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Dodging The Dicey Defense Base Act Issues?

The expense of Defense Base Act (DBA) insurance has become a necessary cost of working as a U.S. Government contractor overseas. Virtually every overseas contract with the U.S. Government requires DBA coverage, and over 1,000 DBA claims have been filed related to contractors killed during the Iraq and Afghanistan wars alone. Special Inspector General for Iraq Reconstruction, *Report to Congress*, at 15 (Oct. 30, 2005).

Enacted in 1941, the DBA, 42 USCA §§ 1651–1654, affords disability compensation and medical benefits to employees, and death benefits to eligible survivors of employees of Government contractors who perform "public work" overseas, including contracts and projects in connection with national defense. Like other workers' compensation statutes, the contractor pays insurance premiums on behalf of employees, who, in return, surrender their common-law remedies against the employer for work-related injuries or death. While many employers initially balked at the high DBA premiums, the unanticipated violence toward contractors in Iraq has resulted in the DBA serving as a "safe harbor" from the far steeper costs associated with wrongful death claims or other tort litigation.

Since the onset of the Iraq war, the U.S. Department of Labor has witnessed an unprecedented surge in DBA claims practice, forcing DOL to address many issues related to DBA coverage for the first time since the DBA's enactment. As DOL observed, "[w]ithout a doubt, by the time the thousands of cases that have arisen over the past few years work their way through the system of judicial review, there will be many important new interpretations to assimilate into our understanding of the DBA." Jack Martone, "A Brief History of the Defense Base Act," at 2 (presentation from DBA/War Hazards Compensation Act Seminar, Feb. 23, 2006).

This article addresses two threshold jurisdictional issues currently being litigated in DBA cases: whether the DBA applies to contracts (1) entered into by the Coalition Provisional Authority (CPA) or (2) financed by the Development Fund for Iraq (DFI). As described below, the answers to these issues are complex because of the vague nature of the CPA and the various sources of funding for Iraq reconstruction efforts, yet resolution of these fundamental questions is long overdue.

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Is the CPA a U.S. Entity or Instrumentality?—Section 1651(a)(4) of the DBA states that the statute applies to contracts and subcontracts "entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States) …." In interpreting this section, DOL explicitly has held that § 1651(a)(4) "requires that the United States or an agency thereof be a party to the contract." *Morrissey v. Kiewit-Atkinson-Kenny,* 36 BRBS 5 (2002); see also *Airey v. Birdair*, 12 BRBS 405 (1980) (denying claim for benefits under the DBA because claimant was not injured while engaged in employment under a contract or subcontract with "the United States Government"); *Z.S. v. Science Application Int'l Corp.*, Case No. 2006-LDA-00034, OWCP No. 02-13865 (April 6, 2007) (concluding that claimant was not covered under § 1651(a)(4) because she "was not working under a Government contract while in Iraq").

Because the CPA awarded and retained responsibility for many reconstruction contracts in Iraq, a critical question regarding the scope of DBA coverage is whether the CPA is "the United States or any executive department, independent establishment, or agency thereof" under § 1651(a)(4). Between its inception in 2003 and April 4, 2004, alone, the CPA awarded 1,988 contracts, grants, and purchase and delivery orders valued at approximately $1.04 billion. SIGIR, *Iraq Reconstruction: Lessons in Contracting and Procurement 2* (July 2006), at 35. Yet, despite the magnitude of this procurement activity, no publicly available decision conclusively determines whether a CPA contract is covered by the DBA.

One DOL decision addresses the issue but does not resolve it. In *J.T. v. American Logistics Servs.*, BRB No. 07-0135 (April 30, 2007), the employer contended that the DBA did not apply to the claimant's claim because the contract was with the CPA and not the U.S. or any agency or department thereof. DOL's Benefits Review Board (BRB) expressly declined to address this issue, however, because it had not been addressed below by the administrative law judge, and the BRB remanded the case to the ALJ for a new evidentiary hearing.

In the absence of DBA precedent on this issue, the history of the CPA is important for understanding its status. The earliest public reference to the CPA appears in the April 16, 2003 "Freedom Message to the Iraqi People" by Gen. Tommy Franks, the commander of coalition forces in Iraq. In that message, Gen. Franks "announced the formation of the CPA as the body that would exercise temporary powers of government in Iraq." See *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 620 (E.D. Va. 2005) (*Custer Battles I*).

In May 2003, the U.N. formally recognized the CPA as a multi-national coalition temporarily governing Iraq. See UNSCR 1483. According to its own regulations, the CPA was established to "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development." CPA Regulation No. 1, § 1. The CPA was further "vested with all executive, legislative and judicial authority necessary to achieve its objectives." Id.

In October 2003, in a letter submitted to the Government Accountability Office in connection with a bid protest, the U.S. Army Legal Services Agency submitted an unambiguous statement that the CPA "is not a Federal agency," but instead it "is composed of an international coalition." Maj. Frank A. March, Department of the Army, U.S. Army Legal Services Agency, "Protest of Turkcell Consortium, B-293048," correspondence to GAO, Oct. 21, 2003, at 2–4. Similarly, the status of the CPA as separate and distinct from the U.S. Government also has been confirmed by the former administrator of the Office of Federal Procurement Policy:

> The CPA is not the United States Government. Accordingly, if one enters into a contractual relationship with the CPA, one is not entering into a contractual relationship with the United States. The rights and remedies available to parties contracting with the United States will not be available in a contractual relationship with the CPA.

SIGIR Report, *Iraq Reconstruction: Lessons in Contracting and Procurement 2* (July 2006), at 24.

The CPA was not a U.S.-only operation. At least 19 countries provided resources to the CPA. SIGIR Audit Report No. 04-001, *Coalition Provisional Authority Coordination of Donated Funds* (June 25, 2004), at 11. The preamble to every CPA regulation issued by CPA Administrator Paul Bremer stated that the regulation was issued pursuant to the authority of the CPA administrator consistent with "relevant U.N. Security Council

Resolutions" and "the laws and usages of war." See, e.g., CPA Regulation No. 1. The first CPA regulation issued provided that, under "the laws and usages of war" and "relevant United Nations Security Council resolutions, including Resolution 1483 (2003)," the CPA was "vested with all executive, legislative and judicial authority necessary to achieve its objective." Id. at 1. The CPA further stated that the applicable law was established by the CPA and the laws of Iraq unless Iraqi law prevented the CPA from exercising its rights and obligations. Id.

The status of the CPA has been addressed by a U.S. district court in the context of a False Claims Act case: *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006) (*Custer Battles II*). After careful study, the Court concluded that "the CPA was not a U.S. government entity." Id. at 689. Instead, it held that the CPA is "an international body formed by the implicit, multilateral consent of its Coalition partners, which would not be subject to the specific laws of its member states, including the FCA." Id. at 688–89.

> [L]ike NATO or any other international organization created by the multilateral consent of multiple member nations, whether by treaty or otherwise, the CPA is not an instrumentality of each of its members states, distinctly subject to the laws of all of its members, but a wholly distinct entity that exercises power through a structure agreed to by its member states and that is subject to the laws of war and to its own laws and regulations.

Id. at 689. Finally, the Court concluded that "although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government." Id.

Because the CPA is not the "United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States)," § 1651(a)(4) does not provide coverage for claims for DBA benefits to CPA contracts if the CPA retained contracting responsibilities.

Are Contracts Funded by the DFI "Financed" by the U.S.?—Section 1651(a)(5) of the DBA provides jurisdictional coverage only if the injury or death of an employee occurs while the employee is engaged in any employment under a contract or subcontract "approved and financed by the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States) ...." Since the inception of the rebuilding efforts in Iraq, the reconstruction contracts have been funded almost exclusively by two "pots of money": U.S. appropriations and DFI funds. See, e.g., *Rebuilding Iraq: Status of Funding and Reconstruction Efforts*, GAO Report No. 05-876 (July 2005), at 6–12. As the distinction between the two funding sources is well-established, DOL or a court should have no difficulty determining whether a DFI "financed" contract is covered by the DBA under § 1651(a)(5).

In light of the magnitude of DFI funding of the Iraq reconstruction effort, many DBA claims likely have been filed in connection with DFI-financed contracts. As of June 2004, the DFI had received total deposits of about $20 billion. SIGIR, *Iraq Reconstruction: Lessons in Contracting and Procurement 2* (July 2006), at 25. Over the course of the DFI's 13-month existence under CPA management, the CPA spent $3.35 billion in DFI funds on relief and reconstruction projects. Id. Yet, to date, no publicly available decisions have addressed the applicability of the DBA to DFI-financed contracts.

As with a determination of the CPA's status, the history and origins of the DFI are essential to understand the nature of DFI-funded contracts. The U.N., the CPA, and the U.S. Government have consistently stated that DFI funds are "Iraqi funds" and not U.S. funds. UNSCR 1483 sanctioned the establishment of the DFI and provided that DFI funds shall be disbursed at the direction of the CPA. UNSCR 1483 at 4. The CPA is required to use the DFI funds "in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq." Id. Indeed, UNSCR 1483 makes clear that "from its inception, the DFI was Iraqi money, administered for a time by the CPA, but strictly on behalf of the people of Iraq." *Custer Battles I*, 376 F. Supp. 2d at 645.

CPA Memorandum Number 4 also explained that DFI funds are "Iraqi funds" and are not comprised of appropriated funds from the U.S.:

> Funds under the control of the [CPA] consisting of (a) proceeds from Iraqi state-owned property that has been vested or seized in accordance with applicable laws and made available to the CPA to assist the Iraqi people and assist in the reconstruction of Iraq; and (b) funds in the Development Fund for Iraq, the establishment of which is noted in Resolution 1483 (2203). As used in this Memorandum, "Iraqi Funds" do not

> include funds provided through the appropriations process of Coalition member governments (for example, funds provided directly to the CPA by the governments of the United States or the United Kingdom).

CPA Memorandum No. 4, *Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq*, at 3–4.

The decision in *Custer Battles I* summarizes the various sources of funding comprising the DFI:

> The DFI was established through the coordinated effort of the United Nations and the CPA to fund relief and reconstruction efforts in Iraq. It was established to hold various funds for Iraq's reconstruction needs, including (i) deposits from surplus funds in the U.N. 'Oil for Food' program, (ii) revenues from export sales of Iraqi petroleum and natural gas, (iii) international donations, and (iv) repatriated Iraqi assets seized by the United States and other nations.

Custer Battles I, 376 F. Supp. 2d at 626. Further, independent audits of the DFI conducted by KPMG show that the DFI did not consist of any U.S. appropriated funds.

Importantly, in *Custer Battles I*, the district court focused on the U.S. Government's concession that " '[t]he funds in the DFI have always been Iraqi funds;' they never became United States government property." Id. at 645. Consistent with this position, in a statement to the U.S. House of Representatives Committee on Government Oversight and Reform on February 6, Bremer began by noting that the subject of the hearing was on the CPA's use of and accounting for DFI funds, and he then clearly stated that the DFI funds "are not appropriated American funds. They are Iraqi funds." Id.

Considering the source of funds comprising the DFI, as well as the CPA's control over those funds, the Court in *Custer Battles I* concluded that the DFI did not constitute U.S. funds. This finding was based on the following key facts, which are of particular relevance to DBA applicability: (1) "funds in the DFI did not vest in the U.S. Treasury;" (2) funds in the DFI "could not be used or wasted to further the interests of the United States;" and (3) "all of the funds in the DFI either came directly from Iraqi sources or became Iraqi funds upon donation to the DFI." *Custer Battles I*, 376 F. Supp. 2d at 645. The Court concluded that "a request for payment from the DFI was not a demand for payment from U.S. government money that caused financial loss to the federal fisc." Id. at 646. Accordingly, it is undisputed that DFI funds are not U.S. funds, and a DFI-funded contract is not "financed" by the U.S., as required for coverage of a claim for benefits under § 1651(a)(5) of the DBA.

The deafening silence on issues of such significance as these leads one to wonder whether employers are far more willing to pay DBA premiums and concede DBA coverage than risk potentially crippling tort liability exposure by litigating the tough issues. Or is it that employers simply do not want to raise *any* arguments that would narrow the scope of DBA coverage? Regardless of the motivation, in the overwhelming majority of DBA cases, employers do not dispute the applicability of the DBA to the claim for benefits. Considering that the costs of the DBA benefits (in addition to the costs of litigating disputes over DBA claims) ultimately have been passed on to the U.S. Government in many Iraq cases pursuant to the War Hazards Compensation Act, 42 USCA §§ 1701–17, this noted disincentive to narrow to scope of the DBA ultimately results in added costs borne by the taxpayers.

DOL can and should address these issues and provide greater certainty on the scope of DBA coverage to the vast number of employers involved in overseas contracts. Private contractors, by necessity, will continue to play an integral role in any future conflicts—conflicts that likely will involve the support of multi-national coalitions—so these issues will not "disappear" with the withdrawal of U.S. troops in Iraq.

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Chinese Imports: Safety First

Chinese imports of pet food, seafood, candy, toy boats, toothpaste, electrical heaters, dolls, musical instruments, wooden train sets, jewelry, holiday figurines, bathrobes, jumper cables, car tires and even children's "potty seats"—it is as though if you can name a product from China, it has been recalled. There is no doubt that China is an important source of imports into the U.S. However, during the past year the overall safety of products from China has been called into question, and U.S. and Chinese authorities have cooperated to rectify the situation. Nonetheless, it is incumbent on all importers of products into the U.S. from any country to ensure the safety of those products. This article summarizes some recent governmental import safety initiatives and outlines issues importers should address to keep out of the recall limelight.

Public-Sector Reaction—In the wake of this past spring's pet food recall, U.S. and Chinese representatives began investigating means of providing for greater overall safety of imports of products into the U.S. from China. In July, the president issued an executive order creating an Interagency Working Group on Import Safety. This working group, which is comprised of senior representatives of the departments of Heath and Human Services, State, Treasury, Justice, Commerce, Transportation, Homeland Security, Agriculture and others, was tasked with more effectively using public-sector assets and engaging the private sector to improve general import safety.

In November, the working group issued its Action Plan for Import Safety. This report called for better coordination among federal executive agencies, more focused vision for import safety, a greater level of enforcement activity, more effective use of technological tools, and the development of risk-based models to follow for the various stages of a product's life cycle. The report detailed specific actions undertaken in 2007, including new Food and Drug Administration food safety initiatives, new seafood certification programs through the National Oceanic and Atmospheric Administration (NOAA), and greater cooperation with foreign government counterparts by the Consumer Product Safety Commission (CPSC), USDA and the FDA.

In a related initiative, HHS entered into two key memoranda of understanding with elements of the Chinese government on import safety on December 11 and 12. The first agreement, between HHS and the Chinese State Food and Drug Administration (SFDA), relates to the safety of drugs and medical devices. It sets forth a program under which a designated inventory of drugs and medical devices can be identified for further cooperation. From this product listing, the U.S. and China agreed that only those Chinese companies registered with and inspected by the SFDA will be permitted to export to the U.S. market. HHS and the SFDA further agreed to devise "chain-of-custody" systems, anticounterfeiting mechanisms, mutual reporting protocols, compatible standards, streamlined inspection procedures and other means of cooperation. HHS entered into a similar agreement with the Chinese General Administration of Quality Supervision, Inspection, and Quarantine on the safe importation of food and feed into the U.S.

Private-Sector Responsibility—While there has been admirable administration activity in import safety, the ultimate responsibility for product safety in general rests with private-sector importers, distributors and retailers. The private sector can look to the above-noted government initiatives for guidance, but it should employ standard corporate best practices to safely contract with Chinese suppliers and manufacturers. Specifically, importers should conduct an appropriate level of due diligence, negotiate contractual terms that ensure product safety and protect the company, implement import compliance procedures, ensure safety through independent testing, and devise a recall strategy in the event of the importation of products later determined to be unsafe. These issues are discussed in turn.

Due Diligence: Proper due diligence must be undertaken with respect to the Chinese supplier or manufacturer, and do not be afraid to begin with the basics. What are the manufacturer's name, address, telephone number, fax number and e-mail address? How is the manufacturer incorporated, organized and registered to do business? How is it owned? Is it government-owned or owned by government officials? Who owns the manufacturer's parents, if it has any? What is the citizenship of any individual owners? What is the manufacturer's profile? Does the company have the expertise and capacity to undertake the work required? Will it undertake the work directly or subcontract out portions, and, if so, to whom? Where does the manufacturer bank? How do its financial statements and annual reports look? Has the manufacturer been involved with criminal charges, convictions, bankruptcies or cases of civil litigation in which the company has been a defendant?

What is the manufacturer's record of and reputation for product safety, plant safety, workers' rights and environmental protection? What can be discovered through business, personal and financial references? Who are these references and are they credible? How and from whom did your company learn about the manufacturer? Who arranged the introduction? What information can you obtain from public sources, the local chamber of commerce, the diplomatic corps, or from a media search of local and international press accounts? What do local and international official records searches show? Is the company on any U.S. "denied parties" listing?

Only upon satisfaction of baseline and tailored due diligence should a company move forward with any contractual relationship with a Chinese supplier or manufacturer.

Contracting: Although general contractual provisions are called for in any supplier contract, importers may take steps to protect themselves from liability by building certain clauses into their contracts with exporters and customs brokers. As a threshold matter, importers should include clear specifications and safety or quality standards that the supplier must meet. Moreover, the supplier should warrant and certify that it understands and will comply with the applicable specifications or standards. Likewise, as noted in greater detail below, contracts should include testing procedures and an agreement on how testing will be conducted. The contract also should include terms about the rejection of nonconforming goods and resulting remedies.

The contract should give the purchaser visibility into the supplier's supply chain. Specifically, contract terms may be a helpful vehicle to allow the importer to gather reliable information on conditions that may affect safety. Importers may insist that the supplier certify facts or make warranties on the source of raw materials, manufacturing techniques or the chain of custody of particular products, such that the manufacturer assumes liability if any of this information is false and the products cause harm.

If the transaction relies on supplied intellectual property or know-how, the contract should account for and protect those assets. Special attention should be paid as the importance and and proprietary nature of the intellectual property increases.

By way of logistics, if the transaction relies on the proper completion of U.S. Customs paperwork, or export paperwork required by the country of origin, then the contract should specify the supplier's duty to complete the paperwork and assign liability for any shortcoming. Specifically, the contract may require the inclusion of information required by Customs on invoices, such as the date of sale, the identity of the seller, HTS classification and valuation of the items, and the port of entry. Similarly, the contract should require the provision of country-of-origin markings as required.

The contract may also contemplate "non-business" issues that can affect the overall value of the transaction. For example, child or prisoner labor issues might be verified along with general workers' rights conditions. Likewise, environmental degradation possibilities should be investigated and addressed in contracts. Finally, the contract may rightly address local anti-corruption compliance along with these other "social" concerns.

By way of dispute resolution, an importer should be sure that the Chinese supplier has both indemnified it for any harm that may be caused by the products being supplied. This warranty may necessarily require the supplier to submit to jurisdiction in the U.S. for disputes arising under the contract. Even if the foreign supplier insists on some form of international arbitration for importer-supplier disputes, it is essential that the importer ensure that the supplier is "on the hook" to indemnify the importer from third-party claims and agree to submit to jurisdiction in the U.S. for the purpose of enforcing indemnity actions despite an alternative dispute resolution provision. Providing avenues for enforcement in other jurisdictions may be appropriate, but having a means of bringing the supplier before some proper tribunal is necessary.

The above is by no means a complete checklist of all contractual issues to be addressed in a contract with a Chinese supplier. However, these and other contractual considerations can increase the likelihood of importing a safe product from China.

Import Compliance Considerations: Although having products delivered duty paid (Incoterms DDP) or otherwise not serving as the importer may be ways to limit exposure from import regulations, in general, it would be advisable to have an import compliance program. The program should cover overall importation requirements such as shipping, entry, inspection and related business aspects. Likewise, an import program should include classification (what is the unique Harmonized Tariff Schedule number the product falls under?), appraisal (how much in import duties must be paid based on the tariff rate and value of the imported product?), and country of origin (where does it come from, and does it need to be marked "made in China"?). Along the same lines, an import program should address whether additional duties in the form of antidumping or countervailing duties apply, or whether the products can be entered duty-free under some form of a preferential trade program. Furthermore, an import compliance program should address all Customs recordkeeping requirements (essentially five years for key documents supporting the entry process). Finally, the compliance program should address what to do in the case of an audit or enforcement action involving customs issues.

Alongside these concerns are several other issues worth examining. As noted above, Customs duties are based on the classification of the product, the applicable duty rate and the value of the imported merchandise.

Therefore, importers may be able to add to their bottom lines at the margins by identifying savings in these areas. For example, importers may select a classification number with a lower tariff duty rate. Or, if appropriate, an intermediary price rather than a retail price can be the proper value for duty rate calculation.

Likewise, specialized customs programs such as the use of free trade zone (FTZ) programs and the collection of duty drawbacks can further help increase profits or minimize losses. For example, products can be imported into an FTZ, further advanced in value and subsequently imported into the U.S. at a savings of duties. For a drawback, companies are entitled to receive back customs duties paid on products entered into the U.S. with proof of the reexport of those products outside of the U.S. Through these kinds of programs, importers can find additional value in their supply chains.

Finally, there are specialized Customs programs that can assist importers in their ability to bring products into the country. The now familiar (and improved) Customs-Trade Partnership Against Terrorism (C-TPAT) is a program that allows participating companies certain import benefits upon demonstration to U.S. Customs authorities of certain supply-chain security measures. With C-TPAT, comes the ability to participate in the Importer Self-Assessment program, which may further speed clearance times and reduce the chances of a Customs audit.

The last point in this section pertains to the Container Security Initiative (CSI). Through the CSI, national Customs officials work together to ensure product safety, port security and efficient international trade. As of 2002, China signed on to the CSI program, and presently the ports of Shanghai and Shenzhen are CSI approved ports. Cargo departing from these ports may get to sea or through U.S. Customs faster than cargo departing from other Chinese ports.

Product Testing: As noted above, product safety and product testing must be an integral part of any supplier or manufacturing contract. Although testing each and every imported product may be an appropriate ideal, in practice some sort of sampling or process testing likely is more appropriate. Nonetheless, depending on the product and risk quotient, the standards and means of testing to those standards must be effective and workable.

This product testing procedure should set forth who will conduct the testing, whether opposite party verification will be available, what party or non-party entity will conduct the testing, and which party will be responsible for payment of testing costs. Likewise, the parties should consider what testing proxies will be acceptable to the purchasing party—perhaps Underwriters Laboratories will be acceptable for approval of product specifications or design, and a separate independent testing laboratory would be acceptable for product-by-product approval. More importantly, parties will need to understand which regulatory industry standards apply, how those standards will be monitored, and how they will be extended and enforced through the supplier-sub-prime supplier supply chain (think lead paint on children's toys). Moreover, importers should consider utilizing "pre-approved" testing facilities such as those identified by NOAA and the CPSC. Failure to use these pre-approved testing facilities for appropriate products could be an indicia of improper conduct if an "unsafe" product event occurs. Finally, importers should consider separate, independent testing if doubt arises about the safety of a particular product or line of products.

Recall Strategies: The due diligence is completed, the contracts are inked, compliance plans are in place, and testing protocols are in force, and yet unsafe products are entered into the country. Thus, even though steps can be taken to minimize the likelihood of unsafe products entering the marketplace, prudent importers should have a plan to minimize the impact of shortcomings of their import safety measures. That plan should include a recall strategy that addresses the products at issue and the relevant governmental agencies, such as the CPSC, USDA, FDA or the National Highway Traffic Safety Administration. Likewise, the plan should include a tailored approach to address the particular safety risks at issue. For example, the FDA has several levels of recalls that should be addressed—Class I for the recall of products that could cause serious health problems or death, Class II for recall of products that may cause a temporary health problem and Class III for recalls involving labeling regulations. Devising tailored recall plans would require an understanding of not only the company's supply chain, but also its distribution chain, and may necessitate discussions with cognizant governmental recall officials prior to any recall event occurring.

Conclusion—Despite the spate of recalls of unsafe products from China, far more "safe" Chinese products have been imported over the same period. When it comes to importing products from China, safety has to be among the top concerns. Although government authorities are taking greater steps to ensure only those products that are safe for consumption and use enter the U.S. marketplace, the ultimate responsibility for importation and distribution lies with the private sector. Products liability claims and other damages actions will be filed not against the FDA, the USDA or the CPSC, but against individual companies. Thus, the heightened governmental involvement in ensuring the safety of imports from China should put importers on notice of the need for more stringent safety initiatives. As a result, due diligence, contracting, compliance, testing and recall planning all need to be adjusted in this new import safety environment. A systematic approach to safety can result in the importation of safe products.

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Developments

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UK Defense Projects Over Budget And Behind Schedule

The UK's National Audit Office on November 30 released its Ministry of Defence Major Projects report for 2007. The annual report by the comptroller and auditor general reviewed 20 of the largest projects in its first part, finding MOD to be "in a similar position to the [2006 report] for forecast cost and performance," with several projects, including the Astute-class submarine, Type 45 destroyer, Nimrod MRA4 aircraft and Brimstone missile significantly behind schedule and over budget. The second part of the report focuses on naval projects.

"The size and complexity of these equipment [projects] with their huge challenges in delivery and technology must not be underestimated," said Baroness Ann Taylor, who became minister of defense equipment and support (DES) in November. "The National Audit Office [recognizes] that we are moving in the right direction to keep costs down and [minimize] delays. But there is more to be done." Taylor also pointed out that 13 of the top 20 projects forecasted reduced costs, and 10 reported on-time or early delivery forecasts, with most of the cost overruns coming from just two programs—the Type 45 anti-air warfare destroyer and Astute attack submarine. Cost overruns of £496 million for those two programs account for the majority of the 2007 cost increases. But, according to the report, focusing on individual projects, specifically on 20 of the biggest projects, may distort the department's capabilities and its progress in controlling procurement expenses, including adjusting to mid-year changes. The report highlights some positive examples, such as £81 million saved from reducing equipment orders and £7 million saved by delaying delivery on four projects. However, according to the report, although MOD saved money by reducing quantities, deferring deliveries and proactively trying to contain cost increases, 62 percent, or £609 million, of its cost reductions came from shifting costs to other budgets or projects. In many cases, only the budget lines changed, but project management teams remain the same.

Shifting costs around may keep a particular project within budget and allow better cost management, but it does nothing to reduce overall costs. The report notes examples of this problem, such as shuffling £64 million for a support vehicle project from warranty costs to in-service costs, shifting £165 million from the Guided Multiple Launch Rocket System budget and removing £227 million from the Astute-class submarine budget, without actually eliminating those expenditures. Similarly, the Type 45 destroyer, facing a 2007 cost increase of £462 million despite earlier scaling back on the Royal Navy's original intended order from 12 ships to eight, shows its biggest savings from shifting £78 million to other budget lines. But even with that shift and another £30 million saved by reducing the number of missiles on order, Type 45 costs still have increased by £354 million in 2007, and the project to create a new class of anti-air warfare ships has fallen an additional 11 months behind schedule.

The report also analyzes project delays for 19 of the 20 projects, finding that overall delays increased by 36 percent, with a few projects significantly skewing the numbers as others held steady or even showed improvement. Projects that started prior to 2001, so-called legacy programs, which include the Astute-class submarine, the Nimrod MRA4 aircraft and the Typhoon fighter aircraft, were behind schedule before 2007 and account for nearly half of the total delays, even though five newer projects were the only ones that showed additional delays in 2007. Technical issues were to blame for most delays and cost overruns for legacy projects, but did not have a discernible impact on costs of newer projects. This was attributable to the historical tendency of delays and cost increases caused by technical factors to increase significantly after seven to nine years.

The report lauds the April creation of DES, which combined defense procurement and logistics agencies and is enabling MOD to use its workforce better. DES is credited with reducing expenses by approving projects in stages, delaying expenditures, manufacturing only after a level of reliability is reached and reducing uncertainty of equipment delivery. The report also notes DES' contributions to achieving the goals of Maritime Industrial Strategy (MIS). "[DES is] putting the changes in place to improve the delivery of [equipment] to our Armed Forces," Taylor said.

The second part of the report found that MIS made progress in meeting its goals, but it should continue to develop and use defined performance measures, "robust performance indicators, and a framework to be able to assess whether [MOD] is getting value for [its] money."

The report is available at *www.nao.org.uk/publications/nao_reports/07-08/070898i.pdf*.

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ABA Panelists Provide Guidance On Defense Contracting With India

An expert on defense contracting with the Indian government recently advised potential vendors to present quality goods, quote the lowest possible price and avoid purported facilitators.

"Because our procedures are so strict and so transparent, they don't have to do anything except bring in quality equipment and put it through the trials," retired Indian Army Gen. A.K. Mehra said during a December 5 American Bar Association teleconference and Web cast on Indian defense contracting.

The panel discussion was the last of a three-part series on contracting with the Indian government. Mehra's 37 years of military service included a stint as India's chief army acquisition officer. Joining Mehra on the panel was retired Gen. J.B.S. Yadava, who, from the time of his 2005 retirement until the spring of 2006, served as an adviser to Bharat Electronic Ltd., an Indian government-owned, leading manufacturer of defense electronics. The retired generals outlined defense procurement procedure.

Providing background, Yadava said that the country's 15-year, long-range defense budget is approximately $2.4 trillion U.S. dollars, approximately 60 percent of which is targeted for general revenue expenditures, with the rest slated for capital expenditures. "Many of you will question as to why India's defense needs are so huge," Yadava said. He then discussed India's defense obligations, which cover a "threat spectrum" ranging from "sub-conventional" fighting to nuclear warfare. Citing a need to protect various national interests, Yadava said the country is "compelled" to have the world's third-largest armed forces. Currently, the Indian army has 1.1 million soldiers; its navy has 55,000 sailors and 112 ships. The air force is comprised of 120,000 personnel and 1,700 aircraft, 785 of which are reserved for combat missions. Additionally, India's army, navy and air force are supported by territorial armies and paramilitary forces.

For most of the past 50 years, Russia and the Eastern Bloc countries have supplied the bulk of India's contracted defense needs. Over the years, Israel, France and the U.K. have become major suppliers as well. Recently, U.S. vendors—most notably Lockheed Martin and Boeing—have joined the Indian defense contracting market. According to Yadava, India's immediate major defense needs include 126 "multi-role" combat aircraft expected to cost $7.8 billion, eight long-range patrol maritime aircraft worth about $1 billion, and 197 utility helicopters valued at $600 million. Additional needs include high-technology equipment, tanks and mid-range guns.

Yadava noted that India's defense minister is at the top of the defense procurement process. Within the ministry, the minister of state for defense production and supplies is responsible for procurement activities. Actual equipment orders originate with the individual armed services and a new agency that oversees military joint ventures.

Acquisitions are classified under three categories, (1) "Buy," which includes "Buy Indian"—required purchase from Indian vendors, and "Buy Global"—purchases allowed from Indian and foreign vendors; (2) "Buy and Make," which provides for purchases from foreign vendors who produce the requested items in India; and (3) "Make," which covers high-technology complex systems designed, developed and produced in India. Mehra said that other than the "Buy Indian" subcategory, there is no preference given to indigenous vendors. Yadava added, "Anybody who offers equipment, the Indian government is ready to take a look at it."

Yadava described the 11-phase acquisition process as emanating from the government's 15-year plan, followed by capital requirements identified by the respective services. MOD scrutinizes requirements before approving solicitations. Next, the respective services issue requests for proposals. Technical bids are evaluated separately. Field evaluations of products are then carried out in India on a no-cost (to the government), no-commitment basis. Trial results are evaluated, and selected vendors enter negotiations with the Contract Negotiating Committee. The CNC prepares a report for the approving financial authority. If financial approval is granted, the contract is awarded. The military services monitor post-contract activities.

Yadava portrayed the process as being "quite comprehensive" and "very transparent." He added that very little can go wrong "if the process is followed strictly."

Mehra discussed the defense industry's burgeoning offset policy for acquisition, and added that "it is very important for us to formulate policies which will eventually benefit our defense industry as well as lead to economic growth." Mehra noted that from 2004 through 2006, India imported military equipment valued at $10.5 billion U.S. dollars, while the nation received direct foreign investment of approximately $11.8 billion. "So the amount of money which came into this country we sent back in the form of imports," Mehra said, and "it makes sense for a country like [India] to start a process by which we can enhance our exports and gain more technology." Mehra explained that the policy favors direct offsets and the transfer of technology that will help India develop weapon-systems upgrades. Currently, there is a uniform offset policy of 30 percent of the contract cost with respect to both the "Buy Global" subcategory and the "Buy and Make" category. The offset provision can be excluded or revised up to 100 percent.

Commenting on contract violations, Mehra said that foreign companies may be fined and disbarred, and nationals can be jailed. He added that the best way for a company to become a vendor is to register through the government's Web site.

Yadava concluded by reminding the audience that the military currently maintains a strong demand for "state-of-the-art" surveillance, electronics and aviation equipment. He stressed, however, that potential vendors should be able to provide the quality of service that they advertise. "We don't want to be taken for a ride," Yadava said, "because today we are capable of not only absorbing, but making some of the best equipment available if we are given a little help and assistance."

India defense contracting procedures are available at *mod.nic.in/dpm/welcome.html.*

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Guidelines For U.S.-China High Technology And Strategic Trade Development Signed

The U.S. Department of Commerce and China's Ministry of Commerce recently signed the "Guidelines for U.S.-China High Technology and Strategic Trade Development," outlining the benefits of promoting U.S. technology exports to China.

"These Guidelines are a positive step forward for bilateral, civilian high technology trade," U.S. Commerce Secretary Carlos Gutierrez said recently. "The Guidelines recognize China's status as the fastest growing export market for U.S. exports and memorialize our respective commitments to communicate and cooperate, through such forums as the [Joint Commission on Commerce and Trade (JCCT)], to promote the development of safe, secure high technology and strategic trade between our two countries."

Commerce Undersecretary Mario Mancuso and China's Commerce Vice Minister Wei Jiangguo signed the guidelines on the occasion of the 18th JCCT. Commerce's Bureau of Industry and Security developed the guidelines with its Chinese counterpart as part of the U.S.-China High Technology and Strategic Trade Working Group, created at the 2005 JCCT to further cooperation on export control and high technology trade issues. Under the new guidelines, both countries will identify and carry out steps to enhance secure high technology and strategic trade.

According to the Commerce Department, the signing continues the "positive momentum of ongoing bilateral discussions," while providing a framework for future discussions. For example, Commerce notes that each country will continue to review U.S. dual-use policy to identify appropriate processes for streamlining the licensing process for civilian trade. The guidelines also recognize the role of end-use visits in ensuring U.S. national security interests in high technology trade enhancement. In 2006, U.S. high technology exports to China increased 44 percent to $17.7 billion, and total U.S. exports to China increased 32 percent, reaching $55 billion.

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European Commission Updates Common Procurement Vocabulary

A new European Commission regulation updates the common procurement vocabulary (CPV), the EU-wide classification system for public procurement contracts. The new system is touted as more user-friendly and accounts for recent developments in technology that make it easier for businesses to sell products and services to EU public authorities.

"The new and improved CPV is a modern business tool that will make life easier for companies and for the 26,000 public authorities per year that put their contracts online," Internal Market and Services Commissioner Charlie McCreevy said. "Businesses will also have the choice to be alerted electronically about contracts in their field," McCreevy added.

The CPV update is the result of consultations with the public and private sectors and a comparative study on other existing business classifications. The new CPV is more "product driven" than "material driven." For instance, the previous version included chair codes that relied on the material—plastic, wood or metal. The new version emphasizes the product itself, a chair. Other specifications, such as materials, are added using appropriate codes of the supplementary vocabulary.

To bring the CPV into line with e-procurement standards, the commission created a system of 1,000 attributes to complement the 9,000 main codes. The main elements of contract specifications can now be described and translated by using appropriate codes of the supplementary vocabulary. For simple and common purchases, the new system is meant to reduce time spent drafting and translating specifications.

Several new areas are covered by the updated CPV, including software packages and applications, medical appliances and environmental services. In line with a 2006 communication on defense procurement, the classification was improved for defense-related equipment and services by regrouping existing codes into new groups and classes to create a more coherent presentation.

The modifications to the CPV codes have been reflected in references in annexes of public procurement directives 2004/17/EC and 2004/18/EC. The new CPV does not affect the material scope of these directives. The commission announced there will be a six-month period between the publication of the new regulation and its application. This will allow CPV users time to make necessary modifications to their electronic systems. The new regulation is available at *ec.europa.eu/internal_market/publicprocurement/e-procurement_en.htm#cpv*.

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OECD Convention Marks 10th Anniversary Of Anti-Bribery Convention

The Organization for Economic Co-Operation and Development met November 21 in Rome to commemorate the 10th anniversary of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, also known as the OECD Anti-Bribery Convention. The Rome meeting gave representatives from OECD member countries and other convention signatories an opportunity to discuss convention achievements and shortcomings.

In opening remarks to the convention, OECD Secretary-General Angel Gurria said countries have taken major steps forward "in creating a global level playing field." Gurria praised countries' enactment of antibribery laws and the creation of special investigation and prosecution units. He said that penalties for foreign bribery are effective, and international cooperation has improved. For example, Gurria noted that bribes can no longer be claimed as a tax deduction.

International cooperation in the strong enforcement of antibribery laws is essential, Gurria said, noting that "advances in finance and technology are making crimes of corruption easier to commit and harder to detect and prosecute." According to Gurria, more than 150 foreign bribery investigations are ongoing. At least 30 individuals and companies have been sanctioned for foreign bribery. Some of these cases include large multi-million dollar fines, Gurria said, noting that Germany recently fined a local company €200 million for violating foreign-bribery prohibitions.

Although there has been much progress and the convention has brought attention to the problem of bribery of public officials, some countries are "sliding back on their determination," and some are "still holding back on implementing the convention," Gurria said.

In addition to proactive measures such as investigations and prosecutions by current convention signatories, future success and avoiding a return to "business as usual" depends on persuading more countries, especially large emerging economies, to join the convention, Gurria said. He extended special invitations to join the convention to China, India, Indonesia, Israel and Russia, which sent representatives to the 10th anniversary meeting. Finally, Gurria recognized the important anticorruption contributions of industry organizations such as the Davos Partnering Against Corruption Initiative, launched by the chief executives of engineering, construction, energy, metals and mining industries.

Ministers and senior officials from the 37 parties to the convention reaffirmed their commitment to fight bribery of foreign pubic officials. Convention representatives pledged to enforce the convention's standards, investigate and prosecute those who bribe foreign officials, encourage other anticorruption initiatives, and support ratification of the convention by all countries.

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Developments In Brief ...

(a) UK Treasury Challenges Agencies to Use eAuctions

Exchequer Secretary to the Treasury and Procurement Minister Angela Eagle recently asked UK agencies and departments to buy more goods and services through the Office of Government Commerce's electronic reverse auction vehicle known as eAuctions. "Innovation in the way government buys goods and services is key in securing value for money," Eagle said, adding, "I am calling upon all departments and agencies to look at how they might use eAuctions as part of their procurement strategy." Eagle recently attended a live eAuction for information technology hardware. Twenty-four agencies bought IT equipment and, according to OGC, saved £5.2 million for the taxpayer. Eagle stressed that if organizations pool their requirements and invite suppliers to bid down the price in these collaborative auctions, the government can realize savings of up to 50 percent, as compared to the price an organization might pay without eAuctions.

(b) UK Government Procurement Service Seeks Civil Service Fast-Stream Members

It seems the U.S. is not the only country troubleshooting how to improve and expand its acquisition workforce. The UK Office of Government Commerce recently announced the Government Procurement Service fast-stream procurement placement option, designed to attract civil service "fast stream" members to "equip future senior civil servants with a sound understanding of the significance and complexity of procurement activities." According to an OGC press release, the new program will expose successful applicants to "a range of procurement and management roles … and will enable fast streamers to gain experience in either Operational Delivery or Corporate Services, two areas that can be most difficult for fast streamers to access on their journey to the senior civil service." Placements are for 12 to 18 months, with the first seven to be drawn from organizations including OGC, the Highways Agency (Department for Transport), Ministry of Defence, NHS Purchasing and Supply Agency, Department of Work and Pensions, Olympic Delivery Authority and HM Prison Service. Commenting on the program, Cabinet Secretary Sir Gus O'Donnell said, "Procurement plays an essential role in delivering government policy and in ensuring we do so in a cost effective way. A placement in this field is a great opportunity to build key skills and to make a real impact at the heart of delivering public service outcomes."

Regulations

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Regulations In Brief ...

(a) U.S. Department of Commerce—Bureau of Industry and Security (BIS)—Updated Statements of Legal Authority for the Export Administration Regulations (EAR)—Final Rule

This rule updates the Code of Federal Regulations legal authority citations for the EAR to replace citations to the president's notice of Oct. 27, 2006—Continuation of Emergency Regarding Weapons of Mass Destruction with the president's notice of November 8 on the same subject, replace public law citations with U.S. Code citations, remove outdated citations and add one previously omitted citation. BIS is making these changes to keep the CFR legal authority citations for the EAR current and to comply with the Office of the Federal Register policy of using U.S. Code citations for statutory provisions that have been added to the U.S. Code. This rule makes no changes to the text of the EAR and is effective November 30. 72 Fed. Reg. 67636 (Nov. 30, 2007).

(b) BIS—Revisions to License Exceptions TMP and BAG—Expansion of Eligible Items—Final Rule

This rule amends the EAR to expand the availability of License Exceptions Temporary Imports, Exports, and Reexports (TMP) and Baggage (BAG) to allow certain temporary exports and reexports of technology by U.S. persons to U.S. persons or their employees traveling or temporarily assigned abroad. TMP, EAR § 740.9, and BAG, EAR § 740.14, contain tool-of-trade provisions, § 740.9(a)(2)(i) and § 740.14(b)(4), which authorize temporary exports and reexports for usual and reasonable kinds and quantities of tools of trade for use by the exporter. This rule does not authorize any new release of technology. Technology exported under license exceptions TMP or BAG may be released only to persons who may receive that technology under other EAR provisions. Exporters and reexporters who wish to use the tools of trade provisions of these license exceptions may do so, subject to restrictions applicable to technology exports and reexports. 72 Fed. Reg. 70509 (Dec. 12, 2007).

(c) U.S. Federal Acquisition Regulation—Information Collection—Prohibition Against Acquisition of Products Made by Forced or Indentured Child Labor—Notice

The FAR Secretariat will submit to the Office of Management and Budget a request to review and approve an extension of a currently approved information collection requirement about the prohibition against acquisition of products produced by forced or indentured child labor. The clearance expires Jan. 31, 2008. The information collection complies with EO 13126, signed June 12, 1999, requiring contractors to certify to the contracting officer that a good faith effort has been made to determine whether forced or indentured child labor was used to mine, produce or manufacture any product furnished under the contract, and that the contractor was unaware of any such practice. The order also obligates contractors to provide reasonable access to documents, persons or premises for determining whether forced or indentured child labor has been used to perform the contract. FAR 22.1505, 52.212-3, 52.222-18 and 52.222-19 require contractors to certify that the requirements have been met. Comments on the information collection requirement are due Feb. 1, 2008. 72 Fed. Reg. 67920 (Dec. 3, 2007).

(d) U.S. Department of State—60-Day Notice of Proposed Information Collection—Form DS-4071, Export Declaration of Defense Technical Data or Services—OMB Control Number 1405-0157—Notice of Request for Public Comments

State has asked OMB to approve an extension of a currently approved collection of information. This notice allows 60 days for public comments before submitting the request to OMB. Under the mandatory information collection, titled "Export Declaration of Defense Technical Data or Services," export of defense technical data and defense services will be electronically reported directly to the Directorate of Defense Trade Controls (DDTC) using DS-4071, which is available on DDTC's Web site, *www.pmddtc.state.gov*. Exports must comply with requirements of the International Traffic in Arms Regulations (ITAR) and Arms Export Control Act § 38, which DDTC administers. DDTC will monitor the information to ensure proper control of the transfer of sensitive U.S. technology. Comments are due within 60 days of the notice of publication. 72 Fed. Reg. 68940 (Dec. 6, 2007).

(e) State—Voluntary Disclosures—Final Rule

State is amending ITAR voluntary-disclosure provisions by imposing a 60 calendar-day deadline after the initial notification to submit a full disclosure and by clarifying what identifying information should be provided, as well as who should sign the voluntary disclosure in cases of a major violation, if there is a systemic pattern of violations or in the absence of an effective compliance program. The changes are designed to improve the Government's ability to assess and respond to the national security and foreign policy consequences of an export violation. The rule is effective immediately. 72 Fed. Reg. 70777 (Dec. 13, 2007).

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