Turning a Battleship:

Design-Build on Federal Construction Projects

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A Brief History of Federal Design-Build Contracting

Federal design-build procurement has undergone a cycle of acceptance, decline, and now rebirth. This article considers the current status of federal design-build contracts and the future of this project delivery method.[1]

A brief summary is necessary to understand the current context of federal design-build construction. By the early 1980s, the federal procurement scheme included legislation encouraging—even mandating—the approval of plans and specifications prior to the commencement of construction. In addition, the rules governing procurement of design services required the utilization of a qualifications-based selection process for designers,[2] while the Federal Acquisition Regulation (FAR) mandated the award of construction contracts to the lowest responsible, responsive bidder. Absent authorization of a comparable selection process for both services, the use of design-build procurement was virtually impossible.[3]

The move toward putting design-build procurement on par with design-bid-build began with the Competition in Contracting Act of 1984 (CICA).[4] However, CICA's application was limited to defense contracts and had no real effect on the construction industry. The first real boost for design-build in construction came at the hands of the General Services Administration, which began to use a design-build, competitive negotiation process to procure small office buildings for government use. In 1991, the GSA published a *Design-Build Request for Proposal Guide*, and other agencies began to follow suit.

In 1996, following two years of collaboration of industry and governmental forces, including the GSA, Corps of Engineers, AIA, AGC, DBIA, and others, Congress passed the Clinger-Cohen Act, which codified a two-step procurement process for design-build projects.[5] Pursuant to this act, an agency head is empowered to decide, based on factors set forth in the act, whether design-build is an appropriate procurement method for a particular project. The factors set forth in the act include the anticipation that three or more offerors will submit proposals, each of which will incur significant expense in preparing its proposals; that some design work must be performed in order to develop a price or cost proposal; and that the contracting officer has considered factors such as the time constraints for project delivery, the suitability of the project for the two-step process, the extent to which the project requirements are defined, and the capability of the agency to manage a two-step procurement process. If this analysis indicates that design-build is appropriate, the act sets forth the two-step process for procurement.[6]

Under the two-step procurement process, the contractor's technical approach and qualifications (including its experience, technical competence, capabilities, and past performance) and other noncost/price factors are considered in the first step, during which the field of competitors is narrowed to no more than five, absent findings warranting a larger number. Then, in step 2, the selected proposers present their technical and pricing submission for evaluation by the agency.[7]

The passage of the Clinger-Cohen Act proved a watershed for public design-build construction, both in the federal arena as well in state and local governments that quickly followed suit. The two-step process allowed the government to eliminate marginal proposers early in the process and assured contractors that they could marshal their resources and pursue only those projects where their odds for success justified the expense incurred in the second step of the process.[8]

On the heels of the Clinger-Cohen Act, the Office of Federal Procurement Policy and the Department of Defense set out to rewrite FAR subpart 15, "Contracting by Negotiation," to streamline the time and resources needed for source selection and to ensure both fair treatment of offerors and the receipt of best value by the government. This effort clarified a previously dense chapter of the FAR and ensured that design-build proposals were evaluated consistently across federal agencies.[9] The mechanics of this selection process are discussed below.

The use of design-build in the public sector has been encouraged in recent years by time-sensitive projects, like those necessitated by natural disasters such as Hurricanes Katrina and Rita; reconstruction operations in war-torn countries like Iraq and Afghanistan; and other, more run-of-the-mill projects where fast-tracking approaches are needed to reduce the time between initial planning and occupancy/use of the improvement. Still, many observers predicted that other recent developments would discourage the use of design-build on federally funded projects. First, when the Obama administration adopted "transparency" as its watchword, many suspected that this would result in a preference for fixed-price procurements where contracts are awarded to the lowest, responsive, responsible bidder based on fully developed plans and specifications. Then, in February 2009 the American Recovery and Reinvestment Act of 2009 (aka the Stimulus Act) was passed.[10] The Stimulus Act's main purposes were to create and maintain jobs, to spur economic activity and invest in long-term growth, and to "foster unprecedented levels of accountability and transparency in government spending."[11] Although the slowness of reporting makes the impact of the Stimulus Act hard to measure on a current basis, many feared that this clearly stated goal of transparency would work against delivery methods like design-build. For example, FAR subpart 5.7, "Publicizing Requirements Under the American Recovery and Reinvestment Act of 2009," requires contracting officers to justify nonfixed-price contracts.[12] Further, where non-fixed-price or noncompetitively awarded contracts, modifications, or orders are utilized for projects funded with Stimulus Act money, FAR 5.705(b) requires the government to

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> publicize the award notice and include in the description the rationale for using other than a fixed-priced and/or competitive approach. These notices and the rationale will be available to the public at the [Government Point of Entry], so do not include any proprietary information or information that would compromise national security.[13]

In addition, the Stimulus Act dedicates a portion of its budget to fund the Recovery Accountability and Transparency Board, which is charged with two goals: providing transparency in relation to the use of Stimulus Act funds and preventing and detecting fraud, waste, and mismanagement. According to testimony from the board chair before the Committee on Homeland Security and Governmental Affairs, as of September 10, 2009, the board had already forwarded more than 100 matters to various inspectors general to ensure the heightened scrutiny of specific procurements that board staff had identified as potentially problematic.[14]

Of course, design-build contracts can be awarded for a fixed price. History tells us that most of them are awarded either on fixed, lump-sum pricing or for guaranteed maximum prices, which are, in a practical sense, fixed price with a possibility of shared savings. Nonetheless, the level of price competition on two-phase design-build contracts is often less than that for design-bid-build projects—even two-phase design-build contracts that are awarded after full and vigorous competition. Indeed, on the scale of transparency, it is hard to deny that contracts let on a purely objective criterion—here, price—are seen as more transparent than contracts awarded after the evaluation based on more subjective factors.

Nonetheless, those who predicted that the Stimulus Act would diminish the use of design-build contracting would seem to be mistaken. At the October 2009 McGraw-Hill Outlook 2010 Executive Conference, both William Guerin, GSA's ARRA National Program Management Office Recovery Executive, and James Dalton, the Chief for Engineering & Construction for the Corps of Engineering & Construction for the Corps of Engineers, stressed that their agencies saw no inconsistency between the use of design-build and the tenets of the Stimulus Act, and that their agencies would continue to utilize design-build for projects where the advantages of single point responsibility and faster "time to market" warranted its use.

The Mechanics of Federal Design-Build Procurement

As mentioned above, federal design-build procurement must be conducted in accordance with FAR subparts 15 and 36. FAR subpart 36, "Construction and Architect-Engineer Contracts," governs the award of both design-build and design-bid-build contracts. The requirements for the selection of design-builders are set forth in subpart 36.3, "Two-Phase Design-Build Selection Procedures."

As the preparation of a design-build proposal is an expensive undertaking, the first of the two phases is primarily aimed at identifying the few best-qualified design-builders to invite to participate in proposal preparation. Thus, before invoking the two-phase approach, the contracting officer must determine that two-phase approach is appropriate; the primary criteria for making this determination are that (1) three or more offers for the procurement are anticipated and (2) design work must be performed by the offerors in order to develop price or cost proposals, and therefore the offerors will incur substantial expense in preparing offers.[15] In addition to these considerations, the contracting officer also must consider the extent to which project requirements have been adequately identified, the time constraints for delivery of the project, the capability and experience of the potential offerors, the suitability of the project for the two-phase selection method, and the agency's ability to manage a two-phase solicitation.[16] The aim of phase one is to limit the field of competitors; the aim of phase two is to identify the best-qualified proposer with whom to negotiate a contract.

The phase one solicitation must include:

(1) a statement of the scope of the work to be procured;

(2) the phase one evaluation factors, including:
   (a) general technical approach (detailed design or technical information is not provided until phase two),
   (b) technical qualifications, such as specialized experience and technical competence, capability to satisfy the project requirements, and past performance of the design-build team (i.e., design and construction members, including subcontractors), and
   (c) other noncost or price-related factors appropriate to narrowing the field of proposers;

(3) the phase two evaluation factors, such as design concepts, management approach, key personnel, and proposed technical solutions; and

(4) a statement of the maximum number of offerors that will be selected to submit phase two proposals. (No more than five, absent a determination by the contracting officer that a greater number is in the Government's interest and is consistent with the objectives of the two-phase design-build contracting.)[17]

Upon the submission of the phase one proposals, the contracting officer must identify the most highly qualified offerors (not to exceed the number set forth in the solicitation) and request only those offerors to submit phase two proposals.[18]

Typically, the most sensitive and controversial of the phase one evaluation factors is past performance. Often contractors feel that their dogged pursuit of legitimate claims will be held against them in future procurements. Also, they worry that terminations for default, which are extraordinarily painful to the contractors involved, can result in de facto debarment when considered in the evaluation of subsequent proposals. For this reason, past performance evaluation commands more ink in the proposal evaluation section of FAR subpart 15 than any other factor. In considering past performance, "[t]he currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered."[19] The past performance evaluation is separate and apart from the responsibility determination made with respect to all potential government contractors (*see* FAR subpart 9.1), and is intended to take into account past performance information regarding predecessor companies, key personnel, or subcontractors performing critical aspects of the work. The evaluation of past performance is, of course, intended spotlight favorable performance as well as the unfavorable, and offerors are invited to (1) identify other public or private contracts in which they performed work similar to that covered by the solicitation, as well as (2) explain any problems experienced on such projects and identify any corrective action they have taken. Offerors that lack a record of relevant past performance "may not be evaluated favorably or unfavorably on past performance."[20] The government is free to consider information from sources external to the procurement in evaluating past performance.

After the phase one evaluation has narrowed the field to include only the few "most highly qualified offerors," phase two—the competitive negotiations—begins. FAR subpart 15 provides most of the operative language on the phase two process, setting forth the rules for "competitive acquisitions" where the aim is the selection of the "proposal representing the best value to the Government."[21]

FAR 15.101 addresses a "best value continuum," the balancing of the various factors that define a successful project in the government's eyes, as follows:

> In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

In cases such as design-build, where the contract award is not to be made solely on the basis of the lowest priced or the highest technically rated offer, the government engages in a "trade-off process" in which the other evaluation criteria are identified for the proposers, and some indication of their relative weight is provided. Pursuant to FAR 15.101-1, the solicitation must advise the offerors of

(1) all evaluation factors and significant subfactors that will affect contract award and their relative importance, and

(2) whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

Although the agency head is responsible for the selection of the proposal that represents the best value (also known as "source selection"), he or she must designate a "source selection authority"—typically the contracting officer.[22] The source selection authority assembles an evaluation team comprised of the appropriate mix of contracting, legal, technical, and logistical expertise to ensure a comprehensive evaluation of offers; approve the source selection strategy (aka acquisition plan) prior to the release of the solicitation; ensure consistency among the solicitation requirements, instructions, evaluation factors, and solicitation provisions and contract language;

take into account the recommendations of any advisory boards; and ultimately select the source whose proposal represents the best value to the government.[23] The contracting officer serves as the focal point for all communications with proposers.[24]

The evaluation factors themselves are the subject of regulation. They must both represent the key areas of importance and emphasis to be considered in the source selection decision and support meaningful comparison and discrimination among competing proposals.[25] The agency has broad discretion in setting the evaluation factors and subfactors and their relative importance; however, it is required to include price or cost as a factor in every procurement, along with qualitative factors such as past performance, technical excellence, management capability, personnel qualifications, prior experience, and compliance with solicitation requirements. In addition, where there is a significant opportunity to subcontract portions of the work (which characterizes most construction contracts), the evaluation criteria must include an evaluation of past utilization of small business entities under contracts requiring subcontracting plans (i.e., construction contracts over $1 million; *see* 15 U.S.C.A. section 637(d)(4)).[26] Although "[a]ll factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation," and the general approach for evaluating past performance information must be described, the precise rating method for weighing the factors need not be disclosed.[27]

Past performance evaluation is separate and apart from the responsibility determination made with respect to all potential government contractors.

The proposals are subject to evaluation solely on the factors and subfactors identified in the solicitation, and the relative strengths, weaknesses, and risk supporting proposal evaluation shall be documented by the evaluation team.[28]

A key part of the two-phase selection process is the series of face-to-face exchanges between the evaluation team and each of the proposers. Unlike the prebid meetings common to design-bid-build work, these sessions are intended to be negotiations in which the proposer's price, schedule, technical considerations, and other factors are openly discussed, and in which the interplay among these factors (e.g., the trade-off between price and schedule) is explored. The primary objective of these discussions is to maximize the government's ability to obtain the best value, based on the requirements and evaluation factors set forth in the solicitation.[29] The intent of the FAR is clear:

> Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.[30]

At a minimum, the contracting officer is required to explore "any deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond."[31] He or she is also expected to pursue any aspects of the proposal that could be altered or explained to materially enhance the proposer's potential for award. The regulations recognize, however, that the actual scope and extent of these discussions are a matter of the contracting officer's judgment.

These discussions are not without boundaries, however. Government personnel are forbidden from engaging in conduct that favors one offeror over another, reveals an offeror's price or technical information to another without the offeror's permission, or discloses the identities of persons from whom past performance information has been obtained.[32] However, the contracting officer may disclose that an offeror's price is too high or too low, and/or reveal the government's pricing analysis to all offerors.

Within three days after an award has been made, the contracting officer must notify all unsuccessful phase two proposers in writing of the number of offerors solicited, the number of proposals received, the name and address of each awardee, the contract price at which the award was made,[33] and, in general terms, the reason the offeror's

proposal was not accepted.[34] Upon request, the unsuccessful offeror shall receive a postaward debriefing in which it is furnished the basis for the selection decision and contract award. Any protests are to be handled in accordance with FAR subpart 33, "Protests, Disputes, and Appeals."

Bid Protests Involving Design-Build Procurements

A disappointed bidder who might have been eligible to compete for or to be awarded a government contract has standing as an "interested party"[35] to challenge the government's solicitation (e.g., allegedly restrictive specifications, omission of a required provision, and ambiguous or indefinite evaluation factors), cancellation of a solicitation, award of a contract (including acceptance or rejection of a proposal), or termination or cancellation of the award of a contract if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.[36] The majority of state courts uphold the rights of taxpayers and citizens to enjoin waste or unlawful expenditure of public funds, 37 thus conferring standing to protest the award of a state or local public contract.[38]

In a traditional design-bid-build project, where the award to a responsible bidder is based on price alone, the resolution of a bid protest typically turns on whether a bid irregularity could have given the successful bidder an unfair advantage not available to other bidders or could have permitted the successful bidder to have withdrawn its bid without forfeiting its bid security.[39] In design-build procurements, the "best value" evaluation of a variety of what may be viewed as subjective factors other than price and the high degree of discretion allowed to the awarding body in competitive negotiations can create grounds for bid protests based on perceptions of unfairness and disparate treatment of proposers. The awarding agency's discretion is limited by the requirements that its decisions not be arbitrary or capricious, contrary to established procedures, or unsupported by substantial evidence,[40] as well as overall considerations of fairness. Although protest procedures vary among federal, state, and local agencies, all require the protesting party and the public agency to act quickly to resolve the protest.

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For design-build procurements of federal agencies, a protester has four alternative venues for filing a protest: (1) the awarding agency,[41] (2) the Government Accountability Office (GAO, formerly known as the General Accounting Office),[42] (3) the US Court of Federal Claims,[43] or (4) the U.S. district courts.[44] Selection of the appropriate initial venue for a bid protest depends upon the procedural requirements necessary to seek relief, the remedies available in each forum, and time constraints; however, Executive Order 12979 (October 25, 1995) and the FAR[45] encourage inexpensive, informal, fair, and expeditious resolution of protests at the agency level, including alternative dispute resolution techniques, third-party neutrals, and another agency's personnel, before filing with the GAO or other tribunals outside the agency.[46]

Protests to the Awarding Agency

Protests against an award of contracts in negotiated acquisitions are handled according to FAR Part 33.[47] Protests must be in writing,[48] be concise, and include the following information:

- Name, address, and fax and telephone numbers of the protester;
- Solicitation or contract number;
- Detailed statement of legal and factual grounds for protest, including prejudice to the protester;
- Copies of relevant documents;
- Request for a ruling by the agency;
- Statement as to the form of relief requested;
- All information establishing that the protester is an interested party; and
- All information establishing the timeliness of the protest.[49]

Failure to substantially comply with any of the foregoing requirements may be grounds for dismissal of the protest.[50]

Protests on grounds apparent from the face of the solicitation documents must be filed before the closing date for receipt of proposals. All other protests must be filed not later than 10 days after the basis for the protest is known or should have been known, whichever is earlier. The agency has discretion to consider an untimely protest for good cause shown or where a protest raises issues significant to the agency's acquisition system.[51]

Upon receipt of a timely protest (i.e., lodged within 10 days after contract award or within five days after a debriefing date offered to the protester, whichever is later), the contracting officer must immediately suspend performance, pending resolution of the protest within the agency, unless continued performance is justified for urgent and compelling reasons, or is determined, in writing, to be in the best interest of the government. Such justification or determination must be approved at a level above the contracting officer or by another official pursuant to agency procedures.[52]

Agencies must make best efforts to resolve a protest within 35 days after the protest is filed.[53] Independent review is available by agency-designated individuals, who need not be within the contracting officer's supervisory chain. When practicable, the independent reviewer(s) should not have had previous personal involvement in the procurement.

Pursuing an agency protest does not extend the time for obtaining a stay at the GAO. Agencies may include a voluntary suspension period as part of the agency protest process when agency protests are denied and the protester subsequently files at the GAO.[54] If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend the GAO's timeliness requirements.[55]

Protests to the Government Accountability Office

An interested party is encouraged to seek resolution with the agency before filing a bid protest with the GAO, but may file the initial bid protest directly with the GAO[56] in accordance with GAO regulations at 4 C.F.R. part 21. The procedures are similar to those applicable to agencies under FAR part 33. In deciding protests, the comptroller general, as head of the GAO, considers whether federal agencies have complied with statutes and regulations controlling government procurements.[57]

In addition to the information required for protests filed with an agency, a protest to the GAO may include a request for a protective order, a request for specific documents relevant to the protest, and a request for a hearing.[58] The GAO may conduct a hearing on its own initiative.[59]

The protest document must be clearly labeled if it contains information that a protester believes is proprietary, confidential, or otherwise not releasable to the public. This is likely to be the case in protests of design-build procurements, due to the inclusion of technical proposals and alternative design approaches in the preaward evaluation. In those cases, within one day after filing the protest, the protester must provide the GAO and the contracting agency a redacted version of the protest that omits such information.[60]

Deadlines for filing bid protests with the GAO are set forth in 4 C.F.R. section 21.2. In most cases, the protest must be filed within 10 days after the protester knew or should have known the basis of the protest, except for design-build contracts conducted under a competitive proposal for which a debriefing is requested.[61] There, the initial protest must be filed not later than 10 days after the date on which the debriefing was held.[62] The purpose of this exception is to encourage offerors to seek, and contracting agencies to give, meaningful debriefings prior to an offeror deciding whether to file its initial protest.

The GAO will notify the contracting agency of the protest within one day of filing.[63] This notice may trigger a statutory stay of the award or performance of the contract, as provided in 31 U.S.C. section 3553(c) pending the GAO's decision, unless (a) the agency makes a written finding that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the decision of the comptroller general and (b) the GAO has been notified of that finding.

The GAO must act on the protest within 100 days unless an express option for resolution within 65 days is used.[64] In 2008, 31 U.S.C. section 3557 was added, requiring an expedited action in protests of public-private competitions. The GAO may sustain the protest (i.e., find that the agency violated a statute or regulation and that the violation prejudiced the protester), in which case the GAO will recommend appropriate corrective action in accordance with 31 U.S.C. section 3354(b) and (c). Alternatively, the GAO may summarily dismiss the protest on jurisdictional or procedural grounds.[65] If the protest is sustained, the GAO generally will recommend that the protester be reimbursed the cost of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees, and, in some cases, proposal preparation costs.[66]

Protests to Federal Courts

Bid protests also may be filed directly with the U.S. Court of Federal Claims or U.S. district courts.[67] The broader remedies and full scope of discovery available in courts may be beneficial to some factually intensive bid protests.

Design-Build Claims and Disputes

In considering design-build contracts, the decisions generally (and at times surprisingly) apply well-known principles of government contract law from the field of design-bid-build contracts. As a general rule, the person who provides a design that turns out to be defective usually bears the risk of the defect in that design. In addition, the courts and boards of contract appeal often refuse to rule in favor of the government when it seeks to interpret the contract to limit the normal reach of the mandatory changes and differing site conditions clauses.

Who Owns the Design When It Is Defective?

It is often said that, in design-build contracting, there is a "single point of responsibility." The problem is, while the government seeks to shift all design responsibility to the contractor, it also wants to maintain control over design decisions. This tension leads to situations where, in reality, the government remains "the designer" who bears responsibility for design defects.

Most of the reported cases arise out of "bridging" specifications prepared by the government when it issues a request for proposals (RFP). Many federal agencies use a design consultant to assist in developing the program and preparing a preliminary design for the RFP. The preliminary design is usually around the 30 percent level. It is expected that, after contract award, the successful design-build contractor will complete the design. The concept is generally known as "bridging."[68]

A seminal case to consider design defects involving bridging projects is *M.A. Mortenson Co.*[69] In *Mortenson*, the Corps of Engineers awarded a design-build contract for a medical clinic. The RFP contained a preliminary design, including alternative structural designs. The RFP stated that the government's preliminary design could be used in preparing proposals but that the successful contractor would need to verify the information during the design phase.

After contract award, the contractor discovered that the structural design was inadequate. The contractor was forced to increase the planned quantities of structural steel and reinforcing steel within concrete. The contractor submitted a claim, which the government rejected, claiming that the contractor should have included a contingency in its proposal for quantity increases.

The board rejected the government's position. It held that the contractor was entitled to rely on the accuracy of the government's preliminary design. The duty to verify the design, the board held, was part of the design effort, not the proposal effort. In addition, the government's interpretation would effectively read the mandatory changes clause out of the contract.

A similar result was reached in *Bethlehem Steel*.[70] There, the RFP to design and build two ships included a preliminary structural design but included language requiring the contractor to make its own calculations and

prepare an adequate design. In preparing the design, the contractor discovered that the RFP, if followed, would result in excessive vibration. Using a traditional design-bid-build contract analysis, the board held that "[w]here performance specifications are accompanied by detailed drawings, absent effective disclaimer, the contractor has the right to rely on the drawings 'for adequate detail to meet the performance requirements without substantial change or redesign.' " (Citations omitted.) An effective disclaimer, according to the board, would have clearly put the risk of additional costs due to redesign on the contractor.

Another, more recent case in this line is *Donahue Electric, Inc.*[71] The Veterans Administration awarded a design-build contract for an ambulatory care center. The RFP required the contractor to install government-furnished equipment (a sterilizer) and to make it interface with a new boiler to be provided as specified in the RFP. The government's preliminary drawings were for "information only," yet bidders were expected to use them for bidding purposes and to complete the design after award.

Although protest procedures vary among federal, state and local agencies, all require the protesting party and the public agency to act quickly to resolve the protest.

Following the award, the contractor realized that the sterilizer would work only if the specified boiler was upgraded. The board held that by including specific design information in the RFP, the VA assumed the design risk and warranted the accuracy of the RFP specifications. The board rejected the VA's argument that, as a design-build contractor, the contractor was responsible for any design problem, noting that the VA's interpretation would require the contractor to complete the design and discover the problem prior to the bid day.

There are some decisions that take a contrary view, especially concerning the design phase of the project. In *Fire Security Systems, Inc.*,[72] for example, the contract in question was to design-build a sprinkler system in an existing VA hospital. The RFP required the contractor to verify all information provided by the government. The RFP included a set of "background" drawings showing existing conditions. After award, the contractor discovered that the drawings were inaccurate. Instead of "spot checking" the drawings, as it planned, the contractor had to perform its own complete field survey of the hospital.

The board rejected the contractor's claim for additional engineering work. The work, the board held, was already included in the contract. The contract required the contractor to "verify"—it did not say "spot check." The board continued:

> As a "design and build contractor," [the contractor] assumed a far greater responsibility for preparation of drawings than would a contractor that was constructing entirely with the use of prescriptive drawings and specifications. . . . [The government-furnished drawings] were not intended to supersede the design/build contractor's independent obligation to verify the accuracy of each room's dimensions. . . . (Emphasis in original.)

In another case, the government's RFP contained conflicting requirements. The contractor's subcontractor was aware of the conflict but made no prebid inquiry. The board held the contractor responsible for the "patent" conflict due to the lack of inquiry. This rule of contract interpretation, the board noted, was not suspended in a design-build contract. "To the contrary, the case law indicates that a design build contract shifts risk to a contractor that a final design will be more costly than the bid price to build and that the traditional rules of fixed price contract interpretation still obtain."[73]

Another board decision faulted the design-build contractor for not making a sufficient investigation prior to submitting its proposal. In *Strand Hunt Construction, Inc.*,[74] the contract involved a design-build project for a military building at Eielson AFB, Alaska. The RFP required that windows be furnished to meet both post-9/11 blast requirements and tough thermal requirements. The contractor could not locate commercially available

windows and had to have them custom built, for which it sought compensation. The board declined to compensate the contractor, and held that the contractor, by submitting a proposal, represented it could meet the performance requirements of the RFP. Any failure to adequately investigate was at the design-build contractor's risk.

When the government issues a bridging specification with the RFP, the contractor often responds with a technical proposal. What is the status of the contractor's proposal if it forms the basis for the contract award? In *Stewart & Stevenson Services, Inc.*,[75] the contractor argued that the risk of all design changes shifted to the government because it accepted the contractor's proposal. The board held, however, that making the proposal part of the contract did not make it a "Government specification for which the Government assumes the risk of design change."

By the same token, the fact that a contract is made on a design-build basis does not insulate the government from responsibility when a differing site condition is encountered. In Haskell Corp.,[76] the contract was to design and build a storage facility in a remote site in Alaska. The contractor encountered conditions different than anticipated. The board rejected the government's argument that, as a design-build contractor, this problem was assumed by the contractor.

How Much Flexibility Does the Design-Build Contractor Get to Comply with the Contract Specifications?

The short answer to the question is "not much." When a contract is let on a design-build basis, the contractor often assumes that it has broad flexibility to decide how to carry out the work. After all, isn't the contractor "the designer" who gets to decide the "design intent"? The cases, however, keep the contractor on a fairly short leash.

In *Sea Crest Construction Corp. v. United States*,[77] the design-build contract involved a housing project at West Point, New York. The contractor, after award, sought to change to a "better" site layout than the one in the contract. The government refused, and the contractor claimed. The Court of Federal Claims held that the contractor did not have the right to change the design without the government's approval. The court noted:

> It does not matter whether the Corps obtained the most economical or the best use of its site . . . [the government] issued an RFP requiring those features and [the contractor] won the Contract by submitting a compliant site design.

In a similar vein is *FSEC, Inc.*[78] There the RFP contained both prescriptive and performance specifications. The contractor assumed it could change the prescriptive requirements so long as it met the performance specifications. The board disagreed. Even though the contractor told the government, before contract award, that it bid only "turnkey projects," the contractor was not given carte blanche for the design. The contractor's claim was denied.

A trio of decisions demonstrates the lack of latitude accorded the design-build contractor after "winning" the contract. In the first case, the government's refusal to permit an "or equal" substitution was upheld.[79] In the second case, the government's reversal of its approval of a contractor's shop drawing that conflicted with the government's bridging specifications also was upheld.[80] In both cases the government was allowed to enforce the RFP's requirements. In the third case, the contractor sought to change the design submitted in its technical proposal. Because the government had accepted the proposal and made it part of the contract, the board held the contractor was required to build what it proposed.[81]

On the other hand, where the specifications do not contain an express design requirement, the design-build contractor has the flexibility to decide how to achieve the end result. The government's postaward instruction to use a particular method is a compensable change in the work.[82]

Socioeconomic Programs and Their Impact on Design-Build Contracts

Socioeconomic programs have been part of the fabric of government contracting for decades. For federal agency contracting, FAR parts 19–26 implement a variety of socioeconomic programs, denominated Small Business Programs;[83] Application of Labor Laws to Government Acquisitions;[84] Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety and Drug-Free Workplace;[85] Protection of Privacy and Freedom of Information;[86] Foreign Acquisition;[87] and Other Socioeconomic Programs.[88]

Currently, socioeconomic programs targeted at small businesses and green building are a prominent part of the Stimulus Act.[89] For example, the General Services Administration (GSA) received $4.5 billion in Stimulus Act funding to convert federal buildings to high-performance green buildings.[90] To help speed the process and meet spending time frames, the GSA intends to use design-build and other alternative project delivery methodologies,[91] including a fixed-price design-build contract for the modernization of the Byron G. Rogers Federal Office Building in Denver, Colorado. The completed project must achieve a LEED®[92] Silver rating. All offerors that are not small businesses must submit a subcontracting plan that provides subcontracting opportunities to small businesses to the maximum extent possible.[93]

This section provides a brief overview of requirements of small business programs and analysis of whether the underlying policies may be enhanced or hindered by design-build contracting.

Small Business Programs—Federal Requirements

The Small Business Act

The Small Business Act,[94] enacted in 1953, declared that the federal government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise and ensure that a fair proportion of the total purchases and contracts for property and services for the government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises.

The Small Business Act established the Small Business Administration (SBA). Each federal agency with contracting authority must work with the SBA to

- Identify proposed solicitations that involve bundling;[95]
- Facilitate small business participation as contractors, where appropriate;
- Facilitate small business participation as subcontractors and suppliers where participation by small business concerns as contractors is unlikely;[96]
- Assist small business concerns in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions;[97]
- Make recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded as a small business set-aside under FAR subpart 19.5, as a section 8(a) award under FAR subpart 19.8, as a HUBZone ("historically underutilized business zone") set-aside under FAR subpart 19.13, or as a service-disabled veteran-owned small business set-aside under FAR subpart 19.14;[98]
- Conduct annual reviews to assess the (i) extent to which small businesses are receiving a fair share of federal procurements, including contract opportunities under the programs administered under the Small Business Act; (ii) adequacy of contract bundling documentation and justifications; and (iii) actions taken to mitigate the effects of necessary and justified contract bundling on small businesses.[99]

Small Business Size Standards

A "small business concern" is defined as an enterprise that is independently owned and operated and that is not dominant in its field of operation.[100] In addition, the SBA specifies size standards on an industry-by-industry basis using the North American Industrial Classification System (NAICS).[101] Size standards are expressed in terms of annual receipts or number of employees. Annual receipts are measured over the most recently completed three fiscal years for the business concern and its "affiliates" (when one concern or entity controls or has the power to control another or when a third party controls or has the power to control both).[102] To calculate the number of employees, the SBA counts all individuals employed on a full-time, part-time, or other basis for the preceding completed 12 calendar months.[103] Size standards for construction are based on average annual receipts ($33.5 million for general building and heavy construction contractors and $14 million for special trade construction contractors).[104]

This tension leads to situations where, in reality, the government remains "the designer" who bears responsibility for design defects.

The procuring agency contracting officer designates the proper NAICS code and size standard in the solicitation.[105] A business concern must self-certify that it is small under the size standard specified in the solicitation. A contracting officer may accept a firm's self-certification as true in the absence of a written protest by other offerors or other credible information that causes the contracting officer or the SBA to question the size of the concern.[106]

Participation Goals

The president establishes annual federal government-wide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.[107] The head of each federal agency shall, after consultation with the SBA, jointly establish small business participation goals to realistically reflect the potential of such small business concerns to perform the agency's prime contracts and subcontracts.

FAR Part 15 Source Selection Factors

Source selection evaluation factors for design-build services must include:

- **Past Performance of Subcontractor Small Business Participation.** (For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans.[108])
- **Extent of Current Small Disadvantaged Business Participation.** (The extent of participation of small disadvantaged business concerns in performance of the contract shall be evaluated in unrestricted acquisitions expected to exceed $1,000,000 for construction.[109])
- **Extent of Current Small Business Subcontractor Participation—Subcontracting Plan.** (For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include proposed small business subcontracting participation in the subcontracting plan as an evaluation factor.[110])

FAR Part 19—Small Business Programs

FAR part 19 implements the acquisition-related sections of the Small Business Act and covers, among other matters, eligibility for SBA set-asides, the SBA Subcontracting Program, the Section 8(a) program (under which agencies contract with the SBA for goods or services to be furnished by a DBE), and the Small Disadvantaged Business Participation Program.[111]

The small business set-aside program,[112] as implemented by FAR subpart 19.5, requires federal agencies to limit competition on certain contracts to qualified small businesses so that small firms do not have to compete with large ones for the same contracts. Because the law requires the federal government to buy at competitive prices, contracts are set aside when two small businesses are expected to submit offers to ensure adequate competition. The SBA establishes size standards that determine a firm's eligibility to bid on set-asides.

Section 8(a) of the Small Business Act (15 U.S.C. § 637(a) (2006)), as implemented by FAR subpart 19.8, established a program that authorizes the SBA to enter into contracts for goods and services with other federal agencies. The SBA then subcontracts actual performance of the work to socially and economically disadvantaged small businesses that have been certified by the SBA as eligible to receive these contracts. This program provides federal government contracts on a noncompetitive basis to socially and economically disadvantaged small businesses. The SBA also offers managerial, technical, and financial support to participating firms.

Subcontracting opportunities in federal contracting have expanded over the past two decades. The total volume of subcontracts on federal projects increased from $63.8 billion in FY 1985 to $119 billion in FY 2003.[113] FAR subpart 19.7 implements the requirements of Public Law No. 95-507,[114] setting forth the structure for a subcontracting program. The Small Business Subcontracting Program's primary mission is to promote the maximum use of small businesses by requiring businesses other than small businesses that are awarded prime contracts to submit a subcontracting plan for construction contracts exceeding $1 million with subcontracting opportunities.[115]

Each subcontracting plan must include:[116]

(1) Separate percentage goals for using small business concerns as subcontractors;

(2) A statement of the dollars planned to be subcontracted in total and to small business concerns;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of types planned for subcontracting to small business concerns;

(4) A description of the method used to develop the subcontracting goals;

(5) A description of the method used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and, if so, a description of the methodology used;

(7) The name and duties of the offeror's employee who will administer the offeror's subcontracting program;

(8) A description of the efforts the offeror will make to ensure that small business concerns have an equitable opportunity to compete for subcontracts;

(9) Assurances that the offeror will include the clause at FAR 52.219-8, Utilization of Small Business Concerns, in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $550,000 ($1,000,000 for construction) to adopt a plan that complies with the requirements of FAR 52.219-9;

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required; (ii) submit periodic reports so that the government can determine the extent of compliance by the offeror with the subcontracting plan; (iii) submit the Individual Subcontract Report (ISR) and the Summary Subcontract Report (SSR); (iv) ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR; (v) provide its prime contract number, DUNS number and the email address of the official responsible for the reports to all first-tier subcontractors with subcontracting plans; and (vi) require that each subcontractor with a subcontracting plan provide the information in (v) to its subcontractors with subcontracting plans; and

(11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan and a description of the offeror's efforts to locate small business concerns and to award subcontracts to them.

If the apparent successful offeror fails to submit a subcontracting plan acceptable to the contracting officer within the prescribed time, the offeror will be ineligible for award.[117] Any contractor or subcontractor failing to make a good faith effort to comply with the subcontracting plan will be in material breach of the contract, which shall result in the imposition of liquidated damages in an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.[118]

Agency-Specific Small Business Programs—DOT DBE Program

In 1983, Congress enacted the first Disadvantaged Business Enterprise (DBE) provision requiring DOT to ensure that at least 10 percent of the funds authorized for the highway and transit financial assistance programs be expended with DBEs. In 1987, Congress reauthorized and amended the statutory DBE program and added women as an eligible group. The intent of the DOT DBE program is to remedy past and current discrimination against disadvantaged enterprises, ensure a level playing field, and foster equal opportunity for DOT-assisted contracts. The DOT DBE program is carried out by state and local transportation agencies.

The DBE regulations require state and local transportation agencies that receive DOT financial assistance to establish narrowly tailored goals for the participation of disadvantaged business enterprises and to certify the eligibility of DBE firms to participate in the contracts. These agencies establish contract-specific subcontracting goals, which may vary from the approved overall DBE goal; however, at the end of the year, the amount of contract/subcontract awards to DBEs should be consistent with the overall goal. In order for small disadvantaged firms to participate in the DOT-assisted contracts of state and local transportation agencies, they must apply for and receive certification as a DBE; there is no self-certification.

On May 9, 2005, the Ninth Circuit Court of Appeals issued a decision in *Western States Paving Co. v. Washington State Department of Transportation*[119] that, while recognizing the underlying DOT DBE program was valid on its face, required Washington to comply with new evidentiary standards necessary to constitutionally support the use of race-conscious DBE goals to implement the DBE program. The appellate decision is binding on states and local agencies within the jurisdiction of the Ninth Circuit. Thereafter, the California Department of Transportation (Caltrans) utilized a race-neutral methodology with regard to its DBE program for U.S. DOT-funded projects and required local agencies to agree to implement Caltrans' DBE program (which eliminated the long-standing use of contract goals and good faith efforts). In 2007, Caltrans commissioned a disparity study to examine utilization of the six groups identified as DBEs in DOT projects. Disparity was found with regard to four groups—African Americans, Native Americans, Asian Pacific, and women—referred to as Underutilized DBEs (UDBE). The remaining two DBE groups, Hispanic males and Subcontinent Asian males, were found to be utilized appropriately. In light of the results of the disparity study, Caltrans requested and received a waiver from U.S. DOT to allow the use of race and gender-specific contract goals (targeted at UDBEs only) in order to meet the objectives of Caltrans's DBE program.

Impact of Design-Build Contracting on Small Business Participation

The increased use of design-build in public procurement has raised the concern that small firms may not be able to participate on design-build teams due to the large scale of many design-build contracts, more stringent qualification requirements, bonding requirements, and emphasis on prior experience with design-build team members. A widespread complaint is that design-build contracting places local firms at a distinct disadvantage to larger national firms that have more experience in successfully responding to alternative project delivery models. Another concern is that increased use of design-build will result in fewer business opportunities for small businesses. For example, the Mechanical Contractors Association of New Jersey filed suit over five school construction projects alleging that (a) the design-build process would be unfair to small contractors and would

ultimately cost taxpayers more; (b) combining the bidding for design and construction could open the door to corruption and overcharging; and (c) the design-build process would make it impossible to evaluate costs from one bid to another because the state would be choosing from different designs.[120]

In a recent design-build effectiveness study prepared for the U.S. DOT Federal Highway Administration,[121] agency survey respondents indicated that the percentage of design-build project costs going to small businesses was only slightly less than for design-bid-build projects. These results suggest that small businesses did not lose work due to design-build project delivery. Two-thirds of the respondents indicated that the prime contractors and subcontractors for design-build projects were similar in size to their counterparts on design-bid-build projects, thus design-build project delivery does not prevent small businesses from participating in such projects. The survey results also indicated that design-build contracts spread more of the design work among subconsultants than comparable design-bid-build contracts, which could translate to a positive effect for small businesses. The percentage of subcontracted construction work on design-build projects was roughly the same as on design-bid-build projects. The results did indicate that the number of firms or teams responding to a design-build project was smaller than for design-build-bid projects and that fewer local firms participated in design-build procurements.

Endnotes

1 A full description of the history of federal design-build procurement is beyond the scope of this article but has been treated authoritatively by giants in our industry. *See, e.g.,* John B. Miller, Principles of Public and Private Infrastructure Delivery (Kluwer Academic Publishers 2002); Michael C. Loulakis, Design-Build for the Public Sector (Aspen Law & Business 2003); and Michael C. Loulakis, Lauren P. McLaughlin & Donald A. Tobin, *Alternate Delivery Systems: Design-Build, Construction Management, and IDIQ Task Order Contracts, in* Federal Government Construction Contracts (Michael A. Branca et al. eds., ABA Forum on the Construction Industry, 2d ed. 2010), ch. 5.

2 *See* Brooks Architect-Engineers Act, Pub. L. No. 92-582, 86 Stat. 1278 (2005) (codified at 40 U.S.C.A. § 1101) (Brooks Act). Additional regulations governing the selection of firms to provide design, engineering investigations, program management, value engineering, and construction phase advisory services can be found at FAR subpart 36.6. These regulations are consistent with the Brooks Act and provide for the selection of firms to provide these services based on their professional qualifications, specialized experience, and technical competence in the work required; capacity to perform in the allotted time; past performance of both public and private contracts; geographic locations and knowledge of the locality of the project; and acceptability under "other appropriate evaluation criteria." FAR 36.602-1. FAR subpart 36.6 provides the mechanism for selection of the "most highly qualified firm" by the agency head or designated selection authority; upon selection, the contracting officer is authorized to commence contract negotiations in accordance with FAR part 15.

3 There were, of course, exceptions made through legislation aimed at a particular agency or type of project. Legislation was enacted permitting the use of turnkey procurement on government housing projects in the mid-20th century, at the same time as NASA was allowed to use design-build procurement. And, in 1986, the Military Construction Authorization Act allowed each branch to use design-build on a few pilot projects. *See* Loulakis, *supra* note 1, at ch. 2.

4 Competition in Contracting Act of 1984, Pub. L. No. 98369, 98 Stat. 1175 (1984).

5 Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 4001 (codified at 41 U.S.C. § 253m).

6 FAR Subparts 36.1 and 36.3 now reflect the two-step procurement set forth in the act.

7 The Federal Acquisition Regulation *is available at* www. acquisition.gov/comp/far/index.html. See FAR 36.303.

8 *See* Loulakis, *supra* note 1, at ch. 1.

9 For a more fulsome discussion of the FAR part 15 rewrite, *see* Robert Frank Cushman & Michael C. Loulakis, Design-Build Contracting Handbook 336–41 (Aspen Law & Business, 2d ed. 2001).

10 American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, 123 Stat. 287 (2009).

11 For a summary of the Stimulus Act, *see* Recovery.org, www.recovery.gov/About/Pages/The_Act.aspx.

12 For example, FAR 5.701 states: "This subpart prescribes posting requirements for presolicitation and award notices for actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act). The requirements of this subpart enhance transparency to the public."

13 Federal Business Opportunities, https://www.fbo.gov/, is the website designed as a single point of entry for federal buyers to publish and for vendors to find posted federal business opportunities across departments and agencies.

[14] *See* Testimony of the Honorable Earl E. Devaney, Chairman, www.recovery.gov/About/board/Documents/testimony_ 20090910.pdf.

[15] FAR 36.301(b).

[16] *Id.*

[17] FAR 36.303-1(a).

[18] FAR 36.303-1(b).

[19] FAR 15.305(a)(2).

[20] *Id.*

[21] FAR 15.002.

[22] FAR 15.303.

[23] *Id.*

[24] *Id.*

[25] FAR 15.304(b).

[26] *Id.*

[27] FAR 15.304(d).

[28] FAR 15.305(a).

[29] FAR 15.306(d).

[30] *Id.*

[31] *Id.*

[32] FAR 15.306(e).

[33] If unit prices are involved, the notice must identify the items, quantities, and stated unit prices of the award unless the number of items involved makes such a listing impracticable. FAR 15.503(b)(1)(iv).

[34] FAR 15.503(b)(1)(v).

[35] An actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 48 C.F.R. § 33.101 (2009).

[36] 31 U.S.C. § 3551(1) (2006); 48 C.F.R. § 33.101 (2009).

[37] Annotation, *Right of Citizen or Taxpayer to Enjoin Waste or Expenditure of State Funds*, 58 A.L.R. 588 (2009).

[38] *See,* e.g., *Sayer v. Minn. Dep't of Transp.*, 769 N.W.2d 305 (Minn. App. 2009), *rev. granted.*

[39] *See,* e.g., *Menefee v. County of Fresno*, 210 Cal. Rptr. 99 (Cal. Ct. App. 1985).

[40] 5 U.S.C. § 706(2) (2006).

[41] 48 C.F.R. §§ 33.101–.106 (2009).

[42] 31 U.S.C. § 3552 (2006).

[43] 28 U.S.C. § 1491(b)(1) (2006).

[44] *Id.*

[45] 48 C.F.R. § 33.102(e) (2009).

[46] For a detailed overview of bid protest on federal, state, and local design-build contract awards, see Neal J. Sweeney, Shawn Dansky Rodda, Antonio F. Doganiero, Nancy C. Smith, Brian G. Papernik, Corey A. Boock & Michael T. Callahan, *Design-Build Contracting with the Federal Government* (ch. 9) and *Design-Build Contracting with State and Local Agencies* (ch. 10), In Design-Build Contracting Handbook (2d ed. 2001 & Supp. 2009).

[47] 48 C.F.R. §§ 33.000–.106 (2009).

[48] *Id.* § 33.101.

[49] *Id.* § 33.103(d)(2).

[50] *Id.* § 33.103(d)(1).

[51] *Id.* § 33.103(e).

[52] *Id.* § 33.103(f).

[53] *Id.* § 33.103(g).

[54] *Id.* § 33.103(f)(4).

[55] *Id.* § 33.103(d)(4).

[56] *Id.* § 33.102(e).

[57] 31 U.S.C. § 3552 (2006).

[58] 4 C.F.R. § 21.1(d) (2009).

[59] *Id.* § 21.7(a) (2009).

[60] *Id.* § 21.1(g) (2009).

[61] 48 C.F.R. § 15.506 (2009).

[62] 4 C.F.R. § 21.2(a)(2) (2009).

[63] *Id.*§ 21.3(a) (2009).

[64] 31 U.S.C. § 3554(a) (2006).

[65] 4 C.F.R. §§ 21.1, 21.5 (2009).

[66] *Id.*§ 21.8(d) (2009).

[67] 28 U.S.C. § 1491(b)(1) (2006); 31 U.S.C § 3556 (2006).

[68] "Bridging" has been attributed to George Heery, FAIA. *See* LOULAKIS, MCLAUGHLIN & TOBIN, *supra* note 1, at n.89.

[69] A.S.B.C.A. No. 39,978, 93-3 B.C.A. (CCH) ¶ 26,189.

[70] *Bethlehem Steel Corp.,* A.S.B.C.A. No. 13,341, 72-1 B.C.A. (CCH) ¶ 9,186.

[71] V.A.B.C.A. No. 6,618, 03-1 B.C.A. (CCH) ¶ 32,129.

[72] V.A.B.C.A. No. 5559-63, 02-2 B.C.A. (CCH) ¶ 31,977.

[73] *United Excell Corp.,* V.A.B.C.A. No. 6937, 04-1 B.C.A. (CCH) ¶ 32,485.

[74] A.S.B.C.A. No. 55,671, 2008 WL 2,231,484.

[75] A.S.B.C.A. No. 43,631, 97-2 B.C.A. (CCH) ¶ 29,252.

[76] A.S.B.C.A. No. 54,171, 06-2 B.C.A. (CCH) ¶ 33,422.

[77] 59 Fed. Cl. 473 (2004).

[78] A.S.B.C.A. No. 49,509, 99-2 B.C.A. (CCH) ¶ 30,512.

[79] *Sherman R. Smoot Corp.,* A.S.B.C.A. No. 52,150, 03-01 B.C.A. (CCH) ¶ 32,073.

[80] *C&L Constr. Co.,* A.S.B.C.A. No. 22,846, 78-2 B.C.A. (CCH) ¶ 13,516.

[81] *Lovering-Johnson, Inc.,* A.S.B.C.A. No. 53,902, 05-2 B.C.A. (CCH) ¶ 33,126.

[82] *Maddox Indus. Contractors, Inc.,* A.S.B.C.A. No. 36,091, 88-3 B.C.A. (CCH) ¶ 21,037.

[83] 48 C.F.R. §§ 19.000–.1407 (2009). FAR Part 19 implements the acquisition-related sections of the Small Business Act (15 U.S.C. §§ 631–657p (2006)), applicable sections of the Armed Services Procurement Act (10 U.S.C. §§ 2302–2334 (2006)), the Federal Property and Administrative Services Act (Pub. L. No. 106-580, 114 Stat. 3088–92 (codified as amended in scattered sections of 40 and 41 U.S.C.)), section 7102 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, 108 Stat. 3243), 10 U.S.C. § 2323 (2006), and Exec. Order No. 12,138, 3 C.F.R. § 393 (1979), *as amended by* Exec. Order No. 12,608, 3 C.F.R. § 245 (1987), *reprinted in* 42 U.S.C. § 4321 app. at 244–45 (1991).

[84] 48 C.F.R. §§ 22.000–.1803 (2009). FAR part 22, "Application of Labor Laws to Government Acquisitions," includes, but is not limited to, subpart 22.4, "Labor Standards for Contracts Involving Construction," implementing the Davis-Bacon Act (40 U.S.C. §§ 3141–3148 (2006)); Subpart 22.8, "Equal Employment Opportunity," implementing Exec. Order No. 11246, 3 C.F.R. § 339 (1964–1965), *reprinted in* 42 U.S.C. § 2000e app. at 28–31 (1982), *amended by* Exec. Order No. 11,375, 3 C.F.R. § 684 (1966–1970), *superseded by* Exec. Order No. 11,478, 3 C.F.R. § 803 (1966–1970), *reprinted in* 42 U.S.C. § 2000e app. at 31–33 (1982); and subpart 22.13, "Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans," implementing the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (38 U.S.C. §§ 4211 & 4212 (2006)); Exec. Order No. 11701, 3 C.F.R. § 752 (1971–1975), *reprinted as amended in* 38 U.S.C.S. § 4212 app. at 558–564 (1998); the regulations of the Secretary of Labor (41 C.F.R. §§ 60-250 & 61-250); and the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339, 112 Stat. 3182 (1998).

[85] 48 C.F.R. §§ 23.000–.1005 (2009). FAR part 23 supports the government's program for protecting and improving the quality of the environment by: (a) controlling pollution; (b) managing energy and water use in government facilities efficiently; (c) using renewable energy and renewable energy technologies; (d) acquiring energy-efficient and water-efficient products and services, environmentally preferable products, products containing recovered materials, and biobased products; and (e) requiring contractors to identify hazardous materials.

[86] 48 C.F.R. §§ 24.000–.203 (2009). FAR part 24 implements requirements of the Privacy Act of 1974 (5 U.S.C. § 552a (2006)) and the Freedom of Information Act (5 U.S.C. § 552 (2006)).

[87] 48 C.F.R. §§ 25.000–.1103 (2009). FAR part 25 includes, but is not limited to, subpart 25.2, "Buy American Act—Construction Materials," and subpart 25.6, "American Recovery and Reinvestment Act—Buy American Act—Construction Materials."

[88] 48 C.F.R. §§ 26.000–.404. FAR part 26 includes, but is not limited to, subpart 26.2, "Disaster or Emergency Assistance Activities," implementing the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121–5270 (2006)), which provides a preference for local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities.

[89] American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, 123 Stat. 115 (2009).

[90] News Release, MaryAnne Beatty, U.S. General Services Administration, GSA Invests $1 Billion in Recovery Act Construction Projects Nationwide (July 30, 2009), *available at* www. gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=10430& channelId=24825&P=&contentId=28346&contentType=G SA_BASIC).

[91] Department of Transportation, Report No. MH-2009-046, American Recovery and Reinvestment Act of 2009: Oversight Challenges Facing the Department of Transportation (2009), available at www.recovery.gov/Accountability/inspectors/Documents/DOT_Oversight_Challenges_Report_final_508.pdf.

[92] Leadership in Energy and Environmental Design (LEED), Green Building Rating System, U.S. Green Building Council.

[93] U.S. Gen. Serv. Admin., Amendment: Recovery—Solicitation Notice of the Design-Build for the Modernization of the Byron G. Rogers Federal Office Building, Denver, Colorado (2009), *available at* www.recovery.org/projectdetails. aspx?pid=AMD:10945955&gloc=Colorado*CO.

[94] 15 U.S.C. §§ 631–657p (2006).

[95] The Small Business Act defines the term "bundling of contract requirements" as "consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to: (A) the diversity, size, or specialized nature of the elements of the performance specified;(B) the aggregate dollar value of the anticipated award; (C) the geographical dispersion of the contract performance sites; or (D) any combination of" these factors. 15 U.S.C. § 632(o) (2006).

[96] 48 C.F.R. § 19.201(d)(5) (2009).

[97] *Id.* § 19.201(d)(6) (2009).

[98] *Id.* § 19.201(d)(10) (2009).

[99] *Id.* § 19.201(d)(11) (2009).

[100] 15 U.S.C. § 632(a) (2006).

[101] 13 C.F.R. §§ 121.101, 121.201 (2009).

[102] *Id.* §§ 121.103(a), 121.141 (2009).

[103] *Id.* § 121.106 (2009).

[104] *Id.* § 121.201 (2009).

[105] *Id.* § 121.402 (2009).

[106] *Id.* § 121.405 (2009).

[107] 15 U.S.C. § 644(g)(1) (2006) establishes the following percentage goals for participation (of the total value of all prime contract and subcontract awards for each fiscal year): 23 percent by small business concerns, 3 percent by service-disabled veterans, 3 percent by qualified HUBZone small business concerns, 5 percent by socially and economically disadvantaged individuals, and 5 percent by women.

[108] 48 C.F.R. § 15.304(c)(3)(ii) (2009).

[109] *Id.* § 13.304(4) (2009).

[110] *Id.* § 15.304(c)(3)(5) (2009).

[111] *Id.* §§ 19.000, 19.201, 19.501–.508, 19.701–.708, 19.800– .812, 19.1201–.1204 (2009).

[112] 15 U.S.C. § 644(i), (j) (2006).

[113] Major Clark III, Chad Moutray & Radwan Saade, Office of Advocacy, U.S. Small Business Administration, The Government's Role In Aiding Small Business Federal Subcontracting Programs In The United States (2006), *available at* www.sba.gov/advo/research/rs281tot.pdf.

[114] "It is the policy of the United States that small business concerns . . . [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems." 15 U.S.C. § 637(d)(1) (2006).

[115] 48 C.F.R. § 19.702(a) (2009).

[116] *Id.* § 19.704 (2009).

[117] *Id.*§ 19.702(a) (2009).

[118] *Id.*§§ 19.702(c), 19.705-7 (2009); 15 U.S.C. § 637(d)(4)(F) (2006).

[119] 407 F.3d 982 (9th Cir. 2005).

[120] Lisa Fleisher, *Legal Tangle over Bid Process Puts Schools on Hold*, Jersey J., Oct. 22, 2009, *available at* www.nj.com/news/ jjournal/jerseycity/index.ssf?/base/news-9/1256192734294190. xml&coll=3.

[121] SAIC, AECOM Consult & Univ. of Colorado at Boulder, Design-Build Effectiveness Study—As Required by TEA-21 Section 1307(F): Final Report: Prepared for U.S. DOT—Federal Highway Administration IX (2006), *available at* www.fhwa.dot.gov/reports/designbuild/designb

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