

# The Government Contracts Attorney

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## THE CHAIR'S CORNER

Dear FBA Section Members and Friends,

We extend our congratulations to Stacey Dey-Foy, the staff, and contributing writers of our new quarterly section newsletter. This newsletter features an article of particular interest to small businesses, one on the timely issue of cloud computing, and another on Logistics Civil Augmentation Program contracts.

The GC section is continuing its educational programming for the 2010-11 program year under the watchful eye of new section chair. This fall we held a luncheon program at Troutman Sanders on government contracts compliance systems and how to respond to a government investigation. The section will host another program on The Procurement Integrity Act, and will two host two programs on electronic discovery in December. Our section also is supporting the FBA Northern Alabama Chapter's Procurement Symposium in December 1-2 in Huntsville. The October issue of the Federal Lawyer is dedicated to government contracts and contains many topical articles submitted by section members.

We are currently looking for programming suggestions for the spring season. To stay informed on section activities, please join the FBA DC Government Contracts group on LinkedIn.

Matt McGrath  
McGrath Law Group  
Washington, D.C.  
*Immediate Past Chair*



**Federal service has provided Kevin Love the opportunity to experience a varied and rich series of opportunities, and the ability to participate in ice hockey at almost every stop.**

Mr. Love's legal career began in a non-legal position; when he was assigned as an instructor to the Army Logistics Management College (ALMC), Ft. Lee Virginia, to learn and then teach defense acquisition and legal subjects in entry level courses. The students, and the instructor in some cases, learned about the life cycle of a contract, from the award, to the administration, to the termination of contracts.

In 1991 he answered an ad for an acquisition attorney position at the Idaho National Engineering Laboratory (INEL) and began a legal career at this research and engineering laboratory. The INEL procurement shop had received poor audit scores, and his skills as an instructor were put to work conducting weekly procurement seminars designed to broaden the contract specialists understanding of contracts, and pass the next audit. He also reviewed all laboratory "Management and Operating" ("M&O) contract task orders and modifications, and resolved contract disputes that arose. As in any organization personnel disputes were inevitable, and another legal discipline was begun- he took on all employee relations law and ethics responsibilities. An ice hockey passion was also rekindled in the older Mr. Love, and sparked in his young son. The legal disciplines- acquisition, personnel law, and ethics were carried forward to the next series of stops across the country, as was the passion for ice hockey.

The next stop was in the Tidewater, at Langley Research Center (LaRC) from 1996-2005. LaRC is a NASA research lab, and it offered a rich variety of legal experiences. He was involved in the award and administration of unique contracts, financial assistance instruments (grants and cooperative agreements), and NASA's "other transactional authority" known as "Space Act Agreements" ("SAA's"). One award combined a contract and a grant, for the creation of the National Institute of Aerospace (NIA). The LaRC Chief Counsel grew a successful team that always adhered to a preventive law philosophy, working hard to resolve issues at the earliest possible stage, and avoid costly litigation. In addition, Mr. Love and son actively pursued their hockey interests, where Mr. Love learned to coach.

A unique opportunity presented itself in early 2006, when the NASA General Counsel asked for a "volunteer" to start-up the NASA Shared Services Center's counsel's office. NASA, using a competitively awarded A-76 process (CSC won the competition) had consolidated redundant administrative and business units from its 10 Centers into one function, a newly formed organization located as a tenant of the Stennis Space center, Mississippi. Mr. Love started up the legal office and was the only "Counsel to the Executive Director" from 2006-2008. He was the NSSC's attorney on all contract administration, real property, personnel, performance work statement, and ethics issues. One of the unique innovations of the NSSC civil service and contractor team, from an ethics counsel perspective, was the creation and implementation of NASA's electronic financial disclosure filing process.

In 2008 an opportunity to work at NASA's largest center- Johnson Space Center- arose, and he persuaded the family to move one more time. This move was in no way triggered by the lack of an ice rink in Mississippi. He was quickly immersed in complex awards, which included the "Commercial Resupply Contract" ("CRS", for pressurized and unpressurized cargo to/from the International Space Station (ISS), a \$40 million dollar portfolio of SAA awards for distinct efforts to enable Commercial Crew and Development ("CCDEV") using "Recovery Act" ("ARRA") funds, and most recently the re-compete of the White Sands Test Facilities (WSTF) operations support/ test and evaluation contract. And, there was an ice rink not too far from home for father and son to pursue their skating passions.

Federal service is rewarding if one is willing to move in search of the enriching legal opportunities. Where will the next opportunity arise? Check for an ice rink close by.

**The Government Contracts Attorney is looking for  
Federal Government lawyers and contracting professionals  
whose contributions to the government contracts field warrant recognition.**

**To be considered or to nominate a colleague, please send an email to  
[stacey.dey-foy@nasa.gov](mailto:stacey.dey-foy@nasa.gov) or  
contact us at [awoolley@fedbar.org](mailto:awoolley@fedbar.org) or 571-481-9100.**

## BIG NEWS FOR SMALL BUSINESSES<sup>1</sup>

*By Amy Siadak<sup>2</sup>*

Recently, small businesses have taken center stage in government contracting. With the Small Business Jobs Act, the Small Business Administration's (SBA) new rule on the Women-Owned Small Business (WOSB) Federal Contract Program, and a report from the Interagency Task Force on Federal Contracting Opportunities for Small Businesses, big changes are in the works for small business contracting programs.

### **Small Business Jobs Act**

On September 27<sup>th</sup>, President Obama signed the Small Business Jobs Act ("the Act") into law.<sup>3</sup> While the Act's stated purpose is to address small business loans and tax provisions<sup>4</sup>, the Act also has a significant impact on small business contracting.<sup>5</sup> Notably, the Act dealt with the hotly debated small business parity issue.<sup>6</sup> In replacing the word "shall" with the word "may" in the 1953 Small Business Act's Historically Underutilized Business Zone (HUBZone) statute to match the wording used for 8(a) and service-disabled veteran-owned

<sup>1</sup> THE CONTENT OF THIS ARTICLE REPRESENTS THE OPINION OF THE AUTHOR AND DO NOT REPRESENT THOSE OF THE FEDERAL BAR ASSOCIATION, THE FBA GOVERNMENT CONTRACTS SECTION MEMBERSHIP OR BOARD MEMBERS.

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<sup>3</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at § 1347.

small businesses, the Small Business Act eliminated the preference for HUBZone concerns over other small businesses.<sup>7</sup>

The Act also includes provisions to reduce contract bundling and mitigate the negative effects of bundling on small businesses. By creating a Small Business Teaming Pilot Program designed to assist with teaming and joint ventures<sup>8</sup>, and requiring agencies to solicit bids from these teaming and joint ventures,<sup>9</sup> the Act attempts to create opportunities for small businesses to compete for larger procurement contracts.<sup>10</sup> The Act also makes it more difficult for agencies to bundle contract requirements by mandating a written determination that the consolidation of requirements is necessary and justified prior to solicitation.<sup>11</sup> In the same vein, the Act requires agencies to publish a list and rationale for any bundled contracts on their agency website.<sup>12</sup>

Additionally, the Small Business Jobs Act takes steps to ensure small business awards are actually going to properly certified small business concerns. Section 1341 declares that submitting a bid for a small business set-aside or registering on a Federal electronic database as a small business concern for the consideration of award “shall be deemed affirmative, willful, and intentional certifications of small business size and status.”<sup>13</sup> Section 1343 then goes on to require a government-wide policy on the prosecution of small business size and status fraud. Together, these sections seem to indicate an intention to crack down on invalid self-certifications. While, the Act also requires the promulgation of regulations to “provide adequate protections to individuals and business concerns from liability under this subsection in cases of unintentional errors, technical malfunctions, and other similar situations,<sup>14</sup>” these sections may be a cause of concern for contractors.

The Act also addresses, among other things, compliance with small business subcontracting plans<sup>15</sup>, small business set-asides under multiple award contracts<sup>16</sup>, participation of small business concerns in micro-purchases<sup>17</sup>, payment of subcontractors<sup>18</sup>, mentor-protégé programs<sup>19</sup>, and grants for small business development centers.<sup>20</sup> It will be interesting to see the impact the Small Business Jobs Act of 2010 has on small business concerns as the Act’s provisions are carried out.

### **SBA’s Rule on the Women-Owned Small Business Federal Contract Program**

The SBA published their final rule on the Women-Owned Small Business (WOSB) Federal Contract Program in the Federal Register October 7th.<sup>21</sup> The rule, which will come into effect on February 4, 2011<sup>22</sup>, is designed to ensure WOSB’s an “equal opportunity to participate in Federal contracting.”<sup>23</sup> The act allows contracting

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § 1314.

<sup>9</sup> *Id.* at § 1312.

<sup>10</sup> *Id.* at § 1314.

<sup>11</sup> *Id.* at § 1313.

<sup>12</sup> *Id.* at § 1312.

<sup>13</sup> *Id.* at § 1341.

<sup>14</sup> *Id.* at § 1343.

<sup>15</sup> *Id.* at § 1322.

<sup>16</sup> *Id.* at § 1331.

<sup>17</sup> *Id.* at § 1332.

<sup>18</sup> *Id.* at § 1334.

<sup>19</sup> *Id.* at § 1345.

<sup>20</sup> *Id.* at § 1402.

<sup>21</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 194, 62258 (Oct. 7, 2010).

<sup>22</sup> *Id.* at 62258.

<sup>23</sup> *Id.* at 62282.

officers to restrict competition to WOSB's for certain contracts in industries where WOSB's are underrepresented.<sup>24</sup> In order to qualify as a WOSB, a concern must be a small business and be at least 51% owned and controlled by one or more women who are United States citizens.<sup>25</sup> WOSB's which are also economically disadvantaged, meaning their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities compared to others in the same or similar line of business,"<sup>26</sup> can be certified as Economically Disadvantaged WOSB's (EDWOSB's).<sup>27</sup> In order to receive Online Representations and Certifications Application (ORCA) certification, a WOSB must either receive third party certification or provide specific documents to the WOSB Program Repository.<sup>28</sup> Ten years after the enactment of the Small Business Reenactment Act of 2000, which authorized contracting officers to restrict competition to qualified WOSB's<sup>29</sup>, the program is finally going to be implemented.

### **Interagency Task Force on Federal Contracting Opportunities for Small Businesses Report**

In April, Barack Obama issued the Presidential Memorandum on the Interagency Task Force on Federal Contracting Opportunities for Small Businesses ("the Task Force") to help small businesses participate in the economic recovery through competition for federal contracts.<sup>30</sup> This September the Task Force, including representatives from over a dozen federal agencies, issued a report with recommendations for improvements.<sup>31</sup> The Task Force identified three priorities: "stronger rules," "a better equipped, more informed and more accountable acquisition workforce," and "improved outreach and better use of technology and data."<sup>32</sup> The report includes 13 recommendations for the implementation of these goals and suggests actions which can be taken in connection with each recommendation.<sup>33</sup> The Task Force must report to the President by December 30, 2010 with the progress on implementing the recommendations of this report.<sup>34</sup> For more information, the report can be accessed online at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/contracting\\_task\\_force\\_report.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/contracting_task_force_report.pdf).

While this article focused on three news items which are likely to bring about very big changes for small business contractors, they are only a sample of the things happening right now which have an effect on small businesses. For example, this month Senator McCaskill announced plans to introduce a reform bill to put Alaska Native Corporations on a more equal footing with other small disadvantaged businesses in the Small Business Administration's (SBA's) 8(a) Business Development Program<sup>35</sup>, one of the largest government contractors was suspended from receiving new work for allegedly inappropriately accessing contracts set

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 62283.

<sup>26</sup> *Id.* at 62284.

<sup>27</sup> *Id.* at 62283.

<sup>28</sup> *Id.* at 62285.

<sup>29</sup> *Id.* at 62258.

<sup>30</sup> Barack Obama, Presidential Memorandum on the Interagency Task Force on Federal Contracting Opportunities for Small Businesses (April 26, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-interagency-task-force-federal-contracting-opportunities-sm>.

<sup>31</sup> Interagency Task Force of Federal Contracting Opportunities for Small Business, Report, 4 (Sept. 3, 2010) [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/contracting\\_task\\_force\\_report.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/contracting_task_force_report.pdf).

<sup>32</sup> *Id.* at 2.

<sup>33</sup> See generally, *id.*

<sup>34</sup> *Id.* at 2.

<sup>35</sup> Robert Brodsky, *Proposal Would End Alaska Native Contracting Advantages*, October 8, 2010, [http://www.govexec.com/story\\_page.cfm?articleid=46297&dcn=e\\_gvet](http://www.govexec.com/story_page.cfm?articleid=46297&dcn=e_gvet).

aside for small companies,<sup>36</sup> and in September the SBA, Office of Advocacy released a report on the impact of regulatory costs on small firms.<sup>37</sup> As small business concerns have gained much of their attention as a result of their importance to the economy, it will be interesting to see what effect these changes have on the recovery and to what extent small business concerns are prioritized in the future.

## WILL CONTRACTING OFFICERS SOON HAVE THEIR HEADS IN THE CLOUD? A BRIEF LOOK AT THE IMMINENT CLOUD-COMPUTING STORM FRONT<sup>38</sup>

By Benjamin J. Balter<sup>39</sup>

As one Hewlett Packard Chief executive recently put it, cloud computing “is the next generation of the internet.<sup>40</sup>” Whether you realize it or not, if you use services like Facebook or Gmail, your personal data already lives in “the cloud,” and the same transformative power that connects long-lost classmates at the click of a mouse can be harnessed by federal agencies to approach modern governance in incredibly powerful ways.

### What is Cloud Computing?

Traditionally, when one thinks of computing power, he or she thinks of an on-site datacenter -- a room filled with blinking lights and whirling fans -- hardware, software, and data storage all within feet of the users they serve<sup>41</sup>. The traditional approach to computing generally entails complicated and expensive upgrade procedures scheduled on a semi-regular basis, as well as accommodating the increasing demand for backup and recovery redundancy necessary to reduce downtime should these system fails<sup>42</sup>. Such datacenters are often managed by their own departments, staffed with the specialized, technical administrators needed to maintain and ensure the day-to-day operation of these increasingly complex and increasingly mission-critical business resources<sup>43</sup>.

Seen as a virtually unlimited hardware and communications infrastructure managed by a third party-provider, cloud computing, on the other hand, allows for rapid increases in capacity without the need to invest in additional hardware, personnel, or software licensing<sup>44</sup>. “As a customer, you don't know where the resources are, and for the most part, you don't care. What's really important is the capability to access your application

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<sup>36</sup> Robert O'Harrow, Jr., *Alaska-Connected GTSI Cut Off From Federal Contracts*, The Washington Post, October 2, 2010, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100107288\\_2.html?referrer=emailarticle](http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100107288_2.html?referrer=emailarticle).

<sup>37</sup> Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, September 2010, <http://www.sba.gov/advo/research/rs371tot.pdf>.

<sup>38</sup> **THE CONTENT OF THIS ARTICLE REPRESENTS THE OPINION OF THE AUTHOR AND DO NOT REPRESENT THOSE OF THE FEDERAL BAR ASSOCIATION, THE FBA GOVERNMENT CONTRACTS SECTION MEMBERSHIP OR BOARD MEMBERS.**

<sup>39</sup> Benjamin J. Balter is a J.D./M.B.A. candidate at the George Washington University and an intern with the New Media Team in the Federal Communications Commission's Office of the Managing Director.

<sup>40</sup> Stephen Lawson, *Cloud is Internet's Next Generation*, HP Executive Says, InfoWorld, June 25, 2009, <http://www.infoworld.com/d/cloud-computing/cloud-internets-next-generation-hp-executive-says-120> (quoting HP CTO Russ Daniels).

<sup>41</sup> See *Generally* Jack Newton, *Putting Your Practice in the Cloud A Pre-Flight Checklist*, 73 Tex. B.J. 632 (2010).

<sup>42</sup> See Mark H. Wittow, Daniel J. Buller, *Cloud Computing: Emerging Legal Issues for Access to Data, Anywhere, Anytime*, 14 J. Internet L. 1 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> Wittow, 14 J. Internet L. 1 (2010).

anywhere, move it freely and easily, and inexpensively add resources.<sup>45</sup> In simplest terms, the cloud uses an off-site service to store, transmit, and process information, and employs the Internet as the means to access that service<sup>46</sup>.

## How Cloud Computing Came About

Several innovations fueled the shift toward computing in the cloud. First, the rise and adoption of both broadband Internet access, which allowed for reduced load times, and a programming technique known as AJAX, which allowed Web sites to look and feel more like desktop programs through a constant push-and-pull of information, combined to usher in a greater reliance on remote applications<sup>47</sup>. At the same time the growth of enterprise data centers, and the public's increasing comfort with Web 2.0 services like GMail and Facebook provided a technical and social infrastructure to support such a push<sup>48</sup>.

The biggest breakthrough, however, the core and true power behind cloud computing, came from the consolidation of physical servers through system virtualization. Through virtualization, one physical server can become the host to many virtual servers<sup>49</sup>. Because the resources are dynamically allocated across physical servers as the virtual servers require them, the physical resources are used more efficiently<sup>50</sup>. If server *A*, say an e-mail server like one may see in most corporate or government offices sees a sudden spike in activity, rather than slowing, it can borrow resources from server *B*, a Web site hosted on the same physical server. The user, unaware that this shift has even occurred, sees the two servers as discrete and unconnected despite their physical location.

The biggest implication however, is that computing resources can be provisioned and released on demand and as needed<sup>51</sup>. If agency *X* is a government agency that requires a great deal of information to be processed at the close of the stock market each day, it can pay for five servers up until 3:59 each day, be charged solely for the increased processing power and storage it requires from 4:00 to 4:05, and can return to five server for the remainder of the day. Under a traditional approach, all 100 servers, for example, it required at its peak, would have to be operational 24 hours a day, with the necessary personnel and infrastructure to support it.

## Types of Cloud Computing

Cloud computing exists in several forms today. The most basic, "infrastructure as a service" (IAAS), uses shared facilities, hardware, and networks to hold and move data. Customers, given virtual servers, may then install, configure, and utilize their own software freely<sup>52</sup>. As indicated above, however, customers do not rent the physical servers (merely their equivalent processing power), and providers may move virtual servers between physical servers as necessary<sup>53</sup>. Amazon's EC2, S3, and CloudFront are prime examples of cloud computing, storage, and delivery respectively.

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<sup>45</sup> J. Nicholas Hoover, Interop: Oracle Predicts Cloud Confusion to Continue, InformationWeek, Sept. 17, 2008, [http://www.informationweek.com/news/services/hosted\\_apps/showArticle.jhtml?articleID=210602225](http://www.informationweek.com/news/services/hosted_apps/showArticle.jhtml?articleID=210602225).

<sup>46</sup> Peter M. Lefkowitz, Contracting in the Cloud: A Primer, Boston B.J., Summer 2010, at 9.

<sup>47</sup> Dennis Kennedy, Working in the Cloud Tips on Success with Online Software Services, ABA J., August 2009, at 31.  
48 *Id.*

<sup>49</sup> Wittow, 14 J. Internet L. 1 (2010).

<sup>50</sup> *Id.*

<sup>51</sup> Peter Mell and Tim Grance, Definition of Cloud Computing, National Institute of Standards and Technology, Information Technology Laboratory, October 7, 2009, <http://csrc.nist.gov/groups/SNS/cloud-computing/cloud-def-v15.doc>.

<sup>52</sup> Lefkowitz, Boston B.J., Summer 2010, at 9.

<sup>53</sup> *Id.*

Second, and slightly more advanced, “platform as a service” (PAAS) allows providers to serve customers with a shared computing platform and software environment. The customer can upload software code in a predetermined programming language (such as Java or PHP) and the provider executes that code and returns the result<sup>54</sup>. Google Apps Engine is a prime example of such an arrangement.

Finally, “software as a service” (SAAS) is most associated with Web-based consumer services such as Facebook or Flickr but can find application in business and government environments as well. The provider hosts software designed to perform a specific function, such as social networking or photo sharing, and the user interacts with that application being run on the provider’s server<sup>55</sup>.

One additional distinction among cloud services can be made. Each of the three approaches listed above can be hosted in either a public cloud, meaning one customer’s virtual servers may be freely intermingled with another customer’s among physical servers, or in a private cloud in which the physical servers, infrastructure, or datacenter may be entirely segregated from those used to provide services to other clients<sup>56</sup>.

### **Implications of Cloud Computing**

Cloud computing has several implications for members of the government contracting community. First, inherent in the nature of cloud computing is the fact that one organization must trust a third party with its data, something which may have far-reaching ethical and legal implications depending on the type of data stored and the parties involved.

More broadly, when contracting for cloud services, organizations have several technical aspects to take into account. From a security standpoint, customers should evaluate data encryption (can others access my data?), physical security (can others access the datacenter?), and provider viability (will the service be around in ten years?). From a data integrity standpoint, those looking to enter the cloud should inquire as to data locality (is my data being hosted outside the United States?), data portability (what happens if I want to leave the service?), and redundancy (what happens if there is a natural disaster near their data center?). Finally, from a legal perspective, customers should evaluate terms of service, privacy policies, and service level (uptime) agreements<sup>57</sup>.

### **How to Get Into the Cloud**

Several avenues exist for organizations looking to experiment with the cloud. For federal agencies, the General Services Administration, through Apps.gov, will soon be rolling out a Federal private cloud. While the specifics have not yet been announced, this service is expected to provide federal agencies with storage, virtual machine, and Web hosting services at a relatively low cost<sup>58</sup>. Some of this service’s potential has already been hinted at by the recent launch of Apps.Gov NOW, a hosted service that provides federal agencies with out-of-the-box blogs (Web site publishing platforms), Wikis (Web sites editable by members of a community), and online bulletin boards (Web sites to facilitate online discussions), all at no cost<sup>59</sup>.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Newton, 73 Tex. B.J. 632.

<sup>58</sup> Cloud IT Services, Apps.Gov, [https://www.apps.gov/cloud/advantage/cloud/category\\_home.do](https://www.apps.gov/cloud/advantage/cloud/category_home.do) (last visited October 5, 2010).

<sup>59</sup> Apps.Gov Now, General Services Administration, <http://citizen.apps.gov/> (last visited October 12, 2015).

Second, many federal Web sites such as the Federal Communications Commission and Recovery.Gov are in the process of seeking or have already sought third-party cloud hosting services like Amazon Web Services (AWS) as mentioned above<sup>60</sup>. Federal agencies opting for such a route must be sure to work closely with the appropriate parties to ensure, federal IT security standards are met, such as FISMA<sup>61</sup> requirements, or that record retention standards are met, for example, where data stored in the cloud constitutes a system of records under the privacy act<sup>62</sup>.

Finally, earlier this summer, Google announced FISMA moderate certification of its Google Apps for Government data centers, providing mail, calendar, document, video, and Web hosting services to Federal agencies in a private cloud hosted entirely within the United States<sup>63</sup>. Agencies wishing to contract their traditional IT infrastructure out to Google can do so for as low as \$50 per user per year, however, such savings may come at a cost. Special attention must be paid to the risks associated with trusting a third-party with what may potentially be an agency's most sensitive data.

Whether a federal contracting officer or a provider of IT services, just as the Internet has revolutionized countless aspects of every day life, it is clear that so too will the emerging cloud computing front forever shape the contours of Federal IT procurement in the years to come.

## FEDERAL UPDATES

BY STAN HINTON<sup>64</sup>

The SBA has announced the availability of a [compliance guide](#) for the Women-Owned Small Business (WOSB) Program, which sets forth in plain language the requirements for participation in the WOSB program and is intended to help small businesses understand the regulation and how it affects them. The guide is available [here](#).

[FTR Case 2010-303](#): This interim rule, effective March 3, 2011, amends the FTR by (i) adding terms and definitions for "Dependent," "Domestic partner," and "Domestic partnership," and (ii) revising the definition of "Immediate family" to include "Domestic partner" and children, dependent parents, and dependent brothers and sisters of the Domestic partner as named members of the employee's household, and (iii) adding references to domestic partners and committed relationships, where applicable, in the FTR. Comments are due by December 20.

[DFARS Case 2010-D016](#) (Continuation of Contracts--Deletion of Redundant Text): This final rule eliminates the now redundant text of DFARS 209.405-1, which limits the placement of orders against contracts with

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<sup>60</sup> Cloud Services, Federal Business Opportunities, [https://www.fbo.gov/index?s=opportunity&mode=form&id=d63c725d5a3006919289698350e3d4b3&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=d63c725d5a3006919289698350e3d4b3&tab=core&_cview=1) (last visited October 5, 2010); J. Nicholas Hoover, Recover.Gov Moved to Amazon Cloud, Information Week, May 12, 2010, <http://www.informationweek.com/news/government/cloud-saas/showArticle.jhtml?articleID=224701861>.

<sup>61</sup> Federal Information Security Management Act of 2002.

<sup>62</sup> 5 U.S.C.A. § 552a (West).

<sup>63</sup> Google Apps for Government, Official Google Enterprise Blog, July 26, 2010, <http://googleenterprise.blogspot.com/2010/07/google-apps-for-government.html>.

<sup>64</sup> Mr. Hinton is an attorney in Frisco, Texas. His practice limited to federal government contracts. These summaries are also available at <http://stanhinton.com/>.

contractors that have been debarred, suspended, or proposed for debarment, because, on December 11, 2003, the final rule published under FAR Case 2002-010 (68 FR 69250) incorporated these restrictions into the FAR.

[DFARS Case 2009-D017](#) (Continuation of Essential Contractor Services): This final rule, adopts, with changes the interim rule amending the DFARS to add policy and a contract clause (DFARS 252.237-7023) requiring that contractors providing essential contractor services, as determined by the requiring activity, shall be prepared to continue such services during periods of crisis.

Item VII ([FAR Case 2009-039](#)), entitled "Buy American Exemption for Commercial Information Technology--Construction Material," is an interim rule amending the FAR to implement section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117), which authorizes an exemption from the Buy American Act for the acquisition of information technology that is a commercial item. Comments are due by November 29.

[FAR Case 2009-043](#) ("Time-and-Materials (T&M) and Labor-Hour (LH) Contracts for Commercial Items"): This proposed rule would amend the FAR to implement recommendations of [GAO Report 09-579](#) ("Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program") Comments are due by November 26.

## RECENT DECISIONS

BY STAN HINTON<sup>65</sup>

[EREH Phase I](#) won its post-award protest at the Court of Federal Claims because the GSA's finding that the property offered by awardee did not lie within a flood plain was arbitrary and capricious (and just plain wrong); but the court also held that the equities did not favor an injunction; so the protester was limited to recovering its bid preparation costs. In the court's heavily-redacted decision in [Pyramid Real Estate Services](#), the protester failed to timely protest solicitation terms and alleged ambiguities in the solicitation and lost its protest against various conclusions by the evaluators (because the court would not substitute its judgment for those of the evaluators and because the protester failed to meet the high burden of proof required to establish the evaluators' bias).

[Hostetter, Keach & Cassandra Construction](#) won its GAO protest against the rejection of its bid as nonresponsive where, although there was a discrepancy in names of bidder and bid bond principal, the record showed that they were the same entity and that the principal would be liable on the bonds if the bidder defaulted.

The ASBCA dismissed [Sygnetics'](#) appeal for lack of CDA jurisdiction because the original certification was not signed.

In [AECOM Government Services](#), the Board granted the Government's motion for summary judgment that the contractor was not entitled to recover F.I.C.A. taxes on offshore subsidiaries first imposed by the HEART Act six months after the award of its fixed-price contract, at least based on the contractor's theory of breach of the

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<sup>65</sup> Mr. Hinton is an attorney in Frisco, Texas. His practice limited to federal government contracts. These summaries are also available at <http://stanhinton.com/>.

implied warranty of good faith and fair dealing. The Board noted that the contractor's alternative theory of mutual mistake was not involved in the summary judgment motion.

In [Systems Development Corp.](#), the Board dismissed a claim as barred by the CDA's statute of limitations because it "accrued" more than six years before it was submitted to the Contracting Officer for a decision.

[Angelika Textile Services](#) won its protest at the Court of Federal Claims because the Contracting Officer, in violation of the Veterans Benefits Act and its implementing regulations (the New Guidelines), did not consider whether SDVOSBs or VOSBs were available to meet a requirement prior to placing a firm on the AbilityOne Procurement List so that she could award it a sole source contract, all this despite the fact that the GAO had previously dismissed the protest as frivolous because it did not spot the issue.

Several Court of Federal Claims decisions have been published. In [United Constructors](#), the court denied (i) a Type I Differing Site Conditions claim because the conditions were reasonably foreseeable at time of bidding and (ii) a constructive acceleration claim because contractor's own actions contributed to the delay. In [Environmental Safety Consultants](#), the court (pursuant to Rules 12(b)(1) and 12(b)(6)) dismissed PPA, takings, and punitive damages claims, as well as (i) a claim first submitted when the firm was no longer a contractor with the United States and (ii) a claim barred by the CDA's statute of limitations. [PMTech](#) is noteworthy not so much for its specific holding (denying the plaintiff's challenge to the Government's override of the automatic stay during a bid protest) but rather for its thorough discussion of the legislative history, case law, and standards for deciding whether an override decision is justifiable. [CRAssociates](#) succeeded in convincing the court that there were a number of prejudicial errors in the agency's price, technical, and past performance evaluations that justified an injunction even though the protester lost on several other grounds of its protest (e.g., OCI, flawed responsibility determination, misplaced price information in the technical proposal).

In [Tekkon Engineering Co.](#), the ASBCA held that (i) the contractor did not prove the elements required to establish a prior course of dealing; (ii) the contractor was not entitled to adjustments under the EPA clause, in part because there were no established prices on which to base those adjustments; (iii) the contractor's subjective, unexpressed reading of the contract, which was never communicated to the Contracting Officer, could not form the basis for its interpretation; and (iv) because the Government was not required to place any orders during an option period (and did not do so), the contractor could not recover costs associated with that option period.

The GAO sustained [Total Health Resources'](#) protest that a solicitation requirement for two years' experience by the prime was unduly restrictive because the agency could not establish the requisite experience by a subcontractor or team member would not be sufficient.

The GAO sustained the protest of [Douglas County Fire District #2](#) because the agency unreasonably rated the protester's proposal as "fail" in the "geographic coverage" evaluation factor even though (i) it offered to provide the same geographic coverage as it had successfully provided under the predecessor contract and (ii) its proposal language was similar to the awardee's, which the agency rated as "pass."

The Court of Federal Claims held that [The Marquardt Co.](#) was not entitled to either CDA or PPA interest on the time required for Government to make payments under a global settlement agreement of various underlying contracts because the agreement was not a contract within the meaning of those statutes, because it did not provide for a definite time for payment to be made, and because it provided a different remedy if payment were not made.

In [United Partition Systems](#), after concluding that the contractor was entitled to an EAJA award because the Government's position in the litigation was not "substantially justified," the court noted that the "precise question at hand is whether an expenditure listed as a 'cost' under 28 U.S.C. § 1920 is recoverable as an 'expense' under 28 U.S.C. § 2412(d)(1)(A), particularly in an instance where 'costs' were not awarded to the plaintiff." The court held that it is.

In [International Industrial Park](#), the court held that because a barter agreement for the relocation of an easement in return for an undertaking to pave roads on the easement was not a contract within meaning of the CDA, the plaintiff was not required to file a claim with the Contracting Officer prior to filing suit in court.

In [Shawview Cleaners](#), the ASBCA held that the contractor was not entitled to rely on alleged representations by government employees that the wage determination attached to contract was just a suggestion and not mandatory.

In [Bruce E. Zoeller](#), the ASBCA denied the contractor's motions for sanctions against the Government for failing to produce discovery documents that the Government was unable to locate.

## SECTION EVENTS

### **Current Issues and New Developments in Export Controls**

Speakers:

**John A. Ordway**  
**Berliner Corcoran and Rowe,**

**Matthew J. McGrath**  
**McGrath Law Group**

Thursday, November 18, 2010

Noon-1:30 p.m. EST

This event will take place via teleconference.

Private contractors and attorneys-\$15; Government-\$10; Students-\$7

To register, please contact Ashley Kitchen at [akitchen@fedbar.org](mailto:akitchen@fedbar.org) or Adrienne Woolley at [awoolley@fedbar.org](mailto:awoolley@fedbar.org)

## NEWS FROM THE COMMITTEES

The Federal Bar Association's Government Contracts Section Federal Grants Committee generally meets on the first Thursday of the month for a brown bag lunch to discuss current issues of interest in the grants law community. Sometimes the Committee breaks in summer and right after winter holidays.

In addition, the Committee occasionally invites guest speakers, and for many years has sponsored a panel discussion at the National Grants Management Association annual training conference in the spring.

At the September 2010 meeting, the Federal Grants Committee discussed potential implications of a Federal case involving stem cell research on grant selection processes. At the October 2010 meeting, the Committee discussed a Comptroller General case, B-320329, NeighborWorks America--Availability of Appropriations for Grants to Affordable Housing Centers of America, September 29, 2010. This case related to defining organizational structures of recipients. <http://www.gao.gov/decisions/appro/320329.htm>. In addition, Transparency Act reporting requirements and other current events were discussed.

Meetings are usually held at the offices of Schnader, Harrison, Segal & Lewis, 750 9th Street, NW, Suite 550 Washington, D.C. 20001 (Metro stop is Gallery Place. Metro Center may also be convenient depending on your

starting point) starting at 12 Noon. Bring a brown bag or look for places nearby to pick up lunch. The next two meetings are tentatively planned for November 4, 2010 and December 2, 2010. It is best to join the grantslaw listserv as a notice will be sent confirming that the meeting will be held and announcing any special events.

*To join the listserv, send a request to Edward Sharp via email ([ESharp@doc.gov](mailto:ESharp@doc.gov)),  
or by telephone at (301) 713-2175.*

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