# George Mason American Inn Of Court

## January 20, 2016

## *AGENDA*

## TOPIC: Government Contracts Crash Course

1. Opening Remarks and Introduction of Speakers (Judge T. Mann)....…….…….....2 Min.
2. Background Information and Practitioner's Perspective (S. Wilson).……..….....5 Min.
   a. Applicable Laws, Changes Clause, Intellectual Property (D. Phan) ……...…….....7 Min.
   b. Terminations, "Christian Doctrine," Competition Requirements (E. Gallagher)..…7 Min.
   c. Challenge of Award, Labor & Employment, Criminal Sanctions (J. Newcomer).....7 Min.
3. Video Display and Mock Motions Practice (Judge T. Mann, R. Miller, R. Rasmus).....20 Min.
4. Call for Questions and Conclusion (S. Wilson, R. Miller)…..……...10 Min.
5. Closing Remarks (Judge T. Mann)...……..……..2 Min.

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I. Applicable Laws
  A. Federal government contracting is governed by:
    1. Federal Acquisition Regulations (FAR).
    2. U.S. Code, Titles 10, 40, 41.
    3. Case law from the U.S. Court of Federal Claims, the Federal Circuit, the Government Accountability Office (GAO), and the applicable Board of Contract Appeals.
  B. Code of Federal Regulations, Title 48 – Federal Acquisition Regulations
    1. Federal rules governing the federal government's purchasing process.
    2. Applies to almost all executive branch agencies.
    3. Covers acquisition planning, contract formation, contract administration, and contract termination.
  C. 28 U.S.C. § 1491 – Tucker Act
    1. Jurisdictional statute – grants U.S. Court of Federal Claims jurisdiction over certain lawsuits against the United States, including
      a) Claims founded on express or implied contracts with the United States, and
      b) Protests by an interested party objecting to a solicitation, award, or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.
    2. Waives United States' sovereign immunity with respect to these lawsuits.
  D. 41 U.S.C. §§ 7101, et seq. – Contract Disputes Act.
    1. Establishes the procedures for handling "claims" relating to United States Federal Government contracts.
  E. There is also a separate set of rules that govern labor and wage requirements, which are enforced by the Department of Labor's Wage and Hour Division.

II. Competition Requirements
  A. Competition in Contracting Act (CICA)—Full and open competition must be obtained in soliciting offers and awarding contracts
  B. Competition can be obtained through two procedures:
    1. Sealed bids
    2. Competitive proposals
  C. May contract without full and open competition if (a) there's only one responsible source, or (b) unusual and compelling urgency.
    1. Agency must still solicit offers from as many potential sources as practicable under the circumstances
    2. Full and open competition is not needed when awarding a contract to a particular source to maintain a facility or to establish or maintain essential engineering, research, or development for an educational or otherwise non-profit institution or federally funded research and development center
      a) Requires approvals in writing for proposed contracts at certain levels by the contracting officer up to the head of an agency or Secretary of Defense

3. Non-competitive contracts may be awarded in connection with procurements or understandings between the USA and other nations or foreign entities

D. Set-asides
   1. The Small Business Act of 1953 states that small businesses should receive a "fair proportion" of federal contracts.
   2. The Government has established goals for the awards of contracts to small businesses. To comply with these "socioeconomic policies," the government uses set-asides and preference programs.
      a) Small disadvantaged businesses.
      b) Women-owned small businesses.
      c) Historically underutilized business zone (HUBZone) small businesses.
      d) Service-disabled veteran-owned small businesses.

E. Competitive measures to fulfill full and open requirement
   1. Sealed bids must be solicited when
      a) Time permits the solicitation, submission, and evaluation of sealed bids
      b) Award is based on price and price-related factors
      c) It's not necessary to conduct discussions with responding offerors about their bids
      d) Reasonable expectation of receiving more than one bid
   2. Competitive proposals may be requested if four conditions for sealed bids are not met.
   3. CICA created statutory presumption in favor of competition except in cases of procurement procedures expressly authorized by statute.

III. Challenge of Award

A. Protest to Government Accountability Office (GAO)
   1. Deadlines
      a) PROTEST DEADLINE: The later of 10 days from when the protestor knew or should have known the basis of the protest; or 10 days from any required debriefing.
      b) STAY DEADLINE: The later of 10 days after contract award (regardless of when contractor knew of the award) or 5 days from first offered required debriefing.
   2. Who can file a protest?
      a) Must be an "interested party" – directly affected by the award or failure to receive.
         (1) The protestor must have bid on the procurement.
         (2) The alleged errors must have been prejudicial to the protestor (i.e., but for the errors, the protestor would have been in line for award).
      b) Subcontractors cannot protest the failure to award to its prime contractor.
   3. Automatic Stay pursuant to the Competition in Contracting Act (CICA).

a) When a protest is filed, the agency may be required to withhold the award and suspend contract performance.
b) When the deadline for a CICA stay falls on a Saturday or Sunday, you must file by Friday to get the stay. (Weekend does not toll the deadline, but GAO is not "open" to accept the protest on the weekend.)

4. Timing.
   a) GAO resolves all protests within 100 days from the date of filing.
   b) If the protest is not dismissed for procedural reasons, the agency must, within 30 days of the filing of a protest, file the Agency Report.
   c) Within 10 days of the filing of the Agency Report, the protestor and any intervenors must file their comments to the Agency Report, and any supplemental protests based on information learned in the Agency Report.
5. Protective Order.
   a) GAO has a standard Protective Order.
   b) Protects offerors' proprietary or confidential data or the agency's source selection-sensitive information.
   c) Only people admitted to the protective order may review the protected information – attorneys, experts, consultants. The company cannot be admitted to the protective order and see the confidential information.
6. Agency Report.
   a) Statement of relevant facts signed by contracting officer.
   b) Memorandum of law explaining agency's position signed by agency counsel.
   c) Relevant documents, such as: solicitation and all amendments; proposal of protestor; proposal of awardee; relevant evaluation documents.
7. Potential Outcomes:
   a) GAO dismisses for procedural reasons (no standing, untimely, GAO doesn't have jurisdiction).
   b) Agency takes voluntary corrective action.
   c) Withdrawal of protest by protestor
   d) ADR
   e) Decision by GAO.
      (1) Deny the protest. The automatic stay is lifted and the agency typically proceeds with the award.
      (2) Sustain the protest and recommend that the agency take corrective action.
      (3) Examples of corrective action:
         (a) Refrain from exercising options under the contract;
         (b) Terminate the contract;
         (c) Recompete the contract;

(d) Issue a new solicitation;
(e) Reevaluate existing proposals and award a contract consistent with statute and regulation.

(4) If GAO sustains protest, it may recommend that the agency reimburses the protestor's attorneys' fees.

B. Protest to the United States Court of Federal Claims

1. Deadlines
   a) There is no protest deadline. The Court will sometimes use the doctrine of laches if a protest is filed a long time after award is made. Delay may change the remedies available.
   b) There is no automatic stay available. The protestor may file a motion for a temporary restraining order (TRO) or a preliminary injunction (PI) to request that the award and/or performance be stayed while the protest is pending.
2. Who can file a protest?
   a) Must be an "interested party" – directly affected by the award or failure to receive.
      (1) The protestor must have bid on the procurement.
      (2) The alleged errors must have been prejudicial to the protestor (i.e., but for the errors, the protestor would have been in line for award).
   b) Subcontractors cannot protest the failure to award to its prime contractor.
3. No automatic stay available.
   a) Protestor can file a motion for a TRO and/or PI while protest is pending.
   b) Agency may voluntarily stay the award.
4. Protective Order.
   a) The Court has a sample Protective Order in its Rules, but each judge may have a variation of this Protective Order.
   b) Protects offerors' proprietary or confidential data or the agency's source selection-sensitive information.
   c) Only people admitted to the protective order may review the protected information – attorneys, experts, consultants. The company cannot be admitted to the protective order and see the confidential information.
5. Agency Record.
   a) Contains solicitation and all amendments; proposal of protestor; proposal of awardee; relevant evaluation documents.
6. Potential outcomes.
   a) Dismiss the protest (procedural grounds).
   b) Deny the protest. Agency typically proceeds with the contract award.
   c) Sustain the protest and recommend corrective action.
   d) Attorneys' fees are generally unavailable.

C. Agency-Level Protest.
   1. Bidders may choose to file an agency-level protest.
   2. PROTEST DEADLINE: "Knowledge":10 days from when the protestor knew or should have known the basis of the protest FAR 33.103(e).
   3. STAY DEADLINE: "Contract award:" 10 days after contract award (regardless of when contractor knew of the award) or 5 days from first offered required debriefing, whichever is later. FAR 33.103(f)(3).

IV. Labor, Employment, and Workplace Requirements
   A. Recipients of awards are subject to certain requirements by the U.S. Department of Labor.
      1. **Davis-Bacon Act (DBA).** Requires payment of prevailing wages and benefits to employees of contractors engaged in federal government construction projects.
      2. **McNamara-O'Hara Service Contract Act (SCA).** Sets wage rates and other labor standards for employees of contractors furnishing services to the federal government.
      3. **Walsh-Healey Public Contracts Act**. Requires payment of minimum wages and other labor standards by contractors providing materials and supplies to the federal government."
      4. **Contract Work Hours and Safety Standards Act (CWHSSA).** Requires contractors and subcontractors on federal contracts to pay laborers and mechanics at least one and one-half times their basic rate of pay for all hours worked over 40 in a workweek. This Act also prohibits unsanitary, hazardous, or dangerous working conditions in the construction industry on federal and federally financed and assisted projects.
      5. **Copeland Anti-Kickback Act.** Prohibits a contractor or subcontractor from inducing an employee to give up any part of his/her compensation to which he/she is entitled under his/her contract of employment.
   B. Non-displacement of Qualified Workers.
      1. Requires that workers on a federal service contract who would otherwise lose their jobs as a result of the completion or expiration of a contract be given the right of first refusal for employment with the successor contractor.
   C. Recent executive orders, including:
      1. Raising minimum wage for contractors.
         a) Raised minimum wage rate to $10.10/hour. Minimum wage rate to increase to $10.15/hour effective January 1, 2016
      2. Pay transparency.
         a) Effective Date: January 11, 2016
         b) Contractors cannot fire or discriminate against an employee or job applicant for asking about, discussing, or disclosing compensation information.
         c) Imposes affirmative obligations on federal contractors and subcontractors.

(1) Modifies the Equal Opportunity Clause included in covered federal contracts and subcontracts.
(2) Requires contractors to incorporate a nondiscrimination provision into employee manuals or handbooks.
(3) Requires contractors to disseminate the nondiscrimination provision to employees and job applicants.
(4) Requires contractors to post updated "EEO is the Law" poster.

3. Fair Pay and Safe Workplaces.
   a) Executive Order Issued: July 31, 2014
   b) Proposed Rule and DOL Guidance Issued: May 28, 2015
   c) No Final Rule has been issued. Currently on FAR Council's action list for final publication in April 2016.
   d) Imposes significant new reporting requirements for federal contractors to ensure their compliance with fourteen federal labor laws, executive orders, and equivalent state laws.
4. Paid sick leave.
   a) Executive Order Issued: September 7, 2015.
   b) No proposed rule issued yet.
   c) Requires contractors and subcontractors to provide employees with at least one hour of paid sick leave for every 30 hours worked.

V. Changes Clause
   A. The vast majority of federal government contracts have this clause, allowing the government to unilaterally change what it is purchasing. It's an extremely broad and elastic right, and can be additive or deductive.
   B. Changes have to be limited to things like: the drawings, designs, specifications, methods of shipment.
   C. The changes have to be within the general scope of the contract.
      1. **Cardinal change**: A change that can't be redressed within the contract by an equitable adjustment or the contract price. It's a claim that is outside the general scope of the contract.
         a) It's an objective test. It's what a reasonable offeror, looking at the original procurement, would have viewed in the scope of what the government might have ordered and if there would have been a new group of people who would have bid on this
      2. Case: *American Air Filter Co.*, 57 Comp. Gen. 567 (B-188408), June 19, 1978.
         a) Change in heating units fueled by gas to heating units fueled by diesel was a "cardinal change" beyond the scope of the contract.
         b) "A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause."
   D. Equitable Adjustment: A make-whole remedy. It's designed to cover the contractor's additional cost and additional reasonable profit

VI. Intellectual Property

A. The government usually has very broad – and sometimes unlimited – data rights in items developed using government funds. If an item of IP is not marked as being the property of a contractor, there is the potential for the government to gain IP rights in the item if it is not clearly marked as the contractor's, even if the contractor developed the IP independently. So based on what IP-related clauses you have in your agreement, you may need to mark any IP you provide to the government in a very specific way or else risk surrendering IP rights to the government.

B. However in a commercial item – that is, an item developed independently and offered to the public in addition to the government – the government's data rights and IP rights in the item are usually commensurate with the rights that public buyers acquire on the open market.

C. "Data Rights" are the Government's nonexclusive license rights in two categories of valuable intellectual property: "technical data," and "computer software" delivered by contractors under civilian agency and DoD contractors.

1. Contractors generally retain copyright ownership of the non-commercial technical data and non-commercial computer software they develop and deliver pursuant to government contracts.
2. The nature of the government's right to use this data and software generally depends on the source of the funding that went into its development and any particular terms of the contract at issue, but options include:
   a) Unlimited rights to use (generally operative when the government funds the development exclusively)
   b) Government purpose rights, i.e. the right to use the product internally (generally operative when the government and contractors both fund the development)
   c) Limited rights, i.e. the right to use the product in only very specific, defined ways (generally operative when a project the contractor funds the development exclusively)

VII. Terminations

A. Most government contracts contain prescribed termination clauses that authorize contracting officers to (a) enter into settlement agreements, (b) terminate contracts for convenience, or (c) terminate contracts for default

1. Written notice is required for terminations for convenience or default.
2. "No cost" settlements may be used instead of termination notices when it's known the contractor will accept one, no government property was furnished, and there are no outstanding obligations (e.g. outstanding payments, debts due the government, etc.).
3. Contracts may not be terminated simply because a contractor speaks publicly against the government or agency.

B. Termination for default

1. Government's contractual right to completely or partially terminate a contract because of contractor's actual or anticipated failure to perform

a) Government is not liable for contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments applicable to the work.
b) Not to be used as authority to acquire completed supplies or manufacturing materials unless the government does not already have title under some other provision of the contract.
c) Contractor's failure to meet fixed dates within time specified by contract may become default.

2. Notice to Show Cause
a) Where a termination for default appears appropriate, contracting officer should notify contractor in writing of the danger of termination
b) Notice calls contractor's attention to contractual liabilities and requests that they provide an argument against terminating for default
c) The government has the right, but not the duty, to issue a notice or show cause letter

3. Government should not terminate for convenience or with a no-cost settlement if the contractor is in default and the government needs the supplies or services. There is a duty to terminate for default to protect taxpayer money.

4. Even though initial procurement was determined by sealed bid, reprocurement following a default termination may be negotiated.

C. Convenience Termination
1. Performance of work under a contract may be terminated by the government in whole or in part whenever the contracting officer determines such termination to be in the government's interest.
2. Accomplished by delivery of written notice of termination to the contractor.
a) Contractor must stop work, terminate all subcontracts, notify government of any legal problems arising from the subcontracts, sand submit to the contracting officer his termination claim.
b) Failure to timely submit settlement proposal precludes a contractor from asserting any claims arising prior to the termination.

VIII. "Christian Doctrine"
A. Affects contracts in instances when the government has failed to include certain required contract clauses in a federal contract. A clause might be required by regulation, statute, or executive order.
B. *G.L. Christian & Assoc. v. United States*, 375 U.S. 954 (1963).
1. Court of Claims held that the termination for convenience clause, which had not been written or incorporated by reference into the contract, was nonetheless incorporated into the contract by operation of law.
C. *General Engineering & Machine Works v. O'Keefe*, 991 F2.d 775, 779 (Fed. Cir.1993)

1. Federal Circuit declared that the Christian Doctrine does not automatically incorporate every required clause into a contract.
2. Christian Doctrine applies only to mandatory clauses that express "a significant or deeply ingrained strand of public procurement policy."

D. Examples of clauses incorporated by reference under the Christian Doctrine:
1. Disputes
2. Default
3. Changes
4. Termination for Convenience
5. Service Contract Act
6. Protest After Award

IX. Criminal Sanctions

A. Copeland Anti-Kickback Act
1. 18 U.S.C. § 874. Kickbacks from public works employees
Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.
2. 40 U.S.C. § 3145. Regulations governing contractors and subcontractors
(a) In General.—The Secretary of Labor shall prescribe reasonable regulations for contractors and subcontractors engaged in constructing, carrying out, completing, or repairing public buildings, public works, or buildings or works that at least partly are financed by a loan or grant from the Federal Government. The regulations shall include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.
(b) Application.—Section 1001 of title 18 applies to the statements.

B. False Statements Act
1. 18 U.S.C. § 1001. Statements or entries generally (a) . . . [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,[ 1 ] knowingly and willfully -- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years . . . .

C. False Claims Act – 31 U.S.C. §§ 3729-3733
1. 31 U.S.C. § 3729(a). Liability for certain acts.
(1) In general.--Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-4101), plus 3 times the amount of damages which the Government sustains because of the act of that person.

2. 31 U.S.C. § 3730(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
   a) *Qui tam* or “whistleblower” actions by private persons.

**TABLE OF CONTENTS**

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 91. United States Court of Federal Claims (Refs & Annos)

28 U.S.C.A. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

Effective: December 31, 2011
Currentness

**(a)(1)** The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

**(2)** To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

**(b)(1)** Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

**(2)** To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

**(3)** In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

**(4)** In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

**(5)** If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

**(6)** Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

**(c)** Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

**CREDIT(S)**

(June 25, 1948, c. 646, 62 Stat. 940; July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub.L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub.L. 92-415, § 1, 86 Stat. 652; Nov. 1, 1978, Pub.L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub.L. 96-417, Title V, § 509, 94 Stat. 1743; Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(a), 96 Stat. 39; Oct. 29, 1992, Pub.L. 102-572, Title IX, §§ 902(a), 907(b)(1), 106 Stat. 4516, 4519; Oct. 19, 1996, Pub.L. 104-320, § 12(a), 110 Stat. 3874; Dec. 26, 2007, Pub.L. 110-161, Div. D, Title VII, § 739(c)(2), 121 Stat. 2031; Jan. 28, 2008, Pub.L. 110-181, Div. A, Title III, § 326(c), 122 Stat. 63; Oct. 14, 2008, Pub.L. 110-417, Div. A, Title X, § 1061(d), 122 Stat. 4613; Jan. 4, 2011, Pub.L. 111-350, § 5(g)(7), 124 Stat. 3848; Pub.L. 112-81, Div. A, Title VIII, § 861(a), Dec. 31, 2011, 125 Stat. 1521.)

Notes of Decisions (3713)

Footnotes

1 So in original.

28 U.S.C.A. § 1491, 28 USCA § 1491

Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

**End of Document**

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 41. Public Contracts (Refs & Annos)
Subtitle III. Contract Disputes
Chapter 71. Contract Disputes

41 U.S.C.A. § 7101
Formerly cited as 41 USCA § 601

§ 7101. Definitions

Effective: January 4, 2011
Currentness

In this chapter:

**(1) Administrator.**--The term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to section 1102 of this title.

**(2) Agency board or agency board of contract appeals.**--The term "agency board" or "agency board of contract appeals" means--

**(A)** the Armed Services Board;

**(B)** the Civilian Board;

**(C)** the board of contract appeals of the Tennessee Valley Authority; or

**(D)** the Postal Service Board established under section 7105(d)(1) of this title.

**(3) Agency head.**--The term "agency head" means the head and any assistant head of an executive agency. The term may include the chief official of a principal division of an executive agency if the head of the executive agency so designates that chief official.

**(4) Armed Services Board.**--The term "Armed Services Board" means the Armed Services Board of Contract Appeals established under section 7105(a)(1) of this title.

**(5) Civilian Board.**--The term "Civilian Board" means the Civilian Board of Contract Appeals established under section 7105(b)(1) of this title.

**(6) Contracting officer.**--The term "contracting officer"--

**(A)** means an individual who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts; and

**(B)** includes an authorized representative of the contracting officer, acting within the limits of the representative's authority.

**(7) Contractor.**--The term "contractor" means a party to a Federal Government contract other than the Federal Government.

**(8) Executive agency.**--The term "executive agency" means--

**(A)** an executive department as defined in section 101 of title 5;

**(B)** a military department as defined in section 102 of title 5;

**(C)** an independent establishment as defined in section 104 of title 5, except that the term does not include the Government Accountability Office; and

**(D)** a wholly owned Government corporation as defined in section 9101(3) of title 31.

**(9) Misrepresentation of fact.**--The term "misrepresentation of fact" means a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

**CREDIT(S)**

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3816.)

Notes of Decisions (28)

41 U.S.C.A. § 7101, 41 USCA § 7101
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

**End of Document**

United States Code Annotated
Title 41. Public Contracts (Refs & Annos)
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41 U.S.C.A. § 7102
Formerly cited as 41 USCA §602;41 USCA §603

# § 7102. Applicability of chapter

Effective: January 4, 2011
Currentness

**(a) Executive agency contracts.**--Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) made by an executive agency for--

**(1)** the procurement of property, other than real property in being;

**(2)** the procurement of services;

**(3)** the procurement of construction, alteration, repair, or maintenance of real property; or

**(4)** the disposal of personal property.

**(b) Tennessee Valley Authority contracts.**--

**(1) In general.**--With respect to contracts of the Tennessee Valley Authority, this chapter applies only to contracts containing a clause that requires contract disputes to be resolved through an agency administrative process.

**(2) Exclusion.**--Notwithstanding any other provision of this chapter, this chapter does not apply to a contract of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system.

**(c) Foreign government or international organization contracts.**--If an agency head determines that applying this chapter would not be in the public interest, this chapter does not apply to a contract with a foreign government, an agency of a foreign government, an international organization, or a subsidiary body of an international organization.

**(d) Maritime contracts.**--Appeals under section 7107(a) of this title and actions brought under sections 7104(b) and 7107(b) to (f) of this title, arising out of maritime contracts, are governed by chapter 309 or 311 of title 46, as applicable, to the extent that those chapters are not inconsistent with this chapter.

**CREDIT(S)**

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3817.)

Notes of Decisions (117)

41 U.S.C.A. § 7102, 41 USCA § 7102

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41 U.S.C.A. § 7103
Formerly cited as 41 USCA §604;41 USCA §605

# § 7103. Decision by contracting officer

Effective: January 4, 2011
Currentness

**(a) Claims generally.**--

**(1) Submission of contractor's claims to contracting officer.**--Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

**(2) Contractor's claims in writing.**--Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

**(3) Contracting officer to decide Federal Government's claims.**--Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

**(4) Time for submitting claims.**--

**(A) In general.**--Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

**(B) Exception.**--Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

**(5) Applicability.**--The authority of this subsection and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.

**(b) Certification of claims.**--

**(1) Requirement generally.**--For claims of more than $100,000 made by a contractor, the contractor shall certify that--

**(A)** the claim is made in good faith;

**(B)** the supporting data are accurate and complete to the best of the contractor's knowledge and belief;

**(C)** the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

**(D)** the certifier is authorized to certify the claim on behalf of the contractor.

**(2) Who may execute certification.**--The certification required by paragraph (1) may be executed by an individual authorized to bind the contractor with respect to the claim.

**(3) Failure to certify or defective certification.**--A contracting officer is not obligated to render a final decision on a claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim. Prior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected.

**(c) Fraudulent claims.**--

**(1) No authority to settle.**--This section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

**(2) Liability of contractor.**--If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government' s costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.

**(d) Issuance of decision.**--The contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor.

**(e) Contents of decision.**--The contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

**(f) Time for issuance of decision.**--

**(1) Claim of $100,000 or less.**--A contracting officer shall issue a decision on any submitted claim of $100,000 or less within 60 days from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period.

**(2) Claim of more than $100,000.**--A contracting officer shall, within 60 days of receipt of a submitted certified claim over $100,000--

**(A)** issue a decision; or

**(B)** notify the contractor of the time within which a decision will be issued.

**(3) General requirement of reasonableness.**--The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations prescribed by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor.

**(4) Requesting tribunal to direct issuance within specified time period.**--A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

**(5) Failure to issue decision within required time period.**--Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim as otherwise provided in this chapter. However, the tribunal concerned may, at its option, stay the proceedings of the appeal or action to obtain a decision by the contracting officer.

**(g) Finality of decision unless appealed.**--The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter. This chapter does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

**(h) Alternative means of dispute resolution.**--

**(1) In general.**--Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims. All provisions of subchapter IV of chapter 5 of title 5 apply to alternative means of dispute resolution under this subsection.

**(2) Certification of claim.**--The contractor shall certify the claim when required to do so under subsection (b)(1) or other law.

**(3) Rejecting request for alternative dispute resolution.**--

**(A) Contracting officer.**--A contracting officer who rejects a contractor's request for alternative dispute resolution proceedings shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or other specific reasons that alternative dispute resolution procedures are inappropriate.

**(B) Contractor.**--A contractor that rejects an agency's request for alternative dispute resolution proceedings shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

**CREDIT(S)**

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3817.)

Notes of Decisions (485)

41 U.S.C.A. § 7103, 41 USCA § 7103
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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41 U.S.C.A. § 7104
Formerly cited as 41 USCA §606;41 USCA §609

# § 7104. Contractor's right of appeal from decision by contracting officer

Effective: January 4, 2011
Currentness

**(a) Appeal to agency board.**--A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.

**(b) Bringing an action de novo in Federal Court.**--

**(1) In general.**--Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

**(2) Tennessee Valley Authority.**--In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a district court of the United States pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

**(3) Time for filing.**--A contractor shall file any action under paragraph (1) or (2) within 12 months from the date of receipt of a contracting officer's decision under section 7103 of this title.

**(4) De novo.**--An action under paragraph (1) or (2) shall proceed de novo in accordance with the rules of the appropriate court.

**CREDIT(S)**
(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3820.)

Notes of Decisions (451)

41 U.S.C.A. § 7104, 41 USCA § 7104
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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41 U.S.C.A. § 7105
Formerly cited as 41 USCA §438;41 USCA §607;41 USCA §610

# § 7105. Agency boards

Effective: January 4, 2011
Currentness

**(a) Armed Services Board.--**

**(1) Establishment.**--An Armed Services Board of Contract Appeals may be established within the Department of Defense when the Secretary of Defense, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least 3 members who shall have no other inconsistent duties. Workload studies will be updated at least once every 3 years and submitted to the Administrator.

**(2) Appointment of members and compensation.**--Members of the Armed Services Board shall be selected and appointed in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that members must have had at least 5 years of experience in public contract law. The Secretary of Defense shall designate the chairman and vice chairman of the Armed Services Board from among the appointed members. Compensation for the chairman, vice chairman, and other members shall be determined under section 5372a of title 5.

**(b) Civilian Board.--**

**(1) Establishment.**--There is established in the General Services Administration the Civilian Board of Contract Appeals.

**(2) Membership.--**

**(A) Eligibility.**--The Civilian Board consists of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a register of applicants maintained by the Administrator of General Services, in accordance with rules issued by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) for establishing and maintaining a register of eligible applicants and selecting Civilian Board members. The Administrator of General Services shall appoint a member without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board member.

**(B) Appointment of members and compensation.**--Members of the Civilian Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional

requirement that members must have had at least 5 years experience in public contract law. Compensation for the members shall be determined under section 5372a of title 5.

**(3) Removal.**--Members of the Civilian Board are subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5.

**(4) Functions.--**

**(A) In general.**--The Civilian Board has jurisdiction as provided by subsection (e)(1)(B).

**(B) Additional jurisdiction.**--With the concurrence of the Federal agencies affected, the Civilian Board may assume--

**(i)** jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act exercised jurisdiction before January 6, 2007; and

**(ii)** any other function the agency board performed before January 6, 2007, on behalf of those agencies.

**(c) Tennessee Valley Authority Board.--**

**(1) Establishment.**--The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals of the Tennessee Valley Authority of an indeterminate number of members.

**(2) Appointment of members and compensation.**--The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to the agency board established under paragraph (1), and shall designate a chairman of the agency board. The chairman and other members of the agency board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the agency board.

**(d) Postal Service Board.--**

**(1) Establishment.**--There is established an agency board of contract appeals known as the Postal Service Board of Contract Appeals.

**(2) Appointment and service of members.**--The Postal Service Board of Contract Appeals consists of judges appointed by the Postmaster General. The judges shall meet the qualifications of and serve in the same manner as members of the Civilian Board.

**(3) Application.**--This chapter applies to contract disputes before the Postal Service Board of Contract Appeals in the same manner as it applies to contract disputes before the Civilian Board.

**(e) Jurisdiction.--**

**(1) In general.--**

**(A) Armed Services Board.**--The Armed Services Board has jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency.

**(B) Civilian Board.**--The Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

**(C) Postal Service Board.**--The Postal Service Board of Contract Appeals has jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either agency.

**(D) Other agency boards.**--Each other agency board has jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency.

**(2) Relief.**--In exercising this jurisdiction, an agency board may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

**(f) Subpoena, discovery, and deposition.**--A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General, or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring the person to appear before the agency board or a member of the agency board, to produce evidence or to give testimony, or both. Any failure of the person to obey the order of the court may be punished by the court as contempt of court.

**(g) Decisions.**--An agency board shall--

**(1)** to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes;

**(2)** issue a decision in writing or take other appropriate action on each appeal submitted; and

**(3)** mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

**CREDIT(S)**

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3820; Pub.L. 111-259, Title IV, § 422, Oct. 7, 2010, 124 Stat. 2727; Pub.L. 111-383, Div. A, Title X, § 1075(o), Jan. 7, 2011, 124 Stat. 4378.)

**AMENDMENT SUBSEQUENT TO DECEMBER 31, 2008**

<Pub.L. 111-350, Jan. 4, 2011, 124 Stat. 3677, which codified T. 41, Public Contracts, as positive law, directed that if a law enacted after Dec. 31, 2008, amends or repeals a provision replaced by Pub.L. 111-350, that law is deemed to amend or repeal, as the case may be, the corresponding provision enacted by Pub.L. 111-350, see Pub.L. 111-350, § 6(a), Jan. 4, 2011, 124 Stat. 3854, set out as a note provision preceding 41 U.S.C.A. § 101.>

<Pub.L. 111-383, Div. A, Title X, § 1075(o), Jan. 7, 2011, 124 Stat. 4378 and Pub.L. 111-259, Title IV, § 422, Oct. 7, 2010, 124 Stat. 2727, amended former 41 U.S.C.A. §§ 438 and 607(d) from which this section was derived. Pub.L. 111-383, amended former 41 U.S.C.A. § 438, by striking "(41 U.S.C. 607(b))" and inserting "(41 U.S.C. 607(d))" in subsec. (c)(1), and inserting "of 1978" after "Contract Disputes Act" in subsec. (c)(2). Pub.L. 111-259 amended former 41 U.S.C.A. § 607(d) by adding at the end "Notwithstanding any other provision of this section and any other provision of law, an appeal from a decision of a contracting officer of the Central Intelligence Agency relative to a contract made by that Agency may be filed with whichever of the Armed Services Board of Contract Appeals or the Civilian Board of Contract Appeals is specified by such contracting officer as the Board to which such an appeal may be made and such Board shall have jurisdiction to decide that appeal.">

Notes of Decisions (20)

41 U.S.C.A. § 7105, 41 USCA § 7105
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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41 U.S.C.A. § 7106
Formerly cited as 41 USCA §607;41 USCA §608

# § 7106. Agency board procedures for accelerated and small claims

Effective: January 4, 2011
Currentness

**(a) Accelerated procedure where $100,000 or less in dispute.**--The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $100,000 or less. The accelerated procedure is applicable at the sole election of the contractor. An appeal under the accelerated procedure shall be resolved, whenever possible, within 180 days from the date the contractor elects to use the procedure.

**(b) Small claims procedure.--**

**(1) In general.**--The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less, or in the case of a small business concern (as defined in the Small Business Act (15 U.S.C. 631 et seq.) and regulations under that Act), $150,000 or less. The small claims procedure is applicable at the sole election of the contractor.

**(2) Simplified rules of procedure.**--The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal. An appeal under the small claims procedure may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

**(3) Time of decision.**--An appeal under the small claims procedure shall be resolved, whenever possible, within 120 days from the date the contractor elects to use the procedure.

**(4) Finality of decision.**--A decision against the Federal Government or against the contractor reached under the small claims procedure is final and conclusive and may not be set aside except in cases of fraud.

**(5) No precedent.**--Administrative determinations and final decisions under this subsection have no value as precedent for future cases under this chapter.

**(6) Review of requisite amounts in controversy.**--The Administrator, from time to time, may review the dollar amounts specified in paragraph (1) and adjust the amounts in accordance with economic indexes selected by the Administrator.

**CREDIT(S)**
(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3823.)

Notes of Decisions (1)

41 U.S.C.A. § 7106, 41 USCA § 7106
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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41 U.S.C.A. § 7107
Formerly cited as 41 USCA §607;41 USCA §609

# § 7107. Judicial review of agency board decisions

Effective: January 4, 2011
Currentness

**(a) Review.**--

**(1) In general.**--The decision of an agency board is final, except that--

**(A)** a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days from the date the contractor receives a copy of the decision; or

**(B)** if an agency head determines that an appeal should be taken, the agency head, with the prior approval of the Attorney General, may transmit the decision to the United States Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within 120 days from the date the agency receives a copy of the decision.

**(2) Tennessee Valley Authority.**--Notwithstanding paragraph (1), a decision of the board of contract appeals of the Tennessee Valley Authority is final, except that--

**(A)** a contractor may appeal the decision to a United States district court pursuant to section 1337 of title 28, within 120 days from the date the contractor receives a copy of the decision; or

**(B)** the Tennessee Valley Authority may appeal the decision to a United States district court pursuant to section 1337 of title 28, within 120 days from the date of the decision.

**(3) Review of arbitration.**--An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 to 13 of title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

**(b) Finality of agency board decisions on questions of law and fact.**--Notwithstanding any contract provision, regulation, or rule of law to the contrary, in an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a)--

**(1)** the decision of the agency board on a question of law is not final or conclusive; but

**(2)** the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is--

**(A)** fraudulent, arbitrary, or capricious;

**(B)** so grossly erroneous as to necessarily imply bad faith; or

**(C)** not supported by substantial evidence.

**(c) Remand.**--In an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a), the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with direction the court considers just and proper.

**(d) Consolidation.**--If 2 or more actions arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved.

**(e) Judgments as to fewer than all claims or parties.**--In an action filed pursuant to this chapter involving 2 or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one of the claims can be divided for purposes of decision or judgment, and in any action where multiple parties are involved, the court, whenever appropriate, may enter a judgment as to one or more but fewer than all of the claims or portions of claims or parties.

**(f) Advisory opinions.**--

**(1) In general.**--Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request an agency board to provide the court with an advisory opinion on the matters of contract interpretation under consideration.

**(2) Applicable issue.**--An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

**(3) Referral to agency board with jurisdiction.**--A district court shall direct a request under paragraph (1) to the agency board having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract being interpreted by the court.

**(4) Timely response.**--After receiving a request for an advisory opinion under paragraph (1), an agency board shall provide the advisory opinion in a timely manner to the district court making the request.

**CREDIT(S)**

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3824.)

Notes of Decisions (658)

41 U.S.C.A. § 7107, 41 USCA § 7107
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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41 U.S.C.A. § 7108
Formerly cited as 41 USCA § 612

# § 7108. Payment of claims

Effective: January 4, 2011
Currentness

**(a) Judgments.**--Any judgment against the Federal Government on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

**(b) Monetary awards.**--Any monetary award to a contractor by an agency board shall be paid promptly in accordance with the procedures contained in subsection (a).

**(c) Reimbursement.**--Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.

**(d) Tennessee Valley Authority.**--

**(1) Judgments.**--Notwithstanding subsections (a) to (c), any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831h(b)).

**(2) Monetary awards.**--Notwithstanding subsections (a) to (c), any monetary award to a contractor by the board of contract appeals of the Tennessee Valley Authority shall be paid in accordance with section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831h(b)).

**CREDIT(S)**
(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3825.)

Notes of Decisions (10)

41 U.S.C.A. § 7108, 41 USCA § 7108
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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41 U.S.C.A. § 7109
Formerly cited as 41 USCA § 611

# § 7109. Interest

Effective: January 4, 2011
Currentness

**(a) Period.**--

**(1) In general.**--Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim, pursuant to section 7103(a) of this title, until the date of payment of the claim.

**(2) Defective certification.**--On a claim for which the certification under section 7103(b)(1) of this title is found to be defective, any interest due under this section shall be paid for the period beginning with the date the contracting officer initially receives the contractor's claim until the date of payment of the claim.

**(b) Rate.**--Interest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify as applicable for each successive 6-month period. The rate shall be determined by the Secretary of the Treasury taking into consideration current private commercial rates of interest for new loans maturing in approximately 5 years.

**CREDIT(S)**

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3825.)

Notes of Decisions (62)

41 U.S.C.A. § 7109, 41 USCA § 7109
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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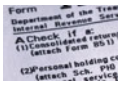
BID PROTEST REGULATIONS





## Bid Protest Regulations

These regulations explain the bid protest process.

## Bid Protests

Federal government procurement contracts may be protested by bidders or other interested parties. GAO's Procurement Law Division adjudicates those bid protests. Learn more >

### § 21.0 Definitions.

(a)(1) Interested party means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(2) In a public-private competition conducted under Office of Management and Budget Circular A–76–76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A–76, interested party also means

(A) The official responsible for submitting the Federal agency tender, and

(B) Any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees.

(b)(1) Intervenor means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

(2) If an interested party files a protest in connection with a public-private competition conducted under OMB Circular A–76 regarding an activity or function of a Federal agency, the official responsible for submitting the Federal agency tender, or the agent representing the Federal employees as described in paragraph (a)(2)(B) of this section, or both, may also be intervenors.

(c) Federal agency or agency means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.

(d) Days are calendar days. In computing any period of time described in Subchapter V, Chapter 35 of Title 31, United States Code, including those described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the Government Accountability Office (GAO), or another Federal agency where a submission is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open.

(e) Adverse agency action is any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or agency acquiescence in continued and substantial contract performance.

(f) A document is filed on a particular day when it is received by GAO by 5:30 p.m., Eastern Time, on that day. Protests and other documents may be filed by hand delivery, mail, commercial carrier, facsimile transmission (202-512-9749), or e-mail (protests@gao.gov). Please check GAO's Web site (http://www.gao.gov/legal/bidprotest.html) for current filing information. Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at GAO.

(g) Alternative dispute resolution encompasses various means of resolving cases expeditiously, without a written decision, including techniques such as outcome prediction and negotiation assistance.

### § 21.1 Filing a protest.

(a) An interested party may protest a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.

(b) Protests must be in writing and addressed as follows: General Counsel, Government Accountability Office, 441 G Street, NW., Washington, DC 20548, Attention: Procurement Law Control Group.

(c) A protest filed with GAO shall:

(1) Include the name, street address, electronic mail address, and telephone and facsimile numbers of the protester,

(2) Be signed by the protester or its representative,

(3) Identify the agency and the solicitation and/or contract number,

(4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,

(5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,

(6) Set forth all information establishing the timeliness of the protest,

(7) Specifically request a ruling by the Comptroller General of the United States, and

(8) State the form of relief requested.

(d) In addition, a protest filed with GAO may:

(1) Request a protective order,

(2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and

(3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.

(e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the agency in the solicitation for

receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a complete copy of the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

(f) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and the protester must file a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

(h) Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding procedures for filing and handling the information.

(i) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

### § 21.2 Time for filing.

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

(2) Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (a)(2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

(b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.

(c) GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

### § 21.3 Notice of protest, submission of agency report, and time for filing of comments on report.

(a) GAO shall notify the agency by telephone within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly send a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall furnish copies of all protest communications to the agency and to other participating parties. All protest communications shall be sent by means reasonably calculated to effect expeditious delivery.

(b) An agency or intervenor which believes that the protest or specific protest allegations should be dismissed before submission of an agency report should file a request for dismissal as soon as practicable.

(c) The agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has previously furnished or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall respond to the request for documents in writing. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(d) The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Subject to any protective order issued in the protest pursuant to § 21.4, the agency shall simultaneously furnish a copy of the report to the protester and any intervenors. The copy of the report filed with GAO shall list the parties who have been furnished copies of the report. Where a protester does not have counsel admitted to a protective order and documents are withheld from the protester in accordance with this part, the agency shall provide documents adequate to inform the protester of the basis of the agency's position.

(f) The agency may request an extension of time for the submission of the list of documents to be provided by the agency pursuant to § 21.3(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis.

(g) The protester may request additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by GAO, any request for additional documents must be filed with GAO and the agency not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The agency shall provide the requested documents, or portions of documents, and a list to GAO and the other parties within 2 days or explain why it is not required to produce the documents.

(h) Upon the request of a party, GAO will decide whether the agency must provide any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate.

(i) Comments on the agency report shall be filed with GAO within 10 days after receipt of the report, with a copy provided to the agency and other participating parties. The protest shall be dismissed unless the protester files comments within the 10-day period, except where GAO has granted an extension or has established a shorter period in accordance with § 21.10(e). Extensions will be granted on a case-by-case basis. Unless otherwise advised by the protester, GAO will assume the protester received the agency report by the due date specified in the acknowledgment of protest furnished by GAO.

(j) GAO may request or permit the submission of additional statements by the parties and by other parties not participating in the protest as may be necessary for the

fair resolution of the protest. The agency and other parties must receive GAO's approval before submitting any additional statements. GAO reserves the right to disregard material submitted without prior approval.

### § 21.4 Protective orders.

(a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

(d) Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.

### § 21.5 Protest issues not for consideration.

A protest or specific protest allegations may be dismissed any time sufficient information is obtained by GAO warranting dismissal. Where an entire protest is dismissed, no agency report need be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases that shall be dismissed are the following:

(a) Contract administration. The administration of an existing contract is within the discretion of the agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 601-613.

(b) Small Business Administration issues. (1) Small business size standards and North American Industry Classification System (NAICS) standards. Challenges of established size standards or the size status of particular firms, and challenges of the selected NAICS code may be reviewed solely by the Small Business Administration. 15 U.S.C. 637(b)(6).

(2) Small Business Certificate of Competency Program. Referrals made to the Small Business Administration (SBA) pursuant to sec. 8(b)(7) of the Small Business Act, or the issuance of, or refusal to issue, a certificate of competency under that section will generally not be reviewed by GAO. The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 15 U.S.C. 637(b)(7).

(3) Procurements under sec. 8(a) of the Small Business Act. Under that section, since contracts are entered into with the Small Business Administration at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the Small Business Administration, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

(c) Affirmative determination of responsibility by the contracting officer. Because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.

(d) Procurement integrity. For any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 423, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.

(e) Protests not filed either in GAO or the agency within the time limits set forth in § 21.2.

(f) Protests which lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or which fail to clearly state legally sufficient grounds of protest as required by § 21.1(f).

(g) Procurements by agencies other than Federal agencies as defined by sec. 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 472. Protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities are beyond GAO's bid protest jurisdiction as established in 31 U.S.C. 3551-3556.

(h) Subcontract protests. GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has requested in writing that subcontract protests be decided pursuant to § 21.13.

(i) Suspensions and debarments. Challenges to the suspension or debarment of contractors will not be reviewed by GAO. Such matters are for review by the agency in accordance with the applicable provisions of the Federal Acquisition Regulation.

(j) Competitive range. GAO will not consider protests asserting that the protester's proposal should not have been included or kept in the competitive range.

(k) Decision whether or not to file a protest on behalf of Federal employees. GAO will not review the decision of an agency tender official to file a protest or not to file a protest in connection with a public-private competition.

### § 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d); GAO does not administer the requirements to stay award or suspend contract performance under CICA at 31 U.S.C. 3553(c) and (d).

### § 21.7 Hearings.

(a) At the request of a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.

(b) Prior to the hearing, GAO may hold a pre-hearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify.

(c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily

will be conducted at GAO in Washington, DC, hearings may, at the discretion of GAO, be conducted at other locations, or by telephone or other electronic means.

(d) All parties participating in the protest shall be invited to attend the hearing. Others may be permitted to attend as observers and may participate as allowed by GAO's hearing official. In order to prevent the improper disclosure of protected information at the hearing, GAO's hearing official may restrict attendance during all or part of the proceeding.

(e) Hearings shall normally be recorded and/or transcribed. If a recording and/or transcript is made, any party may obtain copies at its own expense.

(f) If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.

(g) If a hearing is held, each party shall file comments with GAO within 5 days after the hearing was held or as specified by GAO. If the protester has not filed comments by the due date, GAO shall dismiss the protest.

(h) In post-hearing comments, the parties should reference all testimony and admissions in the hearing record that they consider relevant, providing specific citations to the testimony and admissions referenced.

### § 21.8 Remedies.

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the agency implement any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

(3) Recompete the contract;

(4) Issue a new solicitation;

(5) Award a contract consistent with statute and regulation; or

(6) Such other recommendation(s) as GAO determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protester the costs of:

(1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and

(2) Bid and proposal preparation.

(e) If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid within 15 days of the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The protester shall furnish a copy of its request to the agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

(f)(1) If GAO recommends that the agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(2) The agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed. If the protester and the agency cannot reach agreement within a reasonable time, GAO may, upon request of the protester, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. 3554(c). In such cases, GAO may also recommend that the agency pay the protester the costs of pursuing the claim for costs before GAO.

(3) The agency shall notify GAO within 60 days after GAO recommends the amount of costs the agency should pay the protester of the action taken by the agency in response to the recommendation.

### § 21.9 Time for decision by GAO.

(a) GAO shall issue a decision on a protest within 100 days after it is filed.

(b) In protests where GAO uses the express option procedures in § 21.10, GAO shall issue a decision on a protest within 65 days after it is filed.

(c) GAO, to the maximum extent practicable, shall resolve a timely supplemental protest adding one or more new grounds to an existing protest, or a timely amended protest, within the time limit established in paragraph (a) of this section for decision on the initial protest. If a supplemental or an amended protest cannot be resolved within that time limit, GAO may resolve the supplemental or amended protest using the express option procedures in § 21.10.

### § 21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.

(a) At the request of a party or on its own initiative, GAO may decide a protest using an express option.

(b) The express option will be adopted at the discretion of GAO and only in those cases suitable for resolution within 65 days.

(c) Requests for the express option shall be in writing and received in GAO not later than 5 days after the protest or supplemental/amended protest is filed. GAO will promptly notify the parties whether the case will be handled using the express option.

(d) When the express option is used, the following schedule applies instead of those deadlines §§ 21.3 and 21.7:

(1) The agency shall file a complete report with GAO and the parties within 20 days after it receives notice from GAO that the express option will be used.

(2) Comments on the agency report shall be filed with GAO and the other parties within 5 days after receipt of the report.

(3) Where circumstances demonstrate that a case is no longer suitable for resolution using the express option, GAO shall establish a new schedule for submissions by the parties.

(e) GAO, on its own initiative or upon request by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.

(f) GAO may conduct status and other conferences by telephone or in person with all parties participating in a protest to promote the expeditious development and resolution of the protest.

### § 21.11 Effect of judicial proceedings.

(a) A protester must immediately advise GAO of any court proceeding which involves the subject matter of a pending protest and must file with GAO copies of all relevant court documents.

(b) GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court. In these cases, unless a different schedule is established, the times provided in this part for filing the agency report (§ 21.3(c)), filing comments on the report (§ 21.3(i)), holding a hearing and filing comments (§ 21.7), and issuing a decision (§ 21.9) shall apply.

### § 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, and the agency involved; a copy also shall be made available to the public. A copy of a decision containing protected information shall be provided only to the agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

(b) Decisions may be distributed to the parties, and are available from GAO, by electronic means.

### § 21.13 Nonstatutory protests.

(a) GAO will consider protests concerning awards of subcontracts by or for a Federal agency, sales by a Federal agency, or procurements by agencies of the government other than Federal agencies as defined in § 21.0(c) if the agency involved has agreed in writing to have protests decided by GAO.

(b) The provisions of this part shall apply to nonstatutory protests except for the provision of § 21.8(d) pertaining to recommendations for the payment of costs. The provision for the withholding of award and the suspension of contract performance, 31 U.S.C. 3553(c) and (d), also does not apply to nonstatutory protests.

### § 21.14 Request for reconsideration.

(a) The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) A request for reconsideration of a bid protest decision shall be filed, with copies to the parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. To obtain reconsideration, the requesting party must show that our prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

# Appendix B

**UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE**
**OFFICE OF THE GENERAL COUNSEL**
**PROCUREMENT LAW DIVISION**
**Washington, D.C. 20548**

**Matter of:**

**File:**

**Agency:**

**PROTECTIVE ORDER**

This protective order limits disclosure of certain material and information submitted in the above-captioned protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure.

1. This protective order applies to all material that is identified by any party as protected, unless the Government Accountability Office (GAO) specifically provides otherwise. Protected material includes information whether on paper or in any electronic format. This protective order applies to all proceedings associated with the protest, e.g., supplemental/amended protests, requests for reconsideration, and claims for costs.

2. Protected material of any kind may be provided only to GAO and to individuals authorized by this protective order. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL**
**TO BE DISCLOSED ONLY IN ACCORDANCE WITH**
**GOVERNMENT ACCOUNTABILITY OFFICE PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Wherever such protection is claimed for a protest pleading, the party filing the pleading shall submit a proposed redacted version for public release when the protected version is filed.

3. Only individuals who are admitted under this protective order by GAO, and support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under this order, and who are not involved in competitive decisionmaking for a party to the protest or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order, shall have access to information covered by this order. Individuals admitted under this protective order shall advise such support staff, prior to providing them access to protected material, of their obligations under this order.

4. Each party included under this protective order shall receive up to 3 copies of the protected material (the original constitutes one copy), and shall not further duplicate that material, except as incidental to its incorporation into a submission to GAO or as otherwise agreed to by the parties with GAO's concurrence. For purpose of this provision, a "party" refers to the entity of record. Therefore, multiple attorneys or law firms representing a single party must determine among them how to allocate the maximum of 3 copies among the individuals admitted to the protective order. Each duplication of electronic media (e.g., CD Rom), whether in electronic or hard copy form, constitutes a single copy. E-mail transmissions to multiple recipients should be counted as generating one copy for the sender and one for each recipient.

5. When any party sends or receives documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents, the party shall refrain from releasing the documents to anyone not admitted under this protective order, including clients, until the end of the second working day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under this protective order.

6. Each individual covered under this protective order shall take all precautions necessary to prevent disclosure of protected material. In addition to physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession, these precautions include, but are not limited to, sending and receiving protected material using physical and electronic methods that are within the control of individuals authorized by this protective order or that otherwise restrict access to protected material to individuals authorized by this protective order. Protected material may be sent using electronic mail unless objected to by any party in this protest. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 60 days after the disposition of the protest(s) (or if a request for reconsideration or a claim for costs is filed, 60 days after the disposition of those matters), all protected material furnished to individuals admitted under this protective order, including all electronically transmitted material and copies of such material, with the exception of a single copy of a protected decision or letter issued by our Office, shall be: (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, retained under the terms of this order for such period as may be agreed. Within the same 60-day period, protected pleadings (including copies in archival files and computer backup files) and written and electronic transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to GAO and the other parties, unless the parties agree otherwise. In the absence of such agreement and for good cause shown, the period for retention of the protected material under this paragraph may be extended by order of GAO. Any individual retaining material received under this protective order (except for the single copy of a protected decision or letter issued by our Office) beyond the 60-day period without the authorization of GAO or the prior written agreement of the party that produced the material is in violation of this order. The terms of this protective order (except those terms regarding the return or destruction of protected material) shall apply indefinitely to the single copy of the protected decision or letter issued by our Office that is retained by a party admitted under this order.

**FORM 8**
**PROTECTIVE ORDER IN PROCUREMENT PROTEST CASES**

# United States Court of Federal Claims

| | | |
|---|---|---|
| _____, | ) | |
| | ) | No. _____ |
| Plaintiff, | ) | |
| | ) | Judge_____ |
| v. | ) | |
| THE UNITED STATES, | ) | |
| Defendant. | ) | |

_____

**PROTECTIVE ORDER**

_____

The court finds that certain information likely to be disclosed orally or in writing during the course of this litigation may be competition-sensitive or otherwise protectable and that entry of a Protective Order is necessary to safeguard the confidentiality of that information. Accordingly, the parties shall comply with the terms and conditions of this Protective Order.

I.

1. Protected Information Defined. "Protected information" as used in this order means information that must be protected to safeguard the competitive process, including source selection information, proprietary information, and confidential information contained in:
   (a) any document (e.g., a pleading, motion, brief, notice, or discovery request or response) produced, filed, or served by a party to this litigation; or
   (b) any deposition, sealed testimony or argument, declaration, or affidavit taken or provided during this litigation.

2. Restrictions on the Use of Protected Information. Protected information may be used solely for the purposes of this litigation and may not be given, shown, made available, discussed, or otherwise conveyed in any form except as provided herein or as otherwise required by federal statutory law.

II.

3. Individuals Permitted Access to Protected Information. Except as provided in paragraphs 7 and 8 below, the only individuals who may be given access to protected information are counsel for a party and independent consultants and experts assisting such counsel in connection with this litigation.

4. Applying for Access to Protected Information. An individual seeking access to protected information pursuant to Appendix C, Section VI of this court's rules must read this Protective Order; must complete the appropriate application form (Form 9—"Application for Access to Information Under Protective Order by Outside or Inside Counsel," or Form 10—"Application for Access to Information Under Protective Order by Expert Consultant or Witness"); and must file the executed application with the court.

5. Objecting to an Application for Admission. Any objection to an application for access must be filed with the court within two (2) business days of the objecting party's receipt of the application.

6. Receiving Access to Protected Information. If no objections have been filed by the close of the second business day after the other parties have received the application, the applicant will be granted access to protected information without further action by the court. If any party files an objection to an application, access will only be granted by court order.

7. Access to Protected Information by Court, Department of Justice, and Agency Personnel. Personnel of the court, the procuring agency, and the Department of Justice are automatically subject to the terms of this Protective Order and are entitled to access to protected information without further action.

8. Access to Protected Information by Support Personnel. Paralegal, clerical, and administrative support personnel assisting any counsel who has been admitted under this Protective Order may be given access to protected information by such counsel if those personnel have first been informed by counsel of the obligations imposed by this Protective Order.

III.

9. Identifying Protected Information. Protected information may be provided only to the court and to individuals admitted under this Protective Order and must be identified as follows:
   (a) if provided in electronic form, the subject line of the electronic transmission shall read "**CONTAINS PROTECTED INFORMATION**"; or
   (b) if provided in paper form, the document must be sealed in a parcel containing the legend **"PROTECTED INFORMATION ENCLOSED"** conspicuously marked on the outside.

   The first page of each document containing protected information, including courtesy copies for use by the judge, must contain a banner stating "**Protected Information to Be Disclosed Only in Accordance With the U.S. Court of Federal Claims Protective Order"** and the portions of any document containing protected information must be clearly identified.

10. Filing Protected Information. Pursuant to this order, a document containing protected information may be filed electronically under the court's electronic case filing system using the appropriate activity listed

in the **"SEALED"** documents menu. If filed in paper form, a document containing protected information must be sealed in the manner prescribed in paragraph 9(b) and must include as an attachment to the front of the parcel a copy of the certificate of service identifying the document being filed.

11. Protecting Documents Not Previously Sealed. If a party determines that a previously produced or filed document contains protected information, the party may give notice in writing to the court and the other parties that the document is to be treated as protected, and thereafter the designated document must be treated in accordance with this Protective Order.

IV.

12. Redacting Protected Documents For the Public Record.
    (a) Initial Redactions. After filing a document containing protected information in accordance with paragraph 10, or after later sealing a document pursuant to paragraph 11, a party must promptly serve on the other parties a proposed redacted version marked **"Proposed Redacted Version"** in the upper right-hand corner of the first page with the claimed protected information deleted.
    (b) Additional Redactions. If a party seeks to include additional redactions, it must advise the filing party of its proposed redactions within two (2) business days after receipt of the proposed redacted version, or such other time as agreed upon by the parties. The filing party must then provide the other parties with a second redacted version of the document clearly marked **"Agreed-Upon Redacted Version"** in the upper right-hand corner of the page with the additional information deleted.
    (c) Final Version. At the expiration of the period noted in (b) above, or after an agreement between the parties has been reached regarding additional redactions, the filing party must file with the court the final redacted version of the document clearly marked **"Redacted Version"** in the upper right-hand corner of the first page. This document will be available to the public.
    (d) Objecting to Redactions. Any party at any time may object to another party's designation of certain information as protected. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to the court for resolution. Until the court resolves the matter, the disputed information must be treated as protected.

V.

13. Copying Protected Information. No party, other than the United States, may for its own use make more than three (3) copies of a protected document received from another party, except with the consent of all other parties. A party may make additional copies of such documents, however, for filing with the court, service on the parties, or use in discovery and may also incorporate limited amounts of protected information into its own documents or pleadings. All copies of such documents must be clearly labeled in the manner required by paragraph 9.

14. Waiving Protection of Information. A party may at any time waive the protection of this order with respect to any information it has designated as protected by advising the court and the other parties in

writing and identifying with specificity the information to which this Protective Order will no longer apply.

15. Safeguarding Protected Information. Any individual admitted under this Protective Order must take all necessary precautions to prevent disclosure of protected information, including but not limited to physically securing, safeguarding, and restricting access to the protected information.

16. Breach of the Protective Order. If a party discovers any breach of any provision of this Protective Order, the party must promptly report the breach to the other parties and immediately take appropriate action to cure the violation and retrieve any protected information that may have been disclosed to individuals not admitted under this Protective Order. The parties must reasonably cooperate in determining the reasons for any such breach.

17. Seeking Relief From the Protective Order. Nothing contained in this order shall preclude a party from seeking relief from this Protective Order through the filing of an appropriate motion with the court setting forth the basis for the relief sought.

VI.

18. Maintaining Filed Documents Under Seal. The court will maintain properly marked protected documents under seal throughout this litigation.

19. Retaining Protected Information After the Termination of Litigation**.** Upon conclusion of this action (including any appeals and remands), the original version of the administrative record and any other materials that have been filed with the court under seal will be retained by the court pursuant to RCFC 77.3(c). Copies of such materials may be returned by the court to the filing parties for disposition in accordance with paragraph 20 of this Protective Order.

20. Disposing of Protected Information. Within thirty (30) days after the conclusion of this action (including any appeals and remands), each party must destroy all protected information received pursuant to this litigation and certify in writing to each other party that such destruction has occurred or must return the protected information to the parties from which the information was received. With respect to protected electronically stored information (ESI) stored on counsel's computer network(s), destruction of such ESI for purposes of compliance with this paragraph shall be complete when counsel takes reasonable steps to delete all such ESI from the active email system (such as, but not limited to, the "Inbox," "Sent Items," and "Deleted Items" folders) of admitted counsel and of any personnel who received or sent emails with protected information while working under the direction and supervision of such counsel, and by deleting any protected ESI from databases under counsel's control. Compliance with this paragraph does not require counsel to search for and remove ESI from any computer network back-up tapes, disaster recovery systems, or archival systems. Each party may retain one copy of such documents, except when the retention of additional copies is required by federal law or regulation, provided those documents are properly marked and secured.

**IT IS SO ORDERED.**

_____
Judge

# The Davis-Bacon Act, as Amended


U.S. Department of Labor
Wage and Hour Division

WH Publication 1246
(Revised April 2009)

This material will be made available to Sensory impaired individuals upon request.
Voice phone: 202-693-0675
TDD* phone: 202-523-9530

PUBLIC LAW 107–217—AUG. 21, 2002 [as amended[1]]

An Act

To revise, codify, and enact without substantive change certain general and permanent laws, related to public buildings, property, and works, as title 40, United States Code, ''Public Buildings, Property, and Works''.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. TITLE 40, UNITED STATES CODE.

Certain general and permanent laws of the United States, related to public buildings, property, and works, are revised, codified,and enacted as title 40, United States Code, ''Public Buildings, Property, and Works'', as follows:

# TITLE 40—PUBLIC BUILDINGS, PROPERTY, AND WORKS

* * * *

### SUBTITLE II—PUBLIC BUILDINGS AND WORKS

* * * *

PART A—GENERAL

* * * *

CHAPTER 31 – GENERAL

* * * *

SUBCHAPTER IV - WAGE RATE REQUIREMENTS

**Sec. 3141. Definition**

In this subchapter, the following definitions apply:

(1) Federal government.— The term "Federal Government" has the same meaning that the term "United States" had in the Act of March 3, 1931 (ch. 411, 46 Stat. 1494) (known as the Davis-Bacon Act).[2]

(2) Wages, scale of wages, wage rates, minimum wages, and prevailing wages.— The terms "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" include—

(A) the basic hourly rate of pay; and

[1] Pub. L. 109-284 Sec. 6(11), (12), and (13) made three minor technical corrections in Secs 3141(1), and 3142(d) and (e). (Sept. 27, 2006, 120 Stat.1213.)

[2] The Davis-Bacon Act, referred to in par. (1), is act of Mar. 3, 1931, ch. 411, 46 Stat. 1494, as amended, which was classified generally to sections 276a to 276a-5 of former Title 40, Public Buildings, Property, and Works, and was repealed and reenacted as sections 3141-3144, 3146, and 3147 of this title by Pub. L. 107-217, Secs. 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304.

(B) for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the forgoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of those benefits, the amount of—

(i) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a fund, plan, or program; and

(ii) the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected.

**Sec. 3142. Rate of wages for laborers and mechanics**

(a) Application.— The advertised specifications for every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.

(b) Based on Prevailing Wage.— The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.

(c) Stipulations Required in Contract.— Every contract based upon the specifications referred to in subsection (a) must contain stipulations that—

(1) the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;

(2) the contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work; and

(3) there may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.

(d) Discharge of Obligation.— The obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, under this subchapter and other laws incorporating this subchapter by reference, may be discharged by making payments in cash, by making contributions described in section 3141(2)(B)(i) of this title, by assuming an enforceable commitment to bear the costs of a plan or program referred to in section 3141(2)(B)(ii) of this title, or by any combination of payment, contribution, and assumption, where the aggregate of the payments, contributions, and costs is not less than the basic hourly rate of pay plus the amount referred to in section 3141(2)(B) of this title.

(e) Overtime Pay.— In determining the overtime pay to which a laborer or mechanic is entitled under any federal law, the regular or basic hourly rate of pay (or other alternative rate on which premium rate of overtime compensation is computed) of the laborer or mechanic is deemed to be the rate computed under section 3141(2)(A) of this title, except that where the amount of payments, contributions, or costs incurred with respect to the laborer or mechanic exceeds the applicable prevailing wage, the regular or basic hourly rate of pay (or other alternative rate) is the amount of payments, contributions, or costs actually incurred with respect to the laborer or mechanic minus the greater of the amount of contributions or costs of the types described in section 3141(2)(B) of this title actually incurred with respect to the laborer or mechanic or the amount determined under section 3141(2)(B) of this title but not actually paid.

**3141(2)(B) of this title but not actually paid. Sec.3143.**

Every contract within the scope of this subchapter shall contain a provision that if the contracting officer finds that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid, the Federal Government by written notice to the contractor may terminate the contractor's right to proceed with the work or the part of the work as to which there has been a failure to pay the required wages. The Government may have the work completed, by contract or otherwise, and the contractor and the contractor's sureties shall be liable to the Government for any excess costs the Government incurs.

**Sec. 3144. Authority of Comptroller General to pay wages and list contractors violating contracts**

(a) Payment of Wages.—

(1) In general.— The Comptroller General shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found to be due laborers and mechanics under this subchapter.

(2) Right of action.— If the accrued payments withheld under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wages required under this subchapter, the laborers and mechanics have the same right to bring a civil action and intervene against the contractor and the contractor's sureties as is conferred by law on persons furnishing labor or materials. In those proceedings it is not a

defense that the laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(b) List of Contractors Violating Contracts.—

(1) In general.— The Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors.

(2) Restriction on awarding contracts.— No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest until three years have elapsed from the date of publication of the list.

* * * *

**Sec. 3146. Effect on other federal laws**

This subchapter does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates.

**Sec. 3147. Suspension of this subchapter during a national emergency**

The President may suspend the provisions of this subchapter during a national emergency.

**Sec. 3148. Application of this subchapter to certain contracts**

This subchapter applies to a contract authorized by law that is made without regard to section 3709 of the Revised Statutes (41 U.S.C. 5), or on a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, if this subchapter otherwise would apply to the contract.

# Service Contract Act of 1965, as Amended

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH Publication 1146
Revised July 1978

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# SERVICE CONTRACT ACT OF 1965, AS AMENDED [1]

(41 U.S.C. 351, *et seq.*)

(Revised text [1] showing in italics new or amended language provided by Public Law 92-473, as enacted October 9, 1972, and in bold face new or amended language provided by Public Law 94-489, as enacted October 13, 1976.)

**AN ACT To provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Service Contract Act of 1965".

SEC. 2. (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, *or, where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).*

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, *or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement, as a result of arm's-length negotiations.* Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency,

[1] Public Law 89-286, 79 Stat. 1034, as amended by Public Law 92-473, 86 Stat. 789; by Public Law 93-57, 87 Stat. 140; and by Public Law 94-489, 90 Stat. 2358.

or will post a notice of the required compensation in a prominent place at the worksite.

*(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341* **or section 5332** *of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.*

(b) (1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. 201, et seq.).

(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2(a) (1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

SEC. 4. (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended, shall govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (*other than section 10*), *but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.*

*(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract:* Provided, *That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.*

*(d) Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this Act applies may, if authorized by the Secretary,*

*be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 2 of this Act no less often than once every two years during the term of the contract, covering the various classes of service employees.*

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends *because of unusual circumstances,* no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. *Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this Act.*

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

SEC. 7. This Act shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

SEC. 8. For the purposes of this Act—

(a) "Secretary" means Secretary of Labor.

**(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons**

**regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.**

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island,[2] but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

SEC. 9. This Act shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the date of enactment of this Act.

*Sec. 10. It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 2 should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:*

*(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.*

*(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.*

*(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.*

*(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.*

*(5) For the fiscal year ending June 30, 1977, and for each fiscal year thereafter, all contracts under which more than five service employees are to be employed.*

Approved October 22, 1965 (Public Law 89-286).

Approved October 9, 1972 (Amendments, Public Law 92-473).

Approved October 13, 1976 (Amendments, Public Law 94-489).

[2] Canton Island added by Public Law 93-57, 87 Stat. 140.

*Legislative History* (Public Law 89-286):
House Report No. 948 (Comm. on Education & Labor).
Senate Report No. 798 (Comm. on Labor & Public Welfare).
Congressional Record, Vol. 111 (1965):
Sept. 20, Considered and passed House.
Oct. 1, Considered and passed Senate, amended.
Oct. 6, House concurred in Senate amendment.

*Legislative History* (Public Law 92-473):
House Report No. 92-1251 (Comm. on Education and Labor).
Senate Report No. 92-1131 (Comm. on Labor and Public Welfare).
Congressional Record, Vol. 118 (1972):
Aug. 7, considered and passed House.
Sept. 19, considered and passed Senate, amended.
Sept. 27, House concurred in Senate amendments.

*Legislative History* (Public Law 94-489):
House Report No. 94-1571 (Comm. on Education and Labor).
Congressional Record, Vol. 122 (1976):
Sept. 21, considered and passed House.
Sept. 30, considered and passed Senate.

employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor Contractor and its subcontractors;

(2) That the subcontractor will provide the Contractor with the information about the service employees of the subcontractor needed by the Contractor to comply with paragraphs (d) and (e) of this clause; and

(3) The recordkeeping requirements of paragraph (f) of this clause.

(End of clause)

[FR Doc. 2012–30592 Filed 12–20–12; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Chapter 1

**[Docket FAR 2012–0081, Sequence 9]**

### Federal Acquisition Regulation; Federal Acquisition Circular 2005–64; Small Entity Compliance Guide

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2005–64, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2005–64, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

**DATES:** For effective date see separate document, which follows.

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–64 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

RULE IN FAC 2005–64

| Subject | FAR Case | Analyst |
|---|---|---|
| * Nondisplacement of Qualified Workers Under Service Contracts. | 2011–028 | Loeb |

**SUPPLEMENTARY INFORMATION:** A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific item number and subject set forth in the document following the item summary. FAC 2005–64 amends the FAR as specified below:

**Nondisplacement of Qualified Workers Under Service Contracts (FAR Case 2011–028)**

This final rule adds subpart 22.12, entitled ''Nondisplacement of Qualified Workers Under Service Contracts,'' and a related contract clause, to the FAR. The new subpart implements Executive Order 13495 and Department of Labor implementing regulations at 29 CFR part 9. The final rule applies to service contracts for performance by service employees of the same or similar work at the same location. It requires service contractors and their subcontractors under successor contracts to offer service employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified.

Dated: December 14, 2012.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

[FR Doc. 2012–30593 Filed 12–20–12; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### 29 CFR Part 9

**RIN 1215–AB69; 1235–AA02**

### Nondisplacement of Qualified Workers Under Service Contracts; Effective Date

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule; notice of effective date and OMB approval of information collection requirements.

**SUMMARY:** The Department of Labor announces the effective date of its Final Rule published on August 29, 2011, to implement Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (Executive Order 13495 or Order). Executive Order 13495 states that the Order shall apply to solicitations issued on or after the effective date of regulations issued by the Federal Acquisition Regulatory Council (FARC) to amend the Federal Acquisition Regulation (FAR) to provide for the inclusion of the contract clause set forth in Executive Order 13495 in Federal solicitations and contracts for services subject to the Order (FARC Final Rule). The Department of Labor Final Rule provided that it would not be effective until the FARC issued the FARC Final Rule, and that as a result, the Department of Labor would publish a notice in the **Federal Register** announcing the effective date once the effective date was determined. The FARC has established January 18, 2013 as the effective date for its final rule. In accordance with the Department of Labor Final Rule, this document advises the public of the effective date of the Department's Final Rule. In addition, in accordance with the Paperwork Reduction Act (PRA), the Department of Labor announces that the Office of Management and Budget has approved the information collection requirements contained in the Department of Labor Final Rule.

**DATES:** The effective date for the Final Rule published on August 29, 2011 (76 FR 53720), is January 18, 2013. In addition, on December 7, 2011, the Office of Management and Budget (OMB) approved under the Paperwork Reduction Act the Department of Labor's information collection request for requirements in 29 CFR 9.21; 9.12(a), (b), (e)(1), (e)(2), and (f) as published in the **Federal Register** on August 29, 2011. *See* 76 FR 53744. The current expiration date for OMB authorization for this information collection is December 31, 2014.

**FOR FURTHER INFORMATION CONTACT:** Timothy Helm, Division of Enforcement Policies and Procedures, Branch Chief, Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, at (202) 693–0064 (this is not a toll-free number).

This notice is available through the printed **Federal Register** and electronically via the *http://www.gpoaccess.gov/fr/index.html* Web site.

Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to

obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:** Executive Order 13495 establishes a general policy of the Federal Government concerning service contracts and solicitations for service contracts for performance of the same or similar services at the same location. This policy mandates the inclusion of a contract clause requiring the successor contractor and its subcontractors to offer those employees employed under the predecessor contract, whose employment will be otherwise terminated as a result of the award of the successor contract, a right of first refusal of employment under the successor contract in positions for which they are qualified. Because the Executive Order applies to contract solicitations issued on or after the effective date for FARC Final Rule, the Department of Labor's final rule published August 29, 2011 (76 FR 53720) could not become effective until the effective date of the FARC Final Rule. The FARC Final Rule has an effective date of January 18, 2013. The effective date of the Department's Final Rule also is January 18, 2013.

The Department's final rule includes information collection requirements subject to the Paperwork Reduction Act. Specifically, the final rule requires information collections for employment offers (§ 9.12(a), (b), (e)(1), (e)(2), and (f)), and related to the filing of complaints (§ 9.21)). As discussed in the preamble to the final rule, the Department submitted the information collections contained therein to the Office of Management and Budget (OMB) for approval. (76 FR 53744) On December 7, 2011, OMB approved the Department's information collection request under Control Number 1235–0025, thus giving effect to the information collection requirements contained in the final rule published in the **Federal Register** on August 29, 2011. The current expiration date for OMB authorization for this information collection is December 13, 2014.

The Department has determined that good cause exists to make this Final Rule effective on January 18, 2013, concurrent with the effective date of the FARC Final Rule. This Final Rule is a technical amendment to the Department's final rule published in the **Federal Register** on August 29, 2011 (76 FR 53720), in which the Department advised the public that the rule would not be effective until the FARC issued the FARC Final Rule, and that as a result, the Department would publish a notice in the **Federal Register** announcing the effective date once the effective date was determined. Contractors and subcontractors subject to the Department's Final Rule have had sufficient opportunity to determine how they would comply with the Department's Final Rule. Furthermore, it is in the public interest to make the effective date of the Department's Final Rule concurrent with the FARC Final Rule's effective date to avoid confusion that could result for contractors and subcontractors if the two rules were to have differing effective dates. For the reasons stated, it is the Department's position that is not necessary to delay the effective date of this Final Rule until 30 days after publication in the **Federal Register**.

Dated: December 13, 2012.

**Mary Beth Maxwell,**

*Acting Deputy Administrator, Wage and Hour Division.*

[FR Doc. 2012–30595 Filed 12–20–12; 8:45 am]

**BILLING CODE 4510–27–P**

# United States Department of Labor
## Wage and Hour Division
## Wage and Hour Division

# FACT SHEET: FINAL RULE TO IMPLEMENT EXECUTIVE ORDER 13658, ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

On February 12, 2014, President Obama signed Executive Order 13658, "Establishing a Minimum Wage for Contractors," to raise the minimum wage to $10.10 for all workers on Federal construction and service contracts. The President took this executive action because boosting wages lowers turnover and increases morale, and will lead to higher productivity overall. Raising wages will improve the quality and efficiency of services provided to the government. The Executive Order directed the Department of Labor to issue regulations to implement the new Federal contractor minimum wage.

The Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on June 17, 2014. The NPRM proposed standards and procedures for implementing and enforcing Executive Order 13658 and invited public comment on the proposed provisions. The Department received many comments from a variety of interested stakeholders, such as labor organizations; contractors and contractor associations; worker advocates, including advocates for individuals with disabilities; contracting agencies; small businesses; and workers.

After carefully considering all timely and relevant comments, the Department has published a final rule to implement the provisions of Executive Order 13658. The final rule issued by Secretary of Labor Tom Perez is an important milestone in raising the minimum wage for workers on Federal contracts.

## Key Provisions of the Final Rule

**The final rule defines key terms used in the Executive Order, including contracts, contract-like instruments, and concessions contracts.** The final rule makes clear that the Executive Order minimum wage requirement applies to all contracts for construction covered by the Davis-Bacon Act; contracts for services covered by the Service Contract Act; concessions contracts, such as contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment on Federal property; and contracts to provide services, such as child care or dry cleaning, in Federal buildings for Federal employees or the general public.

**The final rule provides guidance for contractors on their obligations under the Executive Order.** The final rule sets forth the standards that contractors should apply to determine whether their workers are covered by the Executive Order, recordkeeping requirements, and where to find the required rate of pay for all workers, including tipped workers and workers with disabilities.

**The final rule establishes an enforcement process that should be familiar to most government contractors and will protect the right of workers to receive the new $10.10 minimum wage.** The Department of Labor generally has adopted existing mechanisms for enforcing long-established prevailing wage laws to enforce the provisions of the Executive Order.

**The final rule confirms that around 200,000 workers will benefit from the Executive Order.**

## Details of Final Rule Key Provisions

## Coverage

Executive Order 13658 applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2015 or to contracts that are awarded outside the solicitation process on or after January 1, 2015.

Executive Order 13658 applies to four major categories of contractual agreements:

- procurement contracts for construction covered by the Davis-Bacon Act (DBA);
- service contracts covered by the Service Contract Act (SCA);
- concessions contracts, including any concessions contract excluded from the SCA by the Department of Labor's regulations at 29 CFR 4.133(b); and
- contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

### Procurement contracts for construction

Under the final rule, any contract covered by the DBA and its implementing regulations is subject to the Executive Order minimum wage requirement. The Executive Order does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts.

### Service contracts

Both procurement and non-procurement contracts that are subject to the SCA and its implementing regulations are subject to the Executive Order minimum wage requirement.

### Contracts for concessions

The final rule defines the term concessions contract to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term concessions contract includes, but is not limited to, a contract whose principal purpose is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public. The Executive Order thus covers all concession contracts with the Federal Government, including those excluded from SCA coverage by regulations, such as concession contracts with the Federal Government to operate souvenir shops or to provide food or lodging in national parks.

### Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public

The final rule interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. For example, a lease of space in a Federal building from a Federal agency to a business to operate a coffee shop to serve Federal employees and/or the general public is covered by the Executive Order.

### Contracts that are not covered by the Executive Order and the final rule

The Executive Order and the final rule contain certain narrow exclusions from coverage for the following types of contractual agreements: (1) grants; (2) contracts and agreements with and grants to Indian Tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (i.e., procurement contracts for construction under $2,000); and (4) any contracts for services, except for those

otherwise expressly covered by the final rule, that are exempted from coverage under the SCA or its implementing regulations. For example, the SCA exempts contracts for public utility services, including electric light and power, water, steam, and gas, from its coverage. See 41 U.S.C. 6702(b)(5); 29 CFR 4.120. It additionally exempts employment contracts providing for direct services to a Federal agency by an individual, such as a contract with an individual to provide sign language interpretation for an event. See 41 U.S.C. 6702(b)(6); 29 CFR 4.121. Such contracts would also be exempt from coverage of the Executive Order and the final rule.

The Department also notes that the Executive Order does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, i.e., those subject to the Walsh-Healey Public Contracts Act.

### Workers who are entitled to the Executive Order minimum wage

Workers performing on or in connection with covered Federal contracts whose wages are governed by the Fair Labor Standards Act (FLSA), the SCA, or the DBA are generally entitled to receive the Executive Order minimum wage for all time spent performing on or in connection with covered Federal contracts. The Executive Order therefore generally applies to the following categories of workers performing on or in connection with covered Federal contracts: (1) employees who are entitled to the FLSA minimum wage; (2) service employees who are entitled to prevailing wages under the SCA; and (3) laborers and mechanics who are entitled to prevailing wages under the DBA. The Executive Order specifically provides that workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are entitled to receive the Executive Order minimum wage. If a worker is entitled to a wage rate higher than the Executive Order minimum wage pursuant to another Federal, State, or local law (e.g., the SCA or DBA), the worker must be paid the higher wage rate.

The Department's final rule specifically notes that the minimum wage protections of the Executive Order extend broadly to protect FLSA-, SCA-, and DBA-covered workers performing "on" covered contracts (i.e., workers directly performing the specific services or construction called for by the contract's terms) as well as workers performing "in connection with" covered contracts (i.e., workers performing other duties necessary to the performance of the contract). For example, the Executive Order minimum wage applies to FLSA-covered workers who provide support on SCA- and DBA-covered contracts that is necessary for the performance of the contract, such as an FLSA-covered security guard monitoring a DBA covered project for the entire work week.

### FLSA section 14(c) and the Executive Order

Workers covered by the Executive Order and generally due the full Executive Order minimum wage for time spent performing on or in connection with covered contracts include workers with disabilities whose wages are calculated pursuant to certificates issued under section 14(c) of the FLSA. For additional information on the impact of the Executive Order and the section 14(c) program, please see fact sheet, "Raising The Minimum Wage For Workers With Disabilities Under Executive Order 13658," available at http://www.dol.gov/whd/flsa/eo13658/EO-factsheet.htm.

### Workers that are not covered by the Executive Order and the final rule

The Executive Order and the final rule contain a few limited exclusions from coverage for certain workers. For example, workers who are employed in a bona fide executive, administrative, or professional capacity and who consequently are exempt from the FLSA's minimum wage and overtime requirements are not entitled to receive the Executive Order minimum wage. FLSA-covered workers performing "in connection with" covered contracts are also excluded from coverage of the Executive Order if they spend less than 20% of their work hours in a particular workweek performing in connection with covered contracts.

## Contracting Agency Obligations

The final rule sets forth the responsibilities of contracting agencies under the Executive Order. Contracting agencies are responsible for ensuring that the contract clause implementing the Executive Order minimum wage requirement is included in any new contracts or solicitations for contracts covered by the Executive Order. Contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to pay the required Executive Order minimum wage, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13658 to the Wage and Hour Division (WHD).

## Contractor Obligations

The Department's final rule sets forth certain obligations that contractors and subcontractors must fulfill in order to comply with the Executive Order. For example, contractors and subcontractors must include the Executive Order contract clause in any covered lower-tiered subcontracts. They also must notify all workers performing on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. Contractors and subcontractors must pay covered workers the Executive Order minimum wage for all hours worked on or in connection with covered contracts, and must comply with pay frequency and recordkeeping obligations. Finally, the final rule prohibits the taking of kickbacks from wages paid to workers on covered contracts as well as retaliation against any worker for exercising his or her rights under the Executive Order or the implementing regulations.

## Department of Labor Obligations

Under the Executive Order and the Department's rule, the Secretary of Labor is required to determine the Executive Order minimum wage rate yearly beginning January 1, 2016, and publish this wage rate at least 90 days before the wage is to take effect. The final rule outlines the methods that the Department will utilize to notify the public of the Executive Order minimum wage, including publication in the Federal Register and notice on DBA and SCA wage determinations and on www.wdol.gov.

## Enforcement Procedures

Complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. The final rule contains a mechanism for WHD investigations and informal complaint resolution, as appropriate; it also specifies remedies and sanctions for violations of the Executive Order and its implementing regulations, including the payment of back wages and debarment. The Department's final rule also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

**OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS**

# KNOW YOUR RIGHTS

## Pay Transparency Fact Sheet

**OFCCP Protects You From Discrimination Based on Compensation Inquiries, Discussions, or Disclosures.**

Ensuring that women earn equal pay for equal work is essential to improving the economic security of our families and the growth of the middle class and our economy. Yet in too many workplaces around the country, women and people of color don't know what their counterparts are earning for the same work, and a culture of secrecy prevents them from finding out if they are being discriminated against in time to act on it. Lilly Ledbetter learned only after decades at her job that she had been paid less than her male counterparts while her company had a policy forbidding her from discussing pay with co-workers that prevented her from getting the information she needed to bring a complaint in time. The Lilly Ledbetter Fair Pay Restoration Act, the first piece of legislation signed by President Obama in 2009, helped people like her more effectively challenge unequal pay, but pay secrecy policies still stand in the way of the fundamental principle of equal pay for equal work. If one of Lilly Ledbetter's co-workers had simply been able to tell her about the discrimination that was taking place, she would have been better able to act in time to exercise her workplace rights. Indeed, the ability of workers to share information and effectively organize for their rights is a cornerstone of building an economy that works for everyone. Promoting pay transparency by prohibiting pay secrecy policies helps make the federal contractor workforce more efficient. Pay transparency helps level the playing field for women and people of color, and provides employers access to a diverse pool of qualified talent.

As of January 11, 2016, OFCCP's regulations prohibit covered federal contractors and subcontractors from discriminating against employees and job applicants who choose to inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. Executive Order 11246 already prohibits federal contractors and subcontractors from discriminating based on race, color, religion, sex, sexual orientation, gender identity, and national origin. The new rule provides a critical tool to encourage pay transparency, so workers have a potential way of discovering violations of equal pay laws and can seek appropriate remedies.

1. **Do I have the right to ask about, discuss, or disclose what my employer is paying me or others under this new protection?**

   Yes, you have the right to inquire about, discuss, or disclose your own compensation or that of other employees or applicants through ordinary means such as conversations with co-workers. You cannot be disciplined, harassed, demoted, terminated, denied employment, or otherwise discriminated against because you exercised this right. However, this right is subject to certain limited exceptions, which are discussed below.

**2. Are contractors prohibited from having formal and informal pay secrecy policies?**

Yes. Contractors are generally prohibited from having polices that prohibit or tend to restrict employees or applicants from discussing or disclosing their compensation or the compensation of others. For example, a contractor's policy that prohibits employees from talking to each other about end-of-the-year bonuses would be considered a violation, as it prohibits employees from discussing their compensation.

**3. How is "compensation" defined?**

"Compensation" generally refers to any payments made to an employee, or on behalf of an employee, or offered to an applicant, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

**4. What is "compensation information"?**

"Compensation information" refers to the amount and type of compensation given to employees or offered to applicants. Examples of "compensation information" include salary and pay structures; contractor decisions, statements, and policies related to setting or altering employee compensation; and labor union agreements.

**5. What are some examples of actions by employers that could be discriminatory under the pay transparency protections?**

This type of discrimination generally exists where an employer takes an adverse employment action against an employee or job applicant because he or she inquired about, discussed, or disclosed his or her own compensation or the compensation of another employee or applicant. For example, an employer may not fire an employee because she discussed her salary with another employee. Similarly, an employer may not decrease an employee's work hours because he asked his coworkers about their rates of overtime pay.

**6. Does the Executive Order include contractor defenses?**

Yes. The Executive Order provides contractors with two ways to justify or defend actions taken that might otherwise be seen as discriminatory and prohibited: the "essential job functions" defense; and the general, or "workplace rule," defense.

**7. What are "essential job functions" under the Executive Order?**

The term "essential job functions" means the fundamental job duties of the employment position an individual holds. A job function may be considered essential if:

- The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

- The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

**8. What is the "essential job functions" defense?**

Under the "essential job functions" defense, a contractor can defend against a claim of discrimination by showing that it took adverse action against an employee because the employee (a) had access to the compensation information of other employees or applicants as part of his or her essential job duties and (b) disclosed such information to individuals who did not otherwise have access to it.

For example, Sam is an information technology professional at a federal contractor and one of his weekly tasks is to ensure that personnel data, including individualized pay data, has not been compromised. While performing a routine security check, Sam notices that his co-worker Sally makes $10,000 less a year than Ted, a colleague who does the same job as Sally. The next day, Sam informs Sally of Ted's pay. In this example, the contractor could defend an adverse action against Sam because he revealed pay information that he discovered performing one of his essential job functions. Access to employees' compensation data is necessary to perform one of Sam's routinely assigned tasks. Additionally, Sam's task involved protecting the privacy of personnel information.

However, even employees who have access to compensation data as part of their essential job functions may discuss, disclose, or inquire about compensation in some instances. For example, they can:

- Discuss or disclose the compensation of applicants or employees in response to a formal complaint or charge; in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer; or in accordance with the contractor's legal duty to furnish information.

- Discuss their own compensation data with other employees.

- Discuss possible pay disparities involving other employees with a contractor's management official or while using the contractor's internal complaint process.

- Discuss or disclose compensation data of other applicants or employees based on information received through means other than access granted through their essential job functions.

**9. What is the "workplace rule" defense?**

Under the "workplace rule" defense, a contractor can defend against a claim of discrimination by showing it took adverse action against an employee for violating a consistently and uniformly applied workplace rule that does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. For example, ABC Corporation, Inc. allows

employees to take a 20-minute break for every three hours worked. Jennifer and Sally take a 30-minute break during which they discuss their pay. Their manager refuses to pay both Jennifer and Sally for the extra 10 minutes taken during their break, which is the usual penalty for exceeding the allotted 20-minute break time. In this example, the contractor can defend an allegation that it unlawfully penalized Jennifer and Sally for discussing pay by explaining that Jennifer and Sally were penalized for violating the consistently and uniformly applied workplace rule that employees lose pay if they take a break longer than 20 minutes.

**10. Does my employer have to tell me what other employees are being paid?**

No. Executive Order 11246 does not require employers to provide employees or job applicants with information on the pay of other employees or applicants.

**11. Whom does OFCCP protect?**

OFCCP protects the rights of employees and job applicants of companies doing business with the Federal Government. OFCCP's pay transparency protection covers employees and job applicants of companies with over $10,000 in federal contracts or subcontracts that are entered into or modified on or after January 11, 2016. Workers protected by OFCCP could include employees at banks, meat packing plants, retail stores, manufacturing plants, accounting firms, information technology businesses, and construction companies, among many others.

**Filing a Complaint**

**12. What do I do if I believe my employer discriminated against me because I inquired about, discussed, or disclosed my compensation or the compensation of another employee or applicant**?

If you think you have been discriminated against in employment, or in applying for employment, because you inquired about, discussed, or disclosed your own compensation or the compensation of another employee or applicant, you can file a complaint with OFCCP. You do not need to know with certainty that your employer is a federal contractor or subcontractor to file a complaint. OFCCP will determine whether the company is a federal contractor once it has received your complaint.

**13. How do I file a complaint with OFCCP?**

You may file a discrimination complaint by:

- Completing and submitting a form online through OFCCP's Web site;
- Completing a form in person at the OFCCP office nearest to where you live or work; or
- Mailing or faxing a completed form to the OFCCP regional office that covers the state where you live or work.

The form is available online at http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm and in paper format at all OFCCP offices. To find the office nearest you, visit the online listing of OFCCP offices at http://www.dol.gov/ofccp/contacts/ofnation2.htm.

**14. Is my employer allowed to fire, demote, or treat me less favorably because I filed a complaint?**

No. Under the law, your employer may not retaliate against you for filing a complaint or participating in an investigation. OFCCP's regulations protect you from harassment, intimidation, threats, coercion, or retaliation for asserting your rights.

**15. What will happen if there is a finding that I was a victim of employment discrimination under the pay transparency protections enforced by OFCCP?**

You may be entitled to a remedy that places you in the position you would have been in if the discrimination had never happened. You may be entitled to be hired, promoted, reinstated, or reassigned; and you may be entitled to receive back pay, front pay, a pay raise, or some combination of these remedies. In addition, if OFCCP finds that the federal contractor or subcontractor violated Executive Order 11246, OFCCP could seek to have the company debarred or removed from consideration for future federal contracts or have the company's current contracts or contract modifications cancelled.

*For more information:*
U.S. Department of Labor
**Office of Federal Contract Compliance Programs**
200 Constitution Avenue, NW
Washington, D.C. 20210
1-800-397-6251
TTY: 1-877-889-5627
OFCCP-Public@dol.gov
www.dol.gov/ofccp

*Please note that this fact sheet provides general information. It is not intended to substitute for the actual laws and regulations regarding the program described herein.*

For Immediate Release
May 27, 2015

# FACT SHEET
# Proposed Guidance and Regulations Implementing the Fair Pay and Safe Workplaces Executive Order

While the vast majority of federal contractors play by the rules, every year tens of thousands of American workers are denied overtime wages, are unlawfully discriminated against in hiring or pay, have their health and safety put at risk by federal contractors that cut corners, or are otherwise denied basic workplace protections. Taxpayer dollars should not reward companies that break the law, and contractors who meet their legal responsibilities should not have to compete with those who do not.

On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order, which will require prospective federal contractors to disclose labor law violations and will give agencies more guidance on how to consider labor violations when awarding federal contracts.

The Executive Order also ensures that contractors' employees are given the necessary information each pay period to verify the accuracy of their paycheck, and that workers who may have been sexually assaulted or had their civil rights violated get their day in court by putting an end to pre-dispute arbitration agreements covering these claims at corporations with large federal contracts, except where valid contracts already exist.

Today the Administration is issuing proposed regulations and guidance that would implement the Executive Order. The Department of Labor (DOL) and the Federal Acquisition Regulatory Council (FAR Council) developed the proposed guidance and proposed regulations after extensive outreach to stakeholders. This outreach included formal listening sessions with contractors, contractor organizations, worker advocates, and other stakeholders.

The proposed regulations and guidance make sure that agencies have the information they need to determine which contractors are providing their workers with basic protections. It also creates a process for agencies and DOL to help contractors come into compliance with labor laws. DOL will be setting up an office to help contractors and subcontractors understand their responsibilities under the Executive Order and comply with relevant law, and contracting agencies will have Agency Labor Compliance Advisors to assist contracting officers with reviewing and making determinations about disclosed labor violations, as well as helping contractors take steps to come into compliance.

In implementing the Executive Order, DOL and the FAR Council have made every effort to streamline the disclosure process and minimize the burden on contractors. The processes set forth in the proposed guidance and proposed regulations build on the existing federal acquisition system with which contractors are familiar. Given that most contractors follow the law, they will only attest that they are meeting their responsibilities. Moreover, contracting officers will focus on the most egregious violations; for those contractors with such egregious violations, DOL and agencies will work with them to try to address any issues that can be remedied to bring them into compliance. Parts of the proposed regulations are being phased in, so contractors have more time to fully understand their responsibilities, and the proposed regulations also have proposed alternative procedures to reduce the burden on contractors even further.

Further information on the proposed guidance and proposed regulations can be found below.

Both DOL's proposed guidance and the FAR Council's proposed regulations will be available for public review at https://www.federalregister.gov/public-inspection, and they will be published in the Federal Register shortly thereafter, followed by a 60-day period for public comment.

# ADDITIONAL INFORMATION ON REDUCING CONTRACTOR BURDEN

DOL and the FAR Council have made every effort to streamline the disclosure process and minimize the burden on contractors:

**The processes set forth in the proposed guidance and proposed regulations build on the existing federal acquisition system with which contractors are familiar.** Federal contracting officers already must assess a contractor's record of integrity; however, there currently is no way for them to access comprehensive information about companies' workplace violations. The proposed regulations and guidance make sure that contracting officers have the necessary information to make informed decisions, and provide greater transparency for contractors as to the information that will be considered in making that determination.

**The vast majority of federal contractors will only have to attest that they comply with laws providing basic workplace protections.** The proposed guidance and proposed rule direct contracting officers to consider only the most egregious violations. It is estimated that less than 5 percent of covered contractors and subcontractors will have labor violations involving enforcement-agency action that require disclosure. (Although this figure does not include violations resulting in judgments or awards stemming from private litigation or arbitration proceedings that do not involve enforcement agencies, the overall percentage of the contractor population that will be required to take action beyond attesting will still be very small.) Of this percentage, only an offeror that is being considered for award will be required to disclose details and only a small portion of those will have serious, willful, repeated, or pervasive violations that require further action.

**There will be designated agency personnel who will help contractors understand their responsibilities and come into compliance.** DOL will be setting up an office to help contractors and subcontractors understand their responsibilities under the Executive Order and comply with relevant law. DOL will also work with Labor Compliance Advisors (who each agency will designate or hire as required by the Order) across contracting agencies to ensure efficient, accurate, and consistent decisions across the government.

**Parts of the rule will be phased in over time.** Contractors will not be required to disclose violations related to equivalent State laws immediately, significantly reducing the number of violations they will need to report. And the requirements that subcontractors disclose their violations will also be phased in, so that contractors have an opportunity to better understand the process before they undertake a similar one with respect to their subcontractors.

**The proposed rule contains further proposals to reduce burdens.** Most notably, it provides an alternative process for subcontractors to provide DOL with their violations, rather than their contractor. The contractor could then rely on DOL's review of the subcontractor's violations in determining whether the subcontractor is responsible.

# ADDITIONAL INFORMATION ON THE PROPOSED DOL GUIDANCE

Under the Executive Order, covered contractors and subcontractors will be required to disclose any administrative merits determinations, civil judgments, or arbitral awards or decisions issued within the preceding three years finding that they have violated one or more of the labor laws identified in the Executive Order. As directed by the Executive Order, the proposed guidance defines the determinations, judgments, awards and decisions that must be disclosed. The proposed guidance also defines which labor law violations are considered serious, willful, repeated or pervasive, using existing statutory definitions where available, and provides guidance on considering mitigating factors and weighing the severity of contractors' violations. Finally, the proposed guidance provides direction on implementing the Executive Order's paycheck transparency requirements. Each of these core provisions is summarized below.

**Types of decisions**:

1. **Administrative Merits Determinations:** In order to provide clarity regarding the violations that covered contractors and subcontractors must disclose, the proposed guidance provides a complete list of documents issued by each of the relevant enforcement agencies that constitute administrative merits determinations. Each of these is a written document issued to employers following an investigation by the relevant enforcement agency—such as DOL's Wage and Hour Division, Occupational Safety and Health Administration, or Office of Federal Contract Compliance Programs; the National Labor Relations Board; or the Equal Employment Opportunity Commission—and a finding by the enforcement agency that one of the labor laws identified in the Executive Order has been violated.
2. **Civil Judgments:** These include any judgment or order issued by a court finding that an employer has violated one or more of the covered labor laws, or enjoining the employer from violating one or more of those laws.
3. **Arbitral Awards or Decisions:** These include any award or decision by an arbitrator or arbitral panel finding that an employer has violated one of the covered labor laws, or enjoining the employer from violating one or more of those laws.

**Types of Violations**:

1. **Serious:** The proposed guidance incorporates the Occupational Safety and Health Act's definition of "serious," and for the remaining labor laws defines the elements that make a violation serious. In doing so, the proposed guidance considers factors such as the portion of employees affected; the degree of risk posed or actual harm done by the violation to the health, safety or well-being of a worker; and the amount of damages incurred or penalties assessed.

2. **Willful:** For the Fair Labor Standards Act, the Occupational Safety and Health Act, and several anti-discrimination laws, there are existing standards for determining whether violations are "willful," and the proposed guidance adopts those existing standards for purposes of those statutes. For each of the remaining statutes, a violation is willful if the employer knew that its conduct was prohibited by one or more of the covered labor laws, or showed reckless disregard for, or acted with plain indifference to, whether the covered labor laws prohibited its conduct.
3. **Repeated:** "Repeated" violations are two or more labor law violations within the preceding three years that are the same or substantially similar. Whether violations are substantially similar turns on the nature of both the violations themselves and the underlying legal obligations.
4. **Pervasive:** "Pervasive" violations are the most severe. Violations are pervasive if they reflect a basic disregard by the employer for the covered labor laws, as demonstrated by a pattern of violations, continuing violations or numerous violations. Among the factors to be considered in determining whether violations are pervasive are the size of the contractor relative to the number of violations and the extent of higher-level management's involvement.

**Weighing Violations and Mitigating Factors:**

The proposed guidance provides direction on weighing the relative severity of violations. For example, pervasive violations, violations falling into two or more of the four categories, and violations of particular gravity (such as terminating employees in retaliation for exercising their rights under the covered labor laws, or violations related to an employee's death) should be given the most weight. The proposed guidance also addresses mitigating factors to consider when weighing violations, including good faith efforts to remedy past violations, internal processes for expeditiously and fairly addressing reports of violations, and/or plans to proactively prevent future violations.

**Paycheck Transparency:**

The Executive Order requires covered contractors and subcontractors to provide wage statements to covered workers, giving them information concerning their hours worked, overtime hours, pay, and any additions to or deductions made from their pay. The Executive Order also requires covered contractors and subcontractors to provide to workers whom they treat as independent contractors a document informing them of their independent contractor status. The proposed guidance provides direction on implementing these paycheck transparency requirements. The proposed guidance also sets out two approaches to identifying states with substantially similar wage statement requirements—compliance with which will satisfy the Executive Order's wage statement requirement—and specifically requests public comment on the two options.

**Equivalent State Laws:**

> The Executive Order provides that contractors and subcontractors will also be required to disclose violations of state labor laws equivalent to the 14 federal labor laws identified in the Order, and directs DOL to provide guidance as to which state laws are equivalent. This requirement will be phased in at a later time, with the exception of OSHA-approved state plans, which are included in the current proposed guidance and regulations. DOL will issue a second round of proposed guidance defining the remainder of the equivalent state laws, and the FAR Council will issue a second set of regulations to implement this portion of the Executive Order's disclosure requirements.

The proposed guidance provides more detailed direction on each of these topics, including appendices with illustrative examples for ease of understanding. The text of the proposed guidance can be accessed here.

# ADDITIONAL INFORMATION ON THE PROPOSED FAR RULE

As directed by the Executive Order, the proposed FAR regulations build on the DOL guidance and existing federal procurement policies and practices and include the following provisions:

1. **Initial Representation:** When bidding on federal procurement contracts covered by the Executive Order, prospective contractors will only attest whether they have or have not had violations of the covered labor laws resulting in administrative merits determinations, civil judgments or arbitral awards or decisions—as defined in the DOL guidance—within the last three years.
2. **Disclosure of Additional Information:** Only if a prospective contractor becomes a finalist for the award—and a contracting officer therefore undertakes a responsibility determination regarding the prospective contractor–will it have to disclose additional information about its labor violations (unless the contractor has already submitted such information for another bid and nothing has changed since then). At the same time, the prospective contractor will have the opportunity to provide additional information as it deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures and other steps taken to achieve compliance with the relevant labor law(s).
3. **Evaluation by Contracting Officer:** With the advice and assistance of the contracting agency's Labor Compliance Advisor and, where necessary, DOL, contracting officers will determine whether a prospective contractor's labor violations implicate its integrity and business ethics and whether additional action is needed. If necessary, such action may include a labor compliance agreement with the relevant enforcement agency or agencies, denial of the award, or referral to the agency's suspending and debarring official.
4. **Subcontractor Disclosure:** The Executive Order and the proposed FAR regulations provide that contractors will require their prospective subcontractors on subcontracts valued at greater than $500,000 to disclose information regarding their violations of the covered labor laws. Contractors are already required to evaluate the responsibility of their prospective subcontractors, and they will consider the disclosed labor violations—using DOL's guidance—in the course of making these responsibility determinations. The proposed FAR regulation also seeks comment on ways to ensure that the subcontractor responsibility determination process is clear and manageable for prime contractors. One alternative being considered would allow the contractor to direct the subcontractor to consult with DOL on its violations and remedial actions and report back to the prime contractor on DOL's response. The Executive Order's subcontractor disclosure requirements are expected to be phased in through a delayed implementation in order to give the contracting

community time to become familiar with the proposed regulations' disclosure processes and the information provided in DOL's guidance.

5. **Paycheck Transparency Requirements:** The proposed FAR regulations implement the Executive Order's requirements that covered contractors and subcontractors give their workers wage statements (i.e., information concerning hours worked, overtime hours, pay, and any additions to or deductions made from their pay) and, for workers who are treated as independent contractors, notices informing them of their independent contractor status. These requirements will help workers ensure they are getting paid what they are legally owed.
6. **Giving Workers Their Day in Court:** The Executive Order and proposed FAR regulations prohibit companies with federal contracts of $1 million or more from requiring their workers to enter into predispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act, or from torts related to sexual assault or harassment, except where valid contracts already exist.

The text of the proposed FAR regulations can be accessed here.

# Presidential Documents

**Executive Order 13706 of September 7, 2015**

## Establishing Paid Sick Leave for Federal Contractors

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to promote economy and efficiency in procurement by contracting with sources that allow their employees to earn paid sick leave, it is hereby ordered as follows:

**Section 1.** *Policy.* This order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care. Providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees. These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

**Sec. 2.** *Establishing paid sick leave for Federal contractors and subcontractors.* (a) Executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as ''contracts''), as described in section 6 of this order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, shall earn not less than 1 hour of paid sick leave for every 30 hours worked.

(b) A contractor may not set a limit on the total accrual of paid sick leave per year, or at any point in time, at less than 56 hours.

(c) Paid sick leave earned under this order may be used by an employee for an absence resulting from:

(i) physical or mental illness, injury, or medical condition;

(ii) obtaining diagnosis, care, or preventive care from a health care provider;

(iii) caring for a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care described in paragraphs (i) or (ii) of this subsection or is otherwise in need of care; or

(iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in paragraphs (i) and (ii) of this subsection, to obtain additional counseling, to seek relocation, to seek assistance from a victim services organization, to take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or to assist an individual related to the employee as described in paragraph (iii) of this subsection in engaging in any of these activities.

(d) Paid sick leave accrued under this order shall carry over from 1 year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation.

(e) The use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed.

(f) The paid sick leave required by this order is in addition to a contractor's obligations under 41 U.S.C. chapter 67 (Service Contract Act) and 40 U.S.C. chapter 31, subchapter IV (Davis-Bacon Act), and contractors may not receive credit toward their prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of this order.

(g) A contractor's existing paid leave policy provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations, if applicable, and made available to all covered employees will satisfy the requirements of this order if the amount of paid leave is sufficient to meet the requirements of this section and if it may be used for the same purposes and under the same conditions described herein.

(h) Paid sick leave shall be provided upon the oral or written request of an employee that includes the expected duration of the leave, and is made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable.

(i) Certification.

(i) A contractor may only require certification issued by a health care provider for paid sick leave used for the purposes listed in subsections (c)(i), (c)(ii), or (c)(iii) of this section for employee absences of 3 or more consecutive workdays, to be provided no later than 30 days from the first day of the leave.

(ii) If 3 or more consecutive days of paid sick leave is used for the purposes listed in subsection (c)(iv) of this section, documentation may be required to be provided from an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work. The contractor shall not disclose any verification information and shall maintain confidentiality about the domestic violence, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

(j) Nothing in this order shall require a covered contractor to make a financial payment to an employee upon a separation from employment for accrued sick leave that has not been used, but unused leave is subject to reinstatement as prescribed in subsection (d) of this section.

(k) A covered contractor may not interfere with or in any other manner discriminate against an employee for taking, or attempting to take, paid sick leave as provided for under this order or in any manner asserting, or assisting any other employee in asserting, any right or claim related to this order.

(l) Nothing in this order shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under this order.

**Sec. 3.** *Regulations and Implementation.* (a) The Secretary of Labor (Secretary) shall issue such regulations by September 30, 2016, as are deemed necessary and appropriate to carry out this order, to the extent permitted by law and consistent with the requirements of 40 U.S.C. 121, including providing exclusions from the requirements set forth in this order where appropriate; defining terms used in this order; and requiring contractors to make, keep, and preserve such employee records as the Secretary deems necessary and appropriate for the enforcement of the provisions of this order or the regulations thereunder. To the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council shall issue regulations in the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order the contract clause described in section 2(a) of this order.

(b) Within 60 days of the Secretary issuing regulations pursuant to subsection (a) of this section, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts as described in section 6(d)(i)(C) and (D) of this order, entered into after January 1, 2017, consistent with the effective date of such agency action, comply with the requirements set forth in section 2 of this order.

(c) Any regulations issued pursuant to this section should, to the extent practicable and consistent with section 7 of this order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*; the Service Contract Act; the Davis-Bacon Act; the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*; the Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq.*; and Executive Order 13658 of February 12, 2014, Establishing a Minimum Wage for Contractors.

**Sec. 4.** *Enforcement.* (a) The Secretary shall have the authority for investigating potential violations of and obtaining compliance with this order, including the prohibitions on interference and discrimination in section 2(k) of this order.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has provided employees with paid sick leave prescribed by this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order.

**Sec. 5.** *Severability.* If any provision of this order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

**Sec. 6.** *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) This order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 3(a) of this order, if:

(i) (A) it is a procurement contract for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR 4.133(b); or

(D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of employees under such contract or contract-like instrument are governed by the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from its minimum wage and overtime provisions.

(e) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts

or contract-like instruments at the thresholds specified in those statutes. For procurement contracts in which employees' wages are governed by the Fair Labor Standards Act, this order shall apply only to contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 3 of this order.

(f) This order shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 3(a) of this order.

(g) Independent agencies are strongly encouraged to comply with the requirements of this order.

**Sec. 7.** *Effective Date.* (a) This order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after:

(i) January 1, 2017, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 3(a) of this order; or

(ii) January 1, 2017, for contracts where an agency action is taken pursuant to section 3(b) of this order, consistent with the effective date for such action.

(b) This order shall not apply to contracts or contract-like instruments that are awarded, or entered into pursuant to solicitations issued, on or before the effective date for the relevant action taken pursuant to section 3 of this order.

THE WHITE HOUSE,
*September 7, 2015.*

[FR Doc. 2015–22998
Filed 9–9–15; 11:15 am]
Billing code 3295–F5

57 Comp. Gen. 567 (Comp.Gen.), B- 188408, 78-1 CPD P 443, 1978 WL 13484

COMPTROLLER GENERAL

IN THE MATTER OF AMERICAN AIR FILTER COMPANY— DLA REQUEST FOR RECONSIDERATION

JUNE 19, 1978

***567 CONTRACTS - PROTESTS - PROCEDURES - BID PROTEST PROCEDURES - TIME FOR FILING - RECONSIDERATION REQUEST**

****1** REQUEST FOR RECONSIDERATION FILED BY AGENCY MORE THAN 10 WORKING DAYS AFTER ACTUAL NOTICE OF GENERAL ACCOUNTING OFFICE (GAO) DECISION WAS RECEIVED IS UNTIMELY. HOWEVER, PRIOR DECISION IS EXPLAINED IN VIEW OF APPARENT NEED FOR CLARIFICATION.

**CONTRACTS - TERMINATION - CONVENIENCE OF GOVERNMENT - RECOMMENDATION - PRESERVING INTEGRITY OF COMPETITIVE SYSTEM - PURPOSE**

GAO REVIEW OF PROTESTS CONCERNING CONTRACT MODIFICATIONS AGREED TO BY PROCURING ACTIVITY, OR CHANGES ORDERED BY CONTRACTING OFFICER, IS INTENDED TO PROTECT INTEGRITY OF COMPETITIVE PROCUREMENT PROCESS.

**CONTRACTS - MODIFICATION - SCOPE OF CONTRACT REQUIREMENT**

MUTUAL AGREEMENT BETWEEN CONTRACTOR AND GOVERNMENT MODIFYING ORIGINAL CONTRACT WAS IN EFFECT IMPROPER AWARD OF NEW AGREEMENT, WHICH WENT SUBSTANTIALLY BEYOND THE SCOPE OF COMPETITION INITIALLY CONDUCTED.

THE DEFENSE LOGISTICS AGENCY REQUESTS RECONSIDERATION OF OUR DECISION IN AMERICAN AIR FILTER CO., 57 COMP.GEN. 285 (1978), 78-1 CPD 136, REGARDING CONTRACT DSA700-77-C-8013 TO SUPPLY GROUND PORTABLE HEATERS, TYPE H-1, CLASS I, CONFORMING TO MILITARY SPECIFICATION ***568** MIL-H-4607B. THE H-1 HEATER IS THE PRIMARY PORTABLE HEATING UNIT DEPLOYED THROUGHOUT THE AIR FORCE AND IS USED TO PREHEAT AIRCRAFT ENGINES, COCKPITS, CARGO COMPARTMENTS AND WORK AREAS.

WE SUSTAINED THE PROTEST FILED BY AMERICAN AIR FILTER CO. (AFF), BECAUSE THE GOVERNMENT MODIFIED THE CONTRACT AWARDED TO DAVEY COMPRESSOR CO. (DAVEY) TO REQUIRE UNITS WHICH OPERATE ON DIESEL FUEL RATHER THAN GASOLINE. WE CONCLUDED THAT THE ALTERATIONS MADE WERE OUTSIDE THE SCOPE OF THE ORIGINAL CONTRACT AND RECOMMENDED THAT THE DEFENSE LOGISTICS AGENCY (DLA) GIVE CONSIDERATION TO THE PRACTICABILITY OF TERMINATING THE CONTRACT FOR THE CONVENIENCE OF THE GOVERNMENT AND OF SOLICITING COMPETITIVELY ITS ALTERED REQUIREMENTS. OUR ACTION TOOK THE FORM OF A RECOMMENDATION UNDER SEC. 236 OF THE LEGISLATIVE REORGANIZATION ACT OF 1970, 31 U.S.C. 1176 (1970).

DLA RAISES SEVERAL BASES UPON WHICH IT URGES RECONSIDERATION, ARGUING THAT:

1. GAO SHOULD DEFER TO THE CONTRACTING AGENCY REGARDING WHETHER A CONTRACT CHANGE IS WITHIN THE SCOPE OF THE CONTRACT, AND SHOULD ‘LEAVE THE CONTRACTING PARTIES' AGREEMENT UNDISTURBED UNLESS, WITHOUT QUESTION, THE CHANGE IS OUTSIDE THE SCOPE OF THE CONTRACT.‘
2. THE GREAT WEIGHT OF THE EVIDENCE SHOWED THAT THERE WAS A SUBSTANTIAL BASIS TO FIND THAT THE CHANGES MADE WERE WITHIN THE SCOPE OF THE CONTRACT.

3. A DETERMINATION THAT AN ENGINEERING CHANGE IS OUTSIDE THE SCOPE OF THE ORIGINAL CONTRACT SHOULD BE BASED ON AN ENGINEERING ANALYSIS, WHICH THE DECISION LACKED. THE AGENCY CONTENDS THAT OUR DECISION DOES NOT REFLECT THAT AN ENGINEERING ANALYSIS WAS PERFORMED; THAT IT ERRONEOUSLY ASSESSED THE IMPORTANCE OF THE TECHNICAL CHANGES WHICH WERE MADE; AND THAT IT REFLECTS A MISUNDERSTANDING OF STATEMENTS MADE AT A POST-AWARD CONFERENCE WITH THE CONTRACTOR AND GOVERNMENT PERSONNEL.

****2** IN THIS REGARD, DLA ASSUMES THAT THE IMPACT OF A CONTRACT MODIFICATION IS TO BE EXAMINED BY APPLYING THE CARDINAL CHANGE DOCTRINE. IT ARGUES THAT WE SHOULD LOOK PRINCIPALLY TO THE CONTRACTOR'S CAPABILITY TO PERFORM THE CHANGE OR MODIFICATION, VIEWED IN LIGHT OF ITS INDIVIDUAL CIRCUMSTANCES. DLA MAINTAINS THAT THE CARDINAL CHANGE DOCTRINE WAS DESIGNED TO PROTECT THE CONTRACTOR'S RIGHTS, AND ASSERTS THAT ‘WHERE THERE IS A DISAGREEMENT BETWEEN THE CONTRACTING PARTIES OVER THE SCOPE OF A PROPOSED MODIFICATION, THE CONTRACTOR'S CONTENTIONS AS TO THE ORIGINAL MEETING OF THE MINDS AND THE EFFECT OF THE CHANGE SHOULD BE GIVEN DUE WEIGHT.‘ DLA BELIEVES THAT THE CONTENTIONS OF A THIRD PARTY CHALLENGER, SUCH AS AAF, ARE ENTITLED TO SUBSTANTIALLY LESS WEIGHT, ‘PARTICULARLY WHERE THE PARTIES (THE GOVERNMENT AND CONTRACTOR) AGREE AS TO THE SCOPE OF THE CHANGE.‘

***569** FURTHER, DLA DISAGREES WITH OUR DECISION BECAUSE, IN ITS OPINION, THE MANUFACTURE OF A DIESEL FUELED UNIT POSES NO EXTRAORDINARY DIFFICULTY FOR DAVEY.

DLA REPORTED THAT THE DEFENSE CONSTRUCTION SUPPLY CENTER (DCSC) REACHED ITS ORIGINAL DECISION BASED UPON ‘A LENGTHY ANALYSIS BY DCSC AND AIR FORCE PERSONNEL OF THE TECHNICAL CHANGES REQUIRED TO ACCOMMODATE THE REQUESTED SUBSTITUTION * * 8.‘ THE REVIEW WAS CONDUCTED ‘TO ENSURE THAT A DIESEL HEATER WAS INDEED FEASIBLE.‘ THE NATURE OF THE INQUIRY IS DESCRIBED BY DLA AS BEING CONCERNED WITH WHETHER THE ALTERATIONS REQUIRED ‘WERE TECHNICALLY FEASIBLE AND WITHIN THE SCOPE OF THE DAVEY CONTRACT.‘ DCSC FOUND, INTER ALIA, THAT ‘USE OF A DIESEL POWER PACKAGE WOULD NOT REQUIRE A RESEARCH AND DEVELOPMENT EFFORT,‘ AND VARIOUS CHANGES WHICH AAF SUGGESTED WOULD BE NECESSARY ‘WERE EITHER NOT REQUIRED OR (WERE) WITHIN THE CURRENT STATE OF THE ART.‘

AAF ARGUES THAT DLA'S REQUEST FOR RECONSIDERATION IS UNTIMELY AND SHOULD NOT BE CONSIDERED IN VIEW OF OUR DECISION IN DEPARTMENT OF COMMERCE— REQUEST FOR RECONSIDERATION, B-186939, JULY 14, 1977, 77-2 CPD 23. THERE WE REFUSED TO CONSIDER AN AGENCY REQUEST FOR RECONSIDERATION FILED 4 MONTHS AFTER OUR DECISION HAD BEEN RELEASED. MOREOVER, WE HELD THAT SEC. 20.9 OF OUR BID PROTEST PROCEDURES MAKES NO PROVISION FOR WAIVING THE TIME REQUIREMENTS APPLICABLE TO REQUESTS FOR RECONSIDERATION, EVEN THOUGH IT IS CONTENDED THAT THE MATTERS INVOLVED RAISE ISSUES SIGNIFICANT TO PROCUREMENT PRACTICES OR PROCEDURE. 4 C.F.R. 20.9 (1978).

ALTHOUGH A COPY OF OUR PRIOR DECISION WAS SENT TO THE DIRECTOR, DEFENSE LOGISTICS AGENCY, ON FEBRUARY 16, 1978, DLA STATES THAT IT ONLY OBTAINED A COPY OF OUR DECISION ON FEBRUARY 24. ITS REQUEST FOR RECONSIDERATION WAS HAND DELIVERED TO OUR OFFICE ON MARCH 13— 11 WORKING DAYS LATER. ALTHOUGH THE RULE IN SEC. 20.9(B) REQUIRES THAT A REQUEST FOR RECONSIDERATION BE FILED IN OUR OFFICE WITHIN 10 WORKING DAYS AFTER THE BASIS FOR RECONSIDERATION IS KNOWN OR SHOULD HAVE BEEN KNOWN, DLA ARGUES THAT OUR DECISION WAS NEVER OPERATIVE UPON IT, BECAUSE THE COPY SENT TO THE DIRECTOR WAS NOT RECEIVED AND, ACCORDINGLY, HE WAS NEVER FORMALLY NOTIFIED OF THE DECISION.

****3** IN FACT, DLA PERSONNEL CONTACTED OUR OFFICE PRIOR TO THE EXPIRATION OF THE 10-DAY PERIOD AND WERE ADVISED THAT THEY SHOULD BE CERTAIN THAT ANY REQUEST THEY CARED TO MAKE WAS PROPERLY FILED WITHIN THE TIME LIMIT. INASMUCH AS WE HAVE CONSISTENTLY CONSIDERED ACTUAL NOTICE OF A PARTY'S BASIS FOR PROTEST OR RECONSIDERATION TO BE SUFFICIENT TO START THE APPROPRIATE TIME LIMITS ESTABLISHED IN THE BID PROTEST PROCEDURES RUNNING, WE FIND DLA'S ARGUMENTS UNPERSUASIVE. SEE, E.G., BRANDON APPLIED SYSTEMS, INC., 57 COMP.GEN. 140 (1977), 77-2 CPD 486; DUPONT PACIFIC, LTD., B-190350, OCTOBER 26, 1977, 77-2 CPD 327; ***570** SOUTHWEST AIRCRAFT SERVICES, INC., B-188483, APRIL 1, 1977, 77-1 CPD 227.

EVEN THOUGH WE DISMISS DLA'S REQUEST AS UNTIMELY FILED, WE HAVE IN SIMILAR SITUATIONS IN PAST DECISIONS OCCASIONALLY COMMENTED UPON MATTERS APPARENT ON THE FACE OF THE RECORD, OR BECAUSE WE FELT THAT OUR VIEWS WERE REQUIRED TO CLARIFY APPARENT UNCERTAINTY OR MISUNDERSTANDING REGARDING THE ISSUES IN DISPUTE. DLA'S ARGUMENTS IN ITS REQUEST FOR RECONSIDERATION REFLECT A FUNDAMENTAL MISUNDERSTANDING OF THE REASONS UNDERLYING OUR EARLIER DECISION. IN THE CIRCUMSTANCES AND BECAUSE OUR PRIOR DECISION INCLUDED A REQUEST THAT DLA CONSIDER WHETHER REMEDIAL CORRECTIVE ACTION SHOULD BE TAKEN, WE HAVE CONCLUDED THAT WE SHOULD CLARIFY THE BASIS UPON WHICH OUR DECISION WAS FOUNDED. IN REACHING OUR ORIGINAL DECISION, WE STATED THAT:

> * * * THE MODIFICATION TO THE CONTRACT TO REQUIRE A DIESEL POWERED AND FIRED HEATER NECESSITATED, INTER ALIA, THE FOLLOWING CHANGES:

1. THE SUBSTITUTION OF A DIESEL ENGINE FOR A GASOLINE ENGINE.

2. A SUBSTANTIAL INCREASE IN THE WEIGHT OF THE HEATER.

3. THE ADDITION OF AN ELECTRICAL STARTING SYSTEM.

4. THE DESIGN OF A NEW FUEL CONTROL.

5. THE REDESIGNING OF THE COMBUSTOR NOZZLE.

6. THE ALTERATION OF VARIOUS PERFORMANCE CHARACTERISTICS.

7. AN INCREASE IN THE UNIT PRICE BY APPROXIMATELY 29 PERCENT.

8. THE APPROXIMATE DOUBLING OF THE DELIVERY TIME.

WE CONCLUDED THAT

> * * * THE MAGNITUDE OF THE TECHNICAL CHANGES, AND THEIR OVERALL IMPACT ON THE PRICE AND DELIVERY PROVISIONS COMPELS THE CONCLUSION THAT THE CONTRACT, AS MODIFIED, IS SO DIFFERENT FROM THE CONTRACT FOR WHICH COMPETITION WAS HELD, THAT THE GOVERNMENT SHOULD HAVE SOLICITED NEW PROPOSALS FOR ITS MODIFIED REQUIREMENT.

EVEN ASSUMING THAT OUR PRIOR DECISION WAS LESS THAN CLEAR, NOWHERE DID WE INDICATE AS SUGGESTED BY THE AGENCY THAT WE WERE APPLYING THE CARDINAL CHANGE TEST PER SE. THE ITALICIZED PORTION OF THE QUOTED LANGUAGE WAS MEANT TO REFLECT WHAT WE VIEW AS A SIGNIFICANT DIFFERENCE BETWEEN A DETERMINATION THAT A PROPOSED CHANGE WOULD RESULT IN A GOVERNMENT BREACH OF CONTRACT, AND A DETERMINATION THAT A PROPOSED

CONTRACT MODIFICATION EVADES THE REQUIREMENT FOR OBTAINING COMPETITION AND THEREFORE UNDERMINES THE INTEGRITY OF THE COMPETITIVE PROCUREMENT PROCESS.

MOREOVER, IT IS OUR PRACTICE TO EVALUATE TECHNICAL FACTS IN RESOLVING PROTEST CASES. SEE, E.G., EARTH SCIENCES RESEARCH, INC., B-193964, JANUARY 27, 1978 (LETTER TO THE SECRETARY OF THE INTERIOR). OUR REVIEW, HOWEVER, IS DIRECTED AT DETERMINING WHETHER THE PROCURING ACTIVITY HAS ACTED REASONABLY IN THE DISCHARGE OF ITS LEGAL RESPONSIBILITIES. REGARDLESS OF OUR OWN VIEWS IN A PARTICULAR CASE, WE DEFER TO THE AGENCY'S JUDGMENT IN ANY MATTER INVOLVING THE EXERCISE OF ITS DISCRETION. CASES INVOLVING THE EXERCISE OF TECHNICAL JUDGMENT ARE TREATED NO DIFFERENTLY, AND WE DEFER TO THE PROCURING ACTIVITY'S OPINION, PROVIDED IT ***571** HAS NOT ABUSED ITS DISCRETION. METIS CORPORATION, 54 COMP.GEN. 612 (1975), 75-1 CPD 44; PLESSEY ENVIRONMENTAL SYSTEMS, B-186787, DECEMBER 27, 1976, 76-1 CPD 533; JARRELL-ASH DIVISION OF FISHER SCIENTIFIC CO., B-185582, JANUARY 12, 1977, 77-1 CPD 19.

****4** NEVERTHELESS, AN AGENCY'S TECHNICAL REVIEW CANNOT BE CONDUCTED IN A VACUUM WITHOUT REGARD TO APPLICABLE LEGAL STANDARDS. WHILE WE BELIEVE THAT AN AGENCY'S OPINION REGARDING TECHNICAL FACTS IS ENTITLED TO CONSIDERATION, A CONCLUSION BY TECHNICAL PERSONNEL REGARDING THE LEGAL IMPLICATIONS OF THEIR FINDINGS CARRIES NO MORE WEIGHT THAN ANY OTHER CONCLUSION OF LAW. DCSC'S CONCLUSION THAT IN ITS TECHNICAL OPINION THERE WAS NO CARDINAL CHANGE, AND THAT THE MODIFICATIONS MADE WERE WITHIN THE SCOPE OF THE CONTRACT, WITHOUT MORE, CONTRIBUTES LITTLE TO OUR UNDERSTANDING OF THE ESSENTIAL FACTS. INDEED, THE DCSC ENGINEERING REVIEW APPEARS TO HAVE BEEN CONCERNED PRIMARILY WITH THE FEASIBILITY OF ACCOMPLISHING THE PROPOSED ALTERATIONS, AND PARTICULARLY WITH WHETHER THE AIR FORCE AND DAVEY WERE AGREEING TO WORK WHICH WAS WITHIN THE STATE-OF-THE-ART.

CONTRARY TO THE AGENCY'S POSITION, WE BELIEVE THAT THE DEGREE OF DIFFICULTY, OR EASE, WITH WHICH DAVEY COULD PERFORM THE MODIFICATION IS NOT CONTROLLING. THE DIFFICULTY IN PRODUCING THE ITEM PER SE IS NOT AN ULTIMATE— AS DISTINGUISHED FROM EVIDENTIARY— FACT EVEN IF THE CARDINAL CHANGE DOCTRINE WERE APPLICABLE.

AS WE INDICATED EARLIER, OUR DECISION IN THIS MATTER REFLECTS CONSIDERATIONS RELATED TO OUR ROLE IN BID PROTEST CASES, AND TO OUR CONCERN THAT LACK OF COMPETITION ADVERSELY IMPACTS UPON THE INTEGRITY OF THE COMPETITIVE PROCUREMENT PROCESS. IN 41 COMP.GEN. 484 (1962) WE HELD THAT A CONTRACT MODIFICATION OSTENSIBLY NEGOTIATED ON A SOLE SOURCE BASIS WITH THE EXISTING CONTRACTOR WAS IMPROPER. THERE THE NAVY SOUGHT TO JUSTIFY THE CHANGE BY ARGUING THAT THE EXISTING CONTRACTOR WAS ALREADY ON THE SITE, KNEW OF EXISTING CONDITIONS, AND OFFERED THE GREATEST ASSURANCE THAT THE WORK WOULD SATISFY THE NAVY'S REQUIREMENTS. CITING THE RULE THAT THE CONTRACTING OFFICER'S OPINION AS TO THE NONAVAILABILITY OF QUALIFIED BIDDERS MAY NOT BE ACCEPTED AS CONTROLLING PRIOR TO SOLICITATION OF BIDS, WE NOTED THAT ‘WE SEE NO BASIS, OTHER THAN THE FACT THAT AN AWARD TO * * * (THE INCUMBENT) MIGHT NOT HAVE BEEN ASSURED * * *, FOR CONTENDING THAT IT WOULD HAVE BEEN IMPRACTICABLE TO OBTAIN COMPETITIVE PROPOSALS AND TO NEGOTIATE SUCH A CONTRACT BASED UPON SUCH PROPOSALS.‘

THAT CASE IS CONSISTENT WITH THE RULE SET OUT IN CONNECTION WITH OUR DECISION IN 5 COMP.GEN. 508 (1926) THAT AN EXISTING CONTRACT MAY NOT BE EXPANDED SO AS TO INCLUDE ADDITIONAL WORK OF ANY CONSIDERABLE MAGNITUDE, UNLESS IT CLEARLY APPEARS THAT THE ADDITIONAL WORK WAS NOT IN ***572** CONTEMPLATION AT THE TIME THE ORIGINAL CONTRACT WAS ENTERED AND IS SUCH AN INSEPARABLE PART OF THE ORIGINAL WORK THAT IT IS REASONABLY IMPOSSIBLE OF

PERFORMANCE BY ANY OTHER CONTRACTOR. FOLLOWED, 30 COMP.GEN. 34 (1950). ALONG SIMILAR LINES, WE HAVE RECENTLY HELD THAT GSA ACTED IMPROPERLY IN EXTENDING A CONTRACT FOR PLUG-TO-PLUG COMPATIBLE REPLACEMENT MEMORY BEYOND THE OPTION PERIODS PROVIDED IN A MANDATORY ADP REQUIREMENTS CONTRACT, BECAUSE THERE COULD BE NO JUSTIFICATION FOR ITS FAILURE TO TIMELY SOLICIT A FOLLOW-ON CONTRACT. INTERMEM CORPORATION, B-187607, APRIL 15, 1977, 77-1 CPD 263.

****5** FURTHER, WHILE RECOGNIZING THAT CONTRACT CHANGES OR MODIFICATIONS ARE REQUIRED SUBSEQUENT TO AWARD, WE HAVE CAUTIONED THAT THIS 'IS NOT TO SAY THAT THE CONTRACTING PARTIES MAY EMPLOY A CHANGE IN THE TERMS OF THE CONTRACT SO AS TO INTERFERE WITH OR DEFEAT THE PURPOSE OF COMPETITIVE PROCUREMENT.' E. R. HITCHCOCK & ASSOC., B-182650, MARCH 5, 1975, 75-1 CPD 133. WE HAVE HELD THAT AWARDING A CONTRACT WITH THE INTENTION OF SIGNIFICANTLY MODIFYING THE CONTRACT AFTER AWARD IS IMPROPER. A & J MANUFACTURING CO., 53 COMP.GEN. 838 (1974), 74-1 CPD 240. SEE, ALSO, MIDLAND MAINTENANCE, INC., B-184247, AUGUST 5, 1976, 76-1 CPD 127.

THE CARDINAL CHANGE DOCTRINE WAS DEVELOPED BY THE COURTS AS A MEANS TO DEAL WITH CONTRACTORS' CLAIMS THAT THE GOVERNMENT HAD BREACHED ITS CONTRACTS BY ORDERING CHANGES WHICH WERE OUTSIDE THE SCOPE OF THE CHANGES CLAUSE. AS THE COURT STATED IN ALLIED MATERIALS & EQ. CO. V. UNITED STATES, 569 F.2D 562, 563-564 (CT. CL. 1978),

> * * * A CARDINAL CHANGE IS A BREACH. IT OCCURS WHEN THE GOVERNMENT EFFECTS AN ALTERATION IN THE WORK SO DRASTIC THAT IT EFFECTIVELY REQUIRES THE CONTRACTOR TO PERFORM DUTIES MATERIALLY DIFFERENT FROM THOSE ORIGINALLY BARGAINED FOR. BY DEFINITION, THEN A CARDINAL CHANGE IS SO PROFOUND THAT IT IS NOT REDRESSABLE UNDER THE CONTRACT, AND THUS RENDERS THE GOVERNMENT IN BREACH.

EVEN THOUGH WE BELIEVE THERE IS A SIGNIFICANT AREA OF OVERLAP BETWEEN THE LIMITS WITHIN WHICH THE GOVERNMENT MAY ALTER A CONTRACT WITHOUT FEAR OF BREACHING IT, AND THE LIMITS WHICH ACT TO RESTRAIN ITS RIGHT TO DO SO WITHOUT IMPACTING UPON THE STATUTORY REQUIREMENT FOR COMPETITION, THE EVALUATION OF THE LEGAL PROBLEMS PRESENTED IN EACH INSTANCE HAVE DIFFERENT STARTING POINTS. APPLICATION OF THE CARDINAL CHANGE DOCTRINE ASSUMES A SET OF RELATIONSHIPS BETWEEN THE LITIGANTS— THE GOVERNMENT ON ONE SIDE, THE CLAIMANT ON THE OTHER. THE CASES APPLYING THE DOCTRINE REFLECT THAT RELATIONSHIP, MOLDED BY CONSTRAINTS INHERENT IN THE RULES OF EVIDENCE, DRAWING INTO FOCUS WHAT THE CONTRACTING PARTIES ARE DEEMED TO HAVE HAD IN MIND WHEN THEY EXECUTED THE CONTRACT.

IN CONTRAST TO CIRCUMSTANCES REFLECTING DISAGREEMENT BETWEEN THE GOVERNMENT AND ITS CONTRACTOR, CONTRACT MODIFICATION FLOWS FROM THE PARTIES' WILLINGNESS TO AGREE. FOR AN INCREASE IN PRICE, THE CONTRACTOR MAY BE EXPECTED TO BE AMENDABLE TO PERFORMING THE ADDITIONAL WORK. ***573** SUCH A CONTRACTOR OBVIOUSLY WILL NOT SERIOUSLY QUESTION WHETHER THE AWARD IS OUTSIDE THE SCOPE OF THE ORIGINAL CONTRACT AND WE DO NOT EXPECT THE CONTRACTOR TO CONCERN ITSELF WITH THE TECHNICAL NICETIES OF THE STATUTORY REQUIREMENT THAT THE GOVERNMENT AWARD CONTRACTS COMPETITIVELY. SUCH A CONTRACTOR WILL BE PRONE TO VIEW THE ADDITIONAL WORK AS A LOGICAL EXTENSION OF THE ORIGINAL AGREEMENT.

FURTHER, WE DO NOT AGREE WITH DLA'S VIEW THAT OUR ORIGINAL DECISION IN THIS CASE UNDULY IMPACTS UPON THE DISCHARGE OF ITS RESPONSIBILITY FOR CONTRACT ADMINISTRATION. THERE IS AN ESSENTIAL RELATIONSHIP BETWEEN THE LIMITS OF A CONTRACTING OFFICER'S POWER UNDER THE CHANGES AND DISPUTES CLAUSES AND THE STATUTORY REQUIREMENT FOR COMPETITION. THE CONTRACT CANNOT BE READ SO AS TO CONFLICT WITH THE STATUTORY MANDATE FOR COMPETITION.

STARTING, THEREFORE, WITH THE PROPOSITION THAT THE CONTRACTING OFFICER'S ADMINISTRATIVE AUTHORITY IS SUBORDINATE TO THE COMPETITION STATUTE, IT FOLLOWS THAT DUE REGARD FOR PROTECTION OF THE INTEGRITY OF THE COMPETITIVE PROCUREMENT SYSTEM DOES NOT INTERFERE WITH THE LEGITIMATE EXERCISE OF THE CONTRACTING OFFICER'S ADMINISTRATIVE FUNCTIONS.

****6** THE IMPACT OF ANY MODIFICATION IS IN OUR VIEW TO BE DETERMINED BY EXAMINING WHETHER THE ALTERATION IS WITHIN THE SCOPE OF THE COMPETITION WHICH WAS INITIALLY CONDUCTED. ORDINARILY, A MODIFICATION FALLS WITHIN THE SCOPE OF THE PROCUREMENT PROVIDED THAT IT IS OF A NATURE WHICH POTENTIAL OFFERORS WOULD HAVE REASONABLY ANTICIPATED UNDER THE CHANGES CLAUSE.

TO DETERMINE WHAT POTENTIAL OFFERORS WOULD HAVE REASONABLY EXPECTED, CONSIDERATION SHOULD BE GIVEN, IN OUR VIEW, TO THE PROCUREMENT FORMAT USED, THE HISTORY OF THE PRESENT AND RELATED PAST PROCUREMENTS, AND THE NATURE OF THE SUPPLIES OR SERVICES SOUGHT. A VARIETY OF FACTORS MAY BE PERTINENT, INCLUDING: WHETHER THE REQUIREMENT WAS APPROPRIATE INITIALLY FOR AN ADVERTISED OR NEGOTIATED PROCUREMENT; WHETHER A STANDARD OFF-THE-SHELF OR SIMILAR ITEM IS SOUGHT; OR TO WHETHER, E.G., THE CONTRACT IS ONE FOR RESEARCH AND DEVELOPMENT, SUGGESTING THAT BROAD CHANGES MIGHT BE EXPECTED BECAUSE THE GOVERNMENT'S REQUIREMENTS ARE AT BEST ONLY INDEFINITE.

SPECIFICALLY, IN REACHING OUR DECISION IN THIS MATTER, WE GAVE CONSIDERATION TO THE FACT THAT THIS PROCUREMENT WAS ADVERTISED. BIDS WERE SOLICITED TO MEET A REQUIREMENT PRIMARILY DEFINED BY A MILITARY SPECIFICATION. ALTHOUGH THE HEATERS PERHAPS CANNOT BE FAIRLY CHARACTERIZED AS OFF-THE-SHELF-ITEMS, SIMILAR READILY AVAILABLE UNITS HAVE BEEN PURCHASED BY THE GOVERNMENT FOR YEARS.

IN CONCLUDING THAT OFFERORS WOULD NOT HAVE REASONABLY ANTICIPATED THAT THE CHANGES CLAUSE WOULD BE USED AS IT WAS, WE WERE PARTICULARLY IMPRESSED BY THE FOLLOWING:

> ***574** 1. THE AMENDED CONTRACT REQUIRES EQUIPMENT USING DIESEL FUEL EXCLUSIVELY. THE MILITARY SPECIFICATION EXPRESSLY REQUIRED GASOLINE FUELED HEATERS CAPABLE OF BEING DRIVEN INTERCHANGEABLY BY GASOLINE ENGINES OR ELECTRIC MOTORS. THE SOLICITATION INDICATED THAT UNITS WITH GASOLINE ENGINES WERE TO BE FURNISHED.

WE DO NOT ACCEPT DLA'S CHARACTERIZATION OF THE MILITARY SPECIFICATIONS AS A MERE PERFORMANCE SPECIFICATION FOR HEATERS, BECAUSE WE BELIEVE THE SOLICITATION DOCUMENTS CLEARLY IMPOSED A SALIENT CONSTRAINT UPON THE DESCRIPTION OF THE ITEMS BEING BOUGHT PERMITTING BIDDERS TO CONCLUDE THAT GASOLINE OR ELECTRIC POWERED EQUIPMENT FELL WITHIN THE SCOPE OF THE PROCUREMENT, BUT THAT OTHER EQUIPMENT DID NOT.

IN REFERRING TO THE DECISION BY THE COURT OF CLAIMS IN KECO INDUSTRIES, INC. V. UNITED STATES, 176 CT.CL. 983 (1966), WE EXPLAINED THAT KECO DIFFERED IN THAT AWARD WAS MADE FOR BOTH ELECTRIC AND GASOLINE DRIVEN UNITS. THE PROPORTIONS WERE LATER CHANGED TO REQUIRE ALL GASOLINE DRIVEN UNITS. ALTHOUGH DLA SUGGESTS THAT THIS IS A DISTINCTION WITHOUT A DIFFERENCE, IN OUR OPINION THE DESIGNATION OF FUELS TO BE USED WENT TO THE HEART OF THE GOVERNMENT'S DESCRIPTION OF THE ITEMS SOUGHT. IF CHOICE OF FUEL WAS NOT MATERIAL IN THE CIRCUMSTANCES OF THIS CASE, IT IS DIFFICULT TO CONCEIVE OF ANY ALTERATION WHICH DLA COULD HAVE AUTHORIZED WHICH WOULD HAVE BEEN.

2. THE AMENDMENTS ELIMINATED THE REQUIREMENT THAT THE UNITS FURNISHED BE CAPABLE OF USING AN INTERCHANGEABLE ELECTRIC MOTOR TO PROVIDE POWER. INTERCHANGEABILITY OF POWER UNITS WAS IN OUR VIEW FUNDAMENTAL TO THE NATURE OF THE ORIGINAL PROCUREMENT AND REFLECTED A SECOND SALIENT CONSTRAINT IMPOSED UPON THE SCOPE OF COMPETITION OBTAINED. IN EFFECT, OFFERORS WERE REQUIRED TO BE CAPABLE OF FURNISHING TWO DISTINCT UNITS, ONE USING ELECTRIC AND THE OTHER GASOLINE POWER. ELIMINATION OF THIS REQUIREMENT IN OUR VIEW SIGNIFICANTLY ALTERED THE FRAMEWORK UPON WHICH COMPETITION WAS PREDICATED. (WE NOTE IN PASSING THAT THE INTERCHANGEABILITY REQUIREMENT DISTINGUISHES THESE CIRCUMSTANCES, ALSO, FROM THE FACTS IN KECO, INASMUCH AS INTERCHANGEABILITY AS SUCH WAS NOT A REQUIREMENT IN THAT CASE.)

****7** 3. ALONG RELATED LINES, THE SOLICITATION ANTICIPATED, IN OUR VIEW, THAT THE GASOLINE FUELED UNIT WOULD BE A SELF-CONTAINED ITEM CAPABLE OF START-UP IN A -65 DEGREES F ENVIRONMENT. IN THIS REGARD, THE MILITARY SPECIFICATION REQUIRED THAT THE GASOLINE POWERED UNIT BE CAPABLE OF MANUAL STARTING, AND THAT IT BE DEMONSTRATED DURING FIRST ARTICLE TESTING THAT IT COULD BE STARTED WHEN 'COLD-SOAKED' TO -65 DEGREES F. PREHEATING WAS TO BE ACCOMPLISHED BY USE OF A GASOLINE FIRED PREHEATER BUILT INTO THE UNIT.

WE RECOGNIZE THAT DIESEL ENGINES TYPICALLY UTILIZE HIGH COMPRESSION RATIOS AND ELECTRICAL STARTING. IT IS A MATTER OF COMMON ENGINEERING KNOWLEDGE THAT STORAGE BATTERIES GENERALLY— INCLUDING LEAD ACID ***575** BATTERIES—EXPERIENCE A SIGNIFICANT LOSS IN AVAILABLE POWER WHEN COOLED TO THE TEMPERATURES AT WHICH THESE TESTS ARE TO BE CONDUCTED. THE POST AWARD CONFERENCE MINUTES REFERRED TO IN OUR PRIOR DECISION INDICATED THAT, 'THE SPECIFIED COLD TEST OF -67 DEGREES F (SIC) WILL REMAIN IN EFFECT AND THE IMPACT OF THE SWITCH TO DIESEL WILL BE EVALUATED DURING THIS TEST.' THE EFFECT OF THE DISCUSSION OF COLD STARTING REQUIREMENTS WAS EVIDENTLY TO REQUIRE THAT DAVEY ATTEMPT TO MEET THE COLD STARTING REQUIREMENT, BUT THAT THE GOVERNMENT MIGHT NOT HOLD DAVEY TO ITS AGREEMENT. MOREOVER, AND OF DIRECT CONCERN, DLA INTERPRETS THE AMENDED CONTRACT AS NOT REQUIRING THAT FIRST ARTICLE TESTING BE PERFORMED WITH A COLD-SOAKED BATTERY.

AT BEST, DLA'S INTERPRETATION OF THE AMENDED CONTRACT IS STRAINED. THE DIESEL FUELED UNITS ARE TO HAVE A BATTERY COMPARTMENT. THE BATTERY EVIDENTLY WOULD BE REMOVED FROM IT WHEN OPERATING AT LOW TEMPERATURES. BY ALLOWING DAVEY TO USE AN EXTERNAL POWER SOURCE (I.E., THE BATTERY) TO MEET THE COLD START REQUIREMENT, DLA HAS ABANDONED THE CONCEPT OF A SELF-CONTAINED UNIT. WHILE IT IS ENTIRELY PROPER FOR THE GOVERNMENT TO PERMIT USE OF WHATEVER METHOD OF STARTING THAT IS CONSISTENT WITH ASSURING THAT ITS MINIMUM NEEDS ARE MET, THERE IS NO QUESTION THAT THE PERFORMANCE REQUIREMENTS RELATING TO COLD STARTING CAPABILITY WERE SIGNIFICANTLY ALTERED. IF, AS DLA CONTENDS, THESE CHANGES ARE PART AND PARCEL OF A CHANGE TO A DIESEL FUELED SYSTEM, THEY PROPERLY UNDERSCORE THE SIGNIFICANCE OF THE CHANGE FROM GASOLINE TO DIESEL FUEL. TO THE EXTENT THEY DO NOT, IT IS FAIR TO ASK WHETHER DLA WOULD HAVE ACTED OUTSIDE THE SCOPE OF THE ORIGINAL PROCUREMENT BY AUTHORIZING AN ALTERATION PERMITTING THE VENDOR TO DISPENSE WITH THE REQUIREMENT THAT IT PROVIDE MANUAL STARTING, SELF-CONTAINED GASOLINE FUELED UNITS. IN OUR OPINION, THE MILITARY SPECIFICATION REFLECTS THE IMPORTANCE OF SUCH COLD STARTING CAPABILITIES. ACCORDINGLY, WE BELIEVE THAT DLA COULD NOT DISPENSE WITH SUCH REQUIREMENTS WITHOUT AT THE SAME TIME ABANDONING ONE OF THE SALIENT CRITERIA WHICH DEFINED THE SCOPE OF COMPETITION IN THE ORIGINAL PROCUREMENT.

IN OUR VIEW, THE CONTRACT IN THIS INSTANCE WAS MODIFIED CONTRARY TO THE STATUTORY REQUIREMENT FOR COMPETITION, AMOUNTING TO AN AWARD TO DAVEY FOR NEW REQUIREMENTS WHICH WERE OUTSIDE THE COMPETITIVE SCOPE OF THE ORIGINAL PROCUREMENT.

57 Comp. Gen. 567 (Comp.Gen.), B- 188408, 78-1 CPD P 443, 1978 WL 13484

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter G. Contract Management
Part 49. Termination of Contracts (Refs & Annos)
Subpart 49.5. Contract Termination Clauses

48 C.F.R. 49.501

# 49.501 General.

Effective: January 31, 2011
Currentness

This subpart prescribes the principal contract termination clauses. This subpart does not apply to contracts that use the clause at 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items). In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

**Credits**
[60 FR 48250, Sept. 18, 1995; 62 FR 64927, Dec. 9, 1997; 75 FR 82577, Dec. 30, 2010]

SOURCE: 48 FR 42447, Sept. 19, 1983; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 69 FR 17744, April 5, 2004; 78 FR 46792, Aug. 1, 2013, unless otherwise noted.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Current through Jan. 7, 2016; 81 FR 732.

**End of Document**

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter G. Contract Management
Part 49. Termination of Contracts (Refs & Annos)
Subpart 49.5. Contract Termination Clauses

48 C.F.R. 49.502

# 49.502 Termination for convenience of the Government.

Effective: June 14, 2007
Currentness

(a) Fixed-price contracts that do not exceed the simplified acquisition threshold (short form)—

(1) General use. The contracting officer shall insert the clause at 52.249–1, Termination for Convenience of the Government (Fixed–Price) (Short Form), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is not expected to exceed the simplified acquisition threshold, except—(i) if use of the clause at 52.249–4, Termination for Convenience of the Government (Services) (Short Form) is appropriate, (ii) in contracts for research and development work with an educational or nonprofit institution on a no-profit basis, (iii) in contracts for architect-engineer services, or (iv) if one of the clauses prescribed or cited at 49.505(a) or (c), is appropriate.

(2) Dismantling and demolition. If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I.

(b) Fixed-price contracts that exceed the simplified acquisition threshold—

(1)(i)[1] General use. The contracting officer shall insert the clause at 52.249–2, Termination for Convenience of the Government (Fixed–Price), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold except in contracts for (i) dismantling and demolition, (ii) research and development work with an educational or nonprofit institution on a no-profit basis, or (iii) architect-engineer services; it shall not be used if the clause at 52.249–4, Termination for Convenience of the Government (Services) (Short Form), is appropriate (see 49.502(c)), or one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

(ii) Construction. If the contract is for construction, the contracting officer shall use the clause with its Alternate I.

(iii) Partial payments. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate II. In such contracts for construction, the contracting officer shall use the clause with its Alternate III.

(2) Dismantling and demolition. The contracting officer shall insert the clause at 52.249–3, Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements) in solicitations and contracts for dismantling, demolition, or removal of improvements, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate I.

(c) Service contracts (short form). The contracting officer shall insert the clause at 52.249–4, Termination for Convenience of the Government (Services) (Short Form), in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the contracting officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination. Examples of services where this clause may be appropriate are contracts for rental of unreserved parking space, laundry and drycleaning, etc.

(d) Research and development contracts. The contracting officer shall insert the clause at 52.249–5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), in solicitations and contracts when either a fixed-price or cost-reimbursement contract is contemplated for research and development work with an educational or nonprofit institution on a no-profit or no-fee basis.

(e) Subcontracts.

(1) General use. The prime contractor may find the clause at 52.249–1, Termination for Convenience of the Government (Fixed–Price) (Short Form), or at 52.249–2, Termination for Convenience of the Government (Fixed–Price), as appropriate, suitable for use in fixed-price subcontracts, except as noted in subparagraph (2) below; provided, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (d)) in 52.249–2 should be deleted and the periods reduced for submitting the subcontractor's termination settlement proposal (e.g., 6 months), and for requesting an equitable price adjustment (e.g., 45 days).

(2) Research and development. The prime contractor may find the clause at 52.249–5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), suitable for use in subcontracts placed with educational or nonprofit institutions on a no-profit or no-fee basis; provided, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (h)) should be deleted, the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months), the subcontract should be placed on a no-profit or no-fee basis, and the subcontract should incorporate or be negotiated on the basis of the cost principles in part 31 of the Federal Acquisition Regulation.

**Credits**

[61 FR 39222, July 26, 1996; 71 FR 57368, Sept. 28, 2006; 72 FR 27389, May 15, 2007]

SOURCE: 48 FR 42447, Sept. 19, 1983; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 69 FR 17744, April 5, 2004; 78 FR 46792, Aug. 1, 2013, unless otherwise noted.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Notes of Decisions (66)

Current through Jan. 7, 2016; 81 FR 732.

Footnotes

1 72 FR 27389 purported to amend this subsection, but was without effect.

End of Document

48 C.F.R. 49.503

# 49.503 Termination for convenience of the Government and default.

Currentness

(a) Cost-reimbursement contracts—

(1) General use. Insert the clause at 52.249–6, Termination (Cost–Reimbursement), in solicitations and contracts when a cost-reimbursement contract is contemplated, except contracts for research and development with an educational or nonprofit institution on a no-fee basis.

(2) Construction. If the contract is for construction, the contracting officer shall use the clause with its Alternate I.

(3) Partial payments. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate II. In such contracts for construction, the contracting officer shall use the clause with its Alternate III.

(4) Time-and-material and labor-hour contracts. If the contract is a time-and-material or labor-hour contract, the contracting officer shall use the clause with its Alternate IV. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate V.

(b) Insert the clause at 52.249–7, Termination (Fixed–Price Architect–Engineer), in solicitations and contracts for architect-engineer services, when a fixed-price contract is contemplated.

(c) Subcontracts. The prime contractor may find the clause at 52.249–6, Termination (Cost–Reimbursement), suitable for use in cost-reimbursement subcontracts; provided, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraphs (e), (j) and (n)) should be deleted and the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months).

**Credits**
[61 FR 39222, July 26, 1996; 64 FR 51845, Sept. 24, 1999]

SOURCE: 48 FR 42447, Sept. 19, 1983; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 69 FR 17744, April 5, 2004; 78 FR 46792, Aug. 1, 2013, unless otherwise noted.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Notes of Decisions (3)

Current through Jan. 7, 2016; 81 FR 732.

**End of Document**

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter G. Contract Management
Part 49. Termination of Contracts (Refs & Annos)
Subpart 49.5. Contract Termination Clauses

48 C.F.R. 49.504

# 49.504 Termination of fixed-price contracts for default.

Currentness

(a)(1) Supplies and services. The contracting officer shall insert the clause at 52.249–8, Default (Fixed–Price Supply and Service), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if the acquisition involves items with a history of unsatisfactory quality).

(2) Transportation. If the contract is for transportation or transportation-related services, the contracting officer shall use the clause with its Alternate I.

(b) Research and development. The contracting officer shall insert the clause at 52.249–9, Default (Fixed–Price Research and Development), in solicitations and contracts for research and development when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold, except those with educational or nonprofit institutions on a no-profit basis. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if the contracting officer believes that key personnel essential to the work may be devoted to other programs).

(c)(1) Construction. The contracting officer shall insert the clause at 52.249–10, Default (Fixed–Price Construction), in solicitations and contracts for construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if completion dates are essential).

(2) Dismantling and demolition. If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I.

(3) National emergencies. If the contract is to be awarded during a period of national emergency, the contracting officer may use the clause (i) with its Alternate II when a fixed-price contract for construction is contemplated, or (ii) with its Alternate III when a contract for dismantling, demolition, or removal of improvements is contemplated.

**Credits**

[60 FR 34760, July 3, 1995; 61 FR 39190, July 26, 1996]

SOURCE: 48 FR 42447, Sept. 19, 1983; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 69 FR 17744, April 5, 2004; 78 FR 46792, Aug. 1, 2013, unless otherwise noted.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Current through Jan. 7, 2016; 81 FR 732.

**End of Document**

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter G. Contract Management
Part 49. Termination of Contracts (Refs & Annos)
Subpart 49.5. Contract Termination Clauses

48 C.F.R. 49.505

# 49.505 Other termination clauses.

Effective: June 16, 2010
Currentness

(a) Personal service contracts. The contracting officer shall insert the clause at 52.249–12, Termination (Personal Services), in solicitations and contracts for personal services (see Part 37).

(b) Excusable delays. The contracting officer shall insert the clause at 52.249–14, Excusable Delays, in solicitations and contracts for supplies, services, construction, and research and development on a fee basis, when a cost-reimbursement contract is contemplated. The contracting officer shall also insert the clause in time-and-material contracts, and labor-hour contracts.

(c) Communication service contracts. This regulation does not prescribe a clause for the cancellation or termination of orders under communication service contracts with common carriers because of special agency requirements that apply to these services. An appropriate clause, however, shall be prescribed at agency level, within those agencies contracting for these services.

**Credits**
[72 FR 27389, May 15, 2007; 75 FR 34291, June 16, 2010]

SOURCE: 48 FR 42447, Sept. 19, 1983; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 69 FR 17744, April 5, 2004; 78 FR 46792, Aug. 1, 2013, unless otherwise noted.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Current through Jan. 7, 2016; 81 FR 732.

**End of Document**

312 F.2d 418
United States Court of Claims.

G. L. CHRISTIAN AND ASSOCIATES
v.
The UNITED STATES.

No. 56—59.
|
Jan. 11, 1963.

Action against United States to determine claims for damages arising from government's termination of federal housing project contract at federal fort. The Court of Claims, Davis, Judge, held that termination article required by Armed Services Procurement Regulations would be read into contract where it had been expected that quarters allowance to military personnel assigned to fort would pay off construction loans, and loans had been insured by Federal Housing Administration, and, therefore, upon government's termination of contract, de facto prime contractor and its subcontractors could not recover unearned but anticipated profits but would be allowed profits only under formula in standard termination clause.

Order in accordance with opinion.

**Attorneys and Law Firms**

****419 *4** Norman R. Crozier, Jr., Dallas, Tex., William L. Hillyer, San Diego, Cal., William W. Sweet, Jr., Dallas, Tex., and Chester E. Finn, Dayton, Ohio, for plaintiffs. Richard C. Bexten, Dallas, Tex., was on the briefs.

Carl Eardley, Washington, D.C., with whom was Acting Asst. Atty. Gen., Joseph D. Guilfoyle, for the defendant. Kendall M. Barnes, Washington, D.C., was on the brief.

**Opinion**

DAVIS, Judge. [1]

This case, which involves claims totaling $5,156,144.50, [2] grew out of the deactivation of Fort Polk, Louisiana, by the Department of the Army in 1958. At the time when the decision to deactivate Fort Polk was made, a large housing project, which was to consist of 2,000 dwelling units for the use of military personnel at Fort Polk, was being constructed under a contract that had previously been made by the Corps of Engineers pursuant to the provisions of the Capehart Act. [3] The housing contract was terminated by the Corps of Engineers on February 5, 1958, after which numerous claims for damages were submitted to the Government. Most of the claims (from a numerical standpoint) were settled administratively; and the claims asserted in the present litigation remain for disposition because the particular claimants and the administrative agency ****420** could not agree on the amounts due the claimants. This suit therefore involves only the residue of the claims.

**I**

An unusual feature of the case is that the financial interests of the plaintiff, a joint venture consisting of eight individuals operating under the name of G. L. Christian and Associates, were not affected in any way by the termination ***5** of the Fort Polk housing contract. In order to explain this anomalous situation, the events that transpired in connection with the making of the contract will be summarized in some detail.

Pursuant to an invitation for bids issued by the District Engineer in charge of the Galveston District of the Corps of Engineers, the plaintiff, on November 16, 1956, submitted a bid on the construction of the Fort Polk housing project under the Capehart Act. The plaintiff's bid consisted of a basic bid plus certain added items. The District Engineer determined that the plaintiff was qualified by experience and financial responsibility to construct housing under the Capehart Act, and that its bid was the lowest acceptable bid submitted in response to the invitation. The plaintiff's bid was thereupon accepted by the District Engineer in his capacity as contracting officer for the Government. The acceptance was in the form of a ‘letter of acceptability’ dated December 17, 1956.

After its bid for the construction of the Fort Polk housing project was accepted, the plaintiff approached the H. B. Zachry Company in about January 1957 and endeavored to interest that company in forming a joint venture with the plaintiff to construct the project. Zachry was not interested in forming a joint venture with the plaintiff, and so informed it. However, Zachry did indicate a possible interest in obtaining an assignment of the Fort Polk housing project from the plaintiff and handling the job in its entirety. After further

discussion, the plaintiff granted Zachry an option to acquire the plaintiff's entire interest in the Fort Polk project for $250,000.

Following these negotiations between the plaintiff and Zachry, the latter approached the Centex Construction Company, Inc., in about February 1957, and proposed that Centex enter into a joint venture with Zachry for the construction of the Fort Polk project. Both Zachry and Centex, which were highly competent construction companies with extensive experience in large-scale enterprises, made estimates regarding the prospective cost of constructing the project and the probable margin of profit in the job, under the price fixed in the plaintiff's bid and in the letter of acceptability. Upon ***6** the basis of these calculations, Zachry and Centex concluded that the project was feasible and potentially profitable. Consequently, they decided to take over the Fort Polk housing job from the plaintiff and construct the project as a joint venture.

In furtherance of the decision made by Zachry and Centex, Zachry exercised its option to acquire the Fort Polk project from the plaintiff for $250,000. A document on this matter was signed by Zachry and the plaintiff on March 14, 1957. This document provided that the consideration of $250,000 was to be paid by Zachry to the plaintiff as follows: $100,000 was to be paid 'in cash upon approval by the proper governmental agencies of this assignment,' an additional $75,000 was to be paid within 9 months, and the final installment of $75,000 was to be paid within 18 months. The document declared that, on the basis of such consideration, 'Assignors (the plaintiff) hereby assign, transfer, set over and deliver unto H. B. Zachry Company all of their respective rights, titles and interest held or claimed by Assignors or either of them in and to' the Fort Polk housing job.

A written agreement for the construction of the Fort Polk housing project as a joint venture was entered into by Zachry and Centex on April 9, 1957. This agreement provided (among other things) that Centex would be the managing member of the joint venture and would be in charge of the construction ****421** of the project; that such funds as might be required by the joint venture for construction would be advanced in the proportions of one-third by Zachry and two-thirds by Centex; and that the profits (or losses) resulting from construction would be shared by the joint venturers in the proportions of one-third to Zachry and two thirds to Centex. [4]

Information regarding the existence of the agreements between the plaintiff and Zachry and between Zachry and Centex was furnished to the District Engineer by the attorney for Centex-Zachry at a conference in Galveston. The District Engineer orally expressed approval of the plan for the takeover of the Fort Polk housing job by Centex-Zachry from the plaintiff. It was agreed at the conference that ***7** the takeover would be accomplished by means of a formal assignment of the Fort Polk housing contract (when made) from the plaintiff to Centex-Zachry. Subsequently, however, higher authority in the Department of the Army took the position that a housing contract under the Capehart Act could not be assigned. [5] Thereupon, another conference was held in Galveston between the attorney for Centex-Zachry and the District Engineer. At this conference, it was agreed (subject to the approval of higher authority in the Department of the Army) that the transfer of the Fort Polk housing job to Centex-Zachry would be accomplished by means of a subcontract from the plaintiff to Centex-Zachry that would cover the entire job.

After the approval of higher authority in the Department of the Army was obtained with respect to the plan for the transfer of the Fort Polk housing work from the plaintiff to Centex-Zachry by means of a subcontract covering the entire project, a document entitled 'Agreement to Sub-Contract with Irrevocable Power of Attorney Attached' was entered into between the plaintiff and Centex-Zachry on June 27, 1957. The agreement stated that the plaintiff relinquished 'all its right, title and interest in and to the proposed contract' for the construction of the Fort Polk housing project; that Centex-Zachry 'hereby assumes all of the rights and obligations of G. L. Christian and Associates under the Letter of Acceptability * * * and the proposed contract, and further agrees to relieve and save harmless the said G. L. Christian and Associates from its obligations and responsibilities set forth in said Letter of Acceptability * * * and in the proposed contract'; and that Centex-Zachry 'hereby covenant and agree to at all times save harmless and keep indemnified the said G. L. Christian & Associates * * * against any and all claims, suits, actions, debts, damages, costs, charges and expenses, * * * and against all liability, losses and damages of every nature whatsoever which G. L. Christian & Associates * * * shall or may at any time sustain or be put to by reason of the aforementioned letter of acceptability, * * * the proposed housing contract * * *, the Power of ***8** Attorney * * * made a part hereof, and by the execution of this agreement.'

The power of attorney attached to and made a part of this 'Agreement to Sub-Contract' irrevocably constituted and appointed Centex-Zachry as the plaintiff's 'true and lawful attorney * * * to do any and every act and execute any

and every power that Principal * * * might or could do or exercise' in connection with the construction of the Fort Polk housing project, including the authority 'to make application for and receive all sums of money due or to become due.' The instrument further stated that the plaintiff 'hereby represents and agrees that said attorney in fact shall own and be entitled to all moneys and funds payable * * * under said Housing Contract, granting to **422 said attorney in fact authority to collect said funds and to endorse all checks, bills or instruments in connection therewith.'

The plaintiff made a profit of $171,516.68 in disposing of the Fort Polk housing job to Centex-Zachry for $250,000, and did not have anything further to do with that project. When a formal contract to cover the construction of the Fort Polk housing project was prepared and signed on July 29, 1957, the plaintiff's name was used as one of the parties to the contract, but the contract was signed on behalf of the plaintiff by Centex-Zachry. Thereafter, Centex (acting for Centex-Zachry) assumed the role of de facto prime contractor, negotiated with the persons interested in furnishing supplies, materials, or services in connection with the performance of the work under the contract, entered into numerous subcontracts, and began the construction of the project. None of these activities involved any expense to the plaintiff, and no claim is asserted against the Government in the present litigation on account of any losses allegedly sustained by the plaintiff in the form of unreimbursed expenses or anticipated profits.

The losses on which the present litigation is based were allegedly sustained by Centex-Zachry, the plaintiff's nominal subcontractor, and by certain of Centex-Zachry's subcontractors. These claimants are maintaining the present action in the name of the plaintiff, the nominal prime contractor, because they, having no privity of contract with the Government, *9 cannot sue the Government in their own names. Severin v. United States, 99 Ct.Cl. 435, 442 (1943), cert. denied, 322 U.S. 733, 64 S.Ct. 1045, 88 L.Ed. 1567 (1944).

[1] Generally, when a prime contractor's action against the Government is based on losses allegedly sustained by subcontractors, the possibility of recovery depends not only upon proof that the subcontractors actually sustained the alleged losses, but also upon proof that the prime contractor is liable to the subcontractors for the damages sustained by the latter. Continental Illinois National Bank & Trust Co. v. United States, 101 F.Supp. 755, 758, 121 Ct.Cl. 203, 244—245 (1952), cert. denied, 343 U.S. 963, 72 S.Ct. 1057, 96 L.Ed. 1361; J. L. Simmons Company, Inc. v. United States, Ct.Cl., decided July 18, 1962, 304 F.2d 886, 888—889. In the present case, the plaintiff is not under any liability to its nominal subcontractor, Centex-Zachry, or to the latter's subcontractors because of any losses which these claimants sustained when the Fort Polk housing contract was terminated by the Government. The plaintiff is insulated from such liability by the provision in the 'Agreement to Sub-Contract' dated June 27, 1957, to the effect that Centex-Zachry will 'at all times save harmless and keep indemnified the said G. L. Christian & Associates * * * against any and all claims, suits, actions, debts, damages, costs, charges and expenses, * * * and against all liability, losses and damages of every nature whatsoever' arising in connection with the Fort Polk housing contract.

[2] However, the Government, though mentioning the point, has not stressed the 'Severin doctrine', and we do not believe that it applies in these circumstances. With the Government's full knowledge and assent, Centex-Zachry became in actual fact the prime contractor; it signed the contract with the Government on behalf of the plaintiff and took over the entire role of prime contractor, including the management of performance in the six months prior to the cancellation; the defendant has settled with it a large part of the claims and has paid its subcontractors through it. For the purposes of the 'Severin doctrine', the only fair position in this court is to treat Centex-Zachry as the prime contractor, to which the housing contract has been assigned with the defendant's *10 full consent, and to disregard the nominal plaintiff as if it were no longer involved.

The question remains whether the Anti-Assignment Act absolutely precludes us from recognizing Centex-Zachry as **423 the true party in interest. That statute (R.S. § 3737, 41 U.S.C. § 15) speaks imperatively of annulling any Government contract which is transferred, but it has nevertheless been interpreted as being solely for the Government's own benefit and therefore as permitting the Government to assent to and recognize an assignment where it seems appropriate. Maffia v. United States, 163 F.Supp. 859, 862, 143 Ct.Cl. 198, 203 (1958); Thompson v. Commissioner, 205 F.2d 73, 78 (C.A.3, 1953); Federal Mfg. and Printing Co. v. United States, 41 Ct.Cl. 318, 321 (1906); 16 Op.Atty.Gen. 277 (1879); 15 Op.Atty.Gen. 235, 245—246 (1877); 5 Op.Atty.Gen. 738 (1821); but cf. 19 Op.Atty.Gen. 186 (1888). That was certainly done here. Before and during performance of the contract and after its termination, the Government recognized Centex-Zachry as the prime contractor and consented to its full participation

in that capacity. It would be unreasonable for us to hold otherwise at this late stage.

## II

The Government concedes that the claimants are entitled to be made financially whole, at least with respect to all reasonable expenses that they incurred in preparing to perform work under the Fort Polk housing contract, in partially performing that contract from August 1957 to January 1958, and in meeting the situation that arose when the contract was formally terminated by the Government early in February 1958. The controversy revolves around the proper amounts of the claimants' unreimbursed expenses and the legal question whether the claimants are entitled to recover for anticipated profits. At the time work was suspended in January 1958, the project was only 2.036% complete and the work was substantially behind schedule. [6]

**[3]** **[4]** **[5]** **[6]** The principal legal question is whether the claimants should be permitted to recover for anticipated profits. In ***11** this connection, it is settled that, when the Government enters into a contract, it has rights and it ordinarily incurs responsibilities similar to those of a private person who is a party to a contract (Lynch v. United States, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); Perry v. United States, 294 U.S. 330, 352, 55 S.Ct. 432, 79 L.Ed. 912 (1935)), and if the Government terminates a contract without justification, such termination is a breach of the contract and the Government becomes liable for all the damages resulting from the wrongful act (United States v. Behan, 110 U.S. 338, 346, 4 S.Ct. 81, 28 L.Ed. 168 (1884); United States v. Spearin, 248 U.S. 132, 138, 39 S.Ct. 59, 63 L.Ed. 166 (1918)). The damages will include not only the injured party's expenditures and losses in partially performing the contract, but also, if properly proved, the profits that such party would have realized if he had been permitted to complete the contract. Broadbent Portable Laundry Corp. v. United States,56 Ct.Cl. 128, 132 (1921); see United States v. Behan, supra, 110 U.S. at p. 344, 4 S.Ct. at p. 83. The objective is to put the injured party in as good a position pecuniarily as he would have been in if the contract had been completely performed. Miller v. Robertson, 266 U.S. 243, 257, 45 S.Ct. 73, 69 L.Ed. 265 (1924); Needles for Use and Benefit of Needles v. United States, 101 Ct.Cl. 535, 619 (1944).

**[7]** **[8]** The right to recover for anticipated profits arises, however, only if the termination of the contract by the Government is wrongful and constitutes a breach. If the Government has reserved the right to terminate a contract for its convenience and then does so, there is no breach and normally there can be no recovery for the profits that would have been made if the Government had not exercised its reserved right. Davis Sewing Machine Co. of Delaware v. United States, 60 Ct.Cl. 201, 217 (1925), affirmed 273 U.S. 324, 47 S.Ct. 352, 71 L.Ed. 662 (1927); ****424** College Point Boat Corp. v. United States, 267 U.S. 12, 45 S.Ct. 199, 69 L.Ed. 490 (1925); De Laval Steam Turbine Co. v. United States, 284 U.S. 61, 73, 52 S.Ct. 78, 76 L.Ed. 168 (1931).

**[9]** In the present case, although the Fort Polk housing contract did not contain any provision expressly authorizing the Government to terminate the contract for its convenience, the Government contends that the contract should be read as if it did contain such a clause. This argument is largely based upon Section 8.703 of the Armed Services Procurement ***12** Regulations. [7] Section 8.703 provided (with an exception which is not pertinent here) that 'the following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000,' and then proceeded to prescribe a detailed termination clause that began with the unequivocal declaration that 'the performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government,' and included a formula which did not encompass anticipated profits. As the Armed Services Procurement Regulations were issued under statutory authority, [8] those regulations, including Section 8.703, had the force and effect of law. See Williams v. Commissioner of Internal Revenue, 44 F.2d 467, 468 (C.A.8, 1930); Ex parte Sackett, 74 F.2d 922—923 (C.A.9, 1935). If they applied here, there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did. College Point Boat Corp. v. United States, supra; De Laval Steam Turbine Co. v. United States, supra; Monolith Portland Midwest Co. v. R.F.C., 178 F.2d 854, 858 (C.A.9, 1949), cert. denied, 339 U.S. 932, 70 S.Ct. 668, 94 L.Ed. 1352 (1950).

The question of whether the regulations did govern the present contract depends upon Section 1.102 which limited their applicability to 'purchases and contracts made by the Department of Defense * * * for the procurement of supplies or services which obligate appropriated funds * * *' (emphasis added). Plaintiff contends that the Fort Polk

housing contract did not 'obligate appropriated funds.' It points out that the construction of housing projects at military installations under the Capehart Act was financed by means of loans from private lending institutions, and the contractors and subcontractors doing the construction work were paid out of the proceeds of such loans. In this case, the ***13** money for the construction of the Fort Polk housing project was loaned by the Republic National Bank of Dallas, and the progress payments to Centex-Zachry and its subcontractors during the partial construction of the project were derived from the loans made by the Republic National Bank of Dallas. [9]

****425** On the other hand, the Government insists that it was anticipated that the cost of constructing the Fort Polk housing project would ultimately be liquidated out of appropriated funds, because it was expected that the housing project would be completed, that the dwelling units would be occupied by military personnel assigned to Fort Polk, and that the quarters allowances of such military personnel (provided for in the annual appropriations to the Department of the Army) would be used to pay off, over a period of years, the loans made by the Republic National Bank of Dallas. Also, the loans made by the bank for the construction of the Fort Polk housing project were insured by the Federal Housing Administration, and from the beginning there was at least a possibility that the F.H.A. might be compelled to make good on its commitments to the bank. As indicated in footnote 9, supra, on completion of the project or on termination of the contract, the Government specifically undertook (in the contract with plaintiff and accompanying agreements) to take over ownership of the mortgagor-corporations, to assume liability to the mortgagee for sums advanced, and pay the outstanding notes. Moreover, Centex-Zachry ***14** and its subcontractors have looked to the Government for settlement and payment of their claims, and have received very large amounts of appropriated funds in the partial settlements which have already been accomplished.

**[10]** **[11]** Despite the unusual character of the contract, we have little difficulty in reading the Procurement Regulations, especially the rule requiring the insertion of the standard termination clause, as applying to the present type of agreement which could and would obligate appropriated funds, ultimately if not immediately. As we see it, the primary aim of the exclusion of agreements which do not obligate appropriated funds is to put to one side the contracts of the conventional nonappropriated-fund instrumentalities of the armed forces, such as post exchanges, ships' stores, officers' clubs, and the like. The contracts of such agencies, although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court. Borden v. United States, 116 F.Supp. 873, 126 Ct.Cl. 902 (1953); Pulaski Cab Co. v. United States, 157 F.Supp. 955, 141 Ct.Cl. 160 (1958); cf. Standard Oil Co. of California v. Johnson, 316 U.S. 481, 485, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942). Those are the contracts which the Procurement Regulations declare are to be governed by their own separate rules. But the Regulations do not intimate that contracts which obligate the United States, and create a debt of the United States upon which suit is and can be brought, are also excluded simply because the use or obligation of appropriated funds is delayed and to some extent contingent. There is no doubt that the contract in this case bound the United States and that appropriated funds are importantly involved. The contractor and subcontractors did not hesitate to consider the United States, which of course pays through appropriated funds, liable for the cancellation of the contract. Large sums of appropriated monies were accepted after administrative settlement, and suit is now brought in a court whose judgments are payable through appropriated funds. It would be extraordinary, we think, if an agreement for the breach of which the United States must pay through appropriations was not deemed to obligate such funds.

The Congressional authorization for the contract, i.e., the ***15** Capehart Act itself, recognizes affirmatively that appropriated funds will be involved. One section authorized 'to be appropriated such sums as may be necessary to provide for ****426** payment to meet losses from such guaranty' given by the Defense Department to the Armed Services Housing Mortgage Insurance Fund (12 U.S.C. § 1748b(b)(2) (1958 ed.)). Another provision permits the military departments to use '(a) ppropriations for quarters allowances or appropriate allotments' for the payment of principal, interest, and other obligations of mortgagor corporations acquired by the Government (42 U.S.C. § 1594b (1958 ed.)) (see footnote 9, supra). The Congress which passed the Capehart Act understood that in the long run the housing contracts thereunder could and would 'obligate appropriated funds.'

We are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy. Regularly

since World War I, it has been a major government principle, in times of stress or increased military procurement, to provide for the cancellation of defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work—but not to allow anticipated profits. In World War I, there was the Act of June 15, 1917, 40 Stat. 182, and the Dent Act of 1919, 40 Stat. 1272, both of which were held to prevent awards of prospective or possible profits. Russell Motor Car Co. v. United States, 261 U.S. 514, 523—524, 43 S.Ct. 428, 67 L.Ed. 778 (1923); Barrett Co. v. United States, 273 U.S. 227, 235, 47 S.Ct. 409, 71 L.Ed. 621 (1927); De Laval Steam Turbine Co. v. United States, 284 U.S. 61, 73, 52 S.Ct. 78, 76 L.Ed. 168 (1931). In World War II, the termination provisions used by the war contracting agencies (at least since late 1941) uniformly disallowed anticipated profits. See the opinion of Mr. Justice Douglas in United States v. Penn Foundry & Mfg. Co., 337 U.S. 198, 214—216, 69 S.Ct. 1009, 93 L.Ed. 1308 (1949), also 337 U.S. at 205—206, 69 S.Ct. at 1012—1013; Office of Contract Settlement, A History of War Contract Termination and Settlements (July ***16** 1947), pp. 1, 27. The same policy against unearned profits was embodied in the Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649), Section 6(d)(5) of which directed war contracting agencies, in settling terminated contracts, to award 'such allowance for profit on the preparations made and work done for terminated portion of the war contract as is reasonable under the circumstances'; the regulation issued by the Office of Contract Settlement specifically limited profit to preparations made and work done (32 C.F.R., 1944 Supp., Sec. 8006.3(c), p. 3065). Similarly, the Lucas Act of August 7, 1946, 60 Stat. 902, authorizing the departments and agencies 'to consider, adjust, and settle equitable claims of contractors,' limited the amount of the claim to 'losses (not including diminution of anticipated profits) incurred * * *.' Since World War II, the standard termination clauses promulgated by the Defense Department and its constituent agencies have taken the same tack. Literally thousands of defense contracts and subcontracts have been settled on that basis in the past decades.

This history shows, in our view, that the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur. Particularly in the field of military housing, tied as it is to changes and uncertainties in installations, [10] would it be necessary to take account of a possible termination in advance of completion, and to guard against a common law measure of recovery which had been disallowed for so many years in ****427** military procurement. The experienced contractor in this case, for its part, could not have been wholly unaware that there might be a termination for the convenience of the Government, which the defendant would not deem a breach. Although the housing contract does not contain such an express provision, there are at least four references in it (and the accompanying agreements) to a 'termination of the Housing Contract for the convenience of the Government' and to the Government's assumption of certain obligations in that event. These references must have had some meaning. ***17** For many years unearned profits have not been paid upon such terminations, and we think it probable, too, that Centex-Zachry knew of that general policy.

For all of these reasons, we believe that it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law.

It follows that Centex-Zachry and its subcontractors cannot recover unearned but anticipated profits. Under the standard termination clause (see finding 31(b)), which we hold governs this case, the contractor is entitled to the cost of the work performed and the cost of settling subcontract claims—plus 2% of the cost of materials and articles delivered to the site but not incorporated in the work and 8% of the balance of the cost (with the total profit not to exceed 6% of the whole cost of the work), unless the contractor would have sustained a loss on the entire contract in which event no profit is to be allowed. This is the guide for ascertaining Centex-Zachry's profit. Profit for the subcontractors should be allowed on the same basis.

Since the parties did not apply the termination article in their administrative settlements and the case was not tried in this court on that principle, it may be impossible or overly difficult at this stage to comply precisely with all the terms of the article or fully to accord with the general practice which has grown up under it. But we believe the article should be applied as nearly as it can reasonably be to the determination of allowable profit and with greater leeway, if necessary, to the other problems which may arise. We leave to the Commissioner, under Rule 38(c), the actual determination of the amounts still owing (if any), under these standards, to Centex-Zachry and the subcontractors for earned profit. For the guidance of the parties and the Commissioner, we add simply that we are not impressed with the defendant's faint suggestion that Centex-Zachry would have suffered a loss on

the entire contract and that some of the subcontractors would have been in the same position.

***18 III**

**[12]** There are a few items of cost, actually incurred, as to which the parties still disagree. With respect to Centex-Zachry, the Government disputes the allowance of the full $250,000 payment made by Centex-Zachry to the plaintiff, pointing out that $171,517 of that amount represents profit to the plaintiff and only $78,483 represents the costs of performance by plaintiff before it assigned the contract (see finding 46). The Commissioner took account of this $171,517 profit by allowing it as a cost to Centex-Zachry but deducting it in computing the latter's contemplated profit. In view of our disallowance of anticipated profits, we believe it preferable to include only the sum of $78,483, reflecting an actual cost to performance, in the contractor's costs. The defendant also attacks the allowance of $58,484 in legal fees, but we see no reason to disturb the Commissioner's finding that this was a reasonable allowance. We have also examined the few exceptions to the findings relating to the costs of the subcontractors of Centex-Zachry, but have not been persuaded that the Commissioner was wrong.

On costs (leaving aside profit under the termination clause) the result is that ****428** we find that Centex-Zachry has received $34,630 more than its incurred costs; and that, of the subcontractors, Air-Way Corporation is entitled to $1,270 for unreimbursed costs, Kitzman's joint venture is entitled to $13,512.72 but owes the defendant $65,915.83 for plumbing materials, Mid West Contracting Company is entitled to $2,500, and Witte Gravel Company has been paid for all its costs.

Plaintiff is entitled to recover, on behalf of Centex-Zachry and the subcontractors, in accordance with and to the extent indicated in this opinion. The amount of the recovery, if any, on behalf of Centex-Zachry and the subcontractors will be determined pursuant to Rule 38(c).

JONES, Chief Judge, and DURFEE, LARAMORE and WHITAKER, Judges, concur.

**All Citations**

160 Ct.Cl. 1, 312 F.2d 418

Footnotes

1 This opinion borrows heavily from the careful opinion submitted by Commissioner Mastin G. White to the court, though we reach certain major conclusions different from his.

2 The claims set out in the first amended petition aggregated $5,615,450.90, but adjustments were made in the claims at the time of the trial.

3 This is the name commonly used to designate the provisions of law contained in (1) Title VIII of the National Housing Act, as amended and reenacted by Section 401 of the Housing Amendments of 1955 (69 Stat. 635, 646—651) and as further amended by Sections 501—506(a) of the Housing Act of 1956 (70 Stat. 1091, 1109—1110); (2) Sections 403—409 of the Housing Amendments of 1955 (69 Stat. at pp. 651—654), as amended by Sections 506(b)—509 and 511—512 of the Housing Act of 1956 (70 Stat. at pp. 1110—1112); and (3) Section 410 of the Housing Amendments of 1955, as added by Section 510 of the Housing Act of 1956 (70 Stat. at p. 1110).

4 This joint venture will usually be referred to as ‘Centex-Zachry.’

5 This apparently was based upon the first paragraph of Section 3737 of the Revised Statutes, as amended (41 U.S.C. 15).

6 The project was supposed to be completed in about 18 months after its commencement in August 1957. The total contract price was $32,893,100.

7 At the time with which we are concerned, the Armed Services Procurement Regulations comprised Subchapter A of Chapter I of Title 32, CFR (Rev. 1954).

8 The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. § 151 et seq. (1952 ed.) (See 10 U.S.C.A. § 2301 et seq.), was the principal statute relied upon in issuing the regulations.

9 The steps in a Capehart Act project are as follows: After deciding that a housing project should be built at or in connection with a post on government-owned property, the Army (for example) would have preliminary plans prepared, secure a preliminary approval from F.H.A., and then issue an invitation for bids. A ‘letter of acceptability’ would be issued to the lowest acceptable bidder (see findings 3, 13), requiring it, inter alia, to organize one or more mortgagor-builders which would lease the underlying land from the Government and make arrangements with a financial institution to finance the project with a 100% mortgage. As construction proceeds, the mortgagor-builders draw money from the bank and pay the

contractor. When the project is completed, the contractor will have received his full bid price and the mortgagor-builders will own the project subject to a 100% mortgage to the financial institution which is the mortgagee. The stock of the mortgagor-builders, previously placed in escrow, will then be transferred to the Army. Thereafter, moneys appropriated to pay the housing allowances of personnel assigned quarters in the project buildings are used to service the mortgage. The Government, as owner of the mortgagor-builders, is liable for the outstanding indebtedness and maintains and operates the housing.

10 See Henry Barracks Housing Corp. v. United States, Ct.Cl., decided July 15, 1960, 281 F.2d 196, 201—202.

991 F.2d 775
United States Court of Appeals,
Federal Circuit.

GENERAL ENGINEERING & MACHINE WORKS, Appellant,
v.
Sean C. O'KEEFE, Acting Secretary of the Navy, Appellee.

No. 92–1440.
|
April 16, 1993.

A contractor with the United States Navy appealed from a decision of the Armed Services Board of Contract Appeals confirming Navy's entitlement to reimbursement of $86,775 in material handling fees. The Court of Appeals, Bennett, Senior Circuit Judge, held that Navy was entitled to reimbursement based upon contractor's failure to maintain material handling charges in separate cost pool in accordance with regulatory payments clause included in contract.

Affirmed.

**Attorneys and Law Firms**

***776** Patrick J. Martell, Pettit & Martin, San Francisco, CA, argued for appellant. With him on the brief was Walter F. Pettit.

Arnold M. Auerhan, Atty., Commercial Litigation Branch, Dept. of Justice, of Washington, DC, argued for appellee. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Allen D. Bruns, Asst. Director.

Before RICH, Circuit Judge, BENNETT, Senior Circuit Judge, and NEWMAN, Circuit Judge.

**Opinion**

BENNETT, Senior Circuit Judge.

Appellant, General Engineering and Machine Works (General Engineering) appeals from a decision of the Armed Services Board of Contract Appeals [1] (board) confirming the Navy's entitlement to reimbursement of $86,775 in material handling fees. We affirm the decision of the board.

***777 BACKGROUND**

The essential facts of this controversy are not in dispute. On July 1, 1982, appellant was awarded a time and materials indefinite quantity contract, No. N00228–82–D–6028, under which supplies and services were ordered for the West Coast Shock Test Facility, San Francisco, California. The contract, which was for a term of one year, contained two options for one-year extensions of performance. The Navy exercised those options and, by modification, extended the contract for a fourth year. The last Navy order under the contract was placed on July 29, 1986.

Before the contract was awarded, the Request for Proposals issued to prospective contractors included the following language, under line item 0003, which required the contractor to insert a percentage figure to calculate the appropriate compensation for material handling costs:

> Incidental material required to perform at cost plus ____ % handling. Charge to be reimbursed in accordance with Section C8.
>
> NOTE: Offeror to insert percentage figure, if any, for material handling charge. Material handling charge shall include cost of delivery of material to the work site. If none, so state. For evaluation purposes, Government estimated cost of incidental material required is: *$50,000.00*

In addition, the contract provides:

> C8 COST OF MATERIALS
>
> The cost of materials furnished pursuant to specific authorization, the written Service Orders, shall be reimbursed at the Contractor's invoice cost less any discounts taken or to be taken, *plus material handling costs.* Expendable material costs for items such as office supplies, report paper, repair parts, etc., shall be absorbed by the contractor in his given hourly wage rates. The contractor will be required to support all material cost claims

> by submitting said invoices or store room requisitions therefore [sic].
>
> Material handling costs shall include the cost of labor and transportation to the work site or West Coast Shock Facility.

(Emphasis added.)

Section I of this time and materials contract incorporated by reference several contract clauses required for all firm fixed-price service contracts. One such clause was the Defense Acquisition Regulation (DAR) 7–103.7 "Payments (1958 JAN)" clause (the 7–103.7 clause).[2] However, the contract also made reference to a second payments clause under subheading G2:

> G2 INVOICING AND PAYING INSTRUCTIONS (TIME AND MATERIAL/LABOR–HOUR)
>
> a. The contractor shall prepare his invoices (in quadruplicate unless otherwise specified) and submit them to the Ordering Officer for approval prior to payment.
>
> * * * * * *
>
> b. *Invoices shall be in accordance with the Payments clause of the contract (DAR/ASPR 7–901.6)....*

(Emphasis added.)

The DAR 7–901.6 "Payments (1972 MAY)" clause (the 7–901.6 clause) is more restrictive than the 7–103.7 clause. Specifically, the 7–901.6 clause allows for reimbursement of material handling charges only if those charges are clearly excluded from labor hour rates.[3] In addition, the 7– ***778** 901.6 clause is required in all time and material contracts. 32 C.F.R. § 7–901 (1982).

Appellant included a 15% material handling charge in its contract proposal as well as in each of the two contract extensions.[4] However, the material handling costs were not kept in a separate cost pool. Rather, it was appellant's accounting practice to include the material handling costs in its overhead pool. Appellant received 131 orders under the contract for services and material, but was never questioned about material handling charges throughout the term of the contract. In addition, three prior time and material contracts between the parties each made parenthetical reference to the 7–901.6 clause in sections similar to the G2 clause of the present contract.[5] In each of those contracts, appellant did not use a separate cost pool. Those contracts were audited by the government, but no questions regarding the material handling charges were ever raised.

After completion of the last order under this contract, the Navy sent a letter to appellant stating that material handling costs would be audited. The letter also requested the production of time and material cost proposals summarizing labor hours and rates as well as material costs by fiscal year. Appellant responded with the requested information which indicated that the material handling fee for the years in question totaled $86,775. The Navy conducted its audit and announced, in a June 29, 1988 report of the Defense Contract Audit Agency (DCAA), that the material handling charges were unallowable since appellant had failed to maintain those costs in a separate cost pool pursuant to the 7–901.6 payments clause. The DCAA's report concluded that appellant was double billing the material handling costs by including them in both its hourly rate and its material handling rate.

The contracting officer (CO) confirmed the DCAA report and issued a demand for payment in the amount of $86,775. Appellant began making installment payments on that amount but submitted a certified claim, received by the CO on June 28, 1989, seeking reimbursement of those payments. That claim was denied by the CO, and appellant sought review before the board. Initially, the board incorporated the 7–901.6 clause into the contract by operation of law. The board then held that, although it could not ascertain whether appellant had been paid twice for material handling costs, such double payments would be assumed since, under the 7–901.6 payments clause, appellant was required to maintain material handling costs in separate cost pools. General Engineering now appeals.

## ***779 OPINION**

**[1]** The parties do not dispute the board's findings of fact. The decision of the board on any question of law is not final or conclusive and is subject to de novo review by this court. 41 U.S.C. § 609(b) (1988).

In *G.L. Christian & Associates v. United States*, 312 F.2d 418, 160 Ct.Cl. 1, *reh'g denied*, 320 F.2d 345, 160 Ct.Cl. 58, *cert. denied*, 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314 (1963), the Court of Claims established what has become known as

the Christian Doctrine. In *Christian*, a construction contract was terminated for the convenience of the government even though the contract lacked a termination clause. 312 F.2d at 424. The contractor sued the government alleging breach of contract. The court denied the contractor's claim noting that the termination clause was required under federal procurement regulations. *Id.* at 427. As the court explained:

> [T]he Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law.... If they applied here, there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did.

*Id.* at 424 (footnote omitted). Accordingly, the court incorporated the missing termination clause into the contract.

> [W]e believe that it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law.

*Id.* at 427.

**[2]** Thus, under the Christian Doctrine a court may insert a clause into a government contract by operation of law if that clause is required under applicable federal administrative regulations. However, the Christian Doctrine does not permit the automatic incorporation of every required contract clause. As the *Christian* court stated:

> The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. *That limitation is a deeply ingrained strand of public procurement policy.* Regularly since World War I, it has been a major government principle, in times of stress or increased military procurement, to provide for the cancellation of defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work—but not to allow anticipated profits.

*Id.* at 426 (emphasis added). In denying the contractor's motion for rehearing and reargument, the Court of Claims added:

> To accept plaintiff's plea that a regulation is powerless to incorporate a provision into a new contract would be to hobble the very policies which the appointed rule makers consider significant enough to call for *mandatory* regulation. Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against ad hoc encroachment or dispensation by the executive. There is a comparable need to protect *the significant policies* of superior administrators from sapping by subordinates.

*Christian*, 320 F.2d at 350–51 (emphasis added).

Accordingly, the Christian Doctrine applies to mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy. *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 188 (5th Cir.), *reh'g and reh'g in banc denied*, 734 F.2d 1479, *cert. denied*, 469 U.S. 1037, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984) (clause requiring plaintiff to exhaust administrative remedies before bringing suit for breach of lease); *SCM Corp. v. United States*, 645 F.2d 893, 903–04, 227 Ct.Cl. 12 (1981) (clause promoting uniform treatment of "major issues" such as cost and pricing data when more than one military department is purchasing an item); ***780** *Schoenbrod v. United States*, 410 F.2d 400, 404, 187 Ct.Cl. 627 (1969) (clause outlining proper pre-award negotiation procedures); *S.J. Amoroso Constr. Co. v. United States*, 26 Cl.Ct. 759, 760–61 (1992) (clause implementing requirements of Buy American Act).

However, the Christian Doctrine has also been employed to incorporate less fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation. *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317, 192 Ct.Cl. 176 (1970)

(holding that missing "Mistake in Bids" clause required under ASPR be incorporated into the contract as requested by the government because the clause was written for the protection of contract bidders). *See Applied Devices Corp. v. United States,* 591 F.2d 635, 640, 219 Ct.Cl. 109 (1979); *American Elec. Contracting Corp. v. United States,* 579 F.2d 602, 612–13, 217 Ct.Cl. 338 (1978) (citing *Hartford Accident & Indem. Co. v. United States,* 127 F.Supp. 565, 567, 130 Ct.Cl. 490 (1955)); *Bethlehem Steel Corp. v. United States,* 423 F.2d 300, 306–07, 191 Ct.Cl. 141 (1970); *Rough Diamond Co. v. United States,* 351 F.2d 636, 642–43, 173 Ct.Cl. 15 (1965), *cert. denied,* 383 U.S. 957, 86 S.Ct. 1221, 16 L.Ed.2d 300 (1966).

**[3]** In the present case, the contract clause at issue concerns material handling costs. Material handling costs may be paid to a contractor either as a percentage of the total cost of the materials or as part of general overhead. It is therefore possible for a contractor to receive material handling cost payments twice, and such error would be difficult to verify if all funds are kept in the same cost pool by the contractor. *See, e.g., Systems Eng'g Assocs. Corp.,* ASBCA No. 21846, 77–2 BCA (CCH) ¶ 12,740 at 61,962.

The 7–901.6 clause, by requiring separate cost pools, deters such double payments and thus discourages the unnecessary and wasteful spending of government money. This purpose is sufficiently ingrained in public procurement policy to properly trigger use of the Christian Doctrine. *Christian,* 320 F.2d at 355 ("[T]he general policy against subjecting the Government to liability for unearned profits on military contracts is strong and important."). Accordingly, the 7–901.6 payments clause was properly incorporated into the present contract in fact and in law.

Moreover, the payment of material handling costs through both overhead rates and a percentage mark-up would constitute an impermissible cost-plus-percentage-of-cost system of contracting. 41 U.S.C. § 254(b) (1988); *see Urban Data Sys., Inc. v. United States,* 699 F.2d 1147 (Fed.Cir.1983). Section 7–901.6 is mandatory for all time and material contracts, 32 C.F.R. § 7–901 (1982), and discourages a cost-plus-percentage-of-cost system of contracting by requiring contractors to segregate those charges in separate cost pools.

Thus, 32 C.F.R. § 7–901.6 is based upon a grant of authority stemming in part directly from 41 U.S.C. § 254(b). Federal regulations which are based upon a grant of statutory authority "have the force and effect of law, and, if they are applicable, they must be deemed terms of the contract even if not specifically set out therein, knowledge of which is charged to the contractor." *De Matteo Constr. Co. v. United States,* 600 F.2d 1384, 1391, 220 Ct.Cl. 579 (1979); *Condec Corp. v. United States,* 369 F.2d 753, 757–58, 177 Ct.Cl. 958 (1966). Once again, the 7–901 payments clause was properly incorporated into the contract.

**[4]** Further, government contractors are presumed to have constructive knowledge of federal procurement regulations. *General Builders Supply Co. v. United States,* 409 F.2d 246, 250–51, 187 Ct.Cl. 477 (1969). Thus, appellant should have known that it was required under federal regulations to maintain separate cost pools, particularly since the payments clause upon which appellant would rely is typically used in fixed-price service contracts.

**[5]** Appellant next argues that the 7–901.6 clause should not be incorporated into the contract based on the applicable "Order ***781** of Precedence" clause. [6] Appellant maintains that the language providing for a 15% material handling charge takes precedence over the general provision, the 7.901.6 clause. An "Order of Precedence" clause may be consulted when an inconsistency arises in a contract. *Hensel Phelps Constr. Co. v. United States,* 886 F.2d 1296 (Fed.Cir.1989); *Sperry Corp. v. United States,* 845 F.2d 965 (Fed.Cir.1988). However, the 7–901.6 clause merely adds further restrictions to those of the 7–103.7 clause. Accordingly, the contract may be interpreted to avoid inconsistencies between the two payments clauses, and there is no need to refer to the "Order of Precedence" clause.

Nor do references to the two payments clauses create a latent ambiguity which must be resolved against the Navy. Any ambiguity in the contract would be patent, not latent, since the two payments clauses are both expressly mentioned in the contract. *Mountain Home Contractors v. United States,* 425 F.2d 1260, 1264, 192 Ct.Cl. 16 (1970). Accordingly, if appellant found the contract ambiguous, it was under a duty to inquire and proceeded at its own risk when it did not use a separate cost pool. *Newsom v. United States,* 676 F.2d 647, 649, 230 Ct.Cl. 301 (1982); *Interstate Gen. Gov't Contractors, Inc., v. Stone,* 980 F.2d 1433 (Fed.Cir.1992).

**[6]** Finally, the Navy did not waive the requirement that separate cost pools be maintained, nor is the Navy estopped from asserting this requirement despite the Navy's failure to raise the issue of material handling charges after auditing

the present contract and earlier contracts. There can be no waiver or estoppel without evidence of knowledge on the part of the Navy. *American Elec. Lab. v. United States,* 774 F.2d 1110, 1113 (Fed.Cir.1985). Here, the Navy was unaware that appellant was not maintaining a separate cost pool for material handling costs in this or the prior contracts because, as appellant acknowledges, the material costs were never audited.

**CONCLUSION**

For the aforementioned reasons, the decision of the board is

AFFIRMED.

**All Citations**

991 F.2d 775, 38 Cont.Cas.Fed. (CCH) P 76,504

Footnotes

1 *General Eng'g & Mach. Works,* ASBCA No. 38788, 92–3 BCA (CCH) ¶ 25,055 at 124,867.

2 The DAR 7–103.7 “Payments (1958 JAN)” clause reads:

> The contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or fifty percent (50%) of the total amount of this contract.

32 C.F.R. § 7–103.7 (1982).

3 The DAR 7–901.6 “Payments (1972 May)” clause provides, in pertinent part:

> The Contractor shall be paid as follows upon the submission of invoices or vouchers approved by the Contracting Officer.
>
> (a) *Hourly Rate.*
>
> (1) The amounts computed by multiplying the appropriate hourly rate, or rates, set forth in the Schedule by the number of direct labor hours performed, which rates shall include wages, overhead, general and administrative expense and profit.
>
> * * * * * *
>
> (b) *Materials and Subcontracts.*
>
> (1) Allowable costs of direct materials shall be determined by the Contracting Officer in accordance with Part 2, Section XV, of the Armed Services Procurement Regulation in effect on the date of this contract. *Reasonable and allocable material handling costs may be included in the charge for material to the extent they are clearly excluded from the hourly rate.*
>
> * * * * * *
>
> (e) At any time or times prior to final payment under this contract the Contracting Officer may cause to be made such audit of the invoices or vouchers and substantiating material as shall be deemed necessary. Each payment theretofore made shall be subject to reduction to the extent of amounts which are found by the Contracting Officer not to have been properly payable, and shall also be subject to reduction for overpayments, or to increase for underpayments, on preceding invoices or vouchers.

32 C.F.R. § 7–901.6 (1982) (emphasis added).

4 Appellant's president submitted an affidavit stating that these material handling charges covered the labor costs associated with handling the material and transporting it to the work site and the expenses incurred from ordering, receiving and inspecting the material.

5 The General Provisions incorporated by reference into one of those three prior time and materials contracts included the 7–901.6 “Payments (1972 MAY)” clause. The board was unable to determine if the General Provisions of the other two prior contracts referenced the 7–901.6 clause.

6 The contract's order of precedence clause reads:

> In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the Specifications); (b) Terms and Conditions of the

solicitation, if any; (c) General Provisions; (d) other provisions of the contract, when attached or incorporated by reference; and (e) the Specifications.

32 C.F.R. § 7–2003.41 (1982).

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 41. Extortion and Threats (Refs & Annos)

18 U.S.C.A. § 874

# § 874. Kickbacks from public works employees

Currentness

Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.

**CREDIT(S)**

(June 25, 1948, c. 645, 62 Stat. 740; Pub.L. 103-322, Title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147.)

Notes of Decisions (39)

18 U.S.C.A. § 874, 18 USCA § 874
Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

**End of Document**

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 47. Fraud and False Statements (Refs & Annos)

18 U.S.C.A. § 1001

# § 1001. Statements or entries generally

Effective: July 27, 2006
Currentness

**(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

**(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

**(2)** makes any materially false, fictitious, or fraudulent statement or representation; or

**(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

**(b)** Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

**(c)** With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

**(1)** administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

**(2)** any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

**CREDIT(S)**

(June 25, 1948, c. 645, 62 Stat. 749; Pub.L. 103-322, Title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-292, § 2, Oct. 11, 1996, 110 Stat. 3459; Pub.L. 108-458, Title VI, § 6703(a), Dec. 17, 2004, 118 Stat. 3766; Pub.L. 109-248, Title I, § 141(c), July 27, 2006, 120 Stat. 603.)

Notes of Decisions (1976)

18 U.S.C.A. § 1001, 18 USCA § 1001
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**End of Document**

31 U.S.C.A. § 3729

# § 3729. False claims

Currentness

**(a) Liability for certain acts.--**

**(1) In general.**--Subject to paragraph (2), any person who--

**(A)** knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

**(B)** knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

**(C)** conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

**(D)** has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

**(E)** is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

**(F)** knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

**(G)** knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410 [1] ), plus 3 times the amount of damages which the Government sustains because of the act of that person.

**(2) Reduced damages.**--If the court finds that--

**(A)** the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

**(B)** such person fully cooperated with any Government investigation of such violation; and

**(C)** at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

**(3) Costs of civil actions.**--A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

**(b) Definitions.**--For purposes of this section--

**(1)** the terms “knowing” and “knowingly” --

**(A)** mean that a person, with respect to information--

**(i)** has actual knowledge of the information;

**(ii)** acts in deliberate ignorance of the truth or falsity of the information; or

**(iii)** acts in reckless disregard of the truth or falsity of the information; and

**(B)** require no proof of specific intent to defraud;

**(2)** the term “claim”--

**(A)** means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

**(i)** is presented to an officer, employee, or agent of the United States; or

**(ii)** is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

**(I)** provides or has provided any portion of the money or property requested or demanded; or

**(II)** will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

**(B)** does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

**(3)** the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

**(4)** the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

**(c) Exemption from disclosure.**--Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

**(d) Exclusion.**--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

**[(e) Redesignated (d)]**

**CREDIT(S)**

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub.L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621.)

Notes of Decisions (1429)

Footnotes

1 So in original. Probably should read "Public Law 101-410".

31 U.S.C.A. § 3729, 31 USCA § 3729

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United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle III. Financial Management
Chapter 37. Claims (Refs & Annos)
Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3730

# § 3730. Civil actions for false claims

Effective: July 22, 2010
Currentness

**(a) Responsibilities of the Attorney General.**--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

**(b) Actions by private persons.--(1)** A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

**(2)** A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

**(3)** The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

**(4)** Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

**(A)** proceed with the action, in which case the action shall be conducted by the Government; or

**(B)** notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

**(5)** When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

**(c) Rights of the parties to qui tam actions.--(1)** If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

**(2)(A)** The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

**(B)** The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

**(C)** Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

**(i)** limiting the number of witnesses the person may call;

**(ii)** limiting the length of the testimony of such witnesses;

**(iii)** limiting the person's cross-examination of witnesses; or

**(iv)** otherwise limiting the participation by the person in the litigation.

**(D)** Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

**(3)** If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

**(4)** Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government

has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

**(5)** Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

**(d) Award to qui tam plaintiff.--(1)** If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [2] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

**(2)** If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

**(3)** Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

**(4)** If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

**(e) Certain actions barred.--(1)** No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

**(2)(A)** No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

**(B)** For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

**(3)** In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

**(4)(A)** The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

**(i)** in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

**(ii)** in a congressional, Government [2] Accountability Office, or other Federal report, hearing, audit, or investigation; or

**(iii)** from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

**(B)** For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

**(f) Government not liable for certain expenses.**--The Government is not liable for expenses which a person incurs in bringing an action under this section.

**(g) Fees and expenses to prevailing defendant.**--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

**(h) Relief from retaliatory actions.--**

**(1) In general.**--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any

other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

**(2) Relief.**--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

**(3) Limitation on bringing civil action.**--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

**CREDIT(S)**

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub.L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub.L. 111-148, Title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub.L. 111-203, Title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

Notes of Decisions (2261)

Footnotes

1 See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

2 So in original. Probably should be “General”.

31 U.S.C.A. § 3730, 31 USCA § 3730

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**End of Document**

United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle III. Financial Management
Chapter 37. Claims (Refs & Annos)
Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3731

# § 3731. False claims procedure

Currentness

**(a)** A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

**(b)** A civil action under section 3730 may not be brought--

**(1)** more than 6 years after the date on which the violation of section 3729 is committed, or

**(2)** more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

**(c)** If the Government elects to intervene and proceed with an action brought under 3730(b), [1] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

**(d)** In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

**(e)** Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

**CREDIT(S)**

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 979; Pub.L. 99-562, § 5, Oct. 27, 1986, 100 Stat. 3158; Pub.L. 111-21, § 4(b), May 20, 2009, 123 Stat. 1623.)

Notes of Decisions (173)

Footnotes

1 So in original. Probably should be preceded by ‘‘section’’.

31 U.S.C.A. § 3731, 31 USCA § 3731

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United States Code Annotated
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Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3732

# § 3732. False claims jurisdiction

Currentness

**(a) Actions under section 3730.**--Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

**(b) Claims under state law.**--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

**(c) Service on State or local authorities.**--With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

**CREDIT(S)**

(Added Pub.L. 99-562, § 6(a), Oct. 27, 1986, 100 Stat. 3158; amended Pub.L. 111-21, § 4(e), May 20, 2009, 123 Stat. 1625.)

Notes of Decisions (18)

31 U.S.C.A. § 3732, 31 USCA § 3732
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Chapter 37. Claims (Refs & Annos)
Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3733

# § 3733. Civil investigative demands

Currentness

**(a) In general.--**

**(1) Issuance and service.**--Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

**(A)** to produce such documentary material for inspection and copying,

**(B)** to answer in writing written interrogatories with respect to such documentary material or information,

**(C)** to give oral testimony concerning such documentary material or information, or

**(D)** to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act [1] investigation.

**(2) Contents and deadlines.--**

**(A)** Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

**(B)** If such demand is for the production of documentary material, the demand shall--

**(i)** describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

**(ii)** prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

**(iii)** identify the false claims law investigator to whom such material shall be made available.

**(C)** If such demand is for answers to written interrogatories, the demand shall--

**(i)** set forth with specificity the written interrogatories to be answered;

**(ii)** prescribe dates at which time answers to written interrogatories shall be submitted; and

**(iii)** identify the false claims law investigator to whom such answers shall be submitted.

**(D)** If such demand is for the giving of oral testimony, the demand shall--

**(i)** prescribe a date, time, and place at which oral testimony shall be commenced;

**(ii)** identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

**(iii)** specify that such attendance and testimony are necessary to the conduct of the investigation;

**(iv)** notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

**(v)** describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

**(E)** Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

**(F)** The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney

General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

**(G)** The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

**(b) Protected material or information.--**

**(1) In general.**--A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

**(A)** the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

**(B)** the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

**(2) Effect on other orders, rules, and laws.**--Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

**(c) Service; jurisdiction.--**

**(1) By whom served.**--Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

**(2) Service in foreign countries.**--Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

**(d) Service upon legal entities and natural persons.--**

**(1) Legal entities.**--Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

**(A)** delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

**(B)** delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

**(C)** depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

**(2) Natural persons.**--Service of any such demand or petition may be made upon any natural person by--

**(A)** delivering an executed copy of such demand or petition to the person; or

**(B)** depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

**(e) Proof of service.**--A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

**(f) Documentary material.--**

**(1) Sworn certificates.**--The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

**(A)** in the case of a natural person, the person to whom the demand is directed, or

**(B)** in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

**(2) Production of materials.**--Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

**(g) Interrogatories.**--Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

**(1)** in the case of a natural person, the person to whom the demand is directed, or

**(2)** in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

**(h) Oral examinations.--**

**(1) Procedures.**--The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

**(2) Persons present.**--The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

**(3) Where testimony taken.**--The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

**(4) Transcript of testimony.**--When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

**(5) Certification and delivery to custodian.**--The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

**(6) Furnishing or inspection of transcript by witness.**--Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

**(7) Conduct of oral testimony.--(A)** Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

**(B)** If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

**(8) Witness fees and allowances.**--Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

**(i) Custodians of documents, answers, and transcripts.--**

**(1) Designation.**--The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

**(2) Responsibility for materials; disclosure.--(A)** A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

**(B)** The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

**(C)** Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

**(D)** While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

**(i)** documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

**(ii)** transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

**(3) Use of material, answers, or transcripts in other proceedings.**--Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

**(4) Conditions for return of material.**--If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

**(A)** any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

**(B)** no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

**(5) Appointment of successor custodians.**--In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

**(A)** designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

**(B)** transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

**(j) Judicial proceedings.--**

**(1) Petition for enforcement.**--Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

**(2) Petition to modify or set aside demand.--(A)** Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

**(i)** within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

**(ii)** within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

**(B)** The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

**(3) Petition to modify or set aside demand for product of discovery.--(A)** In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

**(i)** within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

**(ii)** within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

**(B)** The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

**(4) Petition to require performance by custodian of duties.**--At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

**(5) Jurisdiction.**--Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

**(6) Applicability of federal rules of civil procedure.**--The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

**(k) Disclosure exemption.**--Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

**(l) Definitions.**--For purposes of this section--

**(1)** the term "false claims law" means--

**(A)** this section and sections 3729 through 3732; and

**(B)** any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

**(2)** the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

**(3)** the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

**(4)** the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

**(5)** the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

**(6)** the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

**(7)** the term "product of discovery" includes--

**(A)** the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

**(B)** any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

**(C)** any index or other manner of access to any item listed in subparagraph (A); and

**(8)** the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

**CREDIT(S)**

(Added Pub.L. 99-562, § 6(a), Oct. 27, 1986, 100 Stat. 3159; amended Pub.L. 111-21, § 4(c), May 20, 2009, 123 Stat. 1623.)

Notes of Decisions (18)

Footnotes

1 So in original. Probably should be ''law''.

31 U.S.C.A. § 3733, 31 USCA § 3733

Current through P.L. 114-112 (excluding 114-92, 114-94, 114-95, 114-97, 114-102, 114-104 and 114-110) approved 12-18-2015

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