited schedule, the fastest and best way to upgrade the Air Force network would be to install the newest version of the same software already in use. AR 57–2742. The Air Force adopted this recommendation and incorporated it as modification of the delivery order that ultimately issued. See AR 19 (Modification 02 to Delivery Order No. RSFB (Feb. 9, 2012)).

2. Trouble at the base level.

* * *

In September 2011, the Air Force decided to acquire Palo Alto nextgen firewall devices for a proof-of-concept effort. See AR 74–3107 (Prototype Event/Test Report). The record does not reflect that proofs of concept were undertaken for other systems. The stated purpose of the proof-of-concept acquisition was to “shorten the overall lead-time” in the event of eventual implementation of the products. Id. Contemporaneously, Air Force personnel discussed again the possibility of a sole-source acquisition across the board for gateways and base boundaries, debating whether “commonality with the

enterprise” could support a brand-name justification at this juncture. AR 13 (E-mail chain between Air Force personnel (Sept. 2011)).

* * *

Despite McAfee offering the best value, most effective cost, and lowest security risk, the Air Force chose another of the five "course of actions" (COA's) presented to them.]

On April 6, 2012, the Air Force moved to implement COA 2 by issuing an informal advance Request for Proposal ("RFP") to General Dynamics, which included an explanation of the technical requirements the new AFNet Update 2 would need to meet. AR 71 (Advance RFP). The advance RFP did not contain specific brand-name preferences, but reflected detailed program requirements comports with and expanding on those in the March 9, 2012 proposed modifications to the AFNet Upgrade 2 Delivery Order. Id.

* * *

On April 16, 2012, the Air Force authorized General Dynamics to proceed with AFNet Update 2 with the changes as recommended in COA 2, replacing McAfee and [* * *] software with the Palo Alto nextgen firewall program. See AR 28 (E-mail from Debbie Hamilton to General Dynamics). The official RFP was issued on May 3, 2012, incorporating the earlier TRD, at which point formalities were observed to make the modification to AFNet Update 2 official. See AR 29 (RFP). The parties refer to this step as "modification 6," and the court will use this shorthand going forward. The portion of the TRD related to nextgen firewalls does not contain a specific brand-name requirement. AR 29–934 to –938. It does require that the nextgen firewall be configured "to perform

[sensor] functionality of base [and] ... to replace [intrusion prevention software] and [classic firewall] functionality.” AR 29–936. It goes on to specify that the nextgen firewall must perform “[a]pplication identification,” “content filtering” and “[t]hreat detection.” AR 29–937. By the time the sensor went offline at the base boundaries, the Air Force had in place its nextgen firewall contingency plan at the gateway level, and no network shutdown was required.

3. Bringing the base boundaries up to par.

Although the installation of nextgen firewalls at the Air Force gateways staved off network failure, the Air Force nevertheless needed to improve security at the base boundaries after the sensor went offline. To that end, on October 11, 2012, the Air Force requested that ENFAAS develop a request for proposals “that includes a Next Generation Firewall ... to secure the base boundary.” AR 39–1662 (ENFAAS Procurement Directive (Oct. 11, 2012)).

* * *

In January 2013, ENFAAS issued a Brand Name Justification, stating that it intended to use a Palo Alto nextgen firewall at the base boundaries. See AR 44–1707 to 1711 (Brand Name Justification (Jan. 2013)). Under FAR § 16.505(a)(4), procurements may be performed on a brand-name basis if certain requirements are met, namely that “[t]he contracting officer must justify restricting consideration to an item peculiar to one manufacturer.” FAR § 16.505(a)(4)(i). The justification offered by ENFAAS hinged on the fact that “Palo Alto [nextgen firewalls] are the only devices that can integrate with the existing [AFNet] management system.... Without Palo Alto [nextgen firewalls at the base level,] enterprise management of the [nextgen firewalls] deployed as part of ENFAAS

would not be achievable.” AR 44–1709. The Brand Name Justification indicates that the Air Force desires “to deploy identical policy configurations, identical software/firmware updates, identical hot fixes, identical patches, identical application signature updates, identical threat signature updates and identical custom signatures to all systems at the [AFNet gateways] and [ENFAAS base boundaries].” Id. To accomplish these goals, the systems at the gateways and the base boundaries must be controlled by the same management system. Id. Because the gateways were already operating on a Palo Alto management system, the base boundaries had to run Palo Alto software to integrate with the existing infrastructure. Id.

The ENFAAS task order has not yet been awarded. McAfee filed suit in this court on March 19, 2013, alleging that the Air Force's decision to convert to a sole-source system improperly denies it the opportunity to compete as a subcontractor for such NETCENTS projects as the pending ENFAAS contract.

* * *

DISCUSSION

[. . .] Analysis

* * *

McAfee alleges that the Air Force violated CICA, 41 U.S.C. § 3301, as well as 10 U.S.C. § 2304(a), and certain provisions of the FAR, when it failed to conduct a competition or provide appropriate justification prior to its decision to shift to a sole-source network security scheme. Compl. ¶¶ 22–25; Pl.'s Mem. at 19. McAfee also

characterizes the Air Force's exclusive selection of Palo Alto products as arbitrary and capricious. Compl. ¶¶ 26–27.

1. Improper procurement.

The administrative record manifestly demonstrates that the Air Force did not conduct an open competition for its network security needs prior to selecting COA 2. It did not issue a direct solicitation, nor did it instruct any of its NETCENTS contractors to hold one. Yet, with the selection of COA 2 in 2012, the entirety of the Air Force's network security infrastructure was directed towards a sole-source standardization.

The enumerated exceptions to the statutory directives for competition are narrow and do not apply here. The first such exception is whether “the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency.” 10 U.S.C. § 2304(c)(1). At the point in time when the Air Force decided to pursue sole-source network security software, it was fully aware of other sources or combinations of sources which could have provided network security. See AR 64–2875 to –2892 (COA Presentation Slides). However, even before the COA presentation in March 2012, the Air Force had expressed its preference for a sole-source plan. See AR 64–2883 (noting as the only “pro” for COA 2 that it “[m]eets [the Air Force's] original request”). The Air Force cannot claim that there were no other options available but to pursue the sole-source procurement, and cannot justify its failure to evaluate other options competitively. See *Savantage*, 81 Fed.Cl. at 308 (“[S]o long as

there is more than one source competent to perform the contract, [the government] must evaluate the merit of each offeror's product through the competitive lens.”).

The second enumerated exception to competitive procurement arises where “the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.” 10 U.S.C. § 2304(c)(2). Yet COA 2, the sole-source option, was not the fastest course of action presented to the Air Force in 2012. In fact, COA 1 is listed as the “[f]astest COA,” belying any possible assertion that a compelling urgency mandated the selection of COA 2 instead. AR 64–2882 (COA Presentation Slides).

The remaining exceptions to competitive procurement are no less availing for the government. The third allows non-competitive procurements if needed to maintain suppliers during a national emergency, if a nonprofit or federally funded research center must be established or maintained, or if services are required for litigation. 10 U.S.C. § 2304(c)(3). The fourth and fifth exceptions concern situations where international treaties or express statutes mandate other than competitive procedures. *Id.* § 2304(c)(4)-(5). The sixth exception allows an agency to dispense with competition if disclosing the needs in an open solicitation would compromise national security. *Id.* § 2304(c)(6). Finally, the seventh exception to competitive procurements requires simply that it be “necessary in the public interest” to use non-competitive procedures; however, in such a case, the head of the agency must notify Congress in writing of such a determination “no less than 30 days before the award of the contract.” *Id.* § 2304(c)(7). None of these situations apply here.

The government contends that its discrete procurement actions (modification 6 and the ENFAAS solicitation) violate neither CICA nor the FAR. Def.'s Mot. at 34–44. The government emphasizes that in-scope modifications are insulated from significant oversight and that the ENFAAS solicitation was accompanied by a Brand Name Justification. However, these particular actions cannot be considered in isolation. The cited actions are but steps taken to implement a broader scheme of standardization and sole-source procurement. The fact that the government may have taken ostensibly insulated steps to accomplish an improper goal does not redeem the government's actions. Rather, the court looks to the predicate decision to adopt a sole-source infrastructure. In that respect, the government's arguments are severely undercut by the commentaries of two Air Force contracting officials in August and September 2011 expressing concern about moving to a sole-source system without demonstrated justification. See *supra* nn. 7–8. Given that there were known, additional, responsible, multiple-source options available to the Air Force at the time the key decision was made, its decision to use a sole-source security system without competition does not accord with CICA and its counterpart for the Department of Defense, 10 U.S.C. § 3204 [. . .]

* * *

CONCLUSION

For the foregoing reasons, McAfee's motion for judgment on the administrative record is GRANTED. The government's decision to procure and implement Palo Alto's network security system as a sole-source without competition contravenes CICA, 41

U.S.C. § 3301, 10 U.S.C. § 2304(a)(1), and the FAR. The government's motion to dismiss, or in the alternative, judgment on the administrative record is accordingly DENIED. Nonetheless, in light of the balancing of factors pertaining to the issuance of equitable relief, McAfee's request that the court enjoin the Air Force from moving forward with its procurement of Palo Alto software is DENIED. Moreover, because McAfee submitted no bid in the procurement at issue, the court may not award bid preparation and proposal costs under 28 U.S.C. § 1491(b)(2). In effect, this is a situation in which McAfee has demonstrated a violation by the Air Force of statutes and the FAR, but no viable remedy is at hand.

The clerk will enter judgment in accord with this disposition.

McAfee is awarded its costs of suit pursuant to RCFC 54(d).

It is so ORDERED.

Chapter 3. Commercial, IDIQ, and MAS Contracting

A. FedBizOpps

After end of first paragraph on p. 136, add

The synopsis provides a brief description of the goods or services the agency hopes to receive. See 48 C.F.R. § 5.207 for a complete list of what a synopsis must contain. This gives potential bidders the knowledge needed to compare what they can offer with what the agency needs. Small business competition is also benefited by the synopsis through access to acquisition information that small businesses might not otherwise receive. 1987 WL 101523, 3; 48 C.F.R. § 5.201(c).

Generally, a synopsis must be posted on FedBizOpps.gov for a minimum of 30 days before the bidding is closed. However, this time period can be modified in either direction based on the content of the contract. For example, in contracts for research and development the minimum period is extended to 45 days. Similarly, in contracts for commercial items, the time period can be shortened. 48 C.F.R. § 5.203. In fact, in commercial contracts, contracting officers are required only to offer “a reasonable opportunity to respond” based on circumstances such as complexity, commerciality, availability, and urgency. See *Software Testing Solutions, Inc. v. United States*, 58 Fed. Cl. 533, 539 (2003). Using this framework, time periods as short as three days have been held reasonable. 1995 WL 366985, 3. When dealing with commercial contracts, contracting officers can combine the synopsis and the issuance of the solicitation into a single document pursuant to 48 C.F.R. § 12.603. This procedure streamlines the solicitation for commercial items which would otherwise require both a synopsis and

solicitation. This combined synopsis/solicitation procedure is currently the most common method chosen for commercial contracts.

Chapter 3, Section A, page 136

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solicitation. This combined synopsis/solicitation procedure is currently the most common method chosen for commercial contracts.

Chapter 3, Section B, p. 139

The Federal Awardee Performance Integrity Information System, or FAPIIS, took effect on January 1st, 2016. FAPIIS is a online database that links other older independent databases. These databases were used to store information on contractor past performance. Over time these systems grew to be unwieldy and COs found it difficult and time consuming to cull through each of the databases in order to form an accurate overall picture of a contractor's past performances. FAPIIS was designed to unite those systems and create a portal whereby COs and contractors alike could view and enter data.

Under FAPIIS, COs are required to review and analyze a contractor's FAPIIS information prior to any award that is equal to or above the Simplified Acquisition Threshold (\$150,000). Additionally, for contracts awarding equal to or above \$500,000 the contractor must make extensive certifications that the information contained in FAPIIS is complete and correct. Information must then be supplemented if necessary every six months for the duration of the contract. Items that must be disclosed include criminal proceedings and convictions, civil proceedings and judgments above \$5,000, and administrative proceedings. These disclosures apply to the contractors but also the principles as defined in the FAR. This would include officers, directors, owners, partners, or persons having primary management or supervisory responsibilities such as a general manager, plant manager, or head of a division. If negative past performance reviews are found, COs are required to ask responsibility related questions to contractors. The

contractors must then answer to the extent that they show themselves responsible despite the negative review. If the CO then decides to award the contract to that contractor the CO must notify the relevant agency SDO prior to proceeding with award. The Co then must record the information requested, the information received, and how that information evidenced a finding of responsibility. Much discretion seems to be vested in the COs as contractors would be reluctant to refuse answering a question if it meant they would likely be deemed nonresponsible.

While the original databases that gave rise to FAPIIS were conceived merely as tools for COs, the FAPIIS system will be largely open to the public. Only past performance reviews will be shielded from the public eye. This adds a degree of transparency to the new system, in addition to the efficiency goals. Some speculate that this new transparency will be used offensively by contractors trying to gain an edge on the competition. Critics also worry that FAPIIS will grant too much discretion to COs. With the novelty of the system, only time will tell how effective it proves.

Chapter 3. Commercial, IDIQ, and MAS Contracting

B. Commercial Contracting

Page 144. After the Notes and Questions, add:

4. In *U.S. Food Service, Inc. v. United States*, 100 Fed. Cl. 659 (2011) the Court analyzed whether a commercial solicitation could include a price clause requiring “equal to or lower than” commercial customer prices. The Court sustained protests, finding the clause unreasonable.

B. IDIQ and MAS Contracting

2. MAS Contracting

After *Idea International* and its notes and questions, pg. 164, add

Note on Options

The Government can include options in a contract for an increased quantity of supplies, governed by FAR 52.217-6 and FAR 52.217-7, and options for an extended contract term, governed by FAR 52.217-8 and FAR 52.217-9. *See* 48 C.F.R. 2.101.

The contracting officer has the option to increase the quantity of supplies requested in the contract and request additional supplies identified as option items in the contract. FAR 52.217-6, “Option for Increased Quantity,” allows the contracting officer to increase the quantity of supplies called for in the contract. 48 C.F.R. 52.217–6. FAR 52.217-7, “Option for Increased Quantity--Separately Priced Line Item,” allows the contracting officer to request the delivery of a separately priced line item, identified in the contract as an option item. 48 C.F.R. 52.217–7.

The contracting officer has the option to extend services for a short period and extend the contract for its entire option period. If the contracting officer needs to extend the performance of services during the transition period, after the expiration of a contract, he or she may do so for a period of up to 90 days pursuant to FAR 52.237-3. 48 C.F.R. 52.237–3. FAR 52.217-8, “Option to Extend Services,” allows the Contracting Officer to extend services under the contract for a maximum of six months. 48 C.F.R. 52.217–8. FAR 52.217-9, “Option to Extend the Term of the Contract,” allows the Contracting Officer to extend the contract for the option period identified in the contract, which is generally in one-year increments. *48 C.F.R. 52.217–9.*

When more than one FAR clause applies to the exercise of an option, the Contracting Officer can choose which clause to utilize. 13-8 Briefing Papers 1, 4. In *Arko Executive Services, Inc. v. United States*, the contractor argued that the Government could not invoke an option pursuant to FAR 52.217-8 to extend the term of the contract beyond the maximum contract term provided in FAR 52.217-9(c). *Arko Exec. Servs. v. United States*, 553 F.3d 1375 (Fed. Cir. 2009), 51 GC ¶ 72, aff'g 78 Fed. Cl. 420 (2007). The court rejected the contractor's argument, limiting the language in FAR 52.217-9(c) to FAR 52.217-9, and finding that the clause did not limit other potential options contained in the contract. *Id.* The court held that the Government can apply FAR 52.217-8 to extend services beyond the originally contemplated contract term including all options. *Id.*

An option must be exercised in strict compliance with its terms. *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1275 (Fed. Cir. 1999). Any attempt to modify the terms or conditions of the option renders the exercise ineffective. *See 4737 Conner Co. v. United States*, 65 F. App'x 274 (Fed. Cir. 2003). The modified terms constitute a counteroffer that must then be accepted by the contractor before becoming effective. *See Id.* Unless otherwise approved by the parties, an order of a different quantity than that specified in the contract, alterations to the delivery schedule, oral corrections to an otherwise invalid option, and failure to ensure time delivery to the contractor of an exercised option will all render an option invalid. 13-13-8 Briefing Papers 1, 7

There are several exceptions to the strict compliance rule. 13-8 Briefing Papers 1, 7. If a contractor misleads the Government to believe that it can exercise the option without strictly complying with the option clause, the contractor will be estopped from

asserting the strict compliance rule. *Appeal of Ampex Corp.*, GSBCA No. 5913, 82-1 B.C.A. (CCH) ¶ 15738 (Mar. 31, 1982). An option may also be properly exercised in accordance with the strict compliance rule when the contract language is ambiguous. *See Appeal of Bmy-Combat Sys.*, ASBCA No. 39495, 95-2 B.C.A. (CCH) ¶ 27809 (July 17, 1995).

Chapter 4. Contract Types, Costs, and Budgets

A. Funding

Page 178, after Notes and Questions, add:

The Court carried forward its *Cherokee* analysis in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012). Again, the Court found that the government was obligated to pay a tribe funds for a contractual arrangement, regardless of counterarguments such as that payment was “subject to the availability of appropriations.”

Chapter 4, Section C, Part 1, page 205, Note 3

Brownlee v. Dyncorp, 349 F.3d 1343 (Fed. Cir. 2003)

2. Allocability and Reasonableness

Page 205. At the end of the section, add:

6. In *Boeing Co. v. Dept. of Energy*, CBCA 337 et seq., 11-1 BCA para. 34634 (Dec. 14, 2010), the Board considered the cost of legal defense in a False Claims Act case for a cost-reimbursement contractor. Earlier, the Board had found that the legal costs, incurred solely on counts the contractor was found liable, are unallowable. This time, the Board found unallowable even those “common costs” applicable both to counts found liable and counts not found liable.

7. For an application of *Bill Strong*, see *Tip Top Construction v. Donahoe*, 695 F.3d 1276 (Fed. Cir. 2012). The Federal Circuit held that the contractor was entitled to recover consultant costs and attorney fees during a time of negotiation.

Page 207. After “Cost Principles,” add:

Note: The issue of reasonableness received close scrutiny in a case about Iraq War contracting, *Kellogg Brown & Root Services v. United States*, 107 Fed. Cl. 16 (2012). The Court found that KBR, in its contracting for dining facilities, had not been reasonable in selecting and paying a major subcontractor. Although the opinion largely analyzes the particular facts, it also brings the issue up to date, from previous rulings largely in the 1990s and before.

C. Cost Accounting and Auditing

3. Cost Accounting Standards

After note 2 on page 208, add

3. In *Astronautics Corp. of America*, the ASBCA held that, due to lack of privity, a subcontractor cannot be subject to a CAS claim from the government *In Re Astronautics Corp. of Am.*, ASBCA No. 49691, 99-1 B.C.A. (CCH) ¶ 30390 (May 18, 1999). Although, this doesn't mean subcontractors can disregard CAS practices. The government can essentially punish the prime contractor for the failings of their subcontractor. The resulting adjustment in the prime contractor's contract, it is assumed, will either be passed down to the subcontractor or will be absorbed by the prime—in which case the subcontractor likely will not receive much future business. In either event, while not directly susceptible to CAS claims, the subcontractor still has a strong incentive to follow the standards.

Page 208. At the end of Notes and Questions:

4. The opinion in *Sikorsky Aircraft Corp. v. United States*, 105 Fed Cl. 657 (2012) provided a useful overall discussion of CAS, including the role of DCAA auditing. The

case itself turned on the relatively narrow issue of the statute of limitations and when claims accrue.

5. *DirecTV Group v. United States*, 670 F.3d 1370 (Fed. Cir. 2012), continues a series of complex rulings about CAS and the government's payments for pension costs under cost-reimbursement contracts.

Chapter 5. Contract Administration

B. Specifications, Inspection and Acceptance

1. Specifications

After second full paragraph on p. 219, add

Note on Impliedly Warranted Specifications

Whether a given set of specifications are “impliedly warranted” by the government depends on the language of the specifications set forth in the contract. The genesis of the government impliedly warranting contract specifications comes from the Spearin doctrine which held that a contractor who is bound by contract to follow the government's plans is not responsible for consequences resulting from those plan's defects. *United States v. Spearin*, 248 U.S. 132, 136 (1918). The modern approach divides specifications into one of three categories, design, performance, or hybrid. Language creating performance specifications set forth a benchmark that the contractor must meet. However, a contractor is left to his own ingenuity on *how* to reach this benchmark. Conversely, design specifications describe procedurally how the contractor must construct the final product, offering little room for contractor creativity. Hybrid specifications are a relatively new perspective that recognizes some contracts may contain design specification elements within performance specifications or vice versa. 2 No. 1 Journal of the American College of Construction Lawyers 4 (2008).

Generally, the classification of specification is dispositive in determining whether the government has “impliedly warranted” the specification, and thus, whether it will be responsible for a defective specification. Under the modern test, the government will be responsible for defective design specifications but not responsible for defective

performance specifications. For example, if a contract specifies the proportions of various concrete components to be used for a construction project, a court will determine those to be design specifications. And if a contractor follows those design specifications and the concrete is defective because of the proportions listed in the specifications, then the government will be responsible for the defective concrete. *Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598, 653-54 (2010). Under the hybrid approach, the problematic specification must be analyzed independent of any other specifications. For example, if the defective specification is found to be a design specification the government will be responsible for its defectiveness even if 99% of the other specifications in the contract are performance specifications.

The modern approach has garnered considerable criticism over its reign. Detractors note that any given specification is inherently both descriptive and prescriptive. In other words, the modern test's outcome is arbitrarily determined by the point at which a micro design specification becomes a macro performance specification. Opponents further contend that the modern approach fails to uphold the main rationale of the Spearin doctrine, party expectations. If the parties are unable to know what type of specifications are in a given contract, critics argue, then the resulting uncertainty will manifest through higher bid prices. Kevin C. Golden & James W. Thomas, *The Spearin Doctrine: The False Dichotomy Between Design and Performance Specifications*, 25 Pub. Cont. L.J. 47, 56 (1995). (remove similar citation from string cite on bottom of opposing page). Even under a best case scenario, where there is no uncertainty as to specification type, contractors are left balancing the greater freedom of performance

specifications against the decreased liability of design specifications. Yet, despite its disapprobation, the modern test is firmly entrenched and remains the court's approach.

Chapter 5, Section B, subsection 1, p.219

Note on Requirement Specifications

The government has three main types of requirements specifications that allow contractors to understand how to efficiently bid and eventually complete the contractual obligation if they prove to be the winning bidder. These requirements specifications are functional, performance, and design. Each type of specification can be plotted along a sliding scale with contractor freedom on one end and government control on the other. Selecting which type of requirement specification to use is largely dependent upon the need to be filled. Tasks that require specialized products that rely on other existing systems, such as computer chips custom made for missiles require a high degree of government control and cannot tolerate nearly any deviation. On the other hand a contract for a park bench could be designed and engineered many ways, allowing for greater contractor freedom.

Functional specifications are the first type of requirement specifications. Functional specifications describe the end use to which the product will be used. This is best understood through example, say the government has a manufacturing plant that needs a cooling system to properly function. If the Contracting Officer wanted to use functional specifications, he could require the contractor to provide a cooling system capable of keeping the manufacturing plant cool while in operation. How the contractor sets out to accomplish this goal would be within the sole discretion of the contractor. And as long as the final system was able to meet the temperature requirement the contract

would be completed satisfactorily. Functional specifications represent the broadest type of specification. They promote contractor ingenuity and creativity in meeting the government's needs. This can be illustrated, again, through example. Say when the government sought bids for the manufacturing plant cooling contract they anticipated vendors to submit cooling systems using fan ventilation. If the government used the more restrictive performance specifications described below, they might exclude a vendor that could implement a more effective and cheaper water cooling system that the government may not have originally contemplated.

The second type of requirement specification is performance. Performance specifications require the contractor to perform at a set benchmark in order to satisfactorily complete the contract. Said differently, performance specifications define a result that the contractor must meet. Using our manufacturing plant example, a Contracting Officer using performance specifications could require that a successful bidder be able to produce an array of fans capable of spinning at a certain number of rotations per minute and being able to displace a certain amount of air over a given time. Here, the specifications do not confine the contractor as to how the fans be made, only that they perform at a certain benchmark. On the spectrum of contractor freedom, performance specifications fall between the liberal functional specifications and the restrictive design specifications

The third and final type of requirement specification is design. Design specifications dictate the process by which the product is to be made. This includes the materials used in the product, how the product is assembled, and the schematics used to engineer the product. In the case of our cooling fans. A contract using design

specifications would articulate the types of metal to be used, the length and curvature of the fan blades, and even how tight the bolts holding the fan assembly together should be tightened to. Design specifications represent the lowest degree of contractor freedom.

It's worth noting that in the real world all three of these requirement specifications almost always end up blending together. Often the line separating one from another can be difficult to discern. Also, requirement specification type can have impacts of determinations of liability and breach of contract. As a contractor's freedom to engineer an effective and creative solution increases, so does that contractor's responsibility increase in the event that the product fails. This is also a double-edged sword though. If the government uses restrictive design specifications and those designs prove to be defective, the government will have no one but itself to blame. In such an example, a contractor would be bound by the designs provided and could not be held responsible for simply following those designs. The FAR requires that the government avoid design specifications unless it is absolutely necessary that they be used. This has the effect of both decreasing government liability and increasing market competition through greater contractor freedom.

Chapter 5, Section B, Part 1, page 228, Note 4

Ricks Mushroom Serv. V. United States, 76 Fed. Cl. 250 (Fed. Cl. 2007);
Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 226
Md. App. 420 (Md. Ct. Spec. App. 2016);
Franklin Pavkov Constr. Co. v. Roche, 279 F.3d 989 (Fed. Cir. 2002)

Chapter 5, Section B, Part 1, page 229, Note 5

Appeal of: American Turbo Systems, Inc., ASBCA No. 55906;
Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216 (IA 1988).

Chapter 5, Section B. Specifications, Inspection and Acceptance

1. Specifications

Page 234. Add:

6. In a major case about the causes of the flooding of New Orleans, the Fifth Circuit found that the contractor who provided services for the levee construction was not entitled to government-contractor immunity.

Contract Administration: Latent Defects

Chapter 5, Section B, Part 3, page 246, Note 2

M.A. Mortenson Co. v. United States, 40 Fed. Cl. 389 (1998)

Chapter 5 Contract Administration

B. Specifications, Inspection, and Acceptance

4. Clauses and Terms for Commercial Items

After *In the Matter of Instruments for Industry* and its notes and questions, pg. 249, add

Notes on Clauses and Terms for Commercial Items

Public Law 103–355 establishes special requirements for the acquisition of commercial items intended to more closely resemble those customarily used in the commercial marketplace. 48 C.F.R. 12.201. FAR 12.301 states that contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items or determined to be consistent with customary commercial practice. 48 C.F.R. 12.301. FAR 52.212-4 includes terms and conditions

which are consistent with customary commercial practices and is incorporated in the solicitation and contract by reference. *Id.*

According to FAR 52.212-4, the Government may test or inspect any commercial supplies that have been tendered for acceptance. 48 C.F.R. 52.212-4. After inspection, the Government may require repair or replacement of nonconforming supplies or services. *Id.* Additional changes in the terms and agreement of the contract may only be made by written agreement of the parties. *Id.*

Pursuant to FAR 52.212-4, the Government reserves the right to terminate the contract at its convenience for commercial items. *Id.* In the event of termination for convenience, the contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the contractor can demonstrate to the satisfaction of the Government, using its standard record keeping system, have resulted from the termination. *Id.* The Government may also terminate the contract for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. *Id.* Should the Government terminate for cause, the Government shall not be liable to the contractor for any amount for supplies or services not accepted, and the contractor shall be liable to the Government for any and all rights and remedies provided by law. *Id.*

FAR 52.212-4 requires that the Contractor warrant and imply that the commercial items are delivered pursuant to the contract are merchantable and fit for use for the particular purpose described in the contract. *Id.* Unless specified by an express warranty,

the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted commercial items. *Id.*

Chapter 5. Contract Administration

C. Government Assistance, Including Progress Payments and Prompt Payment, and Sureties

3. Assignment as Security for Credit

After *Industrial Bank of Washington* and its notes and questions, pg. 264, add

4. The waiver of sovereign immunity does not extend to claims of subcontractors, who are not in privity of contract with the government, but does extend to assignees, “except as barred by ... the Anti-Assignment Act.” *Red Hawk Constr., Inc. v. United States*, 108 Fed. Cl. 779, 784 (Fed. Cl. 2013). The Anti-Assignment Act states that any attempt to transfer a government contract or an interest in a government contract annuls the contract. 41 U.S.C.A. § 6305. However, unless prohibited by the contract, amounts due under the contract “may be assigned to a bank, trust company, Federal lending agency, or other financing institution.” *Id.* To waive the protection of the Anti-Assignment acts, the contractor must give “clear assent to the assignment.” *Red Hawk Constr., Inc.*, 108 Fed. Cl. at 789. To determine whether the contracting officer has assented to the assignment, courts examine whether “the totality of the circumstances” presented to the court establishes the Government's recognition of the assignments by its knowledge, assent, and action consistent with the terms of the assignments. *Id.*

In *Red Hawk Construction Inc. v. United States*, Red Hawk Construction, a subcontractor, sought to recover money wrongfully paid by the Government to the contractor, claiming they were an assignee of an assignment agreement between the

contractor and a bank, which was created to hold proceeds in escrow. *Id.* at 783 . The Anti-Assignment Acts bar subcontractors, like Red Hawk Construction, from becoming assignees to a contract. *Id.* at 784. Although the contracting officer can waive the Anti-Assignment Acts, there was no waiver by the Contracting Officer in this case. *Id.* at 789. The court held that Red Hawk Construction could not sue the United States for money wrongfully paid to the contractor because Red Hawk Construction was not in privity of contract with the Government. *Id.* at 787.

Chapter 6. Changes and Delays

Changes and Delays: Changes and Disputes clause

Chapter 6, Section A, page 271, Note 5

Keeter Trading Co. v. United States, 79 Fed. Cl. 243 (Fed. Cl. 2007)

Changes and Delays: Concurrent delays, government causing unreasonable delay

Chapter 6, Section C, page 289, Note 1

Appeal of Dan Rice Construction Co, Inc., ASBCA No. 52160 (2004);

Appeals of Grumman Aerospace Corporation, ASBCA Nos. 46834, 48006, 51526 (2003)

Changes and Delays: Concurrent Delays, Interference as a Sovereign Act

Section C, page 289, Note 2

Appeal of Maggi's Landscaping, Inc., ASBCA Nos. 52463, 52463 (2004);

Weston/Bean Joint Venture v. United States, 123 Fed. Cl. 341 (Fed. Cl. 2015)

Changes and Delays: Equitable Adjustment and Government Failure to Disclose

Section C, page 289, Note

Jay Cashman, Inc. v. United States, 88 Fed. Cl. 297 (Fed. Cl. 2009);

Bannum, Inc. v. United States, 80 Fed. Cl. 239 (Fed. Cl. 2008);

Short Bros., PLC v. United States, 65 Fed. Cl. 695 (Fed. Cl. 2005);

Martin Constr., Inc. v. United States, 102 Fed. Cl. 562 (Fed. Cl. 2011)

Chapter 7. Intellectual Property

A. Patents and Copyright

After Copyrights, on page 298, add a new paragraph:

In *Gaylord v. United States*, 678 F.3d 1339 (Fed. Cir. 2012), the Court gave a broad judgment for compensation by the United States for infringement.

Chapter 7. Intellectual Property, C. Technical Data

Before last full paragraph before FN Manufacturing, on p. 300, add

Note on Rights in Technical Data

§ 815 of the National Defense Authorization Act for Fiscal Year 2012 made several changes in the way rights in technical data operate. First, congress greatly expanded the types of data that can be required to be delivered to the government. Now, in addition to data that was already subject to delivery under the contract, a contractor can be forced to deliver any data that it “generated or utilized” while performing the contract so long as the data “pertains” to an item that was developed in part with the assistance of federal funding, or the data is necessary for “segregation” or “reintegration”. This broad language potentially casts a large net over much of the data held by some contractors. Particularly, the provision enabling delivery for necessary “segregation” or “reintegration” troubles contractors. The precise definitional limits of these words have yet to be fully refined through litigation. The DFAS further allows the DOD to reveal limited rights technical data to third parties when necessary for “segregation” or “reintegration” concerns. While limited rights do not include software, critics argue that the DOD has historically expanded provisions like this to include software; as a result, source code will likely be swept up in the “segregation” or “reintegration” provision

which will force contractors into revealing some of their most prized trade secrets to not only the DOD, but other third parties, including competitors. This would not only damage the contractor, but it would damage the government in the long run because fewer contractors would be willing to submit to the new terms, which would cause subsequent decrease in competition. However, the DFAS has taken precautions to mitigate such ill effects. In order for the DOD to share a contractor's limited or restricted technical data with another support contractor the support contractor cannot be affiliated with the prime contractor, its first-tier subcontractor, or any of their competitors. The support contractor can also be required to agree to the data holding contractor's nondisclosure agreement. This is of course all in addition to the fact that the DFAS applies only to defense contracting and all civil contractors will be unaffected.

Second, certain flowdown provisions have changed with respect to subcontractor's duties and obligations. The government now has the same rights to modify and alter commercial software as they have always had in restrictive rights non-commercial software. Alteration and modification is typically not allowed under most commercial software licenses. Thus, if this new provision is flowed down a subcontractor might be reluctant to oblige, or at the very least require more payment. Also, DFARS subcontractors who are responsible for delivering technical data are now subject to another flowdown provision that exposes them to restricted marking validation. Essentially this means the government can evaluate assertions of limited rights by not only prime contractors but commercial suppliers as well

As of September 2011, a new standard for determining whether data has been developed with government funds or private funds. If a contractor developed the data at

the lowest possible level prior to receiving any government funding then the contractor has limited rights, if technical data, or restricted rights, if software. (the content of this last paragraph could be incorporated into the last full paragraph on p. 299)

C. Restrictive Markings and Software

Page 315. Between the paragraph that begins, “A fundamental difference” and the paragraph that begins, “For more information” add:

The DFARS now has both provisions, and implementing clauses in DFARS Subpart 227.71 (Technical Data) and Subpart 222.72 (Software) include that DoD may challenge the assertion of limited rights by commercial suppliers. These are rights asserted by the contractor (or subcontractor) as to technical data and computer software.

Also, the FY 2012 defense authorization, in section. 815, amended 10 U.S.C. 2320 to provide for a complex way to obtain certain technical data.

The Federal Circuit resolved a narrow question about software contracts in *McHugh v. DLT Solutions*, 618 F.3d 1375 (Fed. Cir. 2010). The contract had a non-substitution clause but this was not breached when the Navy continued to use existing software.

Chapter 7. Intellectual Property, Section D. Information Technology

After note 2 on page 330, add

3. In *McAfee*, the court held national security concerns to outweigh sole sourcing concerns regarding software firewalls. *McAfee* argued that the Air force was engaging in sole sourcing by requiring a brand name firewall component to be used in its contract. The RFP said brand name products were required with no substitutions and the court found that this was in fact sole sourcing. But, because the Air Force claimed that they

needed the brand name in order to quickly integrate the firewall with their system in order to avoid hostile cyber attacks, the court was willing to overlook the less than open competition. To support their position, the Air Force submitted affidavits that claimed any hesitation in firewall procurement would endanger the nation to cyber espionage.

Procedurally, the court did find that the Air Force had violated the CICA's requirement for fair and open competition through sole sourcing. However, because *McAfee* submitted the claim as a pre-award bid protest asking for an injunction, the court was unwilling to grant the injunction because of the damage any delay might cause. *McAfee, Inc. v. United States*, 111 Fed. Cl. 696, 715 (Fed. Cl. 2013). In *Savantage*, another software case a few years earlier, the RFP required certain benchmarks that led the protestor to believe that only one type of software would meet the requirements. The court did not accept the protestor's argument that the software to be provided was effectively sole sourcing. *Savantage Fin. Servs., Inc. v. United States*, 595 F.3d 1282, 1289 (Fed. Cir. 2010). The two cases together suggest a two step approach for evaluating modern software bid protests. First, the court must determine whether the protest can succeed on its merits. If it can, then the court must also conclude that national security concerns do not require the use of sole sourcing in order to avoid vulnerability to cyber espionage. Only when both of these standards are met will a software bid protestor be granted relief.

An additional challenge in software cases involving national security is the difficulty of evaluating factual claims relating to information technology. Both the complexity of software and the speed at which it evolves make information technology nearly impervious to a layperson's understanding. Without understanding the industry

itself, a court is hard pressed to evaluate whether a national security argument is genuine or frivolous. This problem will only be exacerbated in the future as the information technology industry continues to grow increasingly complex and specialized.

Chapter 7 (Intellectual Property), Section D, page 338

After Info Systems

McHUGH v. DLT SOLUTIONS, INC.

618 F.3d 1375

United States Court of Appeals, Federal Circuit

Sept. 23, 2010

Before LOURIE, FRIEDMAN, and MOORE, Circuit Judges.

LOURIE, Circuit Judge.

The Secretary of the Army appeals from the final decision of the Armed Services Board of Contract Appeals holding that the government breached a non-substitution clause of a delivery order awarded to DLT Solutions, Inc. (“DLT”). Appeals of DLT Solutions, Inc., ASBCA No. 54812, 09–1 BCA ¶ 34067 (“Board Opinion”). Because we determine that under a proper interpretation of the contract, the government did not replace the contracted-for software following the termination of its contract with DLT, and hence did not breach the contract, we reverse the Board's decision.

Background

DLT is an authorized software reseller and licensor under a blanket purchase agreement (“BPA”) between Oracle Corporation and the Army's Information Technology E. Commerce and Commercial Contracting Center. DLT is a reseller of Oracle software and software licenses under the terms of the BPA. In February 2003, DLT was awarded

Delivery Order No. 29 (“the contract”) to deliver certain Oracle software (“DO29 software”) to the Navy's Office of Civilian Human Resources (“OCHR”) on a “lease to ownership” basis. The contract award was based on OCHR's October 2000 functionality assessment which resulted in its plan to develop a system that would allow access to a variety of data related to HR training, benefits, resumes, organizations, and positions through a single “portal” to the Navy-wide infrastructure of software programs that interfaced with the Defense Civilian Personnel Data System (“DCPDS”), the Department of Defense's (“DoD's”) department-wide system for managing civilian HR functions and employee records for all DoD civilian employees. The DCPDS is managed by DoD's Civil Personnel Management Service (“CPMS”).

The Army issued the contract on February 28, 2003. The contract provided OCHR with lease-to-own licenses to thirteen Oracle applications used for performing various functions, including marketing and HR management . . . Following the award, DLT assigned all remaining payments to Citizens Leasing Corporation, its financing company. On March 7, 2003, the contract was modified to include a non-substitution clause that prevented OCHR from replacing the leased Oracle software with functionally similar software for a period of one year after the expiration or termination of the contract. The clause reads:

If (i) an Order expires prior to the expiration of the ... full Lease Term ... or (ii) the Government terminates the Order pursuant to a Termination for Convenience, the Government agrees not to replace the equipment and/or Software leased under this Order with functionally similar equipment and/or software for a period of one (1) year succeeding such expiration or termination.

J.A. 114 (emphasis added).

DLT delivered the Oracle software to OCHR on March 18, 2003. In July 2003, OCHR learned that it did not have the authority to implement applications that it had envisioned following its prior functionality assessment because the DoD managed the HR platforms and CPMS did not approve the use of the DO29 software with DCPDS. Moreover, OCHR believed that the hardware it currently possessed was not adequate to run the DO29 software. Thus, the software was never deployed by OCHR. On March 22, 2004, OCHR issued a notice to DLT, terminating the contract for convenience, effective March 31, 2004. On November 3, 2004, the contracting officer returned all compact disks and software documentation relating to the contract, along with a statement that the DO29 “software was never installed.”

Prior to the contract award to DLT, OCHR had used a software suite comprised of twenty-six software applications, including DCPDS, for all its personnel management needs. It continued to use those applications between the time that it awarded the contract and for the year following the termination of the contract (the “non-substitution period”). At the time that OCHR entered into the contract, the DCPDS software suite employed version 10.7 of the underlying Oracle Federal HR software, a customized version of the Oracle software that supports federal statutory and regulatory reporting requirements. Between July 18, 2003 and August 3, 2003, CPMS upgraded the Oracle Federal HR software used by DCPDS from version 10.7 to 11i, adding the capability to access DCPDS applications through a web interface. This Oracle upgrade was the only change made to OCHR's existing applications during the entire period between the award of the contract and its termination

In July 2004, DLT submitted a certified claim for \$8,167,328 to the contracting officer. The claim alleged that the government had breached the non-substitution clause of the contract by replacing the DO29 software with functionally equivalent DCPDS software. On November 3, 2004, the contracting officer denied the claim, stating that the government was not liable for any damages because it had taken no action that could be reasonably construed as a substitution of the DO29 software. DLT appealed the denial of that claim to the Board. The parties did, however, enter into a settlement agreement whereby the government was to pay DLT \$1,283,075 for all expenses associated with the termination for convenience.

On appeal, the Board found that nine out of twenty-six applications that OCHR continued to use during the non-substitution period were “functionally similar” to the DO29 software. Board Opinion at 15. The Board concluded that OCHR's continued use of these nine preexisting applications during the non-substitution period constituted a software replacement that breached the terms of the non-substitution clause. *Id.* Moreover, the Board found that two of those nine applications had received the Oracle Federal HR version 11i upgrade that CPMS made in 2003, enabling web access capability for those applications. *Id.* The Board held that the upgraded software constituted a replacement of the DO29 software as well. *Id.* The Board cited two prior decisions, one from the United States Claims Court (“Claims Court”) and one from the General Services Board of Contract Appeals (“GSBCA”), for the proposition that continued use of preexisting software, both with or without an upgrade, could constitute a violation of a non-replacement clause. See *id.* (citing *Municipal Leasing Corp. v. United*

States, 7 Cl.Ct. 43 (1984) and Northrop Grumman Computing Sys., Inc., GSBCA No. 16367, 06-02 BCA ¶ 33,324).

* * *

Discussion

Under the Contract Disputes Act, we uphold findings of fact by the Board “unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.” 41 U.S.C. § 609(b).

* * *

We disagree with the Board's interpretation of the term “replace” in the non-substitution clause. That is a question of contract interpretation that we review de novo on appeal. Contract interpretation begins with the plain language of the written agreement. *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed.Cir.1996). A reading of the non-substitution clause to prohibit the government from continuing to use software, unmodified in any manner, and one that it was already using prior to the contract award to DLT is not reasonable. *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed.Cir.2002) (“The contract must be construed to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract.”). Contrary to DLT's arguments, the clause does not impose such a requirement against continued use of pre-existing software. Rather, it only states that the government will not “replace the equipment and/or software leased under this Order with functionally similar equipment and/or software.” The plain meaning of the word “replace” would require at the very least some action by the government following the termination of the contract. *Craft Mach. Works,*

Inc. v. United States, 926 F.2d 1110, 1113 (Fed.Cir.1991) (“In contract interpretation, the plain and unambiguous meaning of a written agreement controls.”). The dictionary definition of the word “replace” requires substitution of one by another. See Metro. Area Transit, Inc. v. Nicholson, 463 F.3d 1256, 1259 (Fed.Cir.2006) (using dictionary definitions in contract interpretation) . . . Here, OCHR took no action with regard to 24 of 26 of the pre-existing applications. It did not replace them.

We are also not persuaded by the Board's conclusion that the software upgrade to the underlying Oracle software constituted a replacement of the DO29 software. The Board found that the Oracle Federal HR software upgrade from version 10.7 to version 11i changed its functionality. In doing so, it relied on DLT's expert's opinion that the Oracle 11i upgrade made major improvements with regard to internet usability and self-service functionality. The Board held that this functionality upgrade was analogous to repair and reuse of existing computer equipment that the Claims Court held could constitute replacement.

Once again, we disagree with the Board on its broad interpretation of the contract term “replace.” As a preliminary matter, the non-substitution clause here prohibits replacement of the DO29 software “for a period of one (1) year succeeding ... termination.” The upgrade at issue occurred between July and August 2003, well before OCHR had terminated the contract for convenience in March 2004. More importantly, the upgrade did not impact any core functionality of the pre-existing software. It merely changed two of the applications being used by OCHR from desktop-based to web-based. We do not agree that, under a proper interpretation of the contract, that change is substantial enough to be considered a replacement of the DO29 software suite.

In sum, in this case, the non-replacement clause was intended to preclude or discourage the government from cancelling the contract for its convenience, in order to substitute another product that functioned substantially the same way but appeared more advantageous or desirable to the government—perhaps because it would be cheaper. The government made no such replacement here, but instead simply continued using the DCPDS software it had already been using.

As the Board noted, the case law that it relied upon was not binding on it, nor is it binding on this court. To the extent the two cited cases can be considered persuasive, we find them not applicable to the facts presented here. In *Municipal Leasing*, the Claims Court held that the Air Force had breached a non-substitution clause in a contract to lease computer terminals by refusing to renew the lease on the contracted-for equipment and instead repairing the computer terminals that it had used prior to the contract. The court found that the Air Force had considered the repair as an alternative prior to contracting with Municipal, and held that repairing the older malfunctioning terminals essentially replaced the contracted-for terminals. *Id.* Similarly, in *Northrop Grumman*, the GSBCA, relying on the Claims Court's *Municipal Leasing* decision, held that the General Services Administration (“GSA”) violated a non-replacement clause in a lease for computer storage area network (“SAN”) equipment by upgrading existing SAN equipment and not exercising its option to renew the lease with Northrop.

Unlike in *Municipal Leasing*, here, OCHR never stopped using its original software, never replaced it with the DO29 software, and never returned to using its original software following the contract termination. Nor was the original software a valid alternative that OCHR had previously considered for reaching the goal for which it

leased the DO29 software. Even if the software upgrade were to be considered analogous to repair of malfunctioning equipment, the upgrade here was not carried out with an eye toward replacing the DO29 software. It is undisputed that OCHR had no control over the Oracle upgrades performed by the DoD. Furthermore, the upgrade was fairly insubstantial in comparison with the scope of the DO29 software. The Board found that only two of twenty-six applications received the upgrade. We agree with the government that such an insubstantial upgrade cannot reasonably constitute a replacement of the contracted-for software. Moreover, it is undisputed that the contracted-for software was never intended to replace the DCPDS, merely to work with it. In other words, the two software suites, at least to some extent, provided functionality that may coexist with, rather than replace, each other.

* * *

CONCLUSION

We have considered DLT's remaining arguments and do not find them persuasive.

Accordingly, the judgment of the Board is

REVERSED

Chapter 8, Section A, page 342, Note 1

Winter v. Floorpro, Inc., 570 F.3d 1367 (Fed. Cir. 2009);
Flexlab, L.L.C. v. United States, 424 F.3d 124 (Fed. Cir. 2005);
Ins. Co. of the West v. United States, 100 Fed. Cl. 58 (Fed. Cl. 2011);
Matter of: TCBA Watson Rice, LLP, B-402086.6, B04022086.7 (2010).

Chapter 8. (Small Business and Subcontractors)

Section B (Small Business Programs), page 352

After Note

MANUS MEDICAL, LLC v. UNITED STATES

115 Fed. Cl. 187

United States Court of Federal Claims

March 19, 2014

WHEELER, Judge.

This bid protest raises the question of whether a procuring agency may cure an incomplete proposal from a small business offeror by submitting the matter to the Small Business Administration (“SBA”) for a Certificate of Competency. For the reasons explained below, the Court finds that an agency cannot lawfully cure proposal defects by submitting them to the SBA, and that the contract award to an ineligible offeror cannot stand. Accordingly, the Court sustains Plaintiff’s protest, and permanently enjoins the agency from proceeding with a contract that was illegally awarded.

Factual Background

This case arises from a Department of Veterans Affairs (“VA”) procurement for custom surgical packs to be used at five VA Medical Centers in Denver, Colorado; Grand Junction, Colorado; Salt Lake City, Utah; Cheyenne, Wyoming; and Fort Harrison, Montana. Administrative Record (“AR”) 26. On August 24, 2012, the VA issued the solicitation as a set-aside for Service–Disabled, Veteran–Owned Small Businesses. AR

23. Plaintiff, Manus Medical, LLC (“Manus”), and Defendant–Intervenor, Marathon Medical, LLC (“Marathon,” or “MMC”) were among the six offerors who competed for the award. AR, Tabs 15, 16. The solicitation contemplated the award of an indefinite delivery, indefinite quantity (“IDIQ”) contract for a base year and four option years. AR 26. The VA intended to evaluate proposals and make an award by using a Lowest Price Technically Acceptable (“LPTA”) source selection process. AR 88.

The solicitation contained nine components for determining Technical Capability that would be evaluated on a Pass/Fail basis. AR 88–89. In order to be considered technically acceptable, an offeror had to receive a “Pass” grade for all nine of these components. AR 89. A “Fail” grade in any category would result in the offeror being technically unacceptable and thus ineligible for award. *Id.* Of particular significance here, two of the nine Technical Capability components were as follows:

H. (PASS/FAIL)—Has the offeror identified at least three (3) VA or other Federal, State or Local Government customers for whom the offeror has provided custom Surgical Packs described in this solicitation at any time. This may include up to three commercial customers if government customers are not available. The reference list shall include: customer, office contact, telephone number, fax number, and email address, shall be submitted in the proposal.

I. (PASS/FAIL)—Did the offeror receive at least a “satisfactory” rating on each individual reference based on previous work to: comply with schedules, training and skill levels of personnel accomplishing the work, responsiveness to customer requirements, effectiveness at identifying and correcting problems and overall satisfaction with service performance.

Id.

[. . .] The VA evaluated the offerors' prices by adding the quoted price for the base year and each option year. AR 1443. Marathon submitted the lowest price [...], and Manus submitted the second lowest price [...]. Id.

However, in evaluating Technical Capability, the VA concluded that Marathon failed components “H” and “I” quoted above, because Marathon did not submit the names of any prior customers or references.

The VA determined that Manus received a “Pass” rating on all the Technical evaluation factors, and thus was eligible for award with the second lowest price. Id.

[Despite failing the “H” and ”I” subfactors, Marathon remedied the errors in their proposal through clarifications with the CO. The GAO recommended to VA that Marathon be allowed to continue in the pre-award bidding because the clarifications it provided to the CO were considered discussions rather than negotiations.]

* * *

On June 13, 2013, the VA informed the parties that it would comply with the GAO's recommendation, but on September 11, 2013 (AR 1973), the VA reversed course and decided to submit the question of Marathon's eligibility for award to the SBA for a Certificate of Competency (AR, Tab 51). In its referral letter to the SBA, the VA's contracting officer stated “the offeror [Marathon] was found non-responsive to the solicitation because they did not include the required previous source list required by the evaluation factors.” AR 1981. However, in a letter of the same date sent to the GAO, VA's Office of General Counsel stated:

Where an offeror is a small business and an agency finds an otherwise technically acceptable small business offeror to be unacceptable under a LPTA pass/fail evaluation of responsibility-type criteria (here, the responsibility criteria being the two factors under which Marathon “failed”), that constitutes a nonresponsibility determination that is required to be referred to the SBA for a Certificate of Competency determination.

AR 2107.

On October 30, 2013, the SBA's Area V office in Fort Worth, Texas issued a Certificate of Competency for Marathon, making Marathon eligible for award. AR 2112. On December 19, 2013, the VA made a new source selection evaluation finding that Marathon passed all of the Technical Capability components, and selecting Marathon for award as the lowest priced offeror. AR 2118–46. On January 2, 2014, the VA notified Manus that it would not be accepted for award, and accepted Marathon's proposal for award, subject to approval by the VA's Contract Review Board, expected by February 1, 2014. AR 2147, 2150. On January 10, 2014, Manus filed suit in this Court.

* * *

Discussion

* * *

B. Analysis of the Merits

This is a relatively simple case made more complicated by some curious agency actions following receipt of a GAO bid protest decision. Broadly speaking, the question presented is whether the VA's corrective action was reasonable. More specifically, the question is whether the VA's referral of Marathon's incomplete proposal to the SBA for a

Certificate of Competency determination was proper, given the agency's original decision to exclude that proposal for failing to provide information explicitly required by the solicitation. The answer, as explained below, is that there was nothing improper about the VA's original decision, and without any impropriety to remedy, the VA's corrective action cannot be defined as reasonable, nor can it be upheld.

* * *

a. The Solicitation and Marathon's Proposal

In general, when using the LPTA source selection process, award is “made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.” FAR 15.101–2(b). Whether to include past performance among these non-cost evaluation factors is left to the discretion of the contracting officer. *Id.* In this specific case, the VA elected to include past performance. AR 82–83, 86, 89. In addition, the solicitation clearly stated that the “Government intend[ed] to evaluate offers and award a contract without discussions with offerors” (AR 84), and warned that failure to submit complete information “may exclude the proposal from further consideration” (AR 87). That is precisely what occurred. When Marathon failed to include the required proposal information, it was eliminated from the competition. AR 1444.

b. Agency Discretion

Discretion, by definition, involves the freedom to choose between certain options. Here, the issue is which options were available when the VA received Marathon's incomplete proposal. On the one hand, “where, in a negotiated procurement, an offeror's proposal does not comply with the solicitation's requirements, ‘an agency is not required

to eliminate the awardee from the competition, but may permit it to correct its proposal.’” *ManTech Telecomms. & Info. Sys. Corp. v. United States*, 49 Fed.Cl. 57, 71 (2001) (quoting *D & M Gen. Contracting, Inc., B-252282 et al.*, 93-2 CPD ¶ 104, at 2 (Comp.Gen. Aug. 19, 1993)), *aff'd*, 30 Fed.Appx. 995 (Fed.Cir.2002). On the other hand, an agency is also not obligated to open discussions to obtain missing information when it discovers an offeror's omission. *Orion Tech., Inc. v. United States*, 102 Fed.Cl. 218, 232 (2011), *aff'd*, 704 F.3d 1344 (Fed.Cir.2013). Accordingly, Marathon “could not have had any expectation when it submitted its proposal that it would have the opportunity to rectify proposal deficiencies through discussions.” *Id.*

Nonetheless, the Government's and Marathon's arguments rest on the notion that factors “H” and “I” are responsibility factors and, therefore, Marathon's failure to submit the required information mandates referral to the SBA. However, referral to the SBA is necessary only “[u]pon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility.” FAR 19.602-1 (emphasis added). Such was not the case here, as Marathon's lack of success was determined by its deficient proposal, and the merits of its past performance were never evaluated because it neglected to provide the information for evaluation. Thus, the critical distinction is between failing a past performance evaluation and failing to submit the information necessary for the agency to conduct such an evaluation.

Instructive in understanding this distinction is another GAO decision, *Menendez-Donnell & Assocs., B-286599*, 2001 CPD ¶ 15, 2001 WL 41220 (Comp.Gen. Jan. 16, 2001). The protestor, MDA, submitted a proposal that omitted some required information about its experience and past performance, resulting in the rejection of its proposal as

unacceptable. One of MDA's arguments was that the agency “should have referred its technical unacceptability to the Small Business Administration (SBA) for review under that agency's certificate of competency program, citing Federal Acquisition Regulation (FAR) § 15.101–2(b)(1).” *Id.* at 3. In denying MDA's protest, the GAO “conclude[d] that the agency reasonably found that MDA's proposal failed to provide the information required by the RFP to enable it to evaluate MDA's key subcontractors”:

The information ... was available, but MDA chose not to present the information in its proposal, in direct contravention of the terms of the RFP. In our view, an offeror cannot simply choose to withhold past performance information ... where the solicitation expressly requires that the information be furnished, and where the information is readily available to the offeror.

[T]he reasons the agency found MDA's proposal unacceptable concerned only MDA's failure to submit information establishing its and its subcontractors' experience and past performance, and did not constitute a finding that MDA is not a responsible prospective contractor.

Id. at 3 & n. 1. This Court agrees with the GAO's reasoning in the *Menendez–Donnell* decision and finds that two principles guiding that decision are worthy of amplification. First, offerors have an affirmative duty to submit a proposal that conforms to the explicit requirements outlined in the solicitation. Second, submitting a proposal and evaluating a proposal are two distinct steps, and failure at one step does not equal failure at the other. In other words, finding that an offeror failed to submit required information for a past performance evaluation is different from finding that an offeror is not a responsible

contractor. Applying those principles to this case, it is clear that the VA was well within its discretion to reject Marathon's incomplete proposal.

Moreover, even though Menendez–Donnell involved a comparative evaluation of past performance as part of a “best value” procurement, not an LPTA procurement, the reasoning behind that decision is equally applicable here. When using the LPTA source selection process, the contracting officer may “elect[] to consider past performance as an evaluation factor.” FAR 15.101–2(b). Such an election, however, does not eliminate the general contracting requirement to make an affirmative determination of responsibility prior to every award. FAR 9.103(a)-(b). In addition to past performance, this determination requires consideration of, among other things, a prospective contractor's financial resources, business ethics, organization, experience, accounting and operational controls, and technical skills. FAR 9.104–1. Thus, an LPTA award can be understood as proceeding in two broad steps: (1) evaluation and identification of the lowest priced, technically acceptable proposal, which may include past performance as an evaluation factor; and (2) determination of the apparent awardee's responsibility, which must include past performance along with other responsibility factors. That the evaluation is made on a Pass/Fail basis does not alter the fact that it is a discrete step, or that information is necessary to take that step. Accordingly, an offeror cannot reach the second hurdle until it passes the first, and it cannot even reach the first unless it submits a proposal that conforms to the solicitation's requirements. Indeed, when an agency cannot evaluate information because the offeror fails to provide it, the agency does not reach the question of responsibility, and thus is not required to refer the matter to the SBA. *Pacific Sky Supply, Inc., B–215189 et al.*, 85–1 CPD ¶ 53, at 4 (Comp.Gen. Jan. 18, 1985).

In sum, Marathon failed to submit a complete proposal, and the VA retained discretion to either reject the proposal or allow Marathon to correct its deficiencies. The VA chose the former option, and, because this choice was a proper exercise of its discretion, this proposal evaluation should have ended there. Unfortunately, resolution would not come so easily.

* * *

Conclusion

For the reasons set forth above, Plaintiff's motion for judgment on the administrative record is GRANTED. Defendant's motion for judgment on the administrative record is DENIED, and Defendant–Intervenor's motion for judgment on the administrative record is DENIED.

The VA is hereby enjoined from awarding Marathon a contract, or permitting any performance of a contract by Marathon, under Solicitation VA259–12–R–0078 based on the VA's prior corrective actions. Any party wanting to challenge any future VA action under this solicitation or a related solicitation may file a new action in this Court and designate it as a directly related case to be assigned to Judge Wheeler.

IT IS SO ORDERED.

Chapter 8 Small Businesses and Subcontractors

B. Small Business Programs and Affirmative Action Issues

1. Note on Small Business Programs

After Note on Small Business Programs, pg. 352, add

Res-Care Inc, Plaintiff,

v.

United States, Defendant.

735 F.3d 1384

No. 2013-5035

United States Court of Appeals, Federal Circuit

November 21, 2013

This case turns on the interpretation of the phrase “competitive basis” in the Workforce Investment Act (“WIA”). *See* 29 U.S.C. § 2887(a)(2)(A). Res–Care, Inc. (“Res–Care”) appeals the decision of the United States Court of Federal Claims (“Claims Court”) interpreting the statute as permitting the United States Department of Labor (“DOL”) to select a contractor for the Blue Ridge Job Corps Center (“Blue Ridge”) program through a set-aside for small businesses. For the reasons set forth below, we affirm.

BACKGROUND

Under WIA, DOL administers a national Job Corps program that provides education, training, and support services to help at-risk youth obtain employment. 29 U.S.C. §§ 2881, 2884. There are 125 Job Corps Centers (“JCCs”) across the nation, including Blue Ridge in Marion, Virginia, which Res–Care has operated since 1998. In December 2011, DOL published a Sources Sought Notice for a Request for Information (the “Request”) seeking information from potential bidders on an upcoming procurement for the operation of Blue Ridge. At the time, Res–Care was operating Blue Ridge under a

contract that expired on March 31, 2013. The Request invited “[a]ll interested parties” to submit a response but specifically encouraged firms that qualify as small businesses to respond with a “capabilities statement” that demonstrated their ability to operate the facility successfully. In response to the Request, one large business and four small businesses submitted capabilities statements. Res–Care, a large business, did not respond to the Request.

Based on the responses, a DOL contracting officer found the large business and two of the four small businesses capable of operating Blue Ridge. In her review, the contracting officer considered twelve relevant areas of experience and the financial resources of each business. She specifically found that both small businesses were capable under “*all* of the capability areas identified in the [Request].” J.A. 3063. In particular, she found that, based on the responses from the two capable small businesses, DOL would likely receive bids (1) from at least two responsible small businesses and (2) at fair market prices. Because both of these requirements of Federal Acquisition Regulation (“FAR”), 48 C.F.R. § 19.502–2(b) (the so-called “Rule of Two”), had been met, the contracting officer recommended conducting the Blue Ridge contract selection as a small business set-aside. DOL subsequently issued a presolicitation notice indicating that the next Blue Ridge contract, with a value of \$25 million, would be solicited as a “100% Set–Aside for Small Business” for the two-year base period beginning April 1, 2013, with three unilateral option years.

On April 18, 2012, Res–Care filed its bid protest with the Claims Court alleging, *inter alia*, that DOL violated WIA by setting aside the Blue Ridge contract for small businesses. Section 2887 of WIA describes how entities are selected for managing JCCs.

29 U.S.C. § 2887(a)(2)(A). It provides that DOL shall select entities “on a competitive basis,” but enumerates certain exceptions set forth in 41 U.S.C. § 3304(a)-(c) of the Competition in Contracting Act (“CICA”). *Id.* The exceptions in § 3304(a)-(c) describe instances in which the government may award a contract on a noncompetitive basis. Res-Care argued that setting aside the Blue Ridge contract for small businesses violated the “competitive basis” provision in § 2887.

The court determined that the phrase “competitive basis” in WIA did not mean “full and open competition,” reasoning that the ordinary meaning of the phrase simply requires two or more potential bidders to seek the contract award. *Res-Care, Inc. v. United States*, 107 Fed.Cl. 136, 141–42 (2012). On that basis, the court concluded that WIA did not preclude small business set-asides in which two or more small businesses compete for a JCC contract.³ *Id.* The court also found that the contracting officer did not violate the Rule of Two in setting aside Blue Ridge for small businesses. *Id.* at 142.

Res-Care now appeals to this court, reiterating its contention that WIA does not permit small business set-asides. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

The first question before this court is one of pure statutory interpretation: whether WIA's “competitive basis” language permits small business set-asides. Because the underlying issue is a question of statutory interpretation, it is also subject to review without deference. *Mudge v. United States*, 308 F.3d 1220, 1224 (Fed.Cir.2002).

The relevant language of § 2887 states:

Except as provided in subsections (a) to (c) of section 3304 of Title 41, the Secretary shall select on a competitive basis an entity to operate a Job Corps

center and entities to provide activities described in this subchapter to the Jobs Corps center.

29 U.S.C. § 2887(a)(2)(A) (emphasis added).

When interpreting a statute, we begin our analysis with the language of the statute itself. *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1320 (Fed.Cir.2003). “If the statutory language is plain and unambiguous, then it controls, and we may not look to the agency regulation for further guidance.” *Id.* (citing *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). The meaning of the language is determined in the pertinent overall statutory context. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

To interpret the term “competitive basis,” we presume that the term has its ordinary and established meaning. *See Info. Tech.*, 316 F.3d at 1320. As WIA does not define “competitive basis,” we may refer to dictionary definitions to determine the ordinary meaning of an undefined statutory term. *Id.* “Competitive” is defined as “characterized by, arising from, or designated to exhibit rivalry among two or more equally matched individuals or forces especially for a particular goal, position or reward,” and as “involving, or determined by competition.” *See Res–Care*, 107 Fed.Cl. at 141 (quoting Webster’s II New Riverside Univ. Dict. 290 (1984)). “Competition” means a “rivalry between two or more businesses striving for the same customers or market.” *Id.* Neither definition mandates an unencumbered contest open to the entire realm of all possible bidders. Authorized selection criteria may circumscribe the range of permitted rivals. Here, Congress clearly viewed the use of set-asides for small businesses as “competitive” as indicated by the CICA. *See* 41 U.S.C. § 3303(b) (providing that

“competitive procedures” shall be used for small business set-asides); 41 U.S.C. § 152(4) (defining “competitive procedures” to include competition limited to further Small Business Act). A selection process confined to multiple small businesses bidding to operate a JCC thus satisfies the statutory “competitive basis” requirement.

Res–Care argues for an alternate construction of this language. In Res–Care's view, WIA must be read in conjunction with CICA, which requires “full and open competition” in the government procurement process, “[e]xcept as provided in sections 3303, 3304(a), and 3305” of Title 41. *See* 41 U.S.C. § 3301(a)(1). Those three exceptions contemplate (1) a small business set-aside exception to CICA's “full and open competition” requirement (§ 3303(b)), (2) examples where the government may use “noncompetitive procedures” (§ 3304), and (3) simplified procedures for small purchases (§ 3305). Because WIA's § 2887 incorporates only one “exception” from CICA (§ 3304) and no others, such as § 3303(b)'s authorization of small business set-asides, Res–Care argues that the plain meaning of WIA dictates that § 3304 is the only exception allowed by the statute. Under that interpretation, DOL would lack the flexibility and discretion to use small business set-asides in administering WIA and instead must always hold full, open, and unfettered competition among all possible competitors—except in the very special cases when § 3304 applies.

WIA's plain language, however, requires rejection of Res–Care's argument. In § 2887, Congress did not borrow the “full and open competition” phrase from CICA. Instead, § 2887 simply states that selection of a JCC contractor shall occur “on a competitive basis.” A cardinal doctrine of statutory interpretation is the presumption that Congress's “use of different terms within related statutes generally implies that different

meanings were intended.” 2A Norman Singer, *Statutes and Statutory Construction* § 46.06 (7th ed.2007); *see, e.g., Daw Indus., Inc. v. United States*, 714 F.2d 1140, 1143 (Fed.Cir.1983) (“The congressional choice of words has a further and more significant consequence.... Congress' choice of the different term suggests an intentional difference in meaning.”). Here, we must presume that Congress understood the difference between expressions of a particularized form of competition, *i.e.*, “full and open,” versus the broader notion represented by “competitive basis.” Had Congress intended JCC contractors to be selected solely by “full and open competition,” it knew how to use those words and could have done so. It did not.

Res-Care contends that the Claims Court's—and our—interpretation of WIA permits all of CICA's exception provisions to apply to WIA and, thus, renders superfluous § 2887's reference to § 3304 from CICA. That argument again conflates WIA's and CICA's different structures and language. While it is true that § 2887 refers to one provision in CICA, there is no reason to read any other provision of CICA into § 2887 in the way Res-Care advocates. By its terms, § 2887 is straightforward: selections shall be made on a “competitive basis,” except in the special situations where the “noncompetitive procedures” set forth in § 3304 of CICA apply. The reference to § 3304 is not mere surplusage. It demonstrates Congress's intent to ensure DOL had the flexibility to use a noncompetitive selection process in certain defined situations. Without the § 3304 reference, DOL's selections under WIA would always have to be performed through some form of competition. With this understanding, it becomes apparent that § 2887's reference to § 3304 is not at all superfluous.

The legislative history offers no support for Res–Care's position. As an initial matter, we note that if the plain language of the statute is unambiguous, then that is controlling. *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 950 (Fed.Cir.2013). To overcome the plain meaning of a statute, a party must show that the legislative history demonstrates an “extraordinary showing of contrary intentions.” *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984) (cautioning that resort to legislative history to interpret an unambiguous statute should only occur in “rare and exceptional circumstances”). The legislative history of WIA contains no discussion of any specialized meaning of “competitive basis,” and Res–Care points to nothing in the history demanding or even implying as much. We find nothing in the legislative history that suggests any intent to bar the widespread, established government practice of small business set-asides for this particular category of government contracts.

We therefore conclude that the Claims Court properly construed § 2887(a)(2)(A) to provide DOL the flexibility to use small business set-asides for selecting JCC operators.

For the foregoing reasons, the decision of the United States Court of Federal Claims is affirmed.

AFFIRMED

B. Small Business Programs and Affirmative Action Issues

KINGDOMWARE TECHNOLOGIES, INC., Petitioner

v.

UNITED STATES.

136 S.Ct. 1969

Supreme Court of the United States

No. 14–916.

June 16, 2016.

Background: Veteran-owned small business brought bid protest claim seeking declaratory and injunctive relief against Department of Veterans Affairs (VA), alleging Department's failure to comply with statutory Rule of Two generally requiring Department to set aside contracts for veteran-owned small businesses. The United States Court of Federal Claims, Nancy B. Firestone, J., 107 Fed.Cl. 226, granted summary judgment to government. Small business appealed. The United States Court of Appeals for the Federal Circuit, Raymond C. Clevenger, Circuit Judge, 754 F.3d 923, affirmed. Certiorari was granted, and supplemental briefing was ordered on issue of mootness.

Holdings: The Supreme Court, Justice Thomas, held that:

^[1] exception to mootness doctrine, for controversies that are capable of repetition yet evading review, was applicable, and

^[2] Department is not excused from complying with Rule of Two, even if Department has already met its annual goals for awarding contracts to veteran-owned small businesses, and even if an order is placed through Federal Supply Schedule (FSS).

Reversed and remanded.

Opinion

Justice THOMAS delivered the opinion of the Court.

Petitioner Kingdomware Technologies, Inc., a veteran-owned small business, unsuccessfully vied for a federal contract from the Department of Veterans Affairs to provide emergency-notification services. Kingdomware sued, arguing that the Department violated a federal law providing that it “shall award” contracts to veteran-owned small businesses when there is a “reasonable expectation” that two or more such businesses will bid for the contract at “a fair and reasonable price that offers best value to the United States.” 38 U.S.C. § 8127(d). This provision is known as the Rule of Two.

In this case, we consider whether the Department must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses. We conclude that the Department must use the Rule of Two when awarding contracts, even when the Department will otherwise meet its annual minimum contracting goals.

I

This case concerns the interplay between several federal statutes governing federal procurement.

A

In an effort to encourage small businesses, Congress has mandated that federal agencies restrict competition for some federal contracts. The Small Business Act thus requires many federal agencies, including the Department of Veterans Affairs, to set

aside contracts to be awarded to small businesses. The Act requires each agency to set “an annual goal that presents, for that agency, the maximum practicable opportunity” for contracting with small businesses, including those “small business concerns owned and controlled by service-disabled veterans.” 15 U.S.C. § 644(g)(1)(B). And federal regulations set forth procedures for most agencies to “set aside” contracts for small businesses. See, *e.g.*, 48 CFR § 19.502–2(b) (2015).

In 1999, Congress expanded small-business opportunities for veterans by passing the Veterans Entrepreneurship and Small Business Development Act, 113 Stat. 233. That Act established a 3% governmentwide contracting goal for contracting with service-disabled veteran-owned small businesses. 15 U.S.C. § 644(g)(1)(A)(ii).

When the Federal Government continually fell behind in achieving these goals, Congress tried to correct the situation. Relevant here, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006, §§ 502, 503, 120 Stat. 3431–3436 (codified, as amended, at 38 U.S.C. §§ 8127, 8128). That Act requires the Secretary of Veterans Affairs to set more specific annual goals that encourage contracting with veteran-owned and service-disabled veteran-owned small businesses. § 8127(a). The Act’s “Rule of Two,” at issue here, provides that the Department “shall award” contracts by restricting competition for the contract to service-disabled or other veteran-owned small businesses. To restrict competition under the Act, the contracting officer must reasonably expect that at least two of these businesses will submit offers and that “the award can be made at a fair and reasonable price that offers best value to the United States.” § 8127(d).

Congress provided two exceptions to the Rule. Under those exceptions, the Department may use noncompetitive and sole-source contracts when the contracts are below specific dollar amounts. Under § 8127(b), a contracting officer “may use procedures other than competitive procedures” to award contracts to veteran-owned small businesses when the goods or services that are the subject of such contracts are worth less than the simplified acquisition threshold. 38 U.S.C. § 8127(b); 41 U.S.C. § 134 (establishing a “ ‘simplified acquisition threshold’ ” of \$100,000); see also § 1908 (authorizing adjustments for inflation); 75 Fed.Reg. 53130 (codified at 48 CFR § 2.101 (2010)) (raising the amount to \$150,000). And under 38 U.S.C. § 8127(c), a contracting officer “may award a contract to a [veteran-owned small business] using procedures other than competitive procedures” if the contract is worth more than the simplified acquisition threshold but less than \$5 million, the contracting officer determines that the business is “a responsible source with respect to performance of such contract opportunity,” and the award can be made at “a fair and reasonable price.” 38 U.S.C. § 8127(c).

In finalizing its regulations meant to implement the Act, the Department stated in a preamble that § 8127’s procedures “do not apply to [Federal Supply Schedule] task or delivery orders.” VA Acquisition Regulation, 74 Fed.Reg. 64624 (2009). The Federal Supply Schedule (FSS) generally is a streamlined method for Government agencies to acquire certain supplies and services in bulk, such as office supplies or food equipment. 48 CFR § 8.402(a) (2015). Instead of the normal bidding process for each individual order, FSS contracts are ordinarily pre-negotiated between outside vendors and the General Services Administration, which negotiates on behalf of various Government agencies. See § 8.402(b); *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1369

(C.A.Fed.2013). Under FSS contracts, businesses agree to provide “[i]ndefinite delivery” of particular goods or services “at stated prices for given periods of time.” § 8.402(a). Agencies receive a list of goods and services available through the FSS. Because the terms of purchasing these goods and services have already been negotiated, contracting officers can acquire these items and services simply by issuing purchase orders.

B

Kingdomware Technologies, Inc., is a service-disabled veteran-owned small business. Around January 2012, the Department decided to procure an Emergency Notification Service for four medical centers.² In an emergency, this service sends important information to Department personnel. The Department sent a request for a price quotation to a non-veteran-owned company through the FSS system. That company responded with a favorable price, which the Department accepted around February 22, 2012. The agreement was for one year, with an option to extend the agreement for two more. The Department exercised the one option to extend the time, and performance was completed in May 2013. Decl. of Corydon Ford Heard III ¶ 8.

Kingdomware challenged the Department’s decision to award the contract to a non-veteran-owned company by filing a bid protest with the Government Accountability Office (GAO). See 31 U.S.C. § 3552(a). Kingdomware alleged that the Department procured multiple contracts through the FSS without restricting competition using the Rule of Two, as required by § 8127. Kingdomware contended that the Department could not award the contracts at issue here without first checking to see whether at least two veteran-owned small businesses could perform the work at a fair and reasonable price. The GAO issued a nonbinding determination that the Department’s failure to employ the

Rule of Two was unlawful and recommended that the Department conduct market research to determine whether there were two veteran-owned businesses that could fulfill the procurement. The Department disagreed with the recommendation.

Petitioner then filed suit in the Court of Federal Claims and sought declaratory and injunctive relief. The Court of Federal Claims granted summary judgment to the Department. 107 Fed.Cl. 226 (2012).

A divided panel of the Federal Circuit affirmed. 754 F.3d 923 (2014). In the majority’s view, § 8127 did not require the Department to use the Rule of Two in all contracting. *Id.*, at 933–934. Instead, the court concluded, mandatory application of the Rule of Two was limited to contracts necessary to fulfill its statutory purpose—to provide a means of satisfying the Department’s annual contracting goals described in § 8127(a). *Id.*, at 934. Thus, so long as those goals were satisfied, the Court of Appeals concluded, the Department need not apply the Rule of Two any further. *Ibid.* Judge Reyna dissented, arguing that § 8127 employs mandatory language that “could not be clearer” in requiring the Department to apply the Rule of Two in every instance of contracting. *Id.*, at 935.

We granted certiorari to decide whether § 8127(d) requires the Department to apply the Rule of Two in all contracting, or whether the statute gives the Department some discretion in applying the rule. 576 U.S. —, 135 S.Ct. 2857, 192 L.Ed.2d 894 (2015).

II

III

On the merits, we hold that § 8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals or on the ground that the Department has placed an order through the FSS.

A

In statutory construction, we begin “with the language of the statute.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). If the statutory language is unambiguous and “the statutory scheme is coherent and consistent”—as is the case here—“[t]he inquiry ceases.” *Ibid.*

We hold that § 8127(d) unambiguously requires the Department to use the Rule of Two before contracting under the competitive procedures. Section 8127(d) requires that “a contracting officer of the Department *shall* award contracts” to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, “[e]xcept as provided in subsections (b) and (c).” (Emphasis added.) Subsections (b) and (c) provide, in turn, that the Department “may” use noncompetitive procedures and sole-source contracts for lower value acquisitions. §§ 8127(b), (c). Except when the Department uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the Department to use the Rule of Two before awarding a contract to another supplier. The text also has no exceptions for orders from the FSS system.

Congress’ use of the word “shall” demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the

word “may,” which implies discretion, the word “shall” usually connotes a requirement. Compare *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) (recognizing that “shall” is “mandatory” and “normally creates an obligation impervious to judicial discretion”), with *United States v. Rodgers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983) (explaining that “[t]he word ‘may,’ when used in a statute, usually implies some degree of discretion”). Accordingly, the Department *shall* (or *must*) prefer veteran-owned small businesses when the Rule of Two is satisfied.

The surrounding subsections of § 8127 confirm that Congress used the word “shall” in § 8127(d) as a command. Like § 8127(d), both § 8127(b) and § 8127(c) provide special procedures “[f]or purposes of meeting the goals under [§ 8127(a)].” §§ 8127(b), (c). But, in contrast to § 8127(d), those latter two provisions state that “a contracting officer of the Department *may* use” (or, for § 8127(c), “*may* award”) such contracts. §§ 8127(b), (c) (emphasis added). When a statute distinguishes between “may” and “shall,” it is generally clear that “shall” imposes a mandatory duty. See *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–360, 15 S.Ct. 378, 39 L.Ed. 450 (1895). We see no reason to depart from the usual inference here.

We therefore hold that, before contracting with a non-veteran owned business, the Department must first apply the Rule of Two.

B

The Federal Circuit and the Department offered several reasons for their alternative reading of § 8127(d) as a discretionary provision that the Department can disregard for at least some contracting decisions. We disagree with them.

To hold that § 8127(d) is discretionary, the Federal Circuit relied on § 8127(d)'s prefatory clause. 754 F.3d, at 933. That clause declares that the Rule of Two is designed “for the purposes of” meeting the annual contracting goals that the Department is required to set under § 8127(a). The Department originally made a similar argument before changing arguments in its briefing on the merits. Compare Brief in Opposition 13–15 with Brief for United States 24–25.

But the prefatory clause has no bearing on whether § 8127(d)'s requirement is mandatory or discretionary. The clause announces an objective that Congress hoped that the Department would achieve and charges the Secretary with setting annual benchmarks, but it does not change the plain meaning of the operative clause, § 8127(d). See *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 33 L.Ed. 302 (1889) (explaining that prefatory clauses or preambles cannot change the scope of the operative clause).

The Federal Circuit's interpretation also would produce an anomaly. If the Federal Circuit's understanding of § 8127(d)'s prefatory clause were correct, then §§ 8127(b) and (c), which also contain “[f]or purposes of meeting the goals” clauses, would cease to apply once the Department meets the Secretary's goal, and the Department would be required to return to competitive bidding. If we interpreted the “purposes” clause of § 8127(d) to mean that its mandate no longer applies if the goals are met, then the identical “purposes” clauses of §§ 8127(b) and (c) would also render those clauses' permissive mandates inapplicable. This would require the Department, once the goals are met, to award bids using the default contracting procedures rather than to use the noncompetitive and single-source provisions in §§ 8127(b) and (c).

Second, the Department argues that the mandatory provision does not apply to “orders” under “pre-existing FSS contracts.” Brief for United States 25. The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments. See *OBB Personenverkehr AG v. Sachs*, 577 U.S. —, —, 136 S.Ct. 390, 397–398, 193 L.Ed.2d 269 (2015). But the Department’s forfeited argument fails in any event. Section 8127(d) applies when the Department “award[s] contracts.” When the Department places an FSS order, that order creates contractual obligations for each party and is a “contract” within the ordinary meaning of that term. See, e.g., Black’s Law Dictionary 389 (10th ed. 2014) (“[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”). It also creates a “contract” as defined by federal regulations, namely, a “mutually binding legal relationship obligating the seller to furnish the supplies or services ... and the buyer to pay for them,” including “all types of commitments that obligate the Government to an expenditure of appropriated funds and” (as a general matter) “are in writing.” 48 CFR § 2.101 (2015). An FSS order creates mutually binding obligations: for the contractor, to supply certain goods or services, and for the Government, to pay. The placement of the order creates a new contract; the underlying FSS contract gives the Government the option to buy, but it does not require the Government to make a purchase or expend funds. Further confirming that FSS orders are contracts, the Government is not completely bound by the FSS contract’s terms; to the contrary, when placing orders, agencies may sometimes seek different terms than are listed in the FSS. See § 8.405–4 (permitting agencies to negotiate some new terms, such as requesting “a price reduction,” when ordering from the FSS).

Third, the Department contends that our interpretation fails to appreciate the distinction between FSS orders and contracts. The Department maintains that FSS orders are only for simplified acquisitions, and that using the Rule of Two for these purchases will hamper mundane purchases like “griddles or food slicers.” Brief for United States 21.

But this argument understates current practices under the FSS. The Department has expanded use of the FSS well beyond simple procurement. See Brief for Iraq and Afghanistan Veterans of America as *Amicus Curiae* 14–16. This case proves the point: the contract at issue here concerned complex information technology services over a multiyear period. Moreover, the Department may continue to purchase items that cost less than the simplified acquisition threshold (currently \$150,000) through the FSS, if the Department procures them from a veteran-owned small business. See 38 U.S.C. § 8127(b).

* * *

We hold that the Rule of Two contracting procedures in § 8127(d) are not limited to those contracts necessary to fulfill the Secretary’s goals under § 8127(a). We also hold that § 8127(d) applies to orders placed under the FSS. The judgment of the Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Page 366.

Notes and Questions:

In *CS-360 v. U.S. Dep't of Veteran Affairs*, 846 F.Supp.2d 171 (D.D.C. 2012), when the VA denied a company's eligibility, it challenged the denial. The court rejected broad constitutional and statutory challenges. However, the court told the VA it must provide more to show that the disabled veteran was not in control. It was not enough that another contractor might be "waiting in the wings" to benefit from the veteran's status.

After Congress established the benefit for SDVOSBs in 2003, the VA's implementing regulations allowed the VA to procure through the Federal Supply Schedules without first considering the availability of a set-aside for SDVOSB's. The issue went to the Supreme Court in *Kingdomware*.

Chapter 9. Health Care

Medicaid, Ch. 9, Section 6, p. 411

UNIVERSAL HEALTH SERVICES, INC., Petitioner
v.
UNITED STATES and Massachusetts, ex rel. Julio Escobar and Carmen Correa.

136 S.Ct. 1989
Supreme Court of the United States
No. 15–7.
June 16, 2016.

Synopsis

Background: Parents, as relators, brought qui tam suit against healthcare provider under the False Claims Act (FCA) after their daughter died of a seizure when she was being treated at a mental health clinic by various unlicensed and unsupervised staff in violation of state Medicaid regulations. The United States District Court for the District of Massachusetts, Douglas P. Woodlock, J., 2014 WL 1271757, dismissed, and parents appealed. The United States Court of Appeals for the First Circuit, Stahl, Circuit Judge, 780 F.3d 504, affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

^[1] the implied false certification theory can be a basis for liability under the FCA in some circumstances, abrogating *U.S. v. Sanford–Brown, Ltd.*, 788 F.3d 696, and

^[2] the FCA does not limit liability only to instances where the defendant fails to disclose the violation of a contractual, statutory, or regulatory provision that the government expressly designated a condition of payment, abrogating *Mikes v. Straus*, 274 F.3d 687.

Vacated and remanded.

Opinion

Justice THOMAS delivered the opinion of the Court.

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, imposes significant penalties on those who defraud the Government. This case concerns a theory of False Claims Act liability commonly referred to as “implied false certification.” According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant’s violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim “false or fraudulent” under § 3729(a)(1)(A). This case requires us to consider this theory of liability and to clarify some of the circumstances in which the False Claims Act imposes liability.

We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant’s noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading.

We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the Government

attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.

A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We clarify below how that rigorous materiality requirement should be enforced.

Because the courts below interpreted § 3729(a)(1)(A) differently, we vacate the judgment and remand so that those courts may apply the approach set out in this opinion.

I

A

Enacted in 1863, the False Claims Act “was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.” *United States v. Bornstein*, 423 U.S. 303, 309, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976). “[A] series of sensational congressional investigations” prompted hearings where witnesses “painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.” *United States v. McNinch*, 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958). Congress responded by imposing civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

Since then, Congress has repeatedly amended the Act, but its focus remains on those who present or directly induce the submission of false or fraudulent claims. See 31 U.S.C. § 3729(a) (imposing civil liability on “any person who ... knowingly presents, or

causes to be presented, a false or fraudulent claim for payment or approval”). A “claim” now includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. See § 3729(b)(2)(A). The Act’s scienter requirement defines “knowing” and “knowingly” to mean that a person has “actual knowledge of the information,” “acts in deliberate ignorance of the truth or falsity of the information,” or “acts in reckless disregard of the truth or falsity of the information.” § 3729(b)(1)(A). And the Act defines “material” to mean “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” § 3729(b)(4).

Congress also has increased the Act’s civil penalties so that liability is “essentially punitive in nature.” *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). Defendants are subjected to treble damages plus civil penalties of up to \$10,000 per false claim. § 3729(a); 28 CFR § 85.3(a)(9) (2015) (adjusting penalties for inflation).

B

The alleged False Claims Act violations here arose within the Medicaid program, a joint state-federal program in which healthcare providers serve poor or disabled patients and submit claims for government reimbursement. See generally 42 U.S.C. § 1396 *et seq.* The facts recited in the complaint, which we take as true at this stage, are as follows. For five years, Yarushka Rivera, a teenage beneficiary of Massachusetts’ Medicaid program, received counseling services at Arbour Counseling Services, a satellite mental health facility in Lawrence, Massachusetts, owned and operated by a subsidiary of petitioner Universal Health Services. Beginning in 2004, when Yarushka started having behavioral

problems, five medical professionals at Arbour intermittently treated her. In May 2009, Yarushka had an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Her condition worsened; she suffered a seizure that required hospitalization. In October 2009, she suffered another seizure and died. She was 17 years old.

Thereafter, an Arbour counselor revealed to respondents Carmen Correa and Julio Escobar—Yarushka’s mother and stepfather—that few Arbour employees were actually licensed to provide mental health counseling and that supervision of them was minimal. Respondents discovered that, of the five professionals who had treated Yarushka, only one was properly licensed. The practitioner who diagnosed Yarushka as bipolar identified herself as a psychologist with a Ph. D., but failed to mention that her degree came from an unaccredited Internet college and that Massachusetts had rejected her application to be licensed as a psychologist. Likewise, the practitioner who prescribed medicine to Yarushka, and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision. Rather than ensuring supervision of unlicensed staff, the clinic’s director helped to misrepresent the staff’s qualifications. And the problem went beyond those who treated Yarushka. Some 23 Arbour employees lacked licenses to provide mental health services, yet—despite regulatory requirements to the contrary—they counseled patients and prescribed drugs without supervision.

When submitting reimbursement claims, Arbour used payment codes corresponding to different services that its staff provided to Yarushka, such as “Individual Therapy” and “family therapy.” 1 App. 19, 20. Staff members also misrepresented their qualifications and licensing status to the Federal Government to

obtain individual National Provider Identification numbers, which are submitted in connection with Medicaid reimbursement claims and correspond to specific job titles. For instance, one Arbour staff member who treated Yarushka registered for a number associated with “ ‘Social Worker, Clinical,’ ” despite lacking the credentials and licensing required for social workers engaged in mental health counseling. 1 *id.*, at 32.

In 2011, respondents filed a *qui tam* suit in federal court, see 31 U.S.C. § 3730, alleging that Universal Health had violated the False Claims Act under an implied false certification theory of liability. The operative complaint asserts that Universal Health (acting through Arbour) submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services. Specifically, the Massachusetts Medicaid program requires satellite facilities to have specific types of clinicians on staff, delineates licensing requirements for particular positions (like psychiatrists, social workers, and nurses), and details supervision requirements for other staff. See 130 Code Mass. Regs. §§ 429.422–424, 429.439 (2014). Universal Health allegedly flouted these regulations because Arbour employed unqualified, unlicensed, and unsupervised staff. The Massachusetts Medicaid program, unaware of these deficiencies, paid the claims. Universal Health thus allegedly defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff. The United States declined to intervene.

II

We first hold that the implied false certification theory can, at least in some circumstances, provide a basis for liability. By punishing defendants who submit “false or fraudulent claims,” the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions. When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant’s representations misleading with respect to the goods or services provided.

To reach this conclusion, “[w]e start, as always, with the language of the statute.” *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668, 128 S.Ct. 2123, 170 L.Ed.2d 1030 (2008) (brackets in original; internal quotation marks omitted). The False Claims Act imposes civil liability on “any person who ... knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” § 3729(a)(1)(A). Congress did not define what makes a claim “false” or “fraudulent.” But “[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.” *Sekhar v. United States*, 570 U.S. —, —, 133 S.Ct. 2720, 2724, 186 L.Ed.2d 794 (2013) (internal quotation marks omitted). And the term “fraudulent” is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud. See *Neder v. United States*, 527 U.S. 1, 22, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (the term “actionable ‘fraud’ ” is one with “a well-settled meaning at common law”).

Because common-law fraud has long encompassed certain misrepresentations by omission, “false or fraudulent claims” include more than just claims containing express falsehoods. The parties and the Government agree that misrepresentations by omission can give rise to liability. Brief for Petitioner 30–31; Brief for Respondents 22–31; Brief for United States as *Amicus Curiae* 16–20.

The parties instead dispute whether submitting a claim without disclosing violations of statutory, regulatory, or contractual requirements constitutes such an actionable misrepresentation.

We need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment. The claims in this case do more than merely demand payment. They fall squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations. “The enumeration of two streets, described as unopened but projected, was a tacit representation that the land to be conveyed was subject to no others, and certainly subject to no others materially affecting the value of the purchase.” *Ibid.* Likewise, an applicant for an adjunct position at a local college makes an actionable misrepresentation when his resume lists prior jobs and then retirement, but fails to disclose that his “retirement” was a prison stint for perpetrating a \$12 million bank fraud. See 3 D. Dobbs, P. Hayden, & H. Bublick, *Law of Torts* § 682, pp. 702–703, and n. 14 (2d ed. 2011) (citing *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 78, 80–82, 772 A.2d 494, 496, 497–499 (2001)).

So too here, by submitting claims for payment using payment codes that corresponded to specific counseling services, Universal Health represented that it had

provided individual therapy, family therapy, preventive medication counseling, and other types of treatment. Moreover, Arbour staff members allegedly made further representations in submitting Medicaid reimbursement claims by using National Provider Identification numbers corresponding to specific job titles. And these representations were clearly misleading in context.

Accordingly, we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

III

The second question presented is whether, as Universal Health urges, a defendant should face False Claims Act liability only if it fails to disclose the violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment. We conclude that the Act does not impose this limit on liability. But we also conclude that not every undisclosed violation of an express condition of payment automatically triggers liability. Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.

A

Nothing in the text of the False Claims Act supports Universal Health's proposed restriction. Section 3729(a)(1)(A) imposes liability on those who present "false or fraudulent claims" but does not limit such claims to misrepresentations about express

conditions of payment. See *SAIC*, 626 F.3d, at 1268 (rejecting any textual basis for an express-designation rule). Nor does the common-law meaning of fraud tether liability to violating an express condition of payment. A statement that misleadingly omits critical facts is a misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information. *Supra*, at 1999 – 2001.

The False Claims Act’s materiality requirement also does not support Universal Health. Under the Act, the misrepresentation must be material to the other party’s course of action. But, as discussed below, see *infra*, at 2003 – 2004, statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment. Cf. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39, 131 S.Ct. 1309, 179 L.Ed.2d 398 (2011) (materiality cannot rest on “a single fact or occurrence as always determinative” (internal quotation marks omitted)).

Nor does the Act’s scienter requirement, § 3729(b)(1)(A), support Universal Health’s position. A defendant can have “actual knowledge” that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has “actual knowledge.” Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant’s failure to appreciate the materiality of that condition would amount to “deliberate ignorance” or “reckless disregard” of the “truth or falsity of the information” even if the Government did not spell this out.

As noted, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We now clarify how that materiality requirement should be enforced.

Section 3729(b)(4) defines materiality using language that we have employed to define materiality in other federal fraud statutes: “[T]he term ‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law. Under any understanding of the concept, materiality “look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” 26 R. Lord, *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003) (Williston). In tort law, for instance, a “matter is material” in only two circumstances: (1) “[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction”; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter “in determining his choice of action,” even though a reasonable person would not. Restatement (Second) of Torts § 538, at 80. Materiality in contract law is substantially similar. See Restatement (Second) of Contracts § 162(2), and Comment *c*, pp. 439, 441 (1979) (“[A] misrepresentation is material” only if it would “likely ... induce a reasonable person to manifest his assent,” or the defendant “knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent” to the transaction).

The materiality standard is demanding. The False Claims Act is not “an all-purpose antifraud statute,” *Allison Engine*, 553 U.S., at 672, 128 S.Ct. 2123 or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant’s noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543, 63 S.Ct. 379, 87 L.Ed. 443 (1943) (contractors’ misrepresentation that they satisfied a non-collusive bidding requirement for federal program contracts violated the False Claims Act because “[t]he government’s money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive”); see also *Junius Constr.*, 257 N.Y., at 400, 178 N.E., at 674 (an undisclosed fact was material because “[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood” of the undisclosed fact).

In sum, when evaluating materiality under the False Claims Act, the Government’s decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain

requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

These rules lead us to disagree with the Government's and First Circuit's view of materiality: that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation. See Brief for United States as *Amicus Curiae* 30; Tr. of Oral Arg. 43 (Government's "test" for materiality "is whether the person knew that the government could lawfully withhold payment"); 780 F.3d, at 514; see also Tr. of Oral Arg. 26, 29 (statements by respondents' counsel endorsing this view). At oral argument, the United States explained the implications of its position: If the Government contracts for health services and adds a requirement that contractors buy American-made staplers, anyone who submits a claim for those services but fails to disclose its use of foreign staplers violates the False Claims Act. To the Government, liability would attach if the defendant's use of foreign staplers would entitle the Government not to pay the claim in whole or part—irrespective of whether the Government routinely pays claims despite knowing that foreign staplers were used. *Id.*, at 39–45. Likewise, if the Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material. The False Claims Act does not adopt such an extraordinarily expansive view of liability.

* * *

Because both opinions below assessed respondents' complaint based on interpretations of § 3729(a)(1)(A) that differ from ours, we vacate the First Circuit's judgment and remand the case for reconsideration of whether respondents have sufficiently pleaded a False Claims Act violation. See *Omnicare, Inc. v. Laborers Dist. Council Constr. Industry Pension Fund*, 575 U.S. —, —, 135 S.Ct. 1318, 1332–1333, 191 L.Ed.2d 253 (2015). We emphasize, however, that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations. This case centers on allegations of fraud, not medical malpractice. Respondents have alleged that Universal Health misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations. Respondents may well have adequately pleaded a violation of § 3729(a)(1)(A). But we leave it to the courts below to resolve this in the first instance.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Chapter 11. International Procurement and Afghanistan and Iraq Wars

C. Afghanistan and Iraq Wars

Page 493. After DynCorps Notes and Questions, add:

4. Another issue about procurement to aid the Afghan security forces arose in *AEY v. United States*, 99 Fed. Cl. 300 (2011). The Army terminated AEY for default for supplying Chinese-manufactured ammunition. The government showed it did not matter whether there had been intervening stages in the chain of supply of the ammunition. The termination came during an embarrassing scandal about why the Army had been buying inferior ammunition from this contractor.

5. *Appeal of Kellogg Brown & Root Services, Inc.*, ASBCA No. 56358 (2012), considered the allowability of KBR's spending, in its LOGCAP contract in Iraq, on private security contractors. The Board did hold that there was no categorical prohibition on the use of PSCs. However, there were issues about whether the PSCs being retained were proper and whether the spending (by fixed price subcontractors) was reasonable.

Chapter 12. Government and Contractor Labor Force

Chapter 12, Section C, page 524, Note 1

Government and Contractor Labor Force: Chamber of Commerce, 1949 Act

Chamber of Commerce of the United States v. Napolitano, 648 F. Supp. 2d 726 (D. Md. 2009)

C Labor Policy for Contractors

Page 525. At the end of the Notes and Questions, add:

Another contractor workforce issue is standard security background checks. In *National Aeronautics and Space Administration v. Nelson*, 131 S.Ct. 746 (2011), the Court upheld a standard requirement to answer background check questions against a privacy challenge.

Chapter 13 Termination for Convenience

A. Operation

After “Guidance for Settlement”, pg. 547, add

FAR 49.206-2 defines inventory basis and cost basis as the two bases for settlement proposals. 48 C.F.R. 49.206–2. Inventory Basis is the preferred method of settlement proposals but if it is not practicable to use inventory basis or its use will unduly delay settlement, then the total-cost basis may be used if approved in advance by the TCO. Id.

Under inventory basis, the contractor may propose only costs allocable to the terminated portion of the contract. Id. Each cost in the settlement proposal must be itemized separately. Id. Reimbursable costs under this basis include; Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost; Charges such as engineering costs, initial costs, and general administrative costs; Costs of settlements with subcontractors; Settlement expenses; and other proper charges. Id.

A termination for convenience converts a fixed-price contract to a cost reimbursement contract. Costs on the settlement proposal are then determined under the cost principles and procedures of FAR 31.205-42. See 48 C.F.R. 31.205–42. The cost principles must be applied subject to the fairness principle in FAR 49.201. See *OK's Cascade Co. v. United States*, 97 Fed. Cl. 635, 646 (Fed. Cl. 2011) *aff'd*, 467 F. App'x 888 (Fed. Cir. 2012)

Chapter 13. Termination for Convenience, Section B. Defense

After note 4 on page 558, add

5. In *Tigerswan*, the Court of Federal Claims expounds on the *Krygoski* standard for supporting an improper termination for convenience claim. *Krygoski* made it clear

that a finding of bad faith, that is, a specific intent to harm the contractor can support a wrongful termination for convenience claim. *Krygoski Const. Co., Inc. v. United States*, 94 F.3d 1537, 1545 (Fed. Cir. 1996). However, *Tigerswan* makes it clear that this intent to harm is not the only way to support a wrongful termination for convenience claim. Bad faith can take many forms and be proven many ways, only one of which is the agency's intent to harm the contractor. *TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 347 (Fed. Cl. 2013). An example of bad faith without an intent to injure the contractor can be seen in *Krygoski* where the agency awarded the contract at issue without intending to allow the awardee to perform. While the court seemed to be expanding the parameters of bad faith, it made clear that a contractor cannot use the similar standards for breach of the implied duty of good faith and fair dealing as a basis for a claim of an improper termination for convenience. *TigerSwan*, 345-46. The Court of Federal Claims held that the contractor in *Tigerswan* was able to sufficiently plead improper termination for convenience through this alternate "abuse of discretion" standard. However, the contractor's victory was short lived as the court still dismissed the claim because a breach of contract claim is beyond the jurisdictional scope of a bid protest. Because performance had been fully completed, injunctive relief was similarly unavailable.

For further discussion of the implications of *Tigerswan*, see: 55 NO. 15 Gov't Contractor ¶ 125; 8 No. 3 Costs, Pricing & Accounting Rep. NL ¶ 26; Government Contract Guidebook § 20:4 (4th ed.); 2014 GCYIR 13; Julie A. Roin, Public-Private Partnerships and Termination for Convenience Clauses: Time for A Mandate, 63 Emory L.J. 283, 288 (2013).

Chapter 14. Termination for Default

Chapter 14, Section A, page 574, Note 4

Empire Energy Mgmt. Sys. v. Roche, 362 F.3d 1343 (Fed. Cir. 2004)

McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003)

Appeal of DayDanyon Corp., ASBCA No. 57681 (2015)

Appeal of Hanley Industries, Inc., ASBCA No. 56584 (2014)

Chapter 14. Termination for Default, Section B. Process

After note 5, on p. 580, add

6. In *Appeal of ADT Construction Group Inc.*, the contractor appealed a termination for default due to refusing to continue performance without a change to the contract. ADT argued that a failure to provide assurances did not create anticipatory breach. In this case, the board held that the termination for default was proper not only because ADT refused to continue performance but also because it failed to provide adequate assurances. *Appeal of -- Adt Constr. Grp., Inc. by Timothy S. Cory, Chapter 7 Tr.*, ASBCA No. 55358, 13-1 B.C.A. (CCH) ¶ 35307 (Apr. 30, 2013).

It is well settled that a termination for default based on anticipatory repudiation does not require the government to show that the odds of the contractor completing performance to be utterly impossible. In fact, the less strict *Lisbon* standard requires “no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). In denying *ADT's* appeal, the board appears to have been condoning a lower standard than even the *Lisbon* court set out. While in *ADT*, the issue of adequate assurances was not dispositive, the board appeared to be using a contractor's failure to provide adequate assurances as opening an avenue toward a finding of anticipatory breach. The "no reasonable likelihood that the contractor could perform"

seems a very different standard than a "failure to provide adequate assurances". The precedential value of the Board's decision remains to be seen.

ADT also seems to lower the burden of proof in cases of termination for default. Historically, in a termination for default case, the government shoulders the heavy burden of "good grounds and solid evidence." *Appeal of -- Platinum Logistic Servs. Co.*, ASBCA No. 57965, 13-1 B.C.A. (CCH) ¶ 35392 (Aug. 15, 2013). In *ADT*, the court analyzes the burden as if the government has a duty to establish a mere *prima facie* case of termination for default, after which the burden shifts to the contractor to offer defenses. The board in *ADT* even applied an "abuse of discretion" analysis to the Contracting Officer's decision *Appeal of -- Adt Constr. Grp., Inc. by Timothy S. Cory, Chapter 7 Tr.*, ASBCA No. 55358, 13-1 B.C.A. (CCH) ¶ 35307 (Apr. 30, 2013). This represents a strong departure from the "good ground and solid evidence" standard in *Platinum*. This lowering of the burden of proof standard compounded upon the lowering of the anticipatory repudiation standard could represent an increased ease in the government's obtainment of termination for default rulings in future cases.

B. Process

Page 594. After the Notes and Questions, add:

7. Technically, this opinion was part of a series that ultimately went to the Supreme Court in *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011). The Court decided the case on the unrelated issue that the government's raising the "state secrets" defense led to leaving the parties where they were on the day they filed suit. Still, the *McDonnell Douglas Corp.* opinion stands as the most advanced discussion of its issue about the process of termination for default.

Chapter 15. Bid Protest

B. GAO

On page 614, after the end of Matter of: In Re Bay Area Travel, Inc., add:

Note: The doctrine of the GAO's jurisdiction over a protest concerning task orders was further developed in *Technatomy Corp.*, B-405130 (2011). The GAO's opinion that it had jurisdiction over protests involving task and delivery orders was confirmed by the Court of Federal Claims in 2011 and Congress extended it to 2016 in Section 825 of the 2011 defense authorization and section 813 of the 2012 defense authorization.

Chapter 15, Section C, page 615, Note 1

- a. Bid Protests: Ct. Fed. Claims
- b. New Cases:
 - FCN, Inc. v. United States*, 115 Fed. Cl. 335 (Fed. Cl. 2014);
 - CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl. 559 (Fed. Cl. 2004);
 - Springfield Parcel C, LLC v. United States*, 124 Fed. Cl. 163 (Fed. Cl. 2015).

C. The Court of Federal Claims

Page 616. At the end of the note on COFC Bid Protest Practice, add:

Note: As with the GAO, so with COFC, the issue arose of whether bid protests for task and delivery orders could be considered. In *Med Trends v. United States*, 2011 WL 4037418 (2011), the COFC held that it had jurisdiction of protests of civilian agency task and delivery orders.

Chapter 16. Disputes and other Remedies

After *Samena* and its Notes and Questions, on p. 652, add

F. Government Claims

Note on Government Claims

Similar to how a contractor can bring a claim against the government, the government can also make a claim upon a contractor. The distinction may not seem significant at first but whether or not a dispute is a government claim or not can drastically impact the result of a dispute. For example, when a contractor files a claim the receiving CO must make a timely decision; no such time limit is started under a government claim. When a contractor submits a claim over \$100,000 it must certify that the claim is made in good faith, accurate to the best of the contractor's knowledge, and the amount requested is accurate based on what the contractor believes the government owes it. Conversely, under a government claim, the government need not make a similar certification. 41 U.S.C.A. § 7103. Finally, if litigation eventually results from the dispute, the party that is asserting a claim must file the initial pleading and bear the burden of affirmatively proving their case to the relevant legal standard. Thus, litigation of government claims, with all else being equal, will be more difficult for the government under a government claim than under a contractor claim. This last consideration alone could potentially be the difference between a losing and winning claim.

A government claim exists where a CO decides to withhold money otherwise due under the contract. In *Placeway*, a government set off was used to withhold money from a contractor and was determined to qualify as a government claim. *Placeway Const. Corp. v. United States*, 920 F.2d 903, 906 (Fed. Cir. 1990). Similarly, in *Palafox*, the

government's withholding of rent from the contractor was held to be a government claim. *Palafox St. Associates, L.P. v. United States*, 13-247 C, 2014 WL 717891 (Fed. Cl. Feb. 12, 2014).

A government claim can also arise where a CO determines that certain purchases made by a contractor were not allowable under the contract's Cost Accounting Standards. In *Litton*, the court held that a CO's letter denying payment in a CAS dispute does constitute a government claim because it seeks a certain sum based on interpretation of the contract and the CO's letter regarding these issues represented the government's final position on the matter. *Appeal of Litton Sys., Inc. Guidance & Control Sys. Div.*, ASBCA No. 45400, 94-2 B.C.A. (CCH) ¶ 26895 (Apr. 19, 1994). This same analysis can be seen in *Konoike*, where the contractor claimed that the government's poor performance evaluation constituted a government claim. The performance evaluation did not seek any type of relief, and as a result, did not qualify as a government claim. *Appeal of Konoike Const. Co.*, ASBCA No. 40910, 91-3 B.C.A. (CCH) ¶ 24170 (July 2, 1991).

All terminations for default are government claims while terminations for convenience are not. The reason for the difference rests in the greater damage caused to a contractor by a termination for default than a termination for convenience. Whether a dispute is a government claim or not can have a significant impact on whether either the government or the contractor must lodge a complaint to receive a remedy. In *Malone*, the contractor did not need to submit a complaint to the CO in order to recover when the government terminated it for default because a termination for default is a government claim. *Malone v. United States*, 849 F.2d 1441, 1443 *modified*, 857 F.2d 787 (Fed. Cir. 1988). However, this rule can favor the government as well. In *T&W*, the contractor

submitted a claim to the CO and was awarded too much money. The government was able to recover the extra money despite not having filed its own claim because the CO's administrative decision was sufficient. *United States v. T & W Edmier Corp.*, 465 F.3d 764, 766 (7th Cir. 2006).

Chapter 17. False Claims Act and Defective Pricing

A. False Claims Act/Qui Tam

1. “Qui Tam” Provisions

Page 684. Before “B. TINA and Defective Pricing,” add:

Another important issue has been the seal that applies to qui tam cases, typically until the Justice Department decides on intervention. An ACLU challenge to the seal on First Amendment grounds was rejected in *American Civil Liberties Union v. Holder*, 2011 App. LEXIS 6216 (4th Cir. 2011).

Chapter 18. Ethics

Ethics: Anti-Kickback Law

Chapter 18, Section A, page 721, Note 4

United States ex rel. Westmoreland v. Amgen, Inc., 812 F. Supp. 2d 39 (D. Ma. 2011)

C. Organizational Conflicts of Interest

Before last paragraph on p. 737, add

In *Turner*, how close a relationship two businesses must have to constitute an OCI was analyzed. *Turner* bid to build a hospital for the Department of Defense. *Turner* had previously discussed merging with another company, AECOM, that assisted the agency in developing the requirements of the contract. Upon protest, the agency found no OCI present. The GAO disagreed, finding that the interests of the two organizations were sufficiently aligned to qualify as a biased ground rules OCI. *Turner*, once stripped of the contract, appealed the GAO decision to the CoFC which reversed the GAO decision. The CoFC found that there was no OCI present and notes that “innuendo and suspicion” of an OCI are insufficient. Instead, there must be a finding of “hard facts” that suggest the two organizations have sufficiently aligned interests. *Turner Const. Co., Inc. v. United States*, 94 Fed. Cl. 561, 579 (Fed. Cl. 2010) *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011).

In *McTech*, the line separating “innuendo and suspicion” from “hard facts” was further illuminated. *McTech* bid to build a conference center and dormitories for the Department of Homeland Security. An anonymous call to the agency claimed that *McTech* had received non-public information regarding the requirements of the contract from one of *McTech's* subcontractors, which helped design the planned buildings. Based on this anonymous tip, the agency disqualified *McTech* from bidding. After *McTech* protested this finding, the GAO affirmed the agency's finding of an OCI. *McTech* again

appealed the matter, this time to the CoFC. The agency decided to remove *McTech's* disqualification rather than respond to *McTech's* motion. *McTech* argued that being qualified to bid alone did not cure the agencies error because they would be subject to prejudice and the CoFC agreed. Only after the agency created an inter-office firewall between certain employees and transferred portions of the process to a different office did the court finally agree that the prejudice was mitigated. *McTech Corp. v. United States*, 109 Fed. Cl. 28, 33 (Fed. Cl. 2013). *McTech* illustrates both the point at which an OCI is created and the measures required to cure a bidder's erroneous OCI disqualification.

Chapter 19. Government Breach and Takings, Section B. Takings and Remedies

After Notes and Questions at the end of the section, add:

Page 749 note 3: For further developments in the damages issues for spent nuclear fuel, see *Boston Edison Co. v. United States*, 658 F.3d 1361 (1st Cir. 2011); *Energy Northwest v. United States*, 641 F.3d 1300 (Fed. Cir. 2011); *Kansas Gas and Electric Co. v. United States*, 685 F.3d 1361 (Fed. Cir. 2012); *Yankee Atomic Electric Co. v. United States*, 679 F.3d 1354 (Fed Cir. 2012).