

# THE GOVERNMENT CONTRACTOR<sup>®</sup>

Information and Analysis on Legal Aspects of Procurement



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## FEATURE COMMENT: Real Steps Towards 'Buy American' Compliance—Part IV: What Comes Next?

**Introduction**—The final installment in our four-part series on “Buy American” compliance follows the June 12th opening night of *Hamilton* in Washington, D.C. Some of our readers may appreciate the reference in our title to a solo from King George following the British surrender at Yorktown, in which he asks the American colonists, “What comes next?”

Is it a stretch to compare our four-part series to the American Revolution? Well . . . yes (though the term “trade war” has certainly been bandied about lately); in any case, the end query remains the same. Over the last four months, we have led our readers through the maze of Buy American requirements, and we hope we have fulfilled our promise to provide real steps and practical guidance towards understanding and complying with domestic sourcing requirements.

And so, what comes next? In this final part to our series, we explore what changes may be on the horizon for Buy American policy reform. First, we explore various proposals and actions currently underway from the executive and legislative branches to strengthen domestic sourcing requirements. Next, we assess what actions may be taken in the future, based on the current Buy American framework.

**Executive Actions**—The president has made no secret of his agenda to strengthen domestic sourcing requirements in public procurement. What began as a campaign promise has evolved into a key component of the president’s national security strategy, which highlights multiple “priority actions” related to domestic sourcing requirements. Notably, the plan promises that the U.S. will “pursue bilateral trade and investment agreements with countries that com-

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mit to fair and reciprocal trade and will modernize existing agreements to ensure they are consistent with those principles,” “counter all unfair trade practices that distort markets using all appropriate means,” “emphasize fair trade enforcement actions when necessary,” and “promote policies and incentives that return key national security industries to American shores.” Donald J. Trump, National Security Strategy, at 20, 30 (Dec. 18, 2017). In this section, we examine many of these policies that the executive branch has already begun to enact.

*Buy American and Hire American Report:* Back in April 2017, President Trump signed an executive order on Buy American and Hire American, which instituted a governmental policy to “maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.” EO 13788, “Buy American and Hire American” (April 18, 2017). More specifically, the order required executive branch agencies to “scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law.” Consistent with this policy, the EO mandated that the Department of Commerce, along with several other agencies, submit a report to the White House assessing agencies’ implementation and enforcement of the Buy American Act (BAA), usage and impact of waivers, and policies to maximize the procurement of U.S.-origin manufactured products, components and materials.

President Trump ordered the secretary of commerce to submit the report by Nov. 24, 2017. A few days after the deadline passed, a Commerce spokesperson indicated that the report was under review at the White House. However, this report has yet to be released to the public.

On May 9, 2018, Sen. Debbie Stabenow (D-Mich.) authored a letter to President Trump explaining that she had been told that the report was recently completed, but still unavailable to the public. In addition to praising President Trump’s commitment to the Buy American laws and procurement of U.S.-origin goods and materials, she expressed hope that President Trump will release the report “so the public can better understand how Buy American laws are being implemented and what actions Congress can take to uphold Buy

American laws that support American manufacturing and workers.”

The White House previously indicated that the mandated report was an “internal report that will be used to inform the White House’s policymaking process on this issue.” Accordingly, it could be that the administration hopes to alter BAA requirements, likely to limit procurement of foreign goods further, or perhaps to require additional compliance measures, based on the policy statement accompanying the EO. Even if the administration decides not to increase BAA requirements, it could discourage agencies’ use of waivers. If President Trump releases the report, it would likely contain more specific information on how agencies plan to implement and enforce the Buy American laws in the future, and if they plan to change their approach to issuing BAA waivers.

*Revisions to Trade Agreements:* On February 28, in accordance with the 1974 Trade Act, the U.S. trade representative (USTR) sent President Trump’s 2018 trade policy agenda to Congress. The trade agenda outlines five major initiatives: (1) supporting national security, (2) strengthening the U.S. economy, (3) negotiating better trade deals, (4) aggressively enforcing U.S. trade laws and (5) reforming the World Trade Organization.

Part of the implementation of these goals will be effectuated through waivers of discriminatory purchasing requirements in U.S. Government procurements that require the purchase of U.S. goods and materials. The Trade Agreements Act of 1979 (TAA) grants the president the ability to waive these discriminatory purchasing requirements. Signed in 1980, EO 11846 delegated this waiver authority to the USTR.

Despite rather broad authority to issue waivers, the USTR has typically limited application to the BAA and the Department of Defense’s Balance of Payments Program in conjunction with the WTO Government Procurement Agreement (GPA) and free trade agreements. In 2018, the WTO GPA Committee is focusing on advancing the GPA accessions for six countries: Australia, China, the Kyrgyz Republic, Russia, Tajikistan and former Yugoslav Republic of Macedonia. As such, the TAA waivers could potentially apply to these countries once they complete GPA accession.

In addition to potential changes to parties of the WTO GPA, re-negotiations of the North American Free Trade Agreement are also underway. According

to the USTR report, the focus of re-negotiations has been to strengthen rules of origin for products from Canada and Mexico that significantly contribute to trade imbalance between the countries, and to remove any incentives for outsourcing work from the U.S. to Canada and Mexico.

President Trump has also indicated that he would consider withdrawing from NAFTA entirely if these demands are not met. If the U.S. were to withdraw from NAFTA, Canada and Mexico would not be under any obligation to provide reciprocal trade benefits to U.S. goods. At that point, the USTR would likely reverse its issuance of the waiver for Canada and Mexico, and agencies would then need to modify corresponding regulations that authorize the BAA waivers for the two countries.

On the other hand, if the U.S. enters into a “skinny” NAFTA, whether Canada and Mexico retain any procurement privileges would depend on the specific language in the agreement. Notably, any changes to NAFTA would likely significantly affect Mexico more than Canada because Canada is also part of the WTO GPA. NAFTA provides similar benefits, but at a lower dollar threshold than the WTO GPA (the NAFTA threshold is \$25,000, whereas the WTO GPA threshold is \$180,000). Accordingly, the only procurements of Canadian products that would be affected by the removal of the reciprocal trade benefits would be those between \$25,000 and \$180,000.

*Exception for E-Commerce Portal Purchases under \$25,000:* This last March, the General Services Administration, in consultation with the Office of Management and Budget, finalized the implementation plan for § 846 of the National Defense Authorization Act for Fiscal Year 2018, entitled “Procurement Through Commercial E-Commerce Portals.” Part of this program increases the micropurchase threshold from \$10,000 to \$25,000 for e-commerce portal purchases. Correspondingly, this relaxes BAA requirements for such purchases, as the BAA only applies to procurements above the micropurchase threshold.

*Section 232 Investigations:* The U.S. Department of Commerce’s Bureau of Industry and Security conducted investigations under § 232 of the Trade Expansion Act of 1962 regarding the effect of global imports of steel and aluminum on U.S. national security. In January 2018, BIS concluded that steel and aluminum imports threatened to impair U.S. national security. As a result, President Trump ordered a 25-percent global tariff on steel and a

10-percent global tariff on aluminum, effective March 23.

Various countries are seeking exemptions, some of which have been temporarily granted. Notably, South Korea reached a long-term agreement for steel, and is subject to an annual quota. At the time of the writing of this article, the White House had just issued notices of implementation of tariffs on Canada, Mexico and the European Union. Canada responded by implementing retaliatory tariffs on \$12.8 billion worth of U.S. imports beginning July 1, 2018. Canada also indicated that it will file an objection to the steel and aluminum tariffs at the WTO. Mexico stated that it will react similarly, primarily focusing on 10 U.S. products. The EU also plans to challenge the application of tariffs at the WTO.

Although the § 232 investigations do not directly implicate the BAA or TAA, the focus is the same: protect and benefit U.S. industries. Here, BIS concluded that excessive imports of steel and aluminum caused closures of domestic production capacity. The tariffs are designed to protect that production capacity and encourage consumption of U.S. steel and aluminum. Despite nearly 10,000 exclusion requests for steel and 1,500 for aluminum, none have been granted.

**Legislative Actions**—The president’s trade agenda has largely been mirrored by Congress on a bipartisan level. Not only is Congress also interested in encouraging the consumption of U.S.-origin goods and materials, but it has keenly focused on the use of waivers and the expansion of Buy American-like preferences throughout Government procurements.

*BuyAmerican.gov Act of 2018 (S. 2284):* Introduced in the Senate in January, the bipartisan BuyAmerican.gov Act of 2018 focuses on several issues identified in this article. It requires the secretary of commerce to issue a report, similar to the one that President Trump required in his Buy American and Hire American EO, within 180 days after the enactment of the legislation and every two years thereafter. In addition, it requires the secretary of commerce to review and analyze the impact of free trade agreements and the WTO GPA on Buy American laws.

Aside from the compilation of required reports, the Act also requires GSA to establish a website at—you guessed it—*BuyAmerican.gov*. GSA must make the website publicly available and free to access. *BuyAmerican.gov* will list all waivers of BAA

requirements that have been requested, are under consideration or have been otherwise granted. In addition, the Act requires agencies to provide a detailed justification for each waiver, including the specific statutory basis for the waiver and a certification that the procurement official made a good faith effort to solicit bids for domestic products. While this certainly indicates Congress' focus on cracking down on exemptions to the Buy American laws, it also presents a significant record keeping burden on GSA.

*Buy America 2.0 Act (H.R. 5137)*: Rep. Brendan Boyle (D-Pa.) introduced the Buy America 2.0 Act in the House on March 1. It would prohibit the obligation of federal funds to transportation or infrastructure projects unless the steel, iron and manufactured goods used for the projects are produced in the U.S. There are limited exceptions, i.e., if the requirements would be inconsistent with public interest; the steel, iron or manufactured goods are not sufficiently and reasonably available; or the inclusion of the products would increase the cost of the project by more than 25 percent. Finally, the bill would provide for waivers to the requirements if the agency permits public input.

*American Food for American Schools Act of 2018 (S. 2641)*: Most recently, Buy American reform cropped up in a bill to formalize the waiver process of procuring foreign commodities or products for use in school lunches. On April 10, Sens. Dan Sullivan (R-Alaska) and Maria Cantwell (D-Wash.) introduced the American Food for American Schools Act of 2018 to "amend the Richard B. Russell National School Lunch Act to improve the requirement to purchase domestic commodities or products, and for other purposes." The bill has not made it out of committee to date, and if passed likely would have little effect on the majority of our readership. Regardless, the bill signals continued focus on strengthening Buy American policies in all realms of Government procurement, and further demonstrates that increased waiver restrictions appear to be the Buy American reform du jour.

**Changes on the Horizon**—As discussed above, many Buy American reforms and enhancements are already in the works, but the current focus on Buy American requirements and the domestic sourcing regime in general suggest that more legislative and executive action is yet to come. In this section, we predict where Congress and the White House might be headed in terms of further Buy American reform.

*Percentage Requirements for Domestic Components*: As we discussed in some detail in parts I and II of this series, manufactured products meet a two-part test to be considered "domestic end products" for purposes of BAA compliance: (1) manufacturing must occur in the U.S., and (2) the end product must consist of more than 50-percent U.S. component parts. Federal Acquisition Regulation 25.003. The FAR defines "component" as "an article, material, or supply incorporated directly into an end product or construction material." *Id.* Agencies calculate the percentage of U.S. components by cost.

The language of the BAA itself, however, does not specify this 50-percent domestic component requirement. Instead, the statute passed in 1933 employs a "substantially all" standard: "[O]nly manufactured articles, materials, and supplies that have been manufactured in the United States *substantially all* from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use." 41 USCA § 8302(a) (emphasis added). In 1954, President Eisenhower issued an EO declaring that "substantially all" should be interpreted as 50 percent or greater: "For the purposes of this order materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials." See EO 10582 (Dec. 17, 1954) at § 2(a). In response, the FAR Council implemented the 50-percent rule in the FAR at § 25.003.

Various tribunals have upheld the 50-percent rule as a valid application of BAA requirements. See, e.g., *U.S. ex rel. Made in the USA Found. v. Billington*, 985 F. Supp. 604 (D. Md. 1997); *Allis-Chalmers Mfg. Co.*, Comp. Gen. Dec. B-147210, 1961 CPD ¶ 69. Nevertheless, the 50-percent rule's implementation via an executive order leaves it susceptible to modification.

Executive orders typically enjoy the force and effect of law. See generally, Chu, Cong. Research Serv., RS20846, "Executive Orders: Issuance, Modification, and Revocation" (April 14, 2014). However, executive orders do not benefit from the same permanence as statutes, as "[t]he President is free to revoke, modify, or supersede his own orders or those issued by a predecessor." *Id.* at 7. Congress also maintains the power to revoke or modify executive orders by passing legislation that repeals the order. *Id.* at 9.

Other Buy American requirements, in contrast, do not suffer from the same vulnerability. For instance, the commercially available off-the-shelf exception to the 50-percent domestic content requirement was the result of legislation rather than an executive order. See 74 Fed. Reg. 2713 (Jan. 15, 2009) (FAR amendment to “implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items”). The 50-percent rule is therefore prone to future modification, most likely in the form of increased percentage of domestic components necessary to be considered “substantially all” domestic materials.

*Price Differential for “Unreasonable Cost” Exception:* Another aspect of the BAA susceptible to reform is the price penalty currently applied to foreign offerors. The BAA mandates use of domestic materials “unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable.” 41 USCA § 8302(a). As we have discussed in previous parts to this series, the FAR implements this mandate by requiring agencies to apply a price preference for certain supplies and construction materials if the lowest offer in a procurement is not for the domestic articles, materials or supplies described above. See FAR 25.104 (supplies), 25.204 (construction materials).

Civilian agencies apply a six-percent “price penalty” to foreign offers (12 percent if the next-in-line offeror is a U.S. small business), and DOD agencies provide a more outcome-determinant 50-percent penalty to foreign offers (regardless of small business competition). If, after the application of the pricing preference, the lowest offer is for the designated foreign materials, then the agency may select the foreign offer for award.

The six-, 12-, and 50-percent price penalties may be reasonable interpretations of the BAA requirement, but they are just that—interpretations. The language of the BAA states only that a department head should determine whether a cost is unreasonable. As with the quantification of “substantially all” domestic content, the quantification of the unreasonable cost prohibition also stems from EO 10582. Section (b) of the order provides,

[T]he bid or offered price of materials of domestic origin shall be deemed to be unreason-

able, or the purchase of such materials shall be deemed to be inconsistent with the public interest, if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential computed as provided in subsection (c) of this section.

Section (c)(1) provides the six-percent price penalty implemented in the FAR: “The sum determined by computing six per centum of the bid or offered price of materials of foreign origin.”

For the reasons already stated above, the definition of what constitutes an unreasonable cost could be modified without revising the text of the statute itself. In fact, agencies have already demonstrated such an ability by revising the percentage calculation for foreign offerors competing against small businesses (12-percent price penalty) and DOD agency procurements (50-percent price penalty). Increasing the price differential necessary to deem a foreign offeror’s price “unreasonable” could therefore provide another avenue to strengthen Buy American policies.

*Increased § 232 Investigations and Tariffs:* The president’s March announcement regarding new tariffs on foreign steel, discussed above, demonstrates yet another avenue for additional Buy American reform. See “Presidential Proclamation on Adjusting Imports of Steel into the United States” (March 8, 2018). Section 232 of the Trade Expansion Act of 1962 authorizes the executive branch (through the Commerce Department) to conduct investigations to “determine the effects on the national security of imports.” 19 USCA § 1862.

Within 270 days of initiating an investigation, the Commerce Department must report on findings, including whether certain imports threaten to impair U.S. national security. As demonstrated by the recent use of § 232 (the first in 16 years), the president may then use his statutory authority under § 232 “to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” 19 USCA § 1862(c)(1)(a)(ii). Some sources suggest that other § 232 investigations may already be in the works to consider imports of uranium and of critical minerals. See Grier, *Perspectives on Trade, “Trump’s 232 Choice: Tariffs or Quotas?”* (May 8, 2018). As noted above, although § 232 investigations do not directly implicate the BAA or TAA, the focus remains the same: protect and benefit American

industries. Accordingly, § 232 represents another opportunity for the president to strengthen domestic sourcing policies.

**Conclusion**—Congratulations! You have successfully completed our four-part series on “Real Steps Towards Buy American Compliance.” You reviewed the overall U.S. domestic sourcing regime in Part I, 60 GC ¶ 52, sifted through the nuts and bolts of BAA and TAA requirements in Part II, 60 GC ¶ 97, scared yourself into compliance through a survey of enforcement mechanisms in Part III, 60 GC ¶ 131, and finally, here in Part IV, found at least a few answers and predictions to King George’s query, “What comes next?” The material may not have been as easy (or enjoyable) to digest as *Hamilton*, but it will no doubt prove to be more helpful to your companies and clients. And when *Hamilton* creator Lin Manuel Miranda is ready to move on from the American Revolution and start his screenplay for the (Buy) American Revolution, our series will give him everything he needs.



*This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Stuart B. Nibley, Partner, Amy M. Conant, Associate, and Erica L. Bakies, Associate, K&L Gates LLP.*

## Developments

### ¶ 182

#### **Navy Shipbuilding Should Have Stronger Business Cases, Follow Best Practices**

“Challenges in meeting shipbuilding cost, schedule, and performance goals have resulted in a less-capable and smaller fleet today than the Navy planned” in a 2007 long-range shipbuilding plan, the Government Accountability Office reported June 6. The Navy is more than \$11 billion over budget and “has received \$24 billion more in funding than originally planned,” but it is 50 ships short of its 330-ship goal set in 2007 because policies and processes allow the service to depart from shipbuilding best practices.

There must be a sound business case for a program to succeed, but competitive pressures to get funding for lead ship construction while “many

aspects of the program remain unknown” create “an imbalance between the resources planned to execute these programs and the capabilities the Navy seeks to acquire,” GAO said. Thus, “the Navy often initiates shipbuilding programs with weak business cases that over-promise the capability the Navy can deliver within the planned costs and schedule.” As construction progresses, “programs come under pressure to control growing costs and schedules, often by changing planned quality and performance goals,” GAO continued. “Over time, this approach reduces the Navy’s buying power and the likelihood of achieving fleet goals.”

For example, programs under construction in the past 10 years “have often not achieved their cost, schedule, quality, and performance goals,” with the most recently delivered 11 lead ships costing a total of \$8 billion above initial budgets, GAO noted. “While poor outcomes are more acute with the first ships of the class, follow-on ships also often do not meet expected outcomes.” Ships built during the period include the Littoral Combat Ship, DDG-51 and DDG-1000 guided missile destroyers, the Ford class aircraft carrier, and the Virginia class submarine.

In the past 10 years, GAO has made 67 recommendations to improve the Navy’s shipbuilding, and the Department of Defense and the Navy implemented 29 of those recommendations and agreed with best practices identified by GAO, the report pointed out. “In many cases, however, the Navy has not taken steps based upon these best practices.” Further, GAO found that the Navy “routinely accepts delivery of ships with large numbers of uncorrected deficiencies,” including the most serious deficiencies for safety or operational reasons, as well as significant reliability issues.

The Navy also pays for most of the cost increases because it generally uses cost-reimbursement contracts for lead ships. For several recent programs, the Navy “did not have a complete understanding of the effort needed to construct these ships at the time of contract award,” GAO observed. Further, the fixed-price incentive contracts the Navy generally uses for follow-on ships “do not necessarily ensure that it receives a deficiency-free ship at delivery,” and the Navy ends up paying the contractor to repair the defects that are discovered. See 51 GC ¶ 177; 55 GC ¶ 375; 59 GC ¶ 224.

The Navy is now planning its biggest increase in fleet size in three decades, including “some costly

and complex acquisitions, such as the Columbia class ballistic missile submarine and a new class of guided missile frigates,” GAO explained. As the service now embarks on its new long-term shipbuilding and acquisition plan, “the Navy has an opportunity to improve its shipbuilding approach and avoid past difficulties.” In its long-range plan accompanying its fiscal year 2019 budget request, the Navy estimated that it will need “over \$200 billion during the next 10 years to sustain a Navy fleet with more than 300 ships and begin working toward ... a 355-ship fleet.”

“The Navy will continue to face daunting acquisition challenges over the next decade as it begins a long-term effort to significantly increase the size of its fleet,” GAO cautioned. “The key to overcoming the cycle of cost growth, schedule delays, and capability shortfalls in shipbuilding programs is for decision makers within [DOD], the Navy, and Congress to demand that programs be supported by executable business cases.”

In February, the Navy released its 30-year shipbuilding plan, which envisions reaching its goal of a 355-ship fleet by the early 2050s. See 60 GC ¶ 54(f).

*Navy Shipbuilding: Past Performance Provides Valuable Lessons for Future Investments* (GAO-18-238SP) is available at [www.gao.gov/assets/700/692331.pdf](http://www.gao.gov/assets/700/692331.pdf).

## ¶ 183

### NASA Needs To Improve Financial Data On Reimbursable Agreements

NASA needs to better track financial data on reimbursable agreements, under which NASA provides partners access to underutilized NASA goods, services and facilities, the NASA inspector general has reported. “NASA is unable to provide Congress and other stakeholders with full and accurate insight into the composition, performance, and projections for the more than \$2 billion in reimbursable agreement funds NASA receives annually from its partners.”

NASA enters into reimbursable agreements with other agencies, academia, industry partners, international organizations and nonprofit entities for use of NASA products, services and facilities that are not being fully utilized, the IG noted. The agreements “cover a broad range of partnerships, from short-lived collaborations valued at a few thousand dollars to

partnerships that span decades valued in the billions of dollars.” In fiscal year 2017, NASA derived \$2.3 billion, about 13 percent of its spending authority, from funds collected on reimbursable agreements.

NASA tracks domestic and international reimbursable agreements, respectively, in its Partnership Agreement Maker (PAM) and System for International External Relations Agreements (SIERA). The IG and Government Accountability Office have previously flagged “incomplete and inaccurate agreement information, insufficient policies, failure to identify costs incurred, and an inability to separate reimbursable billings and collections,” the IG noted. See 56 GC ¶ 199.

The IG reviewed a sample of 115 domestic and 25 international reimbursable agreements. Over half had “substantial errors,” including significantly overstated agreement values and waived costs. Waived costs are incurred costs that a partner does not reimburse to NASA.

PAM listed the total value of the IG’s domestic sample at \$11.7 billion, but the IG calculated a value of about \$7.8 billion, “an overstatement of nearly \$4 billion, or 51 percent.” PAM listed a total of \$165.5 million in waived costs, but the IG calculated waived costs of only \$10.8 million, or 6.5 percent of the PAM total. The IG could not check similar international data because SIERA does not capture dollar values or waived costs. The IG cautioned that “[b]ecause of inconsistent data across the PAM and SIERA databases, NASA cannot provide quality information to support effective internal control.”

NASA lacks an effective data-validation process for PAM and SIERA, and expectations for how they are used have shifted. Initially, the databases were designed as record and documentation repositories, not for tracking agreement values and related activity. “[I]nput and updates to fields within the databases are made manually and thus are susceptible to data entry errors,” and the PAM data-validation process did not effectively detect data errors.

In response to the IG’s recommendation in 2014, NASA has sought to accurately integrate PAM and SIERA data with NASA’s Systems Applications Products (SAP) financial data. The IG flagged “a significant number of inaccurate links between SAP and PAM and SIERA.”

The IG recommended that NASA (a) ensure the accuracy of, and routinely verify, PAM and SIERA data; (b) minimize duplication of reimburs-



able agreement records; (c) foster communication among agreement managers, project teams and chief financial officers; and (d) share best practices across NASA centers.

The IG acknowledged recent efforts by NASA to improve reimbursable agreement management. NASA has published an agreement handbook and established policies on vetting partners and mitigating conflicts of interest.

NASA's *Management of Reimbursable Agreements* (IG-18-018) is available at [oig.nasa.gov/docs/IG-18-018.pdf](http://oig.nasa.gov/docs/IG-18-018.pdf).

## ¶ 184

### DOD Needs To Follow IT Best Practices For Major Information Systems

Department of Defense major automated information system (MAIS) management policies do not adhere to all leading information technology management practices, and programs have suffered schedule delays, the Government Accountability Office reported May 24. "Following leading IT acquisition practices on requirements and risk management is essential to help programs effectively plan and direct their development and acquisition efforts."

In April 2017, DOD categorized its MAIS programs in the business and non-business systems. Ten of 34 total MAIS programs were identified as business programs, which would adhere to the management and oversight policies of DOD Instruction 5000.75, "Business Systems Requirements and Acquisition," while the other 24 were non-business, covered by DODI 5000.02, "Operation of the Defense Acquisition System."

GAO found that the DOD policies for managing MAIS non-business programs adhered to all of GAO's leading practices for managing IT projects. DOD policies for business programs did adhere to two leading practices: (1) instituting an investment board to define membership, guiding principles, operations, roles, responsibilities and authorities and (2) identifying decision authorities for executive-level acquisition decisions. However, business program policies did not adhere to two practices: (a) monitoring performance progress, including baseline cost and schedule estimates and thresholds for when cost and schedule perfor-

mance becomes high-risk and (b) capturing performance information and providing it regularly to decision makers.

GAO reviewed a sample of 15 MAIS programs, finding that ten of them had schedule delays, ranging from five months to five years, which "were caused by unrealistic expectations or unplanned changes." And all 15 programs saw changes in planned cost estimates. "The decreases in planned cost were largely due to scope reduction, while cost increases were due to underestimating levels of effort and contracting issues," GAO reported.

Nine of the 15 programs had conducted testing, allowing GAO to identify the number of performance targets that were met. Six of the nine met all performance targets, and three met some, but not all, targets.

GAO recommended that the undersecretary of defense for acquisition and sustainment update MAIS business program policies to address all leading IT management practices. GAO also addressed specific programs, recommending that the Defense Health Agency finalize the requirements management plan for the DOD Healthcare Management System Modernization and that the Navy identify all negative external environmental issues, such as hazards and vulnerabilities, for the Consolidated Afloat Networks and Enterprise Services.

GAO has previously said DOD should establish MAIS baselines earlier, MAIS critical changes were not timely reported, and MAIS programs have suffered cost and schedule increases. See 57 GC ¶ 67(c); 58 GC ¶ 123; 59 GC ¶ 108(b).

*DOD Major Automated Information Systems: Adherence to Best Practices Is Needed to Better Manage and Oversee Business Programs* (GAO-18-326) is available at [www.gao.gov/assets/700/691992.pdf](http://www.gao.gov/assets/700/691992.pdf).

## ¶ 185

### Developments In Brief ...

- (a) **DCAA Anticipates End of Incurred Cost Audit Backlog**—The Defense Contract Audit Agency is "on track to eliminate the backlog" of incurred cost audits by the end of fiscal year 2018, and DCAA's "workforce did an outstanding job reducing the backlog to an average age of 14.3 months,"

according to DCAA's FY 2017 annual report. DCAA finished FY 2017 "with under 3,000 incurred cost years in the backlog, which we expect to complete in FY 2018." DCAA will then "be current on incurred cost based on a two-year inventory of audits." Under § 803 of the FY 2018 National Defense Authorization Act, DCAA then "will move to one year of inventory as required." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I," 60 GC ¶ 1. In 2017, Sen. Claire McCaskill (D-Mo.) pushed DCAA to reduce the backlog, and the Government Accountability Office recommended that DCAA reduce the time it takes to begin an incurred cost audit, assess the effects of multiyear audits and establish performance measures. See 59 GC ¶ 313; 59 GC ¶ 329(d). In April, DCAA Director Anita Bales testified that DCAA expected to eliminate the backlog in FY 2018. See 59 GC ¶ 99. DCAA's FY 2017 annual report is available at [www.dcaa.mil/Content/Documents/DCAA\\_FY2017\\_Report\\_to\\_Congress.pdf](http://www.dcaa.mil/Content/Documents/DCAA_FY2017_Report_to_Congress.pdf).

**(b) Industry Group Suggests Export Review Reforms, National Security Cooperation Strategy**—The Aerospace Industries Association (AIA) recently recommended a stronger interagency security cooperation enterprise, including a national security cooperation strategy, to improve and speed up the review and approval of defense transfers to U.S. allies. AIA's letter to Secretary of State Mike Pompeo follows the national security presidential memorandum on the administration's conventional arms transfer policy, which was rolled out in May and contains the administration's national security priorities. See 60 GC ¶ 146. Increasing demand has strained the Government's "review and approval process, resulting in an overburdened and fragmented process beset by avoidable delays," AIA wrote. "Worse, no one department or agency is solely responsible or accountable for the review, complicating attempts to streamline the process." AIA suggested the development of a plan to expedite specific transactions that reflect U.S. security and cooperation priorities, and the creation of a senior-level interagency oversight mechanism

to ensure rapid review and approval for priority defense exports. AIA recommended reforms for foreign military sales contracting vehicles, the export licensing process, and arms transfer and technology release reviews. The new national security cooperation strategy should identify priorities for building partner capacity, align industry programs and technology development with security cooperation priorities, streamline technology review and contracting for priority transactions, and promote the competitiveness of the U.S. defense and security industries. "Our industry is competing against our adversaries in a global defense marketplace where every export opportunity is a zero-sum, time sensitive competition with an enduring impact on American influence, security and our defense industrial base," AIA said. "AIA and our member companies believe the ultimate key to the success of U.S. security cooperation is to increase the speed of review, approval and advocacy for defense exports that advance America's foreign policy, national and economic security interests." The National Defense Industrial Association expressed its support for AIA's recommendations.

**(c) DHS Can Leverage Program Data to Better Manage Acquisition Portfolio**—The Department of Homeland Security faces budgetary restraints that demand "disciplined policies that reflect best practices to ensure that the department does not pursue more programs than it can afford," the Government Accountability Office reported, recommending that DHS strengthen its acquisition portfolio management. DHS policy does not require reassessment of programs that breach cost or schedule goals to ensure they remain relevant and affordable, and DHS is not leveraging data from post-implementation reviews after programs deploy initial capabilities. DHS management officials said they use an affordability tool, a certification-of-funds memorandum, which components submit when re-baselining a program in response to a breach, and officials do not consider post-implementation results because they are typically conducted after oversight shifts to the components. GAO noted, "DHS is initiating a number of complex

and costly acquisition programs, such as development of a wall system along the southwest border and the Coast Guard's Heavy Polar Icebreaker, which could benefit from this type of information." See 59 GC ¶ 186(b); 60 GC ¶ 162(b). GAO reviewed 28 major programs and found that cost and schedule performance did not improve in 2017, as "more programs will require more time and may require more money to complete than initially planned." Ten of the programs were on track to meet cost and schedule goals. However, six programs had schedule delays, two had cost increases, and six had both schedule delays and cost increases. GAO recommended that DHS (a) require a certification-of-funds memo when a component re-baselines a program after a breach and (b) assess post-implementation review results to find ways to improve performance across the portfolio. DHS acquisition management has been on GAO's high-risk list since 2005. See 56 GC ¶ 157. GAO has flagged problems with DHS' operational test results, cost estimates, joint requirements process, chief information officer's role, and identification of non-major acquisitions. See 57 GC ¶ 127; 58 GC ¶ 121; 58 GC ¶ 385(d); 59 GC ¶ 117; 59 GC ¶ 119(b). *Homeland Security Acquisitions: Leveraging Programs' Results Could Further DHS's Progress to Improve Portfolio Management* (GAO-18-339SP) is available at [www.gao.gov/assets/700/691817.pdf](http://www.gao.gov/assets/700/691817.pdf).

- (d) **DOD Releases Comprehensive Subcontracting Plan Sought in FOIA Dispute**—The Department of Defense has released to the American Small Business League (ASBL), an advocacy group, Sikorsky Aircraft Corp.'s fiscal year 2013 comprehensive small business subcontracting plan—a document ASBL sought for years in Freedom of Information Act litigation. See 56 GC ¶ 390(c); 57 GC ¶ 23(c). In January 2017, the U.S. Court of Appeals for the Ninth Circuit reversed a district court and allowed certain redactions under FOIA exemption 4 for "trade secrets and commercial or financial information [that is] privileged or confidential." DOD "submitted a declaration from Sikorsky's director of supply management (1) identifying the entities with which Sikorsky

competes for government defense contracts and (2) averring that those entities could use the redacted information to gain a significant competitive advantage over Sikorsky," and "[n]othing more is required" for exemption 4, the court held. See *Am. Small Bus. League v. Dep't of Def.*, 674 F. App'x 675 (9th Cir. 2017). Nonetheless, DOD released the subcontracting plan, over Sikorsky's objections, with only redactions of Sikorsky employees' business contact information and signatures under FOIA exemption 6. In a notice to ASBL as FOIA requester, DOD's FOIA division chief said DOD "has recently determined that certain previously withheld information does not warrant protection from disclosure," and "none of the remaining information should be withheld under [FOIA exemption 4]." Section 826 of the FY 2017 National Defense Authorization Act extended DOD's Comprehensive Subcontracting Plan Test Program for 10 years to Dec. 31, 2027. The program allows a prime to use a comprehensive subcontracting plan for multiple contracts, rather than individual plans. ASBL president Lloyd Chapman has derided the program as a "loophole that allowed the Pentagon's largest prime contractors to circumvent federal law that mandates small businesses receive a minimum of 23 percent of all federal contracts." In 2015, the Government Accountability Office recommended that Congress make the program permanent. See 57 GC ¶ 369. ASBL posted Sikorsky's subcontracting plan at [www.asbl.com/documents/may2018/2018.03.15\\_Plan.pdf](http://www.asbl.com/documents/may2018/2018.03.15_Plan.pdf).

## Legislation

### ¶ 186

#### SECRET Act Seeks Transparency On Security Clearance Backlog

Congress has passed a law to require the Office of Personnel Management's National Background Investigations Bureau to report on the backlog of background investigations for personnel security clearances, costs of bifurcating the background

investigation system between NBIB and the Defense Security Service, and efforts to move toward continuous evaluation and reciprocity.

The Securely Expediting Clearances Through Reporting Transparency (SECRET) Act of 2018, P.L. 115-173, requires NBIB, within 90 days and then quarterly, to report to Congress on the background investigation backlog, including the number of backlogged investigations, the average wait times for initial investigations and periodic reinvestigations, the factors contributing to wait times, a backlog mitigation plan, and plans to improve NBIB data security.

The SECRET Act directs OPM, within 120 days, to report on the costs of keeping all background investigations at OPM versus transferring Department of Defense personnel to DSS under a planned transition by 2020. It directs the Director of National Intelligence, in 120 days, to report on the implementation of continuous evaluation Government-wide, agency efforts to implement reciprocal recognition of clearances, and whether the security clearance processing schedule under the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) should be modified.

The Act directs the executive office of the president, within 90 days, to report on its adjudication process for security clearance investigations for its personnel, including White House staff. It also requires NBIB and DNI to review and make any necessary recommendations, within 180 days and every four years thereafter, on position sensitivity designations and the appropriate background investigations for each designation.

In a signing statement, President Trump said U.S. national security depends on a rigorous security clearance process. “As the Supreme Court has acknowledged, however, the Constitution vests in the President the authority to classify information relating to the national security and to control access to such information,” and the executive branch will construe and implement the SECRET Act accordingly, including specifically the requirement for DNI to review IRTPA clearance processing timelines.

David Berteau, president of the Professional Services Council (PSC), an industry association, noted that contractors “are often unable to fill positions requiring clearances, even when the positions are funded under existing contracts.” He said the

SECRET Act “represents a critical initial step in quantifying, tracking, and mitigating the growing backlog of security clearance investigations.”

The Government Accountability Office has reported that NBIB is struggling to reduce the security clearance backlog. See 59 GC ¶ 381. In March, witnesses testified that agencies should incorporate new technologies in the security clearance process and improve reciprocity among agencies. See 60 GC ¶ 80. In 2016, the Congressional Research Service issued a primer on the security-clearance process. See 58 GC ¶ 383.

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## *Regulations*

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### ¶ 187

#### **DFARS Final Rule Adjusts Special Emergency Procurement Authorities**

A Department of Defense final rule amended the Defense Federal Acquisition Regulation Supplement, effective May 30, to delegate to the head of the contracting activity at DFARS 218.271 (redesignated as 218.270) the FAR special emergency procurement authorities provided by §§ 164 and 816 of the National Defense Authorization Act for Fiscal Year 2018, P.L. 115-91. Additionally, the final rule made “conforming changes to nonstatutory emergency acquisition flexibilities relating to item-unique identification, receipt of only one offer, and limitations on time-and-materials contracts.” See 83 Fed. Reg. 24888 (May 30, 2018).

DFARS 218.271 previously “delegated to the head of the contracting activity the determination authority for application of the previously existing special emergency procurement authorities (support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack),” the final rule notes. “In addition, the DFARS has provided non-statutory emergency acquisition flexibilities relating to item-unique identification, receipt of only one offer, and limitations on time-and-materials contracts in circumstances similar to, but somewhat more expansive than those covered by the statutory special emergency procurement authorities.”

The final rule “does not provide an exception at DFARS 211.274-2(b)(1) to the requirement for item unique identification, for acquisitions that facilitate defense against or recovery from cyber attack, because one of the reasons for use of item-unique identification is to ensure item-level traceability throughout the lifecycle to enhance cyber security.” DFARS 211.274-1(e). To defend against or recover from a cyberattack, “item unique identification is particularly required for high-risk items identified by the requiring activity as a target of cyber threats, regardless of dollar value,” the final rule states. DFARS 211.274-2(a)(3)(v).

Additionally, “the coverage at DFARS 218.270 of the increased simplified acquisition threshold when a humanitarian or peacekeeping operation is declared has been removed from DFARS, because it is now covered in the FAR in the definition of ‘simplified acquisition threshold’ in FAR 2.101 and at DFARS 218.204.”

For more on the FY 2018 Defense Authorization Act, see Schaengold, Prusock and Muenzfeld, Feature Comment, “The Fiscal Year 2018 NDAA’s Significant Impact On Federal Procurement Law—Part I,” 60 GC ¶ 1; Schaengold, Prusock and Muenzfeld, Feature Comment, “The Fiscal Year 2018 NDAA’s Significant Impact On Federal Procurement Law—Part II,” 60 GC ¶ 9.

## ¶ 188

### ABA Section Flags Problems With DFARS/ NIST Cybersecurity Guidance

The Department of Defense should revise draft cybersecurity guidance on implementing Defense Federal Acquisition Regulation Supplement 252.204-7012 and National Institute of Standards and Technology Special Publication (SP) 800-171 to align with the Federal Information Security Modernization Act (FISMA), avoid unintended consequence for bid protests, and clarify its relation to risk assessments and contract audits, the American Bar Association Section of Public Contract Law has recommended. It is not clear “how the technical evaluations will be accomplished and whether the Draft Guidance is consistent with the risk-assessment approach underlying NIST security guidance, including NIST SP 800-171.”

In April, DOD issued draft guidance and a requirements matrix for contractors to implement NIST SP 800-171 cybersecurity requirements, including system security plans on “how the specified security requirements are met, or how organizations plan to meet the requirements,” and plans of action on “how any unimplemented security requirements will be met and how any planned mitigations will be implemented.” See 60 GC ¶ 143. In September 2017, the Defense Procurement and Acquisition Policy office issued guidance on implementing SP 800-171. See 59 GC ¶ 301.

**FISMA Standards**—The ABA section noted that the draft guidance fails to address or incorporate FISMA standards for information security. See 44 USCA §§ 3541–3549. To address the FISMA mandates, DOD should incorporate FISMA’s risk-based approach to data protection in the draft guidance’s “DOD Values” priority structure and clarify to contracting officers that cybersecurity controls should be tailored, not one-size-fits-all, and that they should assess SP 800-171 compliance by the same standards as they assess FISMA “cost-effective” risk reduction.

The section is concerned that unless the draft guidance aligns with FISMA’s more flexible approach, COs may use “a binary pass-fail presumption: ‘adequate security’ exists only upon 100% implementation of all 110 NIST SP 800-171 security controls,” which would be “neither consistent with the policies underlying FISMA, nor likely to improve security for contractor networks.”

The section emphasized that FISMA directs agencies to “cost-effectively reduce risks to an acceptable level.” The guidance should state that “the cost of implementing a security control should be considered in addition to the security risk when assessing contractors’ information systems.” It should also allow COs “to recognize that a contractor may deliver greater security at less cost with an innovative security approach to technologies and strategies.”

**Bid Protests**—The ABA section cautioned that DOD’s evaluation of cyber risks in source selections could lead to more pre- and postaward protests. The “checklist-based evaluation” suggested by the draft guidance “may be a poor fit for most procurements,” especially given that 85 percent of SP 800-171 security controls are assigned the highest priority, DOD Value 5. Without a risk-based approach and

tailoring, “too many solicitations will require full satisfaction of all 110 security controls when assessing NIST SP 800-171 compliance,” the section cautioned.

Source selection decisions that use SP 800-171 compliance as a discriminator would be open to protests against mechanical evaluation of proposal risk. The section recommended that the guidance advise evaluators to qualitatively assess cyber risk and limit evaluation to select crucial cyber requirements.

The ABA section noted that, practically, DOD has only limited cyber resources, expertise and personnel to develop—and then evaluate—cyber-risk criteria. DOD may have recourse to the DOD chief information officer’s office or support contractors, but each support option brings its own problems. The DFARS clause and draft guidance “should be broadened to mitigate these types of concerns,” the section recommended.

**Audit Issues**—DOD has indicated that the Defense Contract Management Agency will take an increased role in auditing contractor compliance with DFARS requirements, the section noted. DOD should clarify that the guidance is not an audit tool and DCMA’s role is limited to verifying that a contractor has the required system security plan and plan of action, not a technical assessment of the plans. The section is concerned that otherwise DCMA could misinterpret the guidance as an expansion of its audit scope.

The guidance should clarify that it “is not intended to be used by contracting agencies to dictate how a contractor must implement the requirements.” The section said DOD has previously indicated that DOD will not specify how a contractor implements SP 800-171 requirements or interfere with a contractor’s management of its internal information systems.

The draft guidance assesses only per-contract cybersecurity, which could be unnecessarily costly for large contractors, the section noted. DOD should consider “an option for use of a company- or enterprise-level cybersecurity assessment or compliance validation.”

The ABA section also cautioned that “[i]nconsistent or overly mechanical application of the draft guidance...may price the small-business community out of the marketplace,” and failing to allow for nontraditional contractors’ alternative or innova-

tive approaches “could result losing access to new commercial technology, services, or products, as well as the opportunity to maximize competition.”

For discussions of DFARS 252.204-7012 and NIST SP 800-171, see Turner and Major, Feature Comment, “Lurking In The NIST—Why Federal Contractors May Be Misreading Their Cybersecurity Safeguarding Requirements,” 59 GC ¶ 306; Chierichella and Bourne, Feature Comment, “Achieving Cyber-Fitness In 2017: Part 6—Potential Liabilities And Putting It All Together,” 59 GC ¶ 363.

The ABA section’s comments are available at [www.americanbar.org/groups/public\\_contract\\_law.html](http://www.americanbar.org/groups/public_contract_law.html).

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## Decisions

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### ¶ 189

#### Release Did Not Bar Appeal Of CO’s Challenge To Data Rights, ASBCA Holds

*Cubic Def. Applications, Inc., ASBCA 58519, 2018 WL 2357215 (May 8, 2018)*

A contractor’s action seeking review of a contracting officer’s decision rejecting the contractor’s assertion of rights in technical data was a contractor claim under the Contract Disputes Act. Under the mandatory statutory and regulatory framework for addressing rights in technical data and software, the contractor’s claim did not arise until the CO issued a written challenge to the contractor’s data rights. This did not occur until after the parties’ settlement agreement. Therefore, the contractor’s claim was a future claim excepted from the parties’ release, the Armed Services Board of Contract Appeals has held.

In 2003, the Navy awarded a contract to Cubic Defense Applications Inc. to design and develop a “wideband data link” for transmitting data between ships and military aircraft. Cubic’s proposal contained a contract data requirements list (CDRL) showing items for which Cubic asserted rights in technical data based on partial private funding of the items’ development.

In July 2007, Cubic appealed a deemed denial of its \$6.5 million claim alleging specification defects

and other theories. In December 2007, the Navy asserted a \$4.11 million claim based on contract relief that reduced Cubic's costs. Cubic also appealed that final decision. The parties settled the appeals in 2008, and the settlement agreement included releases by both parties.

In late 2011, Cubic submitted a proposal to the Navy for related systems. Citing the 2003 contract and "internal R&D funding," Cubic asserted that the Government had only limited rights in technical data.

The Navy disagreed and asserted unlimited data rights based on Navy-funded development of the items. The parties discussed the data rights over several months, and Cubic submitted information to justify its assertion of limited rights for a programmable loads module.

After the Navy awarded the new contract to Cubic for the related systems in 2012, the CO challenged Cubic's assertion of restricted rights for the CDRL items in the 2003 contract. The CO's letter stated that Defense Federal Acquisition Regulation Supplement 252.227-7037, Validation of Restrictive Markings on Technical Data, required Cubic to provide records justifying its assertions. The CO said that if Cubic failed to provide that documentation, the CO would issue a final decision on the validity of the asserted restrictions.

Cubic responded by stating that it was providing information supporting Cubic's claim of limited rights for the 2012 contract. The CO advised Cubic that this letter was "nonresponsive" because the Navy's data rights challenge addressed Cubic's data rights for the 2003 contract.

Despite the CO's explanation, Cubic submitted another letter addressing data rights under the 2012 contract. The CO also viewed this letter as nonresponsive and said that if Cubic did not submit the required documentation by Nov. 20, 2012, the CO would issue a decision on the validity of the data rights restrictions for the 2003 contract.

Cubic responded that the Navy's challenge to Cubic's restricted markings on any technical data delivered before the 2008 settlement agreement was barred by its general release.

The CO then issued a final decision finding that Cubic had not provided documentation justifying the restricted data rights and that the Department of Defense had unlimited rights in the data. Cubic appealed that decision to the ASBCA.

### **Statutory and Regulatory Procedure—**

A statutory and regulatory framework provides contractors with due process before a CO removes legends restricting use of data furnished by the contractor. 10 USCA § 2321; 41 USCA § 253d.

Under this framework, contracts for supplies or services must identify in advance of delivery, to the maximum extent practicable, technical data delivered with restrictions on the Government's right to use the data. 10 USCA § 2320(b)(5). A contractor lists on a CDRL all noncommercial technical data and computer software that the contractor intends to deliver with limited rights. The CDRL listing also includes the asserted rights category for each data item and the basis for the assertions. DFARS 252.227-7013(e)(2), (3); 252.227-7014(e)(2), (3); 252.227-7017(b), (d).

The CDRL is part of the contract. DFARS 227.7103-10(a)(3); 227.7203-10(a)(3); 252.227-7013(e)(2); 252.227-7014(e)(2); 252.227-7017(f). The contractor must mark noncommercial technical data or software it delivers with an authorized marking according to its CDRL assertions. DFARS 227.7103-10(b)(1), 227.7203-10(b)(1). The contractor must keep records justifying its CDRL assertions and markings. 10 USCA § 2321(b); DFARS 252.227-7037(c).

Assertions in a CDRL do not bind the Government. They are the contractor's unilateral claim regarding allocation of rights for noncommercial technical data or software. DFARS 227.7103-10(a)(4); 227.7203-10(a)(4); 227.7103-13(a); 227.7203-13(a); 252.227-7013(e)(4); 252.227-7014(e)(4). DOD can challenge the assertions even after final contract payment. 10 USCA § 2321(c)(2)(A), (d); DFARS 227.7103-10(a)(4); 227.7103-13(a), (d)(4), (8); 227.7203-10(a)(4); 227.7203-6(f); 227.7203-13(a), (d)(2), (e)(2); 252.227-7013(e)(4); 252.227-7014(e)(4).

Under this framework, a CO may ask a contractor to explain the basis for its asserted restrictions. If the CO is not satisfied with the contractor's explanation, the CO may request more information. If the CO then determines that (1) reasonable grounds exist to question the contractor's rights assertion and (2) adherence to the asserted restriction could make it impracticable to competitively procure the item, the CO may issue a written challenge to the rights assertion. 10 USCA § 2321(b)(2)(A); DFARS 227.7103-13(c)(1), (d)(2), (4); 252.227-7037(d)(1), (2), (e); 252.227-7019(d)(1), (2), (3).

The CO's statement must specify the grounds for questioning the use restriction and give the contractor 60 days to produce records justifying the restrictive markings. 10 USCA § 2321(b), (d)(3); DFARS 227.7103-11(b), (d)(4); 252.227-7037(c), (e)(1); 252.227-7019(b). A contractor's production of records seeking to justify the validity of the restrictive markings is a contractor claim under the CDA. DFARS 252.227-7037(e)(iv)(3); 10 USCA § 2321(b), (h).

The CO will then issue a final decision on the contractor's claim. 10 USCA § 2321(g)(2); DFARS 252.227-7037(g). The contractor can seek review of the CO's decision at the ASBCA or the U.S. Court of Federal Claims. DFARS 252.227-7019(g)(i), (ii); 252.227-7037(g)(2)(iii), (iv); see 10 USCA § 2321(h). The contractor has the burden of proof on appeal. 10 USCA § 2321(b); DFARS 252.227-7019(b), (f)(iii); 252.227-7037(b)(2)(ii), (c), (e)(ii), (g)(i).

**Release**—At the ASBCA, Cubic argued that the settlement agreement released the Navy's right to challenge Cubic's data rights restriction under the 2003 contract.

"A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another." *Colo. River Materials, Inc.*, ASBCA 57751, 13 BCA ¶ 35,233. As with any question of contract interpretation, the first step is to examine the contract language. *Bell BCI Co. v. U.S.*, 570 F.3d 1337 (Fed. Cir. 2009); 51 GC ¶ 243.

Here, the settlement agreement provided in part that the parties released "all matters and/or claims and potential matters and/or claims (whether known or unknown) arising out of, or incidental to, or relating to the [2003] Contract." Cubic argued that the release was a general release resolving all matters in any way related to or connected with the 2003 contract.

The ASBCA said that the general language cited showed intent to resolve every matter arising under or by virtue of the contract. See, e.g., *Augustine Med. Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367 (Fed. Cir. 1999). A "general release precludes a party to the contractual armistice from renewing or initiating further combat." *H.L.C. & Assocs. Constr. Co. v. U.S.*, 367 F.2d 586 (Ct. Cl. 1966).

The ASBCA noted, however, that the release also stated that "[n]otwithstanding anything to the contrary, this release does not extend to any claims related to the Contract that may arise in the future." That language qualified the release.

Thus, pursuant to its plain terms, the release does not cover contract claims arising in the future, the ASBCA said.

The ASBCA rejected Cubic's argument that the claim at issue was barred because it predated the settlement agreement. Cubic argued that the Navy knew or should have known of its basis for challenging Cubic's limited rights data in light of Cubic's 2002 CDRL table asserting limited rights based on mixed funding of development.

According to Cubic, because the basis of the rights asserted in its CDRL table "is inconsistent—on its face—with the standard allocation of rights established by DFARS 252.227-7103," the Navy had all the information necessary to assert its claim in 2002.

The ASBCA said that Cubic founded "its arguments upon a false premise." Cubic's appeal did not involve a Government claim. Instead, the appeal constituted a validation claim by Cubic under the statutory and regulatory framework that allows a contractor to validate its CDRL assertions of restrictions on its technical data and software. See 10 USCA § 2321; DFARS 252.227-7037. In requiring a contractor to furnish written justification for a data rights restriction and specifying that the contractor's submittal is a CDA claim, Congress assigned to the contractor the burden of proof for validating a restriction and established that the validation of data rights restrictions is a contractor claim under the CDA. Thus, the issue here is not whether a Navy claim is barred by the release. Instead, the issue is whether (a) Cubic's claim asserting the validity of the restrictions is valid and (b) the release bars Cubic's appeal of the CO's decision.

The ASBCA said that asking it to hold that the action regarding validation of Cubic's restrictions arose in 2002 "essentially asks [the ASBCA] to ignore the very specific, detailed statutory and regulatory framework" for resolving validation of use or release restrictions. By statute, a contractor's response to a CO's challenge justifying the validity of its restrictive markings is a contractor claim under the CDA. A contractor cannot submit its response until a CO issues a written validation challenge to the contractor. And the CO cannot issue a challenge until the CO determines that (1) reasonable grounds exist to question the contractor's rights assertions and (2) the contractor's asserted



restrictions may make it impracticable for the Government to competitively procure the item.

The ASBCA acknowledged that the FAR defines “accrual” of a claim as “the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.” FAR 33.201. But binding precedent “elaborates that whether and when a CDA claim accrued is determined in accordance with the FAR, the conditions of the contract, and the facts of the particular case.” “Fixing the date of accrual of a claim requires first that there is a ‘claim,’” the ASBCA said, quoting *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016); 58 GC ¶ 194. A claim does not arise for the purposes of a limitations period if “mandatory pre-claim procedures have not been completed.” *Id.*

Here, mandatory pre-claim procedures did not occur until 2012. Accordingly, the claim regarding validation of Cubic’s restrictions comes within the exception to that release for claims arising in the future, the ASBCA said.

The ASBCA rejected Cubic’s argument that the ASBCA’s interpretation conflicted with the CDA. The CDA does not define claim or claim accrual. The definitions of those terms in FAR 33.201, 52.233-1 do not apply to DOD data rights issues. 10 USCA § 2320(a)(1), (b)(3), (7).

The ASBCA said that its interpretation reads the CDA and 10 USCA § 2321 together without conflict. In contrast, Cubic’s interpretation conflicts with 10 USCA § 2321, which authorizes a CO to challenge data rights restrictions within six years of final contract payment. This authorization is inconsistent with Cubic’s argument that validation claims accrue or arise when a contractor’s CDRL or data list becomes part of the contract. Under this interpretation, the CDA’s six-year statute of limitations would bar “many if not most” validation challenges long before the period for bringing such challenges expired.

Finally, the ASBCA rejected Cubic’s argument that a CO’s validation challenge is a Government claim. The CO’s challenge is simply an administrative proceeding by a CO to obtain documentation from a contractor justifying its asserted restrictions. After receipt of the documentation, a CO may agree with the contractor’s asserted restrictions, the ASBCA said in denying Cubic’s motion for summary judgment.

♦ **Note**—In *FN Mfg., Inc. v. U.S.*, 42 Fed. Cl. 87 (1998); 40 GC ¶ 556, a protest challenged a sole-source award to an arms manufacturer. The protester contended that the Government improperly relinquished data rights in a settlement agreement granting the Government a non-exclusive, non-transferable limited rights license that barred the Government’s use of a technical data package in competitive procurements from the date of the 1997 settlement until 2011. The settlement resolved a dispute related to the Government’s improper release of the arms manufacturer’s technical data, which was developed wholly or partially at private expense.

The COFC held that 10 USCA § 2320 did not prevent the Government from relinquishing rights in technical data without retaining the right to competitively procure items dependent on that data. Relinquishing data rights could, however, violate the Competition in Contracting Act if the settlement on the technical data rights at issue adopted a position not realistically within the potential outcomes from the threatened breach of contract action or the arms manufacturer’s separate claim of ownership of the weapon at issue.

## ¶ 190

### Agency Improperly Directed Out-Of-Scope Work In Lieu Of Competition, Comp. Gen. Says

*Alliant Solutions, LLC, Comp. Gen. Dec. B-415994, et al., 2018 CPD ¶ 173*

An agency improperly directed a contractor to perform work outside of the underlying task order’s scope, the U.S. Comptroller General recently determined.

The General Services Administration, for the benefit of the Navy under GSA’s Alliant Governmentwide Acquisition Contract (GWAC), issued a technical direction letter (TDL) to Smartronix Inc. to obtain support for the Navy’s Rapid Response Project Office (RRPO) under the Rapid Response Technical Services (RRTS) task order. The RRTS task order includes prototype design and development; process and procedure development, advanced concept design, system integration design, and advanced concepts technologies design. The

RRTS task order includes limitations on TDLs—specifically that TDLs “shall not be used to assign new work [or] require new ... deliverables that may cause the contractor to incur additional costs.”

To further the Navy’s efforts to shift its information technology infrastructure to the cloud, GSA issued a TDL on Dec. 15, 2017, to Smartronix seeking “assistance in establishing operations in a Commercial Cloud [Computing] facility.” The TDL included a nine-month period of performance with a three-month option period and a total estimated value of \$19.2 million.

Smartronix contacted Sabre Systems Inc. on December 22 about working on the TDL as a subcontractor. Sabre and six other firms formed a joint venture, Alliant Solutions LLC, which is also an Alliant GWAC holder. On Jan. 5, 2018, Sabre wrote to the GSA Alliant GWAC contracting officer to address concerns that GSA improperly placed Sabre’s subcontracted data center work on Smartronix’s RRTS task order, and that the data center work should have been competed among Alliant contract holders.

The GSA CO recommended that Sabre consult with the prime contractor, intentionally avoiding the questions regarding the TDL’s scope. The CO “did not think it was appropriate to share information related to [the task order] and TDL that [Sabre has] no relationship with.” On January 30, Sabre received a statement of work from Smartronix as a potential subcontractor on the TDL work. Alliant protested to the Government Accountability Office on February 2.

**Timeliness**—GSA argued that the protest was untimely, asserting that Alliant filed the protest more than 10 days after it knew or should have known the basis. See 4 CFR § 21.2(a)(2). When it is unclear when a protester learned of the protest’s basis, the Comp. Gen. resolves timeliness down in the protester’s favor. *Fort Wainwright Devs.; Fairbanks Assocs.*, Comp. Gen. Dec. B-221374.4, et al., 86-1 CPD ¶ 573.

Alliant maintained that it based its February 2 protest on the January 30 RFP transmitted to Sabre—within the 10-day timeframe. Alliant asserted that it first learned that Navy planned to obtain commercial cloud computing services when Sabre received the subcontract RFP and shared it with Alliant. Though the protester suspected that GSA issued the TDL to Smartronix, the TDL was unavailable to Alliant. The first time GSA provided

the TDL to Alliant was when the agency attached the letter to the request to dismiss the protest.

Further, the Comp. Gen. noted that GSA neither published the TDL nor provided it to other Alliant GWAC holders, and thus nothing in the record suggested how Alliant should have known about the TDL’s substance—and GSA provided no evidence that the protester knew in advance.

GSA argued that knowledge of the TDL should be imputed to Alliant by virtue of the Alliant joint venture, but the Comp. Gen. found this argument unpersuasive because Alliant is a separate legal entity, with members in competition with Sabre.

Without providing facts that Sabre or Alliant knew of the TDL work scope before January 30, GSA did not establish that Alliant should have known of the TDL scope through Sabre on an earlier date. Therefore, the Comp. Gen. found the protest to be timely.

**Scope**—Alliant argued that the TDL work was outside the scope of Smartronix’s RRTS task order because the original task order expressly contemplated RRPO support of intelligence, surveillance, and reconnaissance (ISR) and irregular warfare, while the TDL sought general services related to cloud computing migration and operation provided to a broader client base.

GSA asserted that the TDL scope was “entirely consistent” with the RRTS task order, noting several references to the cloud, such as § C.5.3(b), which instructed the contractor to provide “support to [ISR] and Big Cloud system technology insertion initiatives, including transfer and transition of existing and emerging technologies.” But the Comp. Gen. noted that § C.5.3 as a whole was for research and analysis support, and thus subsection (b) envisioned cloud support for the RRTS task order as part of research and analysis support, not enterprise-wide cloud migration and operations, as contemplated by the TDL.

The Comp. Gen. also noted that the TDL did not refer to the RRPO, nor did the work scope refer to ISR—the primary focus of the RRTS task order. Further, though the RRTS task order prohibits using TDLs to assign new work, the TDL purported to do just that, despite GSA’s assertions to the contrary.

Finding the TDL work scope to be broader than the RRTS task order, the Comp. Gen. determined the TDL work represented a material departure from the RRTS task order and sustained the protest.

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