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INTRODUCTION

A service contract is defined by the Federal Acquisition Regulation (FAR) as:

... a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A services contract may be either ... nonpersonal or personal. It can cover services performed by either professional or nonprofessional personnel ...

Thus, the field is diverse and a number of totally different types of contracts can be fairly encompassed under its broad umbrella. Previous contracts have ranged from the procurement of custodial services to securing for an architect's or attorney's professional services, and from planting trees in a National Forest to producing a technical manual for the U.S. Army. Contract types have run the gamut from firm fixed price to various forms of cost plus arrangements, and award has been made both by sealed bidding and competitive negotiation. The same breadth and diversity which makes the field interesting, however, also leads to difficulty in making generalizations or formulating rules which apply across the board. Since the vast majority of litigation has involved firm fixed price contracts for housekeeping services,

Performance Problems in Service Contracting

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INTRODUCTION

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operation of government facilities, and management services,² much of the discussion herein will center on those areas.

In Fiscal Year 1986, the Federal Government spent over 182 billion dollars to construct buildings and to provide necessary goods and services. Of that total, over 41 billion dollars (or over 23%) was spent on the procurement of various services.³ Over the past five years, each budget cycle has witnessed an increase in both the total dollars spent for the diverse services required to operate the government and the percentage of the federal budget expended for those services.⁴ Thus, the growth of the services sector is not simply the result of inflation, but rather is attributable to a number of other dynamic factors.

That growth is likely to continue for at least the next several years. Civil Service manpower ceilings, which are unlikely to be increased in the near term, practically mandate that any new service requirements must be contracted out rather than performed in house. Within the Department of Defense, recent policies have emphasized the devotion of a higher percentage of military personnel to "war fighting" specialties. The resulting decrease in military personnel assigned to support services has led to a concomitant increase in the number and variety of services which must be obtained from

commercial sources. Finally, the government policy of "privatization," or requiring government work forces to compete with private contractors for available work, has led to a significant increase in service contracting.⁵

Other factors, not directly related to identifiable government policies, have also combined to swell the number of service contracts awarded and the number of dollars expended for them. The recent defense buildup has emphasized the procurement of many large and technically complex systems. That complicated equipment must be operated and maintained by someone - and usually the largest pool of available expertise lies within the contractor who designed and built the system. As a result, a number of contracts have been awarded to maintain those systems or, in the alternative, to train uniformed personnel to do so. Although much of the new equipment was designed to be maintained "in the field," a considerable number of those repairs simply entail diagnosing the problem and then replacing the defective "black box" with a spare. The removed parts must then be returned to the manufacturer, or another contractor, for repair. That has led to growth in the number of depot level repair contracts.

Perhaps the biggest single factor in the growth of the government services industry, however, is simply the recognition that private contractors can often perform the

required services at a considerable cost savings. In an era when the entire government is scrambling to reduce the Federal deficit, any such opportunities to save scarce resources are especially attractive.

Despite its recent growth and the almost unimaginably large amounts of money involved, Federal service contracting has received relatively little attention. To the best of my knowledge, no recent textbooks have been published which concentrate exclusively on service contracting. Those general texts on government contracting which have been published in the last several years devote relatively little space to service contracting problems. Treatises and Law Review Articles on the subject are also few and far between. Perhaps most troubling, however, is that most courses in government contracting, both those conducted by the government itself and those offered by private institutions, tend to concentrate on the procurement of supplies and major systems. Few offer any in-depth analysis of the problems associated with service contracting. Thus, most government contracting personnel arrive on the job unfamiliar with past problems, and tend to learn by trial and error - often at considerable government expense.

Traditionally, most government agencies do not maintain divisions specifically devoted to the oversight of service contracts or which can serve as repositories for

specialized knowledge in the field. There are no service contracting equivalents to the Systems or Logistics Commands within the Department of the Air Force or, as far as I have been able to determine, within any of the other Federal agencies. Instead, most service contracting is accomplished at low level, often by relatively inexperienced personnel. The same base contracting office responsible for awarding and monitoring supply and construction contracts is usually tasked to procure and assure the proper performance of service contracts. That lack of specialization and expertise at the contract award and administration level has led to a number of the performance problems which will be discussed herein.

This thesis will address the most important problems currently faced by service contracting personnel; assemble and discuss the major recent decisions in the area; and provide a number of suggestions for avoiding or minimizing future performance problems. The organizational pattern will flow naturally from problems which spring from decisions made during the pre-solicitation phase, move on to performance problems and their associated litigation, and conclude with a discussion of default termination and those problems which arise after the decision has been made to terminate the contract.

Chapter I

Pre-Solicitation Problems

A. Developing the Statement of Work

Basic policy guidance contained in the FAR requires agencies to ensure that all "... services tendered by contractors meet contract requirements"⁶ and that "[n]onconforming ... services are [usually] rejected."⁷ Those simple words belie the complexity of the system which has evolved and is continuing to develop in order to insure that the government receives quality services and pays only for what it actually receives. That system requires the participation and cooperation of three major groups if it is to function effectively - the activity requiring the requested services (hereinafter, the "using activity"); the Contracting Officer and staff; and the contractor eventually selected to perform the services. Unless all three act together and are able to freely discuss their understandings, expectations and intentions regarding the contract, the result is often misunderstandings, contract performance problems, and eventually litigation.

FAR assigns each group its respective responsibilities rather succinctly. Although not discussed at great length, the using activity is charged with developing its own

technical needs, specifications and quality assurance requirements.⁸

The Contracting Office (and the Contract Administration Office in those cases where award and administration functions are bifurcated) is required to ensure that those quality assurance requirements are included in the solicitation and final contract documents;⁹ to develop a government Quality Assurance Plan; to inspect as and when necessary to assure that performance standards are met; and to maintain accurate records about contractor conformity with those standards.¹⁰ Although not explicitly required by the FAR, the Contracting Officer must also work closely with the using activity during the development of their requirements and specifications to ensure that the resulting Statement of Work, Surveillance Plan, etc. are capable of being efficiently administered.

Finally, under current government procurement policy, the contractor is primarily responsible for assuring that services provided meet all government performance standards and specifications, maintaining evidence of that compliance, and (frequently) for providing a quality control system of its own which is acceptable to the government.¹¹

The long term interests of these three groups differ markedly. The using activity is primarily interested in

getting the job done quickly and efficiently while holding costs to a minimum. The contracting office desires a contract that complies with appropriate statutes and regulations, and one that also will not require large infusions of time and manpower to administer. The contractor's primary interests, of course, lie in getting paid for work done and making a profit. These divergent interests are most closely aligned, however, during the early stages of contract formation when the government is writing the performance standards for the work to be contracted and, slightly later, when the contractor is closely examining those standards to formulate his bid or proposal.

Experience has demonstrated that close cooperation between the using activity and the contracting office during the earliest stages of contract development is often the key to arriving at an effective document. Logic would also indicate that the early involvement of the contractor could help to insure that the proposed performance standards, surveillance plan, etc., mesh well with the contractor's proposed method of performance. If ambiguities and differences could be meaningfully explored during these early stages, many later performance problems would probably be avoided. Unfortunately, certain imperatives in the procurement process have tended to work against such early cooperation.

Both the contracting office and the using activity are often overworked and understaffed. The Contracting Officer is frequently "bogged down" in administering a myriad of pre-existing contracts and has little patience or time to devote to projects that are in their developmental stages (often long before a firm decision has been made to acquire the services by contract). On the other hand, the same manpower cuts which originally dictated the requirement to contract-out service tasks also work to reduce the staff which the using activity can devote to the preparation of detailed Statements of Work, specifications, etc..¹²

Finally, the pre-CICA requirement to award most service contracts by the "sealed bidding" method¹³ effectively removed contractors from participating in the early stages of contract development. There has been something of a trend, however, toward converting a number of contracts previously awarded by sealed bid into competitively negotiated contracts.¹⁴ Although statistics are not yet available, it may well be that such negotiated service contracts will involve contractors earlier in the process and lead to fewer long term performance problems.

Despite these practical problems, the system currently in place provides a well thought out method for developing performance oriented Statements of Work for service contracts. That system was originally developed and successfully used by the U.S. Air Force, and is now

ostensibly in use throughout the federal government. Detailed guidance has been provided to the field in the form of an Office of Federal Procurement Policy Pamphlet.¹⁵

That system clearly requires the active involvement of a host of non-contracting government personnel in the development of detailed Statements of Work and Quality Assurance Plans.¹⁶ The first step in the creation of those documents is a detailed review of the work which is currently being accomplished by the government or the incumbent contractor. During this process of "job analysis" each major requirement is broken down into smaller and smaller composite tasks, the acceptable quality level for each individual task is determined, and the contractor cost for performing each task is estimated.¹⁷ Those costs are then expressed as a percentage of total contract cost which can later be used to deduct for deficiently performed services.¹⁸ A detailed Statement of Work and Surveillance Plan are then constructed based on the job analysis. The Statement of Work provides prospective contractors with the performance details of the required work.¹⁹ The Surveillance Plan tells contractors how their performance will be measured and identifies the methods by which the government will gather quality assurance information (ie., random sampling, customer complaints, checklists, etc.)²⁰ Both the Statement of

Work and the Surveillance Plan are later incorporated into the final contract.²¹

Several cases have addressed performance oriented Statements of Work which were generated as outlined above, approved several key provisions, and recognized the value of the process in drafting clear, measurable performance standards. The system used by the government to arrive at those Statements of Work has never been questioned. Instead, contractor attacks have focused on methods of measuring contractor performance and deducting for performance which is found to be defective. One of the first challenges made by contractors was to the use of random sampling to inspect service contracts. Such challenges have been uniformly rebuffed by the Comptroller General, who has frequently stated that "... the random sampling plan provides a statistically accurate surveillance method" and noted approvingly that sampling has been endorsed for use in service contracts by the Office of Federal Procurement Policy.²²

The ability of the government to unilaterally set the percentage of total contract cost attributable to each discrete service task, and hence to preset the measure of liquidated damages to be assessed for failure to perform that task, was attacked in Kime-Plus.²³ The contractor argued that such a policy violated the bidder's right to determine its own pricing scheme. The Comptroller General

found no merit in that contention, holding that the "apportionment of the contractors total monthly price to several services does not affect the bidder's right to determine its price or prices," but that it merely "... establishes a measure of damages in the event individual services are defectively performed."²⁴

In Servicemaster All Cleaning Services,²⁵ the contractor protested a Request for Proposals for janitorial services to be performed at the US Air Force Academy. In that case, the Comptroller General ruled that the Air Force could not only make deductions for deficiencies exceeding the Acceptable Quality Level (AQL)²⁶ which were uncovered by the Surveillance Plan, but also could deduct for those deficiencies discovered independently of the Surveillance Plan (under the rubric of the standard Inspection of Services clause). The Comptroller General went on to note that AFR 400-28 (and, by extension, OFPP Pamphlet 4) merely "sets out instructions for the benefit of government contracting personnel in developing a Statement of Work and Quality Assurance plan, and does not create any rights for potential offerors."²⁷ Therefore, any failure to follow the procedures recommended by OFPP for creating performance oriented Statements of Work will not afford contractors any valid basis for protesting the resulting documents.

Thus, performance oriented Statements of Work are clearly here to stay, provide relatively objective methods

for evaluating the performance of service contractors, and represent a worthwhile tool for avoiding later contract problems. They do not solve other problems, however, such as the previously noted lack of early contractor input; the difficulties inherent in fostering close cooperation between discrete government offices with different priorities; and the need to generate detailed documents in the relatively short time between identification of the need for services and the date on which they must be made available. Those problems may require shifts in manning by the agencies involved, closer surveillance by the lowest level official who supervises all of the offices involved, and earlier identification of potential areas for service contracting. There are a number of other methods by which the agency can enhance the probability of avoiding later performance problems. One of those methods, which also serves to involve the contractor earlier in the procurement process, is the increased use of competitive negotiation.

B. Method of Procurement

Traditionally, most service contracts have been awarded by the sealed bidding method. As a consequence, specifications and performance standards have usually been developed entirely by the government and there has been little or no opportunity for contractor input. That system

does, however, have a number of advantages. It does, for example, often result in the use of "standard" performance-oriented specifications. Such specifications, developed over a period of years, have frequently been scrutinized by courts or boards in the past, received a certain gloss by the actions of the parties during previous contracts, or even evolved into recognized "industry standards" of performance. Negative consequences include the danger that inexperienced service contractors (often small business concerns that are just getting started) really don't understand the performance standards, which are usually buried deeply within the mass of specifications, surveillance plans, and other documents included in the solicitation.²⁸ In addition, formally advertised contracts must be awarded to the lowest responsive, responsible bidder, without giving any consideration to a competitor's ability to render "higher quality" services.²⁹

If sealed bidding is selected as the most appropriate method for soliciting the contract, however, a number of cases have addressed the performance oriented information which must be included in the Invitation for Bids (IFB) and the way in which ambiguities will be resolved. Although the IFB need not be so detailed that it eliminates all performance risks, it must at least include the Acceptable Quality Levels (AQL) and level of deductions which will be

imposed for deficient performance. In Harris System International, Inc.,³⁰ the Army issued a solicitation for custodial services at Fort Polk, Louisiana, but did not include either the AQL or deduction levels in the IFB. Instead, it proposed to add that information later, in a no-cost modification to the resulting contract. The Army procedure was properly invalidated when the Comptroller General sustained the protest and recommended that the solicitation be amended before bids were submitted.³¹

There is no requirement, however, that the IFB contain all internal government documents which relate to inspections, quality assurance, etc.. In Kime-Plus,³² the Comptroller sustained an Air Force decision not to include the Quality Assurance Surveillance Plan which provided instructions to Quality Assurance Evaluators about how to conduct their inspections and establish inspection schedules.

Service contractors, like their supply and construction counterparts, are required to examine IFB's carefully and question any patent ambiguities contained therein. Lewis Management and Services Co., a food services contractor, failed to question obviously ambiguous specifications dealing with the need to perform "minor food preparation," to "pan" certain meats (a term which was neither defined or limited in any way), and other open-ended specifications requiring services to be rendered

"as required" or "as specified."³³ The contractor's failure to inquire about those patent ambiguities led to the decision that it could "... not assert a claim on the basis of its own interpretation, irrespective of the possible reasonableness of that interpretation."³⁴ If the government, on the other hand, has actual knowledge that a contractor is interpreting an otherwise ambiguous specification in a certain way, it will be bound by the contractor's interpretation.³⁵

These latter cases are illustrative of the type of problems which often arise when the government imposes a set of specifications and performance standards on prospective contractors, and must thereafter deal with all offerors at arms length. The requirement that contractors inquire about patent ambiguities, or even the opportunity for the government to explain complicated specifications at a pre-bid conference,³⁶ is no substitute for the free-wheeling discussions which can take place during a competitive negotiation. Such negotiations can result in specifications which are tailored both to the needs of the government and to the strengths and weaknesses of the individual contractor. The government may be able to obtain the benefit of the contractor's experience in providing similar services. It can pose questions regarding the contractor's management approach and how the contractor would react to numerous eventualities which may

or may not arise during the life of the contract. It is also possible to negotiate higher levels of performance in areas that are of critical importance to the government and to insure that the contractor understands that in those areas "substantial performance" may mean virtually perfect performance.³⁷

There are, inevitably, some negative aspects to negotiating service contracts. The parties often have no previous experience with the standards they set and may later find that they are either impossible to meet or are impracticable to meet at the staffing levels proposed or the agreed price. Many of the understandings reached during the lengthy negotiations are not included when the "fully integrated" contract documents are prepared. If later performance problems arise, it is frequently difficult or impossible to accurately reconstruct the negotiations with sufficient detail to determine exactly what the parties intended to convey by a particular phrase or clause.³⁸ Since the standards are new and untried, the parties have no prior course of dealing or "industry standard" upon which to rely for resolving their differences. Finally, there is a perception within some members of the government contracting community that negotiated contracts often lead to higher government costs without any concomitant increase in the quality or quantity of services provided.

Despite these concerns, the Competition in Contracting Act of 1984³⁹ eliminated the statutory preference for "formally negotiated" procurements, replacing it with a requirement to use the renamed "sealed bidding" method only if certain criteria are present. Thus, sealed bids must be solicited if:

- (i) Time permits the solicitation, submission, and evaluation of sealed bids;
- (ii) The award will be made on the basis of price and price-related factors;
- (iii) It is not necessary to conduct discussions with the responding offerors about their bids; and
- (iv) There is a reasonable expectation⁴⁰ of receiving more than one sealed bid.

As a result, a number of recent service contracts have been awarded using competitive negotiation - including several that had previously been awarded by sealed bidding. A series of three decisions issued in 1986 interpreted the above statute and clarified the way it would be applied when a government decision to competitively negotiate is met with an immediate protest by a contractor who, for one reason or another, would prefer that the procurement be formally advertised. In United Food Services, Inc.,⁴¹ a protest against an RFP for food services at Fort Dix, New Jersey, the Army expanded a simple contract for mess attendant services into a larger, more complex contract which also required recycling, energy conservation, and

responsibility for the food service operation at the Officer and NCO Clubs. The Comptroller General decided that "... the Army's need to assure quality of performance and the complexity of the procurement provide[d] a reasonable basis for the determination to conduct a negotiated procurement," and ruled the solicitation permissible under subparagraphs (ii) and (iii) above.⁴²

The Saxon Corporation⁴³ involved a vehicle services and maintenance contract that had previously been awarded by sealed bidding. Saxon, the incumbent contractor, had experienced numerous misunderstandings and performance problems which were allegedly due to poorly refined requirements. After Saxon filed several contract claims, the Army decided to reprocure by competitive negotiation. The Comptroller General allowed the negotiations to proceed since the award criteria were not limited to "price-related" factors, but instead required consideration of information regarding the "... offerors' managerial capability, experience, and plans for logistical support, quality control, and safety."⁴⁴ He further held that the decision regarding contracting method properly called for the exercise of the contracting officer's "business judgment," and would not be disturbed unless the contractor was able to prove it to be unreasonable.⁴⁵

The last case, Servicemaster All Cleaning Services,⁴⁶ was decided in August 1986 and involved an

RFP for janitorial services at the U.S. Air Force Academy. In the past, similar contracts had been awarded by sealed bidding. In fact, this particular solicitation was first issued as an IFB, but was converted to an RFP by modification. The Air Force justified its decision to negotiate by citing past performance problems with prior janitorial services contracts that had been awarded by sealed bidding, argued that the previous contractors didn't understand the requirements, and concluded that "... future problems can be avoided by having offerors describe their understanding of requirements and their approach to accomplishing tasks."⁴⁷ Despite the fact that this was a standard janitorial services contract, of no particular complexity, and for which standard specifications and performance standards were unquestionably available, the Comptroller General extended the earlier cases and upheld the decision to competitively negotiate.

It thus appears that the Comptroller General has fully implemented Congress' intent to remove any preference for formal advertising. Today, virtually any service contract can be competitively negotiated as long as the contracting officer exercises reasonable "business judgment" and cites a good faith need to discuss potential offerors' plans for staffing, quality control, or other such minutiae. Whether or not such contracts should be negotiated in an attempt to avoid future performance

problems is a much more difficult question. Although competitive negotiations can be a valuable tool for eliminating ambiguity, clarifying performance standards, and ensuring that both parties understand the level of services which must be provided, it is not a panacea which can cure all of the performance ills in the field of service contracting. Several competitively negotiated service contracts have resulted in less than optimum performance and required litigation.⁴⁸ Ambiguity can creep into the most exhaustively negotiated performance standards, and there will always be eventualities which are unforeseen by even the most experienced negotiators. At the very least, however, face to face negotiations can often eliminate the most common causes of performance problems, establish rapport between the parties, and thereby lay a foundation for the successful administrative resolution of those problems which do arise.

Chapter II

The Contract Performance Period

After all of the foregoing preliminary questions have been answered, offers have been solicited, and award is made, the period of contract performance begins. Despite the best efforts of all concerned, a given number of performance problems are inevitable in any endeavor involving large numbers of people and significant amounts of money. The types of problems which arise during performance are even more varied than the kinds of services which are procured by the government. Several areas, however, generate such frequent problems that are worthy of particular note.

Many performance problems have resulted from real or perceived "constructive changes." Such changes may occur by design, negligence, or government fault, and frequently alter the specifications and performance standards which were so laboriously drafted during the pre-award phase. Other major issues revolve around the government's right to inspect or monitor the contractor's performance, the contractors receding "right" to reperform nonconforming services, and finally, the levels of performance required to avoid reduced payments or liquidated damages.

A. Constructive Changes

Allegations that the government has constructively changed the original contract have led to many disagreements between the parties and have resulted in a plethora of litigation. The vast majority of those cases involve contractor requests for equitable increases in the contract price to compensate them for extra work which was either informally ordered by the government or occasioned because of government fault. In order to qualify for those equitable increases, the service contractor must demonstrate that the changes fall within the "general scope of the contract"⁴⁹ and that they are one of the specific types of changes described by the services contract Changes Clause.

FAR 52.243-1 and 2, with minor modifications, permit changes in service contracts which relate to either:

- (1) Description of services to be performed.
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).
- (3) Place of performance of the services.⁵⁰

Those terms are so broad, however, that virtually any change which is within the general scope of the contract will also be permitted by the changes clause.⁵¹

Constructive changes to service contracts arise in so many diverse fashions that they virtually defy rational

compartmentalization. Most cases, however, tend to involve disagreements which arise during the inspection process. Recent cases have reemphasized that whenever the government imposes stricter inspection standards than those required by the contract, a constructive change has taken place and the contractor may well be entitled to additional compensation.

In Zundel Brothers,⁵² a contractor was hired by the Forest Service to hand-bait pocket gophers with strychnine-laced oats. During performance it became clear that simply conforming with the letter of the government specifications would not guarantee the contractor full payment due to the inspection regimen being employed by the government inspectors. The contractor therefore ordered his employees to "work to the inspection standard rather than the contract specifications."⁵³ The Department of Agriculture Board of Contract Appeals subsequently ordered an equitable adjustment to the contract price based upon both the inordinately high inspection standards used and the latent ambiguities present in the government's specifications.

Contract Maintenance, Inc.,⁵⁴ involved a janitorial services contract. The government inspectors in that case continually demanded that the condition of the old, World War II vintage buildings be upgraded, and required the contractor to both increase the number of manhours expended

and the cleaning frequency beyond that contemplated by the contract. Since the higher inspection standards were imposed with the full knowledge of the contracting officer, the Armed Services Board of Contract Appeals found a constructive change and ruled that the contractor was entitled to an equitable increase in the contract price.⁵⁵ Carpet Cleaners, wherein the government insisted that the contractor implement certain safety procedures which the contractor felt were both inappropriate and not required by the terms of the contract, would probably have elicited a similar result.⁵⁶ In that case, however, the contractor simply abandoned the contract rather than following the governments instructions and later filing a claim for an equitable adjustment.

Constructive changes have also resulted from government inaction or acquiescence. When the government allows worksite conditions to deteriorate between the date of contract award and the date set for beginning performance, that alone may constitute a constructive change. That eventuality arose in both Pride Unlimited⁵⁷ and Orlando Williams⁵⁸ and, in both cases, upward equitable adjustments in the contract price were ordered.

If government inspectors are present during contract performance, are aware that the contractor is performing extra work or going to extraordinary lengths in attempting

to meet inspection standards, and yet say nothing, a constructive change will likely be found. In Tree-Best,⁵⁹ the contract required the contractor to "scalp" the surface vegetation in order to reach the "moist mineral soil" beneath before planting seedlings. Forest Service inspectors on the scene interpreted that specification as requiring that the soil at the base of the scalp not contain more than 25% root material. Although the inspectors did not "specifically direct" the contractor to dig down as much as twelve inches (rather than the standard three to four inches), the board held that they knew or should have known that the contractor was taking extreme measures in an effort to meet their inspection criteria and have the work accepted. That knowledge, combined with the extra work performed by the contractor, was sufficient to convince the Board that a constructive change had occurred.⁶⁰

The government is also expected to be consistent in its interpretation of contract terms. When a contractor is awarded two consecutive contracts which contain equivalent specifications or standards, the government cannot alter its interpretation of those standards between contracts without risking a determination that it "ordered" a constructive change.⁶¹

The requirement to consistently interpret standards, however, does not mean that a constructive change will be

found whenever the government increases the number of its inspectors,⁶² alters the frequency of its inspections,⁶³ or even when it decides to inspect more meticulously.⁶⁴ In Tidewater, the contractor claimed that the government was inspecting it more frequently and rigorously after a policy change was ordered by the Chief of Naval Operations (CNO). Although the Armed Services Board of Contract Appeals found that neither claim was substantiated, it noted that the contract didn't limit the number of government inspectors or the frequency of their inspections, and that the government could have increased either or both at any time as long as it did not intentionally harass the contractor. The Board further indicated that the government was entitled to insist upon "strict compliance" with the terms of the contract and stated that "... it is not relevant ... that [Tidewater] may have enjoyed less rigorous inspections in similar prior contracts."⁶⁵ Similarly, in Pride Unlimited, the same Board stated:

The rule is well established that the Government is entitled to performance in strict compliance with the specifications and ... [has] the right to insist upon the quality of performance called for under reasonable interpretation of the specification requirements even though it may have accepted under previous ... contracts a lower level of quality than that to which it was entitled.⁶⁶

Although virtually all of these cases involve inspections, that does not necessarily indicate that increased training or supervision of inspectors would lead to a marked decrease in performance problems related to constructive changes. When compared to the total number of service contracts being performed every day, the number of litigated cases in this area is far too small to warrant any such broad conclusion. It does indicate, however, that contracting officers should continue to stress to their inspectors and quality assurance evaluators the importance of adhering to the contract specifications, and the danger of imposing any additions or changes. Subtle increases in the standards of performance required, even if they do not rise to the level of a constructive change or lead to a claim for increased compensation, cannot help but frustrate a contractor who is forced to conform to ever changing criteria. Over time these frustrations can themselves lead to full blown performance problems. To guard against that possibility, contractors should also be encouraged to bring any perceived shifts in inspection standards to the immediate attention of the inspector and, if the matter is not resolved to its satisfaction, to follow up with a letter to the contracting officer.

B. The Government Right to Inspect

Another area which has spawned performance problems and litigation is the government's right to monitor the services rendered by its contractors to insure that they comply with all specifications. The basic right of the government to inspect is guaranteed by the Inspection of Services clause⁶⁷ which must be included in all service contracts.⁶⁸ That clause provides, in pertinent part, that "[t]he government has the right to inspect and test all services ... to the extent practicable, at all times and places...." The only real limitation to that otherwise broad right is the requirement that government tests and inspections not unduly delay the work in progress.

The government thus has the right to inspect its service contractors virtually any time and any place it desires. At its sole discretion, it can increase or decrease the frequency of its inspections and the number of inspectors assigned to the contract, as long as it does not do so arbitrarily, capriciously, or in an attempt to harass the contractor and does not modify the contract's performance standards.⁶⁹ By the same token, inspection is a government right which does not confer any benefits upon the contractor. Thus, there is no requirement that any government inspector be detailed to the contract and certainly no requirement that one be present at all times when services are being rendered.⁷⁰

If the contractor attempts to contest government actions based upon allegedly improper inspection procedures, it bears an extremely heavy burden of proof. The contractor must not only demonstrate that the inspection was improper, but also that the defective inspection caused the government to take the disputed action.⁷¹ When contractors attempt to overturn actions based upon the "bad faith" or malfeasance of a government inspector (not an uncommon allegation after the parties relations have deteriorated to the point that the contractor either has been, or is about to be, default terminated) the evidence required rises to the level of "virtually irrefragable proof."⁷²

Nonetheless, contractors have been able to sustain the necessary burden of proof on a number of occasions. Perhaps the most surprising cause of contractor successes in this area is the failure of the government to keep accurate records of its inspections. Michigan Building Maintenance,⁷³ provides a typical situation in which lack of adequate records (or, at the very least, failure to bring those records to the Board's attention) led directly to payment of the full contract price until the date the contract was formally terminated. In that case the government was not able to submit any inspection reports, could produce no memoranda of phone calls between the parties, and provided virtually no evidence to support its

allegation that the janitorial services in question were not provided. Faced with a situation in which "... each side ... denied everything the other side ... said, neither party provided ... significant proof of its contentions," and where even the affidavits submitted by both counsel contained mostly hearsay allegations, the Board had little choice but to accord the contractor the benefit of the doubt and sustain its request for full payment.⁷⁴

Similar failures to keep detailed inspection records also led to contractor recoveries in Mr.'s Landscaping⁷⁵ and Bluff's Dairy Inc.⁷⁶

The government's occasional failure to follow proper inspection procedures has also proved costly. In Contract Maintenance, Inc.,⁷⁷ the contract stipulated that inspections of the custodial services rendered were to be conducted during normal duty hours. Despite that clear requirement, the government inspector admitted that he inspected the contractor's work "when I felt like it," both before and after duty hours. In addition, he used standards taken from an Air Force manual which was not a part of the contract, rather than applying the standards enumerated in the contract. Those failures led to the contractor's recovery of all monies withheld for the allegedly deficient services. Another inspector's lapse of judgment led to a similar result in Moustafa Mohamed.⁷⁸ In that case the default termination of a food services

contract was overturned when the inspectors evaluation was adjudged "arbitrary and capricious" and as having "little or no basis in fact."

Although the government is entitled to use as many inspectors as it deems prudent, the employment of large numbers of inspectors can create as many problems as it solves. In North American Maintenance,⁷⁹ the Navy attempted to closely monitor a contractor whose services had allegedly deteriorated by adding contract inspection chores to the duties of 40 "building monitors." Those monitors had little training as inspectors and no prior expertise in the custodial services field. The Board found that "the mere proliferation in standards of acceptability engendered by such a number of independent inspectors is unreasonable in itself," and ordered that all deductions based upon those inspections be refunded to the contractor.⁸⁰

Allegations of improper inspection procedures were not substantiated in Leal's Food Service, Inc.,⁸¹ Tamp Corporation,⁸² and Orlando Williams Janitorial Service.⁸³ The only case found which even approached a finding of "bad faith" by inspection personnel was the previously discussed Moustafa Mohamed.⁸⁴

One of the most topical inspection issues in federal service contracting involves the increasing use of random sampling inspection techniques. The government has

frequently argued successfully that random sampling saves time, reduces the number of inspectors required, and is more cost effective than other inspection systems. In addition, a cogent argument can be made that it is the only practical method for inspecting large service contractors whose operations frequently entail thousands of separate tasks in hundreds of different locations. Finally, random sampling tends to further the twin government policies of requiring contractors to take a more active role in inspections and using the limited number of government inspectors to "spot check" the contractor's own quality assurance efforts. Problems in this area center on the fact that random sampling does not provide a 100% accurate assessment of contractor performance and, for that reason, might lead to inequitably reduced payments.⁸⁵

The advantages of a random sampling inspection system for service contracts far outweigh the relatively minor disadvantages. In numerous decisions, the Comptroller General has announced that random sampling can be used either as a primary inspection tool or as an adjunct to other methods.⁸⁶ In Kime-Plus, the Comptroller agreed with the contractor that random sampling does not guarantee complete accuracy, but decided that "... it does provide a reasonably accurate surveillance method, based on principles of statistics"⁸⁷ He did note, however, that contractors are free to challenge any proposed random

sampling plan, but that they then bear the burden of adequately demonstrating that the system would lead to an inaccurate evaluation of their performance.

Random sampling was first used in the supply arena where it was possible to ensure that each sample was exactly the same size and that the factors evaluated remained constant. In service contracting, however, where the size of rooms and buildings vary and the types of services rendered in each location is often different, it is usually impossible to keep unit size exactly equal. In Environmental Aseptic Services Administration,⁸⁸ the protester challenged a random sampling plan by attacking the Air Force's plan to divide a large janitorial services contract into units that were only approximately the same size.⁸⁹ The Comptroller General denied the protest, noting that the Air Force system fell within the mandatory Military Standard 105D requirement to divide the total contract into units which "as far as is practicable, consists of units ... of a single ... size."

Thus, it appears that random sampling has emerged as a viable inspection technique and that reasonable accommodations will be made to ensure that it can be practically applied to service contracts. Indeed, the cases indicate that contractors will have great difficulty in overturning such plans before award and implementation. In order to do so they will need to demonstrate, probably

via their own statistical models, that the plan will inevitably lead to inequitable results. The mere showing that a series of unusual and highly unlikely occurrences could lead to inaccurate evaluation, and eventually to underpayments, will not suffice.⁹⁰ Service contractors have not yet had very much practical experience with random sampling systems and few post-award cases have been litigated. If the systems currently in use do lead to grossly inaccurate evaluations, they can certainly be resolved via the administrative disputes process and, eventually, litigation. Both the Comptroller General and the Armed Services Board, however, have tacitly recognized that minor inaccuracies must be expected, will not support additional compensation, and, to the extent necessary, should be factored into the bid price.⁹¹

C. The Contractor's Right to Reperform

A continuing problem, involving both random sampling plans and more traditional inspection methods, has been whether or not the service contractor has or should have any right to reperform defective work. As discussed above, the government has a general right to insist that contractors strictly comply with all of the performance standards imposed by the contract and to require correction of services it finds to be defective. Contractors, however, do not enjoy any roughly parallel right which entitles them to compel government acceptance of corrected supplies or reaccomplishment of improperly performed services.⁹² Such entitlements, if they exist at all, must be found either in the applicable regulations or contract clauses.

In both supply and construction contracts, the FAR (and numerous Boards of Contract Appeal) require that contractors be afforded the opportunity to correct such minor defects as can be accomplished before the required delivery date.⁹³ That right to reperform, to correct deficiencies, and hence to receive the full contract price is much more limited in service contracting. At first blush, the FAR Inspection of Services Clause⁹⁴ would appear to grant service contractors reperformance rights which are similar to their supply and construction

brethren. Closer analysis, however, indicates that any such rights are very ephemeral (if they exist at all) and that the government is in virtually total control.

FAR 52.246-4(d) states simply that "... the government may require the contractor to perform the services again in conformity with contract requirements, at no increase in contract amount." (emphasis added) The subparagraph simply contains no language which requires the government to allow reperformance, even if the contractor is ready, willing and able to render timely corrections. The subparagraph's only remaining sentence does nothing more than define the government's rights in cases when correction is impossible, including, of course, the right to reduce the contract price to properly reflect the level of services received.

Contractors desiring the right to reperform will not find any greater solace in subparagraph (e). It too does not require the government to allow reperformance, though it does place some limits upon government remedies when correction is not permitted. Thus, the contractor cannot be charged for costs which the government incurs in obtaining satisfactory performance elsewhere, unless the contractor is first given the opportunity to redress the problem itself. The subparagraph also protects contractors from default termination when they are not given the opportunity to correct service deficiencies, and could have

done so within the period originally set for contract performance.⁹⁵

FAR 46.407(b) provides that contractors should "ordinarily" be allowed to correct nonconforming services if they can be accomplished within the original delivery schedule. That general policy statement, however, is not binding and affords scant protection to any particular contractor who is not permitted to reperform. Early cases, such as Exquisite Service Company,⁹⁶ reviewed similar inspection clauses and appeared to conclude that contractors must be afforded a "reasonable opportunity" to correct deficient services.⁹⁷ Later cases, however, have dashed any contractor hopes that such a requirement would be "read into" the clause by the Boards or the Comptroller General. Those cases indicated that there is no general contractor right to reperform. Instead, they held that what does exist is a government option to allow reperformance when and if that action is considered to be in the government's best interest.

Orlando Williams⁹⁸ concerned a custodial services contract at Fort Bragg, N.C., which was terminated for default. The contractor argued, in part, that the termination was improper because he had not been notified of defective work in time to permit reperformance. After reviewing a very similar Inspection of Services clause, and the Military Standard which was applicable, the board

concluded:

We do not agree with [the contractor] that these provisions ... bestow upon the contractor the right to reperform unsatisfactory services independently of the wishes of the government. The "Inspection of Service" clause grants the government the right to require performance of services and imposes a corresponding obligation to perform on the contractor. The clause furthermore explicitly recognizes that circumstances may exist where reperformance would not correct a deficiency and allows deductions for deficient or unperformed services.

We accordingly conclude that [Williams'] contractual rights regarding evaluation of performance were not diminished or violated by circumstances which did not enable [him] to reperform services ... so as to avoid deductions (Citations omitted)

In 1984, the Comptroller General reached a similar conclusion in Linda Vista Industries, Inc..¹⁰⁰ In 1985, the Comptroller again had reason to address contractors' reperformance "rights" in a protest submitted by Sunrise Maintenance Systems.¹⁰¹ He stated, "We have previously recognized (under a similar clause in the Defense Acquisition Regulation) that the government may, but is not required to, permit reperformance." He then concluded that "[t]o the extent that the protester here complains that the solicitation permits the government to deduct payments before giving the contractor an opportunity to reperform, we deny the protest."¹⁰²

Over and above any technical analysis of the

applicable FAR clauses, there are very cogent reasons why service contractors should not enjoy the same right to correct performance as do supply contractors, etc.. In many service contracts the tasks performed are repetitive and must be performed hourly, daily, or at other very close intervals. The failure to perform such a task is simply not "cured" by performance of a similar task later in the day or during the next service cycle.¹⁰³ In addition, many service contracts require performance of so many individual tasks that inspection must be accomplished by random sampling. Allowing correction of those deficient services discovered by the inspector has no impact upon the remaining defective services statistically presumed to exist in the countless other units which were not actually inspected.

Time-Plus¹⁰⁴ reduced contractors' "rights" in this area even further. The Comptroller General announced in that case that there is no government obligation to set out in advance which services may be corrected by the contractor and which are so time sensitive that reperformance will not be permitted.

Despite the general absence of any right to reperform in service contracts, the government can provide such rights via additional contract clauses.¹⁰⁵ Guaranteeing a contractor notice of service defects and affording it the right to reperform may make eminently

good sense in those contracts which do not require daily performance or where delayed performance will not seriously impair the value of the services rendered. Such a clause might even serve to reduce bid prices slightly since the contractor, by prompt correction of those defects which almost inevitably occur in service contracts, could virtually guarantee itself receipt of the full contract price. In most cases, however, written notice such as that required by Mutual Maintenance is simply impracticable. It would be impossible in any contract inspected by random sampling and would be difficult in any contract which relies upon customer complaints to provide quality control. Therefore, despite contractors' dissatisfaction with the lack of any real right to reperform, no such general right exists today or is likely to be included in the majority of service contracts awarded in the future.¹⁰⁶

D. The Contractor's Right to Payment

It goes without saying that every contractors' *raison d'etre* is getting paid for the work he does and thus making a profit. It is not surprising, then, that any government deduction from the agreed upon contract price often results in a storm of protests, denials, and litigation. Although the "substantial performance" doctrine limits the government's right to default terminate a contractor whose performance isn't quite "perfect,"¹⁰⁷ there is virtually no such limitation on the government's right to deduct for services which are performed improperly or not at all.¹⁰⁸

Another payment that has elicited similarly strident contractor protests is liquidated damages. Liquidated damages have been defined as "...fixed amounts which one party to a contract can recover from the other upon proof of a violation of the contract, and without proof of the damages actually sustained."¹⁰⁹ Although differing from inspection clause deductions in several ways (discussed *infra*), the end result is the same, e.g., reduced contractor payments and (presumably) reduced profits. Since both deductions and liquidated damages have seriously disrupted the performance of many service contracts, both deserve to be addressed at some length.

1. Inspection of Services Clause Deductions

Deductions pursuant to the Inspection of Services clause are not penalties assessed for contractor malfeasance. Instead, they simply recognize the government's right to refuse payment for services it did not receive. Such deductions are widely used in service contracts for at least two major reasons. First, the FAR both permits and encourages the government to take price deductions whenever circumstances warrant. FAR 52.246-4 provides that the government may reduce the contract price whenever defective services cannot be corrected by reperformance. FAR 46.407 is even more emphatic and states that "[e]ach contract under which nonconforming ... services are accepted ... shall be modified to provide for an equitable price reduction," unless the deficiencies are considered "minor" (emphasis added). The regulation thus serves to reemphasize the contracting officer's duty to protect the public fisc.¹¹⁰ The second (and arguably most important) reason for the frequent use of deductions is that they are widely considered one of the most effective ways to focus upper level contractor attention on the performance problem in question, and to thus ensure that deficiencies are quickly rectified.

The government has a number of responsibilities if it wishes to retain the right to use this effective tool.

It must, for example, be able to sustain its burden of proof both that it is entitled to the deduction and that the amount deducted is accurate.¹¹¹ As discussed above, that mandates the use of an effective inspection system. If the government is unable to sustain its burden of proving quantum, all deductions will usually be forfeited. The government will generally not be permitted to obtain a "jury verdict recovery" when it fails to keep accurate records.¹¹² Although the quantum issue can be decisive, most cases do not even address it. Instead, litigation is largely won or lost based upon the government entitlement to take the deduction, and the question of quantum is usually referred back to the parties for negotiation of the appropriate amount.¹¹³

Unlike liquidated damages, which will be discussed infra, deductions under the Inspection of Services clause cannot exceed the contract price. That principle was reemphasized in D. J. Findley,¹¹⁴ where the Air Force apportioned a percentage of the total price to each major contract task. Although the sum of those percentages reached one hundred percent, the Air Force clearly desired to retain its right to deduct additional amounts if the contractor deficiently performed other, unlisted services. The Comptroller General properly concluded that deductions which could exceed the contract price would constitute an improper penalty, and cautioned the Air Force against

enforcing the provision.¹¹⁵

The Inspection of Services clause contains no requirement that the contractor be given advance notice of deficient performance before the government makes its deductions. FAR 46.407(g) does require notice if the services are rejected. Notice would not seem to be required, however, where the government intends to accept "substantially performed" services, but desires to retain its right to deduct for minor defects therein. Even when additional contract clauses do make notice a prerequisite for deductions, at least one Board of Contract Appeals has been reluctant to fully enforce those provisions.

Government Contractors, Inc.¹¹⁶ involved a custodial services contract which expressly required the government to notify the contractor of unsatisfactory performance. The Board reasoned, however, that failure to inform the contractor that it wasn't performing in accordance with its schedule did not waive the government's right to make deductions, since the contractor had to be aware of its own nonperformance, and therefore could not have been prejudiced. Similarly, Rice Cleaning Service¹¹⁷ and Skillens¹¹⁸ both indicated that the right to make deductions is "... of cardinal importance to the Government's administration of contracts" and held that failure to notify the contractor of deficiencies "does not abrogate the government's contract right to take [those]

deductions¹¹⁹

Contractors have also argued that the "substantial performance" doctrine should limit the governments right to deduct for minor defects in performance. For example, in C. Martin Company¹²⁰ the contractor argued that the government inspector's certification that landscape maintenance services had been "substantially performed" should bar the government from later deducting minor amounts for work that was improperly performed. The Board held, however, that "[i]t is not sufficient to rely ... on generalized testimony that [Martin] had substantially performed the contract work. [C]onceding that [the contractor] substantially performed ... it still failed to perform some work. The Government does not have to pay for work not performed or unsatisfactorily performed."¹²¹

Similarly, contractors have occasionally attempted to prevent or overturn deductions by arguing that if the government suffered no harm directly attributable to the nonperformed or deficiently performed services, it should not be entitled to any deduction. In Harrison,¹²² a health services contractor failed to provide a resident medical officer for a total of 111 days, but the Navy was unable to cite any health problems or extra expenditures which resulted from that nonfeasance. The Armed Services Board, however, held that a "demonstration of harm or

detriment by failure to provide a service required by the contract is unnecessary to support a deduction for its nonperformance. It resembles insurance in that respect."¹²³ In Space Age, the same Board extended that rule to cases in which services were performed, but performed imperfectly.¹²⁴ In that case, the last in a series of five decisions spawned by a single contract, the contractor performed all of the required services, but did not perform them within the contractually required time limit. The Board held that the contractor's "... nonperformance of the contract requirement ... authorized deductions ... without the necessity of showing 'demonstrable harm or loss' There is nothing improper in the government refusing to pay full price when it did not get what it was entitled to get for that full price."¹²⁵ The issue of quantum was then returned to the contracting officer for recalculation.

Since the government enjoys such wide latitude to impose contract price deductions based upon deficient services, the most successful contractor tactic has been to attack the inspection system itself. In that regard, contractors have been largely successful in their assaults upon "all or none" inspection programs which, until recently, were widely used in service contracting. In North American Maintenance Co.,¹²⁶ one of the reasons for

overturning the price reductions was that the inspection forms used did not provide for "partial or substantially satisfactory performance." The Board stated that lack could "lead to a patently unreasonable result."

Clarkies¹²⁷ presented the Board its most recent opportunity to comment on the area. In that case, even the contracting officer testified that the contractor should have been given pro-rata credit for work satisfactorily performed, but stated that three of four inspectors unfairly "gigged" the contractor by either entirely accepting or rejecting its work. The Board strongly restated its position that "[t]he 'all or none' inspection procedure employed by the government was improper ... and an unfair and unreasonable payment penalty"¹²⁸ The Comptroller General, too, has concluded that such systems can detrimentally affect competition, and has not hesitated to recommend the amendment or cancellation of offending solicitations.¹²⁹

Despite the general condemnation of "all or none" inspection systems, contractors have not always been victorious even in this area. If the government can demonstrate that deficient individual services "... are of such proportion as to render the [entire area] unsuitable for the government's purpose," the agency is entitled to take a 100% deduction for the entire area, even though some services therein might have been properly

performed.¹³⁰ Similarly, if exceeding the AQL makes the rendered services valueless, the government is entitled to take a 100% deduction.¹³¹

Although the government need not always permit reperformance (supra), even when the contractor is allowed to correct defective services it is not guaranteed full payment. In Environmental,¹³² and later in D.J. Findley,¹³³ the Comptroller General recognized that "circumstances may exist where reperformance would not correct a deficiency."¹³⁴ Thus, deductions can still be made if reperformance makes the services untimely, the contractor only corrects the noted deficiencies in a random sampling scenario, or if the number of defects discovered indicates that the contractor is failing to comply with a required Quality Assurance Program.

2. Liquidated Damages

Liquidated damages differ from deductions pursuant to the Inspection of Services clause in that they need not be included in all service contracts, are usually assessed in accordance with a pre-set schedule, often involve delayed performance rather than nonperformance, and do not require pleading or proving actual damages. Like deductions, however, liquidated damages have been a frequent cause of disorder during performance and have led to a considerable amount of litigation.

The regulatory framework includes a general policy statement which indicates that liquidated damage provisions should only be used when untimely delivery is reasonably likely to result in government damages, and where the actual amount of those damages would be difficult to calculate or prove.¹³⁵ The FAR further requires that the amount of liquidated damages provided in the contract should represent a reasonable forecast of actual damages. If it doesn't, the liquidated damages terms may be considered a penalty and hence unenforceable. FAR also provides optional liquidated damage provisions for use in service contracts.¹³⁶

In the government procurement arena, liquidated damage clauses have generally been upheld. One explanation for that wide enforcement has been the

government tendency to set the rate of liquidated damages very low in comparison to the delay damages which could actually be alleged and proven.¹³⁷ Nonetheless, courts and boards often closely examine liquidated damages clauses to ensure that their terms are "reasonable" and do not constitute impermissible penalties or "spurs to performance."¹³⁸ Although almost everyone continues to pay lip service to the Priebe case,¹³⁹ at least the Comptroller General has tacitly acknowledged that the primary rationale for including a liquidated damages clause is to prod recalcitrant contractors to perform in a timely fashion. In Kleen-Rite, the U.S. Army Audit Agency reviewed prior custodial services contracts and determined that the then current liquidated damage rates "... were too low to encourage adequate performance."¹⁴⁰ Based upon that report the Army increased its liquidated damages rates - doubling some and raising others to ten times their previous levels. The Comptroller upheld the higher rates. Thus, despite Priebe, it appears that the intent to "spur contractor performance" is permissible, as long as the rates are reasonable when compared to the actual damages which are anticipated.

There is no single "right" way to determine a reasonable amount for liquidated damages, and many methods have been approved by the Comptroller and various boards. Recent cases have established that when the

contract permits random sampling, liquidated damages can be determined by multiplying the percentage by which defects exceed the AQL by the percentage of the contract price attributable to the defectively performed service.¹⁴¹ Other permissible techniques include assessing 10% of the value of work ordered but not performed under an indefinite quantity contract¹⁴² and rates based upon the equivalent cost of a comparable federal worker capable of performing the service.¹⁴³ The hallmark of these approved systems appears to be that in each case the assessment varied with the anticipated harm. Thus, liquidated damages will almost always be found reasonable if they are set in terms of a given amount for each day of delay, each service left unperformed, etc..

Liquidated damages provisions may clearly be overturned as penalties if there is "no possible relationship" between the amount stipulated and the losses contemplated by the parties. The contractor's burden of proof is very heavy, however, and few service contractors have been able to sustain it.¹⁴⁴

There is no requirement that the government set a maximum dollar amount or a maximum term for liquidated damages to be found reasonable.¹⁴⁵ FAR 12.202(b) provides only that damages may be limited, not that they must be. Further, the reasonableness of the liquidated damages schedule is determined as of the date the contract

was negotiated, not at the time damages are actually levied. Thus, it is immaterial that actual losses due to the delay were minimal or even that the liquidated damages assessment may exceed the entire contract price.¹⁴⁶

In Kleen-Rite,¹⁴⁷ the Comptroller General decided that the same amount of liquidated damages could be assessed for defective performance as for a complete failure to perform. His rationale, in the janitorial services context, was that costs to correct defective performance can be equal to or even exceed the cost of procuring the entire service. Similarly, the decision of the government to set the same liquidated damages rate for high and low priority work has been upheld. The contractor in Walsh¹⁴⁸ failed to sustain his heavy burden of proof that there was no possible relationship between the rates set and reasonably contemplated damages.

The government is also free to amalgamate areas for liquidated damages purposes, e.g., there is no need to set out a separate rate for every divisible area or task.¹⁴⁹ On the other hand, if the government wishes to set separate rates for individual services, it can do so without regard to the prices which a contractor bids for those particular services. In Kime-Plus,¹⁵⁰ the Board held that such action did not impermissibly infringe upon the contractors right to set bid prices. The only limitation was the usual requirement that the rate set be

"reasonable."

There are, of course, some limits to government imposition of liquidated damages. The standard services contract liquidated damage provision provides that damages cannot be assessed if performance delays are "beyond the control" of the contractor, or without its "fault."¹⁵¹ Since the government is the party claiming the damages, the government bears the burden of proving that the delayed performance or failure to perform was the fault of the contractor. Thus, in Colo-Hydro,¹⁵² the government submitted a claim for liquidated damages when a contractor failed to deliver several lots of Douglas Fir seedlings which were to be grown from government furnished seed. The contractor alleged that one seed lot had been contaminated with fungus, that the disease later spread to (and caused the rejection of) all lots, and that its failure to perform was therefore the fault of the government. Since the government was unable to establish that the disease spread because of improper contractor growing techniques, its assessment of liquidated damages was overturned.¹⁵³

If the government attempts to set liquidated damages at one hundred percent of the contract price whenever the AQL is exceeded, it must be able to demonstrate that the services actually rendered are of no value. A series of cases involving the Bureau of Land Management (BLM)

emphasizes the importance of adequately justifying the preset liquidated damages rate. Since the mid 1970's, the BLM has included a provision in its tree planting contracts which permits the assessment of 100% liquidated damages whenever the AQL (usually 80-85%) is exceeded.¹⁵⁴ The U.S. Claims Court had occasion to review a contract containing the provision and decided that the clause constituted an unenforceable penalty because the record provided "neither justification nor even explanation" why exceeding the AQL should bar all payments.¹⁵⁵ In later cases, the Bureau was careful to establish proof that exceeding the AQL would often require totally replanting the acreage in order to maximize its growth potential. After fully considering that rationale, the AGBCA duly upheld the contested provisions.¹⁵⁶

Despite generally favorable treatment by courts, boards, and the Comptroller, liquidated damages provisions are strictly construed and their terms strictly enforced. Although the standard clause does not require contractor notice before imposition of liquidated damages, if the clause contained in the contract requires such notice it will be enforced.¹⁵⁷ Ambiguous terms will also make the clause unenforceable. In Consolidated,¹⁵⁸ the contract authorized liquidated damages whenever supervisory guard services fell below the "minimum number required." The Board found, however, that

the agency had removed the requirement for any particular number of supervisory hours by a contract modification, that any supervision requirement was "vestigial" at best, and that the resultant ambiguity made the liquidated damages provision unenforceable.

Liquidated damages represent payments to the government in lieu of the actual costs occasioned by the delayed performance. Thus, they can be assessed in addition to deductions for nonperformed or deficiently performed services taken under the rubric of the Inspection of Services clause.¹⁵⁹ Liquidated damages can also be assessed in addition to any excess procurement costs which may be recoverable pursuant to the Default clause.¹⁶⁰

A somewhat anomalous provision was reviewed in the Space Age series.¹⁶¹ The contract therein contained a clause which appeared to "straddle the fence" between deductions taken for nonperformance and liquidated damages assessed for delay. That hotly contested provision called for premium payments (e.g., higher prices) for timely performance, and set out a formula by which lower payments could be calculated for services performed later.

The contractor argued, unsuccessfully and at great length, that the unusual clause was a form of liquidated damages provision. The Board emphatically disagreed,

holding that it was simply to be read as an addition to the Inspection of Services clause.¹⁶² That distinction was important because of the two clauses differing treatment of delays which might have been caused by the government. Under a liquidated damages provision, if the required services were performed late and delays were attributable to the government, no damages could be assessed. Since the Board held that the Inspection of Services clause applied, however, the fact that the government might have caused the delays was of no consequence. The government still was not required to pay a premium price for services it did not receive.¹⁶³

If this reasoning continues to be upheld, it may result in an increasing number of service contracts where psuedo liquidated damages provisions are written into the Inspection of Services clause. If so, certain short term benefits could accrue to the government. Examples include avoiding the strict scrutiny traditionally accorded to liquidated damages provisions, removing the need to apportion delay costs, and reducing the need to resolve difficult factual issues such as which party was the "controlling cause" of the delay. In the longer term, however, such benefits are apt to be more illusory than real. Courts and boards will be quick to extend closer scrutiny to deduction provisions which include liquidated damages elements. Provisions like that used in Space

Age are still subject to the same reasonableness requirements as liquidated damages clauses, and certainly will not be upheld if they are unconscionable.¹⁶⁴ In addition, contractors would quickly increase their bid prices to cover the increased risk resulting from these extended inspection clauses, much as they (presumably) now increase prices when standard liquidated damages provisions are included. I suspect that the impact of Space Age type provisions will be minimal, and their use confined to those situations where the government is truly willing to pay a premium for unusually swift service.

Chapter III

Discontinuation of Performance

When the government notes a service defect and orders reperformance, makes deductions pursuant to the Inspection of Services clause, or assesses liquidated damages, its purpose is twofold. It first desires to obtain the service for which it contracted and agreed to pay. Second, it hopes that its actions will stimulate improved future performance and avoid the need to resort to more drastic government action. Unfortunately, those hopes are not always realized, and the government finds that it is continuing to receive substandard services which do not satisfy its basic needs. When sequential services have been ordered, the contractor's failure to make progress can also result in a legitimate concern that overall contract performance is being endangered. Rather than relying upon common law remedies for breach in these situations, government service contracts typically contain default clauses which permit unilateral agency action to terminate the offending contractor. That clause also establishes certain procedural safeguards for the contractor, and requires that defaulted firms bear some of the costs engendered by their failure to perform.

A. Default Terminations

FAR 52.249-8 governs the default termination of most service contracts. It is very similar to its predecessor, DAR 7-103.11. Although the drafters of the FAR included a number of "stylistic changes" which made the clause easier for laymen to understand, they retained the same basic structure and made virtually no substantive changes which affected the rights of the contracting parties.¹⁶⁵ Consequently, many of the cases which examined the earlier DAR clause apply with undiminished vigor to the current clause.

Due in part to the relatively late emergence of service contracting as a significant element in the overall federal procurement sphere, there are few clauses which are service contract specific. Instead, supply and service contracts are often treated together in the same standardized clauses.¹⁶⁶ Although that has resulted in a far shorter procurement regulation, and works well in many cases, the differences between supply and service contracting have caused some difficulty when attempting to apply "supply language" to service contracts. Those difficulties have been particularly apparent in the default termination area and have led several commentators to call for a separate service contract default

clause.¹⁶⁷

While splitting the default clause might make the language somewhat simpler and less convoluted, the current dual purpose clause has been extensively litigated and most of its nuances exhaustively examined. Given the lengthy and cumbersome procedural requirements for accomplishing even the most rudimentary FAR modifications,¹⁶⁸ it is unlikely that the current clause will be changed in the near future. It is therefore appropriate to reexamine the current clause, with particular emphasis upon those recent performance problems which have led to the default termination of service contractors.

1. The Default Clause

The default clause used in fixed price supply and service contracts is composed of eight paragraphs, the most important of which is the first. That "rights granting" paragraph is itself divided into three sections which permit default termination for failure to deliver on time,¹⁶⁹ endangering delivery by failure to progress,¹⁷⁰ and failure to perform "other contract provisions."¹⁷¹ A more vital distinction, however, is that the first section provides an immediate right to terminate, while the latter two sections first require the issuance of a cure notice. Before separately discussing each area, those factors and cases which generally apply to the default termination of all service contracts should first be addressed.

In every potential default situation the contracting officer is faced with two interrelated decisions. The first involves whether performance problems have reached a level sufficient to justify default termination, e.g., can the government establish that it has the "right" to default terminate the contract. The second question involves whether or not the contract "should" be default terminated or whether other, less drastic measures would better serve the government's long term interests.

2. The "Right" to Terminate

The "right" to terminate is always dependent upon the facts of the individual case and the particular clause cited to justify the termination. It frequently requires the government to demonstrate the existence of adequate performance standards¹⁷² and an inspection system capable of accurately measuring the contractors lack of conformity with those standards.¹⁷³ In general, any "right" to terminate must be exercised within a reasonable time or the agency may be faced with a "constructive waiver" defense.¹⁷⁴ In service contracting, however, each failure to achieve the required performance standards constitutes a new default which may, either alone or in combination with previous failures, reestablish the Agency's right to terminate for default. In Emancar, for example, the failure of the government to properly terminate a grounds maintenance contractor for performance problems which occurred in April did not prevent its default termination for subsequent failures to perform which occurred in May.¹⁷⁵ Thus, in the typical services contract which involves the performance of recurring tasks, constructive waiver is not a major problem and few default terminations have been overturned on that basis. When service contracts involve providing a single service, or achieving a particular result within a set time period,

a different result may obtain.

At one time there was considerable concern about the effects of "Inspection of Services" clause deductions upon a later decision to default terminate for those same performance problems. In W.M. Grace, the Armed Services Board held that by deducting amounts for defectively performed janitorial services, "... the Government effectively waived the performance failures ... as a basis for default termination"¹⁷⁶ One month later, the same Board held that the government must either elect to take monetary deductions or, in the alternative, elect to use the defects as a basis for default termination. In that case, involving a requirements contract for moving household goods, the Board stated "... the Government may not use as grounds for this default action those same discrepancies for which it already made deductions from the contract price under the 'Inspection of Services' clause."¹⁷⁷

Unlike its predecessor, however, the current "Inspection of Services" clause explicitly states that deductions taken thereunder will not waive the right to terminate for default,¹⁷⁸ and recent cases have enforced that provision.¹⁷⁹ In fact, several recent cases have come full circle and stated that, far from requiring an election of remedies, "... the government vastly improves its chances of prevailing on a default termination if it

regularly imposes deductions ... rather than waiting until the occasion of the default termination to take decisive action."¹⁸⁰

It should be noted that the default clause is mandatory, at least for all service contracts expected to exceed \$25,000.00.¹⁸¹ If it is not included in the contract, it will be read in via the Christian Doctrine.¹⁸² The FAR, however, specifically excludes small purchase contracts from the requirement to include the clause. If the default clause is not included in a small purchase services contract, then, the Christian Doctrine will not apply, any improper default termination will not be converted into a termination for convenience, and the government may find itself liable for consequential damages.¹⁸³

3. "Should" the Contract Be Default Terminated?

Once the contracting officer establishes that he has the right to terminate for default he must then decide whether or not to actually do so. The FAR and the large number of precedents in this area do provide some guidance but, in the final analysis, the contracting officer is primarily expected to exercise his own discretion and apply his best business judgment. For example, FAR 49.402-3(f) provides a relatively complete list of factors which the contracting officer "shall consider" before making a final decision. Despite that apparently mandatory language, however, it has become clear that those factors are not intended to be a "checklist," are not included in the contract itself, and consequently that the failure to consider one or more of them is not fatal to the termination decision.¹⁸⁴

Similarly, a number of decisions remind the contracting officer that "minor, infrequent" deficiencies which are "insubstantial" do not warrant default termination. Cases like Pride Unlimited, Orlando Williams, Murcole, and a host of others provide examples of performance failures which have been found sufficient to justify default termination.¹⁸⁵ But that terminology and those examples may be less than edifying when the contracting officer is faced with a slightly different

factual pattern, or when the case is one of first impression. In the long run, the termination decision must be based upon the reasoned judgment of the contracting officer and his principal advisors, and must be made after a careful review of the particular facts involved.

Perhaps the best news for the contracting officer in this entire area is the great deference which courts and boards traditionally accord to the contracting officer's judgment. If the government can establish that the contracting officer exercised his individual discretion,¹⁸⁶ and can establish a "right" to terminate based upon one of the provisions of FAR 52.249-8(a), reviewers generally will not substitute their judgment for that of the contracting officer.¹⁸⁷ In fact, government decisions to default terminate have been upheld even when the reasons cited by the contracting officer were incorrect, as long as the Board was able to discern other, proper bases which were sufficient to justify the termination.¹⁸⁸

4. Termination Without Prior Notice

FAR 52.249-8(a)(1)(i) permits immediate default termination, without prior notice of any kind, if the contractor fails to "... perform the services within the time specified" Despite frequent contractor assertions that paragraph (a)(i) terminations should require a cure notice, courts and boards have consistently upheld the clear regulatory language and ruled to the contrary.¹⁸⁹

The primary issue in this area is whether the government is entitled to "strict compliance" with its performance standards, or whether something less will satisfy the agency's minimum requirements and preclude default termination. The general rule, noted in a number of service contract cases, is that the government is entitled to strict compliance with all contract terms and that failure to so comply may well justify default termination.¹⁹⁰ That general rule has significantly eroded, however, and many cases now hold that default termination is not appropriate if the contractor has "substantially complied" with the performance standards and rendered that performance on time. Under that theory, although each minor omission or failure to comply does constitute a default, not every such default will provide a proper basis for default termination. Instead, the

contracting officer must compare the completed and uncompleted tasks, and can default terminate only if the deficient performance formed a significant part of the whole.¹⁹¹ The defense of substantial performance has also been reinforced by the now widespread provision for deductions pursuant to the Inspection of Services clause. Several boards have reasoned that by providing for such deductions, the government has implicitly conceded that perfect performance is neither expected or required.¹⁹²

Substantial performance, then, does constitute a defense to the government's immediate right to terminate for default. However, like the general rule requiring strict compliance, it too has its own limitations. First, of course, the failure to meet performance standards must indeed be both "minor" and "inconsequential." In Marble and Chance,¹⁹³ the government default terminated a law firm for, among other transgressions, failing to close real estate transactions in a timely fashion. Although the partnership protested that it had substantially performed, the Board disagreed. It stated, "Although the doctrine of substantial performance may prevent the government from terminating for default, only the most minor failures of performance, when weighed against the scope and purpose of the contract, bring that doctrine into operation. We find that [the firm's] failures of performance were major, and that [the firm] did not

substantially perform its contract."¹⁹⁴

It is also clear that, in appropriate circumstances, even a single failure to perform services "in full and on time" could support a default termination despite the substantial performance doctrine.¹⁹⁵ Although the Pulley case did not involve a "one time" failure to perform, the ambulance service contractor in that case did successfully perform 392 out of 400 emergency service calls. Despite its 98% performance rate, however, the Board held that the default termination was warranted and that no cure notice was required.

While a cure notice clearly isn't required when a contractor fails to render timely performance, the government has occasionally created problems for itself by gratuitously issuing a cure notice, and then default terminating within the stated cure period. The Armed Services and General Services Boards' have held that "[e]ven a gratuitously granted cure period cannot be cut short by a default termination."¹⁹⁶ The Agriculture Board, however, did permit termination during such a gratuitous cure period when it was clear that the contractor had not relied to its detriment upon the cure notice.¹⁹⁷ In Soledad, the Armed Services Board also allowed premature termination when it was apparent that the contractor had not acted upon the cure notice or taken any of the personnel actions required to effect a cure.¹⁹⁸

cure.¹⁹⁸

Finally, there has been at least one hint that a "no-notice" default termination, even in a Section (a)(i) case, might be a violation of the contractor's 5th Amendment protection against deprivation of property without due process. That brief aside, however, was purely dicta and has not been advanced or applied by any other board or court.¹⁹⁹

5. Termination After Cure Notice

Sections (a)(ii) and (iii) permit default termination if a contractor fails to progress or if it fails to perform "other contract provisions," respectively. Both clauses permit termination well before the date set for final performance. For that reason, however, both sections also require that the service contractor be given written notice of the performance problems which are placing the contract in jeopardy, and be afforded an opportunity to correct those problems before a final termination decision is made.²⁰⁰

At one time, the government was required to demonstrate that performance was "impossible" before it could default terminate in advance of the contract completion date. That "impossibility" requirement has gradually been supplanted by an "improbability" or

Ohnstad Construction, the default termination of a service contractor was upheld because it had become "apparent that there was little probability that [the contractor] could finish the contract on time, particularly in light of [its] chronic equipment failures and a reluctance to commit additional equipment to the work."²⁰²

Although the proof requirements for early default termination have lessened, it is oftentimes difficult to distinguish situations where the required services have not been performed on time from those cases wherein contract completion is merely endangered. This is particularly true in those contracts which call for the periodic performance of certain services and do not require a particular, measurable "result" at the conclusion of the contract performance period. In the typical janitorial services or grounds maintenance context, it is difficult to conceive of very many performance problems which endanger successful completion of the contract and which do not also constitute failures to deliver timely, contract compliant services.²⁰³ Thus, such contracts should rarely require a "cure period," but instead should most often be terminated under Section (a)(i). The major exception, of course, is the situation where the contractor has substantially performed the contract requirements, and thus cannot be default terminated under Section (a)(i), but where it is

consistently performing at a level considered unacceptable or undesirable by the agency. In that scenario, the government has little choice but to look to Section (a)(ii) for assistance.

Section (a)(ii) is much more frequently used in those situations where the contract calls for a measurable outcome at the conclusion of performance. This commonly occurs when the contract requires production of a report, replanting a particular plot of land with seedlings,²⁰⁴ or even digging a given number of ditches at an Army post.²⁰⁵ In most cases, the government can easily satisfy the relaxed requirements for proof of contract endangerment by citing statistics which compare the percentage of work completed to date with the time remaining until contract conclusion, the unavailability of equipment or a trained labor force, etc..²⁰⁶ It is not surprising, then, that recent litigation has not centered upon whether or not contract completion is endangered. Instead, most cases are won or lost based upon the governments compliance or non-compliance with the semi-mechanical requirements for proper contractor notification.

The clear language of the default clause requires that the contractor be given at least ten days to cure the noted service deficiencies. If the contracting officer makes a final decision to terminate at any time

within that ten day window, the default termination will not be sustained despite the relative improbability that the contractor could have effected a cure within the time remaining.²⁰⁷ The contracting officer may, of course, exercise discretion and grant a cure period of more than ten days. Conversely, however, there is absolutely no requirement to grant more than ten days to cure, even if performance within that period is objectively impossible.²⁰⁸

In most cases, then, the issuance of the cure notice waives any right to default terminate for the duration of the cure period. As noted earlier, Soledad Enterprises and Ohnstad Construction²⁰⁹ limit the general rule and do allow termination during gratuitous cure periods as long as the contractor cannot be said to have detrimentally relied thereon. An additional limitation is that the government retains the right to default terminate for Section (a)(i) failures to render timely performance which occur during a previously granted cure period. Thus, in Terrence E. Dean,²¹⁰ a guard services contract required the firm to obtain all necessary state licenses. After the contracting officer became aware that Dean was operating without a license he issued a cure notice, fully expecting that the state would grant a temporary operating permit. When the State Department of Public Safety refused

to issue that temporary license and ordered all guards to leave the premises, however, the contracting officer terminated the contract for default during the previously granted cure period. The General Services Board of Contract Appeals upheld the default termination, noting that a cure notice does not waive the governments right to terminate for Section (a)(i) performance failures.

Once the cure notice is issued, the contractor can be terminated either for failure to cure the listed defects or for new defects which occur during the cure period.²¹¹ Of course, cure notices can also be a double-edged sword. If the contractor successfully remedies the deficiencies mentioned in the notice, and performance later deteriorates again, the previously "cured" defects cannot then be used to support a default termination.²¹² Issuance of the cure notice also waives any pre-existing right to terminate for deficiencies which were not contained in the cure notice. This is true even when the earlier defect would have permitted immediate termination under Section (a)(i).²¹³

Finally, it is clear that cure notices must specifically call the contractors attention to particular performance problems and thus afford him a reasonable opportunity to remedy those deficiencies. Riverside Community Corrections held that generic, "catch-all" cure notices would not support a default termination. The

Board pointed out that the major effect of such broadly stated cure notices would be to nullify the mandatory notice requirements of the default clause, and to thus deprive the contractor of its important right to solve minor problems and render conforming services.²¹⁴

Few service contracts have been terminated for failure to perform "other contract provisions" under section (a)(iii), and such cases do not form a significant part of the case law pertaining to performance problems. Litigation under Section (a)(iii) and its predecessors usually involves the oft noted tendency to characterize a failure to achieve performance standards as a failure to comply with "other contract provisions."²¹⁵ The better rule is that Section (a)(iii) failures should not relate to performance standards or contract specifications at all. Instead, they should be based upon noncompliance with peripheral contract clauses such as the provision of required bonds, certificates, and licenses²¹⁶ or the requirement to disclose records to the General Services Administration.²¹⁷ Such failures, too, should not be insubstantial, but rather should concern "significant" contract requirements.²¹⁸

B. Anticipatory Repudiation

If the government fails to properly comply with the cure notice requirements discussed above, a common fallback position is that the contractor, by its words and deeds, anticipatorily repudiated the contract. Anticipatory repudiation, however, has not been a significant problem in service contracting. It is discussed here only in recognition of its status as another major exception to the general requirement for cure notices whenever contracts are to be default terminated before performance is due.

The doctrine of anticipatory repudiation developed in the common law and was refined in early federal contracts for supplies and construction. Precedents from such contracts are now interchangeably applied to service contracts. Thus, in Moustafa Mohamed,²¹⁹ the General Services Board approvingly cited the early common law case of Dingey v. Oles²²⁰ which held that to constitute anticipatory repudiation "... the alleged repudiator's words or conduct must (1) manifest a positive, unconditional and unequivocal declaration of fixed purpose, (2) not to perform the contract, (3) in any event at any time." Not surprisingly, after examining that oft noted precedent, the Board held that the contractor's negative attitude alone was not sufficient to support a

finding of anticipatory repudiation.

In Wainwright Transfer²²¹ the Armed Services Board also had cause to reexamine the Dingey v. Oles factors. In that frequently cited case, the Board held that the government must also have detrimentally relied upon the contractor's statements before anticipatory repudiation will be found.

Ventilation & Cleaning Engineers,²²² was an unusual case which pointed out that even "abandonment" of the worksite may not always constitute an anticipatory repudiation of the contract. In that case the parties disagreed about whether or not the contractor had fulfilled the terms of the contract. Although the contractor admitted leaving the worksite ten days before the scheduled completion date, it insisted that it had fulfilled all of its contract responsibilities. The Board agreed, found that the government had approved the contractor's proposed process for cleaning the interior stone walls in question, and therefore couldn't complain when unsatisfactory results were achieved. The Board then held that the all government attempts to default terminate the contractor (including its allegations of anticipatory repudiation) were improper.

Not all government attempts to prove the anticipatory repudiation of service contracts have been unsuccessful. In Lawrence D. Bane the Postal Service Board, confronted

with the classic pattern of a contractor who threatens to stop work unless it receives a contract price increase, held that such actions are sufficient to constitute anticipatory repudiation.²²³

C. Excess Reprocurement Costs.

After a service contractor repudiates or is default terminated for failure to perform, the contracting officer is usually faced with the immediate requirement to reprocure those services. FAR 52.249-8 is the regulatory grant of authority to reprocure those services and then charge the excess costs, if any, to the defaulted contractor.²²⁴ Procedures for such reprocurements are contained in FAR 49.402-6.

Whenever services must be reprocured the contracting officer is faced with a number of competing, and frequently contradictory, concerns. First, he is interested in procuring replacement services quickly enough to ensure continuity of service or prompt reaccomplishment of those tasks which have been irregularly performed in the past. Next, he wants to ensure that the replacement contractor understands all of the government's requirements, has the ability to meet the performance standards set out in the contract, and will not require the same infusion of time and scarce quality assurance resources as the past contractor. Finally, since he is purchasing the services for the account of the defaulted contractor, he has a duty to mitigate that contractor's losses. FAR 49.402-6(a) provides, in pertinent part, "When the ... services are still

required after termination, the contracting officer shall repurchase the same or similar ... services against the contractor's account as soon as practicable. The contracting officer shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements."²²⁵ Thus, the contracting officer faced with reprocurring services, like his counterparts in other areas of federal acquisition, must be familiar with the twin concepts of similarity and mitigation. He must also be aware of the most recent cases in which the various boards of contract appeals have construed and interpreted the relevant FAR clauses.

It is clear that tightening performance standards, like the procurement of additional work from a supply contractor, will result in a finding of dissimilarity and the concomitant denial of excess reprourement costs. The effect of a relaxation of contract specifications or performance standards, however, has not always been so clear. In Lome Electronics,²²⁶ the Board reviewed a supply case in which the government reprocured a cheaper, off-the-shelf computer rather than the more complicated model contemplated by the defaulted contract. Despite its "laudable efforts" to save the defaulted contractor money, the Board found that the replacement computers were dissimilar and therefore disallowed the excess costs.

The effect of such relaxed specifications in a

services contract was recently spelled out in Pulley Ambulance.²²⁷ In that case the original contract required the contractor to provide two ambulances on a regular basis, and to have a third vehicle available for occasional use. When Pulley could not routinely provide the services of the third ambulance, it was default terminated. The government, seeking to widen competition for the reprocurement contract, effectively waived the requirement for the third ambulance. Despite that "reasonable and prudent" action, the Board held that the deletion of the requirement rendered the reprocurement dissimilar, and vacated the government's claim for excess reprocurement costs.

Despite Pulley, the simple redrafting of performance standards and specifications to insure that the reprocurement contractor understands important government requirements, or to clarify problem areas uncovered during the performance of the defaulted contract, should not result in a finding of dissimilarity or a denial of excess reprocurement costs.²²⁸ If problems with the original performance standards contributed significantly to the initial default, the contracting officer would be well advised to consult with both the original drafters and those currently using the services to determine whether those standards can be improved or clarified. Any proposed changes, of course, should be carefully reviewed

by the contracting officer and his staff attorney to ensure that all understand their probable impact upon the allowability of excess reprocurement costs. In the final analysis, however, the ability to recover such costs will usually be of relatively minor concern when balanced against the losses of time and effort which could result if the reprocurement contractor is not provided with clear and workable specifications.

Another frequent pitfall for the unwary is the requirement for the government to mitigate the contractor's damages. When service contract performance standards have not been met, the government is frequently faced with a backlog of work and with calls from both the field and agency superiors to reprocure, or otherwise "solve the problem," as quickly as possible. Oftentimes, the defaulted contractor is in the best position to render fast service to the government. Its staff and all necessary equipment are often propositioned or readily available, and the time required to begin providing the necessary services should be minimal. Despite those pressures and the noted advantages, the government has just experienced massive problems with the terminated contractor and therefore is not usually required to deal with it. In certain cases, however, when the defaulted contractor has cured the problem which led to the default, or when the government decides to lower the performance

standards in the reprocurement contract, a failure to deal with the defaulted contractor may be treated as a failure to mitigate damages.²²⁹ Thus, in Douglas County Aviation,²³⁰ the defaulted contractor successfully remedied all of the maintenance problems which had led to its default termination and then submitted the lowest bid for the reprocurement contract. The failure of the government to consider that bid, and hence mitigate damages, led the Board to deny its claim for excess reprocurement costs.²³¹

Another way to rapidly procure the required services, and thus still the clamor from above and below, is to allow government employees to complete the work or to temporarily provide the services. This is especially common in the service contract area, where unskilled or semi-skilled labor is often all that is necessary to complete the work, and where the government frequently has a large pool of such labor available which can quickly be shifted to the highest priority (or highest visibility) tasks. Although use of government labor is permitted by the default clause, civil service or military personnel are usually paid considerably more than the employees of local private contractors. In such cases, if the government wishes to use its own workers it must establish that it met its burden to mitigate damages by demonstrating both that "... there was an urgent need to

complete the work and the circumstances allowed no other reasonable alternative."²³² The difficulty in meeting those tests has been amply demonstrated in other recent cases. In Surf Cleaners,²³³ the government met the first prong, but was unable to demonstrate that other private contractors already working on the base could not have immediately begun work and provided cheaper replacement services. The Agriculture Board of Contract Appeals was faced with a similar problem in the Widdifield case and reached the same conclusion.²³⁴

Thus, the allowability of excess procurement costs is a major factor which must be considered whenever the contracting officer is faced with the need to accomplish the work of a defaulted contractor. Failure to pay proper attention to the entire range of factors discussed above can lead to the needless expenditure of scarce government resources. Only by becoming familiar with the service contract precedents in this area can the contracting officer and his staff ensure that they are properly husbanding the government's assets.

Conclusions and Recommendations

Each year the number of service contracts increases, and each year a higher percentage of the total federal procurement budget is showered upon the service contracting industry. The preceding discussion highlighted many of the performance problems which have plagued that industry in the past, and a number of suggestions were made which could reduce or avoid the repetition of those individual problems. The current system for soliciting, awarding and administering service contracts has worked relatively well in the past. However, the rapid expansion of the field, the growing size and complexity of the service contracts currently being awarded, and the increasingly important nature of the services now being contracted out demand that more attention be focused upon the field, and that methods be devised for improving the overall process of service contracting.

During the course of my research it became very apparent that the same service contract performance problems were recurring again and again. That fact amply demonstrates the need for each agency to develop a central repository for information and guidance specific to service contracting, and to staff it with a cadre of contracting officers and attorneys who are experienced

in the field. That new office should not be yet another level of bureaucracy whose approval is required before any solicitation can be issued or any service contract can be awarded. Instead, it should serve as a clearing house for Statements of Work, Performance Standards, and other service contracting documents generated within the Agency, which can then be provided to field offices tasked with procuring similar services. Contracting officers and attorneys should be available, on occasion, to travel in order to provide on-the-spot assistance to local contracting officers during the negotiation of major, or novel, service contracts. In the vast majority of cases, however, telephonic or datafax communication with the field should be sufficient to provide guidance and avoid recurring problems. Informal ties should be developed with similar offices within other Agencies to ensure that the entire government benefits from each success, and learns not to repeat those mistakes which will inevitably occur. Finally, the office should conduct frequent training programs to familiarize those currently involved in service contracting with recent performance problems, and to suggest methods for preventing similar problems in the future.

Another priority should be the development of instructional materials tailored to service contracting, and the use of those materials to insure that contracting

officers, quality assurance evaluators, and government procurement attorneys are adequately familiarized with the area during their initial training courses. It is no longer sufficient for private or government sponsored educational programs to concentrate upon supply and construction contracts, and then to hope that inexperienced personnel will be able to apply the same basic concepts to service contracts. Service contracting has now become a very important sector of Federal procurement in its own right. Consequently, new personnel should arrive at their first assignments with a working knowledge of the specific problems associated with service contracts and familiar with the current issues. In short, they must be ready to deal, one-on-one, with service contractors whose level of sophistication has grown in direct proportion to the increasing size, complexity, and dollar value of the services they provide.

Finally, the government should make greater use of the expertise possessed by its experienced service contractors, and those contractors should be involved earlier in the procurement process. To that end, Office of Federal Procurement Policy Pamphlet No. 4 should be revised to provide greater opportunities for contractor participation during the development of Statements of Work, the drafting of Performance Standards, etc.. In addition, the government should continue, or accelerate,

the recent trend away from the use of sealed bidding procedures for major service contracts and toward the use of negotiated procurement. Both initiatives should help to insure that each party understands the others priorities and limitations, avoid unrealistic expectations on both sides, foster a working relationship which is geared toward problem resolution rather than distrust and confrontation, and ultimately result in more problem free performance of service contracts.

FOOTNOTES

1. FAR 37.301.
2. Federal Procurement Data System Standard Report, Fiscal Year 1986, Fourth Quarter, p. 13.
3. Id. at p.11.
4. Telephone conversation with the Federal Procurement Data Center, 15 May 1987.
5. FAR 37.102(a) states that "Agencies shall generally rely on the private sector for commercial services (see Office of Management and Budget Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government)."
6. FAR 46.102(b).
7. FAR 46.102(e).
8. FAR 46.103(a) states (in pertinent part) that "... the activity responsible for technical requirements is responsible for prescribing ... inspection, testing, and other contract quality requirements."
9. FAR 46.103(b) provides that contracting offices are responsible for:
 - (b) Including in solicitations and contracts the appropriate requirements for the contractor's control of quality for the supplies or services to be acquired.
10. FAR 46.104 requires contract administration offices to:
 - (a) Develop and apply efficient procedures for performing Government contract quality assurance actions under the contract in accordance with the written direction of the contracting office;
 - (b) Perform all actions necessary to verify whether supplies or services conform to contract requirements;
 - (c) Maintain, as a part of the performance records of the contract, suitable records

11. FAR 46.105 lists numerous contractor responsibilities including, among others:

(a)(1) Controlling the quality of ... services.

(a)(2) Tendering ... only those ... services that conform to contract requirements;

(a)(4) Maintaining substantiating evidence, when required by the contract, that the ... services conform to contract quality requirements, and furnishing such information to the government as required.

(b) The contractor may be required to provide and maintain an inspection system or program for the control of quality that is acceptable to the government.

12. One example of this phenomenon is the low-level internecine conflict that inevitably erupts on Air Force installations between the Base Civil Engineer, who is usually responsible for preparing service and construction specifications, and the Base Contracting Officer who must prepare and administer the resulting contract.
13. Before CICA became effective on 1 April 1985, formal advertising was required for all major service contracts unless negotiation could be justified by one of the statutory exceptions which could then be found in 41 U.S.C. 252(c) and 10 U.S.C. 2304(a). See generally John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts (2d ed 1986), at p. 289.
14. See The Saxon Corporation, B-221054, 86-1 CPD 225; United Food Services, Inc., B-220367, 86-1 CPD 177; Servicemaster All Cleaning Services, Inc., B-223355, 86-2 CPD 216. See generally 18 G.C. 139 and 19 G.C. 99.
15. See A Guide For Writing and Administering Performance Statements of Work for Service Contracts, OFPP Pamphlet #4. This guide is also distributed as Supplement #2 to OMB Circular No. A-76 (1980).

16. Although the system does not envision contractor participation, contractors should be encouraged to contribute their insight early in the contract negotiation process or even during the initial stages of contract performance. Such inputs can then lead to expeditious modifications to the Statement of Work and Quality Assurance Plan, keyed to the contractors proposed method of performing the work.
17. See OFPP Pamphlet #4, supra, at p. 12.
18. Id. at p. 14.
19. Id. at pp. 14 - 15.
20. Id.
21. Both documents are subject to intense, after the fact scrutiny by all parties. It is therefore imperative that both be clear and that all ambiguities be resolved before the solicitation is released. Although the contractor is expected to find and question patent ambiguities within both documents, minor ambiguities which are not discovered until the contract is being performed will often be interpreted against the government. See generally John Cibinic Jr. and Ralph C. Nash, Jr., Administration of Government Contracts (2d ed. 2d printing 1986), hereinafter cited as "Cibinic and Nash," pp. 162 - 176, and cases cited therein. As an outsider who is rarely involved in the very early development of the Statement of Work, the Contracting Officer's staff attorney can often bring a fresh view to the draft documents and is frequently able to spot ambiguities and internal inconsistencies quickly. It is essential that the staff attorneys be brought into the system at this point, and that they not be relegated to reviewing documents later in the process when their role is reduced to "damage control."
22. Environmental Asceptic Services Administration - Request for Reconsideration, B-218487.3, 86-1 CPD 1. See also Kime-Plus, B-215949, 85-1 CPD 244; Saxon Corp., B-214977, 84-2 CPD 205.
23. B-215979, 85-1 CPD 244.

24. B-215979, 85-1 CPD 244, at p. 3. See also Environmental Aseptic Services Administration and Larson Building Care Inc., B-217771 et al., 83-1 CPD 194. Thus, contractors will not be permitted to control the measure of liquidated damages which may be assessed by the simple expedient of making unbalanced bids (i.e., by bidding low for those services which will be most difficult to perform within the AQL).
25. Servicemaster All Cleaning Services, Inc., B-223355, 86-2 CPD 216.
26. "Acceptable Quality Level" is the maximum percentage of a particular service that can be performed deficiently without resulting in any deductions from the contract price. It has been characterized as an implicit recognition by the government that services are rarely performed perfectly (even by government workers) and that the contractor should not be penalized for minor variations in performance.
27. B-223355, at pp. 4 ~ 5. See also Environmental Aseptic Services Administration and Larson Building Care, Inc., B-207771, et al., 83-1 CPD 194.
28. If the contractor fails to conform to one of these "standard" performance specifications the government may have a very good, legally defensible case for default termination, and may even be able to assess excess procurement costs. That prospect is of scant comfort, however, to those who must work in inadequately cleaned offices while the contracting office "builds a file" sufficient to justify default termination, or to the base residents forced to go without trash collection until a new service contractor is selected.
29. Early attempts to justify negotiated procurements based only upon the need to obtain higher quality services met with no success. See 18 G.C. 139; 19 G.C. 99.
30. B-224230, 87-1 CPD 41. See 29 G.C. 69.
31. Although the proposed Army procedure was ill advised, since it would almost inevitably have led to later disagreements between the parties and increased the potential for performance problems, those are administration issues and were not properly before the Comptroller. Instead, the Comptroller reasoned that

bidders would not be able to prepare intelligent bids without the missing documents, and grounded his decision upon the premise that the competitive system might be compromised if potential offerors, concerned by the lack of necessary information, were discouraged from submitting their bids.

32. B-215979, 85-1 CPD 244.
33. Lewis Management and Service Company, ASBCA No. 24398, 85-2 BCA 18041.
34. Id. at 90562 (citations omitted).
35. W. M. Grace, Inc., ASBCA No. 23076, 80-1 BCA 14256 (1980).
36. See FAR 14.207.
37. See generally Pride Unlimited, ASBCA No. 17778, 75-2 BCA 11436.
38. The negotiators notes may be of some assistance, but are often incomplete and frequently do not address the precise points in contention.
39. 10 U.S.C. 2301 et seq.
40. 10 U.S.C. 2304(a)(2). See also 48 C.F.R. 6.401 (1985).
41. B-220367, 86-1 CPD 177.
42. Id. at pp. 4 - 5.
43. B-221054, 86-1 CPD 225.
44. Id. at p. 3.
45. Id.
46. B-223355, 86-2 CPD 216.
47. Id at p. 2.

48. In General Dynamics Corp., ASBCA No. 20727, 70-1 BCA 14000, extensive negotiations preceded award of a contract to prepare technical manuals for the repair of radar equipment. Despite those negotiations, a major controversy arose concerning whether the manuals had to contain depot level repairs or merely instructions for repairs that could be accomplished in the field. In Leal's Food Service, Inc., ASBCA No. 28829, 85-2 BCA 18136, the contractor jointly negotiated minute details of the inspection and liquidated damages provisions with the Army. After encountering performance problems, however, it argued (unsuccessfully) that those provisions were ambiguous.
49. FAR 52.243-1 and 2.
50. Id., Alternatives I and II.
51. No service contract cases were found in which an alleged change was considered to be within the general scope of the contract, but not within the specific types of changes enumerated in FAR 52.243-1 and 2.
52. AGBCA Nos. 83-212-1A and B, 85-3 BCA 18451.
53. Id. at 92682.
54. ASBCA Nos. 18528, 19111, 75-1 BCA 11247.
55. This case is also interesting since it is one of the few cases which even notes in passing the inspector's and COTR's general lack of authority to provide directions capable of resulting in a change to the contract. Most cases simply fail to address the issue.
56. VABCA Nos. 1965, 1984, 84-3 BCA 17585.
57. ASBCA Nos. 17778, 75-2 BCA 11436.
58. Orlando Williams d/b/a Orlando Williams Janitorial Service, ASBCA Nos. 26099, 26872, 84-2 BCA 16983.
59. Tree Best Reforesters, Inc., AGBCA 82-266-3, 83-1 BCA 16290.
60. See 25 G.C. 213.

61. See Surf Cleaners, Inc., ASBCA Nos. 20197, 21244, 77-2 BCA 12687. In that case, however, the contractor was unable to prove inconsistent interpretations. The Board remarked that the mere fact that Surf was able to complete the first contract, while the second contract was terminated for default, was insufficient to prove that the standards were not consistently interpreted.
62. Rice Cleaning Service, GSBGA No. 3156, 71-1 BCA 8787.
63. Tidewater Management Services, Inc., ASBCA No. 21643, 77-2 BCA 12672.
64. Id.
65. Id. at p. 61434.
66. ASBCA No. 17778, 75-2 BCA 11436, at p. 54503 (citations omitted).
67. FAR 52.246-4.
68. See, e.g., Pat's Janitorial Service, Inc., ASBCA No. 29129, 86-3 BCA 19096; G.L. Christian and Associates v. United States, 160 Ct.Cl. 1, 312 F.2d 345, cert. denied, 375 U.S. 954 (1963), 170 Ct.Cl. 902, 320 F.2d 345, cert. denied, 382 U.S. 821 (1965).
69. See Tidewater Management Services, Inc., ASBCA No. 21463, 77-2 BCA 12672. But see North American Maintenance Company, ASBCA Nos. 21986, 21987, 78-2 BCA 13316.
70. See Ventilation Cleaning Engineers, Inc., ASBCA Nos. 16678, 16774, 72-2 BCA 9537. The government may, of course, enter into other arrangements with the contractor that do not require the presence of inspectors or mandate that inspections be conducted within a specified time after performance is completed. In Pacific Reforestation, Inc., AGBCA No. 86-166-3, 86-2 BCA 19004, the contract contained an ambiguous specification which was later interpreted to require government inspection of each area within 24 hours after BCA contractor planted seedlings. Even in that case, however, the Board concluded that there was no right to immediate (or "hot") inspections.

71. See, e.g., RNB Enterprises and Motorworks, ASBCA No. 28085, 86-1 BCA 18696; Globe Engineering Corp., ASBCA Nos. 28832, 29268, 85-3 BCA 18436; Pride Unlimited, ASBCA No. 17778, 75-2 BCA 11436; Rice Cleaning Service, GSBKA No. 3156, 71-1 BCA 8787.
72. See, e.g., RNB Enterprises and Motorworks, ASBCA No. 28085, 86-1 BCA 18696; Globe Engineering Corp., ASBCA Nos. 28832, 29268, 85-3 BCA 18436.
73. IBCA No. 1945, 87-1 BCA 19461.
74. Id. at p. 98368.
75. Mr.'s Landscaping and Nursery, HUD BCA Nos. 75-6, 75-7, 76-2 BCA 11968.
76. ASBCA No. 18969, 74-2 BCA 10836.
77. ASBCA No. 19603, 75-1 BCA 11097.
78. GSBKA Nos. 5760-R, 5812-R, 5901-R, 83-2 BCA 16805.
79. North American Maintenance Company, ASBCA Nos. 21986, 21987, 78-2 BCA 13316.
80. Id. at p. 65133.
81. ASBCA No. 28829, 85-2 BCA 18136.
82. ASBCA No. 25766, 84-2 BCA 17398.
83. ASBCA Nos. 26099, 26872, 84-1 BCA 16983.
84. GSBKA Nos. 5760-R, 5812-R, 5901-R, 83-2 BCA 16805.
85. Kime-Plus, B-215979, 85-1 CPD 244; Saxon Corp., B-214977, 84-2 CPD 205; Orlando Williams, ASBCA No. 26099, 84-1 BCA 16983. Of course, any "inaccurate" measurement of performance might just as easily cut the other way and result in contractor overpayments.
86. See, e.g., Eldorado College, B-213109, 84-1 CPD 238.
87. B-215979, 85-1 CPD 244 at p. 3.
88. B-218487, 85-2 CPD 180.

89. The Air Force plan was to calculate the average number of square feet in the buildings covered by the contract, increase that figure by an arbitrary factor of 20%, and set the resultant number as an "inspection unit." Buildings larger than one unit would be subdivided using natural dividing lines (floors, stairwells, etc.). Buildings smaller than the adjusted average would, however, be treated as a single unit.
90. Environmental Asceptic Services Administration, B-218487, 85-2 CPD 180.
91. See, e.g., Kime-Plus, B-215979, 85-1 CPD 244; Saxon Corp., B-214977, 84-2 CPD 205; Orlando Williams, ASBCA No. 26099, 84-1 BCA 16983.
92. Environmental Asceptic Services Administration and Larson Building Care, Inc., B-207771, et al., 83 CPD 194 (1983), at pp. 7 - 8.
93. See FAR 52.246-2(h) regarding supply contracts; FAR 52.246-12(f) and (g) regarding construction contracts.
94. FAR 52.246-4.
95. See also FAR 52.249-8(a)(i) which allows default termination only when the contractor fails to " ... perform the services within the time specified"
96. ASBCA No. 21058, 77-2 BCA 12799.
97. See generally Cibinic and Nash, at p. 615.
98. ASBCA Nos. 26099, 26872, 84-2 BCA 16983.
99. Id. at p. 84600.
100. B-214447, B-214447.2, 84-2 CPD 380 (1984).
101. Sunrise Maintenance Systems, B-219763.2, 85-2 CPD 603.
102. Id. at p. 4.
103. See, e.g., Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA 11436.

104. B-215979, 85-1 CPD 244.
105. See Mutual Maintenance Co., Inc., GSBGA No. 7492, 85-2 BCA 17944.
106. The lack of any "right" to reperform does not mean that reperformance will not be allowed in the vast majority of service contracts. Numerous cases have recognized that it is generally in the government's best interest to work with the incumbent contractor, allow him to improve the quality of services rendered, and so avoid the delays and costs associated with a reprocurement. See, e.g., Michigan Building Maintenance, Inc., IBCA No. 1945, 87-1 BCA 19461; Dan's Janitorial Service, Inc., ASBCA No. 29485, 86-1 BCA 18536.
107. See infra at pp. 57 - 58, 85 - 86.
108. FAR 52.246-4.
109. See Kothe v. R.C. Taylor Trust, 280 U.S. 224 (1930), cited in Environmental Asceptic Services Administration and Larson Building Care Inc., B-207771, et al., 83-1 CPD 194.
110. See generally FAR 1.601, et seq..
111. See, e.g., Tamp Corporation, ASBCA No. 25766, 84-2 BCA 17398 (1984); W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA 14256; Exquisite Service Company, ASBCA No. 21058, 77-2 BCA 12799; Contract Maintenance, Inc., ASBCA No. 19603, 75-1 BCA 11097.
112. Soledad Enterprises, Inc., ASBCA No. 20376 et al., 77-2 BCA 12552. But see Contract Maintenance, Inc., ASBCA Nos. 18528, 19111, 75-1 BCA 11247.
113. See, e.g., Space Age Engineering, Inc., ASBCA Nos. 25761, et al., 86-1 BCA 18611.
114. B-215230, 85-1 CPD 197.
115. The bids had already been opened by the time the Comptroller General issued his opinion. Therefore, it was not possible for him to recommend that the solicitation be amended.
116. GSBGA No. 6776, 84-1 BCA 16934. See also 1984 G.C. 27.

117. GSBKA No. 3156, 71-1 BCA 8787.
118. Ronald C. Skillens, d/b/a Skillens Enterprises, GSBKA 4625, 77-1 BCA 12525.
119. GSBKA No. 3156, 71-1 BCA 8787 at 60731. But see, Handyman Building Maintenance Co., Inc., IBCA Nos. 1335-3-80, 1411-12-80, 83-2 BCA 16646. In that case, the IBCA was faced with a situation in which "[t]he procedural discrepancies in the administration of [the] contract ... [were] almost as numerous as the omitted services on the part of the contractor." The contracting officer's failure to notify the contractor about specific performance deficiencies provided part of the Board's justification for disallowing the deductions.
120. ASBCA No. 23607, 84-1 BCA 17117.
121. Id. at p. 82210.
122. Harrison, A Joint Venture Consisting of Nat Harrison Associates, Inc., and Harrison Holdings Florida, Inc., ASBCA Nos. 11588, 11678, 67-2 BCA 6421.
123. Space Age Engineering, Inc., ASBCA Nos. 25761 et al., 83-2 BCA 16607 at pp. 29755-6.
124. Id.
125. ASBCA Nos. 25761, et al., 83-2 BCA 16607 at p. 93461.
126. ASBCA Nos. 21986, 21987, 78-2 BCA 13316.
127. Clarkies, Inc., ASBCA No. 22784, 81-2 BCA 15313.
128. Id. at p. 75832.
129. See, e.g., D. J. Findley, B-215230, 85-1 CPD 197; Linda Vista Industries, Inc., B-214447, B-214447.2, 84-2 CPD 380; Environmental Asceptic Services Administration and Larson Building Care, Inc., B-207771, et al., 83-1 CPD 194.
130. Starlite Services, Inc., B-219418, 85-2 CPD 410.

131. See, e.g., Pacific Reforestation, Inc., AGBCA 86-166-3, 86-2 BCA 19004; Double E Reforestation, AGBCA 85-109-1, 85-2 BCA 18764; Rainbarrel Industries, AGBCA 84-124-1, 84-2 BCA 17434. In these cases the government alleged that exceeding the AQL for properly planted seedlings would later require replanting the entire area. Although all were liquidated damages cases, the principle would apply with equal vigor to Inspection of Services clause deductions.
132. Environmental Asceptic Services Administration and Larson Building Care, Inc., B-207771, et al., 83-1 CPD 194.
133. B-215320, 85-1 CPD 197.
134. Environmental Asceptic Services Administration and Larson Building Care, Inc., B-207771, et al., 83-1 CPD 194 at p. 7.
135. FAR 12.202.
136. FAR 52.212-4.
137. Tighter federal budgets and the spotlight recently focused upon the federal procurement process have led to a recent tendency to raise the level of liquidated damages closer to that of actual damages. If that trend continues, it may well lead to even stricter administrative scrutiny and a lower government success rate. See, e.g., Massman Construction Co., B-204196, 82-1 CPD 624.
138. See, e.g., JMNI, Inc. v. United States, 2 FPD 89 (1984); Priebe & sons, Inc., 332 US 407 (1947). See generally, Cibinic and Nash, at p. 799.
139. Priebe & Sons, Inc., 332 US 407 (1947).
140. B-183591, 75-2 CPD 26, at p. 4.
141. C&H Management, Inc., B-221316.2, 86-2 CPD 275; Environmental Asceptic Services Administration, B-221316, 86-2 CPD 268.
142. L.A.J. Incorporated, ASBCA No. 30776, 85-3 BCA 18310.
143. International Business Investments, Inc., B-213723, 84-1 BCA 668.

144. See, e.g., Servicemaster All Cleaning Services, Inc., B-223355, 86-2 CPD 216; Environmental Asceptic Services Administration, B-221316, 86-1 CPD 268; Environmental Asceptic Services Administration--Request for Reconsideration, B-218487.3, 86-1 CPD 1; Richard D. Walsh Associates, Inc., B-216730, 85-1 CPD 621; International Business Investments, Inc., B-213723, 84-1 CPD 668.
145. Richard D. Walsh Associates, Inc., B-216730, 85-1 CPD 621.
146. Kleen-Rite Corporation, B-1836591, 75-2 CPD 1.
147. Id.
148. Richard M. Walsh Associates, Inc., B-216730, 85-1 CPD 621.
149. Starlite Services, Inc., B-219418, 85-2 CPD 410.
150. B-215979, 85-1 CPD 244.
151. FAR 52.212-4.
152. Colo-Hydro, Inc., AGBCA 83-133-1, 86-1 CPD 18599.
153. Colo-Hydro is an excellent example of the Board maintaining the status quo and allowing each side to bear its own damages when neither is able to sustain its burden of proof. In this case, the contractor submitted a claim for almost \$19,000 (in addition to remission of the liquidated damages assessment). Since the contractor could not prove conclusively that the government was at fault for all of its losses, the Board also denied the contractor's claim.
154. JMNI, Inc. v. United States, 2 FPD 89 (1984).
155. Id.
156. Double E Reforestation, AGBCA 85-109-1, 86-2 BCA 18764; Rainbarrel Industries, AGBCA 85-124-1, 84-2 BCA 17434. Double E Reforestation stated that even the juxtaposition of 80% planting quality yielding 70% payment, while 78% planting quality resulted in a total forfeiture of the contract price, was "not necessarily significant for purposes of deciding whether a penalty or forfeiture occur[ed]."

157. L.A.J. Incorporated, ASBCA No. 30776, 85-3 BCA 18310. Compare, Government Contractors, Inc., (unpublished) GSBICA No. 6776, 1984 G.C. 27; Ronald C. Skillens, d/b/a Skillens Enterprises, GSBICA No. 4625, 77-1 BCA 12525; Rice Cleaning Service, GSBICA No. 3156, 71-1 BCA 8787.
158. Consolidated Security Services Corp., GSBICA No. 7714, 86-1 BCA 18597.
159. FAR 52.246-4; FAR 52.246-5.
160. FAR 52.212-4(b).
161. Space Age Engineering, Inc., ASBCA Nos. 25761, et al., 83-2 BCA 16607; 83-2 BCA 16717; 83-2 BCA 16815; 86-1 BCA 18611.
162. "One of the basic issues involved here is whether SP H-19 is a liquidated damages provision. Appellant [Space Age] asserts that it is. Respondent [U.S. Army] asserts that it is not. Appellant is wrong and respondent is right." 83-2 BCA 16607 at p. 82573.
163. "The nonperformance by the contractor, even if excusable ... does not mean that the contractor can be paid for contract services not performed. Consequently, a showing that services were required by the contract and not performed is all that is necessary to justify a deductive adjustment in the contract price (citations omitted)." Harrison, A Joint Venture, ASBCA No. 11558, 67-2 BCA 6421, quoted at Space Age Engineering, Inc., 86-1 BCA 18611 at p. 93460.
164. 86-1 BCA 18611, at p. 93462.
165. See generally H. Dorsey, The Government Right to Terminate for default: A Death Knell for Cure Notice Requirements in Service Contracts, 111 Mil. L. Rev. 167 (1986). The article (hereinafter cited as "Dorsey article") contains an excellent comparison of the DAR and FAR clauses at p. 173.
166. See, e.g., FAR 52.212-4 (liquidated damages); 52.212-13 (stop work orders); 52.212-15 (delay of work); 52.232-1 (payment); 52.232-1 (changes).

167. See Dorsey article; William J. McGrath and Robert B. Shearer, Terminating the Breaching Contractor / The Problem and a Possible Solution, 7 Nat. Cont. Mgt. J. 1 (Spring 1973), reprinted at 10 YPA 659 (1973).
168. FAR 1.201.
169. FAR 52.249-8(a)(1)(i), hereinafter referred to as Section (a)(i).
170. FAR 52.249-8(a)(1)(ii), hereinafter referred to as Section (a)(ii).
171. FAR 52.249-8(a)(1)(iii), hereinafter referred to as Section (a)(iii).
172. See infra, Chapter I.
173. See infra, at pp. 29-35.
174. DeVito v. United States, 188 Ct.Cl. 979 (1969); Marble and Chance, HUD BCA No 85-908-C2, 87-1 BCA 19937; Emancar, Inc., HUD BCA No. 80-534-C12, 82-1 BCA 15531.
175. Emancar, Inc., HUD BCA No. 80-534-C12, 82-1 BCA 15531.
176. W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA 14256, at p. 70231.
177. Wainwright Transfer Co. of Fayetteville, Inc., ASBCA Nos. 23311, 23657, 80-1 BCA 14313, at p. 70537.
178. FAR 52.246-4(e).
179. See, e.g., Cervetto Building Maintenance Co. v. United States, 1 FPD 107 (1983).
180. Michigan Building Maintenance, Inc., IBCA No. 1945, 87-1 BCA 19641, at p. 98369.
181. FAR 49.504(a)(1).
182. G.L. Christian and Associates v. United States, 160 Ct.Cl. 1, 312 F.2d 418 (1963).
183. Monarch Enterprises, Inc., VABCA No. 2239 and 2296, 86-3 BCA 19821.

184. International Electronics Corporation, ASBCA No. 18934, 76-1 BCA 11817, reversed on other grounds, 227 Cl.Ct. 708, 646 F.2d 496 (1981). While this case involved a similar DAR provision, the same logic should apply to the current FAR clause. See generally, Cibinic and Nash, at p. 743; 18 G.C. 248.
185. Pride Unlimited, ASBCA No. 17778, 75-2 BCA 11436; Orlando Williams, ASBCA Nos. 26099, 26872, 84-1 BCA 16893; Murcole, Inc., ASBCA Nos. 17230, 17473, 74-1 BCA 10545.
186. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968); Fairfield Scientific Corp. v. United States, 222 Cl. Ct. 167, 611 F.2d 854 (1979).
187. Murcole, Inc.. ASBCA Nos. 17230, 17473, 74-1 BCA 10545; Douglas County Aviation, AGBCA Nos. 80-108-1, 83-142-1, 85-3 BCA 18257.
188. Douglas County Aviation, supra Note 187; Spokane Helicopter Service, Inc., AGBCA No. 80-108-1, 82-1 BCA 15692.
189. See, e.g., Building Maintenance Specialist, Inc., ASBCA No. 25552, 85-3 BCA 18300; Sentry Corporation, ASBCA No. 29308, 84-3 BCA 17601; Pulley Ambulance, VABCA Nos. 1954, 1984, 84-3 BCA 17655; Milmark Service v. United States, 2 Ct.Cl. 116, 731 F.2d 855 (1983); Emancar, Inc., HUD BCA No. 80-534-C12, 82-1 BCA 15530; Utah Waste Paper Company, VACAB No. 1104, 75-1 BCA 11058; L.M. Copeland, ASBCA No. 13646, 69-1 BCA 7586.
190. Marble and Chance, HUD BCA No. 85-908-C2, 87-1 BCA 19337; Emancar, Inc., HUD BCA No. 80-534-C12, 82-1 BCA 15530; Utah Waste Paper Company, VACAB No. 1104, 75-1 BCA 11058.
191. See, e.g., Mr.'s Landscaping and Nursery, HUD BCA Nos. 75-6, 75-7, 76-2 BCA 11968; Contract Maintenance, Inc., ASBCA Nos. 18528, 19111, 75-1 BCA 11247; Reliable Maintenance Service, ASBCA No. 10487, 66-1 BCA 5331, motion for reconsid. denied, 67-1 BCA 6194.
192. Handyman Building Maintenance Co., Inc., IBCA Nos. 1335-3-80, 1411-12-80, 83-2 BCA 1646; Mr.'s Landscaping and Nursery, HUD BCA Nos. 75-6, 75-7, 76-2 BCA 11968.

193. HUD BCA No. 85-908-C2, 87-1 BCA 19337.
194. Id. at p. 97884 (citation omitted).
195. Pulley Ambulance, VABCA Nos. 1954, 1964, 84-3 BCA 17655; Emancar, Inc., HUD BCA No. 80-534-C12, 82-1 BCA 15531. Compare Miller's Ambulance Service, VACAB No. 548, 67-1 BCA 6274.
196. Moustapha Mohamed, GSBCA Nos. 5760-R, 5812-R, 5901-R, 83-2 BCA 16805 at 83526. See also B & C Janitorial Services, ASBCA No. 11084, 66-1 BCA 5355.
197. Ohnstad Construction, Inc., AGBCA No. 81-160-1, 83-1 BCA 16144. But see, Administrative Judge Doherty's strong dissent, citing numerous decisions which didn't allow contracts to be terminated during the cure period.
198. Soledad Enterprises, Inc., ASBCA Nos. 20736, et al., 77-2 BCA 12552.
199. Riverside Community Corrections, DOT CAB 1379, 84-2 BCA 17239. See 26 G.C. 120.
200. See Cervetto Building Maintenance Co. v. United States, 2 Cl. Ct. 299, 1 FPD 107 (1983).
201. See generally Nash and Cibinic at pp. 695-6, and cases cited therein.
202. AGBCA No. 81-160-1, 83-1 BCA 16144, at 80199.
203. A recent example of one such problem involved a major prepositioning contract at an isolated overseas location. During the "phase-in" period it became clear that the contractor was experiencing difficulty assembling his men and materiel. Those delays in turn delayed the shipment and prepositioning of previously ordered military equipment and supplies. Although strong consideration was given to default terminating the contract for failure to progress, it was determined that host nation barriers had caused many of the problems and that resoliciting the contract would result in even greater program delays.
204. See, e.g., Double E Reforestation, AGBCA No. 85-109-1, 86-2 BCA 18764.

205. Ventilation Cleaning Engineers, Inc., ASBCA Nos. 16678, 16774, 72-2 BCA 9537.
206. See, e.g., Double E Reforestation, AGBCA No. 85-109-1, 86-2 BCA 18764; RNB Enterprises & Motorworks, ASBCA No. 28085, 86-1 BCA 18696.
207. Cervetto Building Maintenance Co. v. United States, 2 Cl. Ct. 299, 1 FPD 107 (1983).
208. Orlando Williams, ASBCA Nos. 26099, 26872, 84-1 BCA 16983.
209. Soledad Enterprises, Inc., ASBCA Nos. 20376, et al., 77-2 BCA 12552; Ohnstad Construction, Inc., AGBCA No. 81-160-1, 83-1 BCA 16144.
210. GSBICA No. 8455.
211. Orlando Williams, ASBCA Nos. 26099, 26872, 84-1 BCA 16983; Murcole, Inc., ASBCA Nos. 17230, 17473, 74-1 BCA 10545.
212. Mr.'s Landscaping and Nursery, HUD BCA Nos. 75-6, 75-7, 76-2 BCA 11968.
213. San Antonio Construction Co., Inc., ASBCA No. 8110, 1964 BCA 4479.
214. DOT CAB No. 1379, 84-2 BCA 17239. See 26 G.C. 120.
215. See generally Nash and Cibinic at p. 700; Ralph C. Nash, Jr. and John Cibinic, Jr., Federal Procurement Law, Volume II (3rd ed. 1980), at p. 1654, Note 8, and cases cited therein; Dorsey at p. 192.
216. A. Arrietta, GSBICA No. 4650, 77-1 BCA 12334 (bond); White Lines, Inc., ASBCA No. 17756, 73-2 BCA 10126 (certificate); Terrence E. Dean, GSBICA No. 8455 (license).
217. American Business Systems, GSBICA No. 5140, et al... See also, 22 G.C. 475.
218. See generally 22 G.C. 475, and cases cited therein.
219. GSBICA Nos. 5760-R, 5812-R, 5901-R, 83-2 BCA 16805.
220. 117 U.S. 490 (1886).

221. ASBCA Nos. 23311, 23657, 80-1 BCA 14313.
222. GSBICA Nos. 3705, et al., 74-1 BCA 10390. See also 16 G.C. 124.
223. PSBCA Nos. 1440, 1491, 86-2 BCA 18997. See generally Nash and Cibinic, pp. 717-724, and cases cited therein.
224. The clause provides, in pertinent part, "If the Government terminates this contract ... it may acquire, under the terms and in the manner the Contracting Office considers appropriate, ... services similar to those terminated, and the Contractor will be liable to the government for any excess costs for those ... services."
225. Although at first blush these duties may appear difficult to accomplish, the AGBICA, at least, does not feel that they are unduly burdensome. "The Government need never fail in meeting its burden. The requirements are well known; the Government may only spend [the Contractor's] money with a modicum of care and keep some evidence that was done." Inberg Surveying Company, AGBICA 85-177-1, 3 June 1986. The number of cases in this area, however, either belie that sentiment or testify to the incompetence of countless government employees.
226. ASBCA No. 8642, 1963 BCA 3833.
227. VABCA Nos. 1954, 1964, 84-3 BCA 17655.
228. Audiosears Corporation, ASBCA No. 9850, 65-2 BCA 5233.
229. Douglas County Aviation, AGBICA Nos. 82-264-1, 83-142-1, 85-3 BCA 18257; Pulley Ambulance, VABCA Nos. 1954, 1964, 84-3 BCA 17655; Marmac Industries, Inc., ASBCA No. 12158, 72-1 BCA 9449.
230. AGBICA Nos. 82-264-1, 83-142-1, 85-3 BCA 18257.

231. In situations like this, it would always appear advisable to allow the defaulted contractor to submit a bid or proposal. His price can be no higher than the original contract price, and may be considerably lower if performance standards have been reduced. If appropriate steps have not been taken to resolve the problems which led to the original default, the contractor can easily be determined to be non-responsible. In the RFP-scenario, proposals from such a contractor can simply be rejected as not representing the best deal for the government, cost and other factors considered.
232. Brent L. Sellick, ASBCA 21869, 77-2 BCA 13510. See 21 G.C. 12.
233. ASBCA Nos. 20197, 21244, 77-2 BCA 12687.
234. Elton E. Widdifield & Excavating Unlimited, AGBCA No. 81-115-1, 83-2 BCA 16639.