

THE GOVERNMENT CONTRACTOR®



Information and Analysis on Legal Aspects of Procurement

Vol. 50, No. 45

December 10, 2008

Focus

¶ 432

FEATURE COMMENT: The Emergency Economic Stabilization Act Of 2008—Procurement Issues

On Oct. 3, 2008, President Bush signed into law the Emergency Economic Stabilization Act of 2008 (EESA), P.L. 110-343. To stabilize the U.S. financial markets and the banking system, among other items, EESA authorized the Troubled Asset Relief Program (TARP). EESA grants the Department of the Treasury broad authority to buy up to \$700 billion of troubled assets and permits Treasury to purchase and insure mortgages and securities based on mortgages. When EESA passed, TARP was expected to focus on the purchase of mortgage-backed securities and whole loans. Treasury's strategy, however, has shifted to investing directly in financial institutions through the Capital Purchase Program (CPP), which is designed to provide financial institutions additional capital through the purchase of senior preferred stock.

Treasury explained that it is "redirecting requirements within the scope of the contracts [awarded under EESA] to support TARP's shift to CPP," and it appears to be drafting new solicitations to conform with this shift. See Government Accountability Office, *Troubled Assets Relief Program: Additional Actions Needed to Ensure Integrity, Accountability, and Transparency* (GAO-09-161) (GAO report) at 35, 37. Regardless of the approach Treasury takes under EESA, it is clear that Treasury is procuring substantial services and products under EESA. This FEATURE COMMENT examines EESA's procurement provisions and how Treasury has procured needed services and products. It reviews Treasury's ability to avoid standard procurement

regulations, possible fora for bid protests, small business opportunities and conflicts of interest (COIs).

Under EESA § 101(c), the Treasury secretary "is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, without limitation[,] ... (2) Entering into contracts." EESA § 107, "Contracting Procedures," states that the secretary may, for certain procurements, "waive specific provisions of the Federal Acquisition Regulation upon a determination that urgent and compelling circumstances make compliance with such provisions contrary to the public interest." EESA further requires that "[a]ny such [FAR waiver] determination, and the justification for such determination, shall be submitted to the Committees on Oversight and Government Reform and Financial Services of the House of Representatives and the Committees on Homeland Security and Governmental Affairs and Banking, Housing, and Urban Affairs of the Senate within 7 days." P.L. 110-343, § 107(a), "Streamlined Process."

EESA provides that the Treasury secretary may waive *specific provisions* of the FAR, as opposed to all, or most, provisions. EESA, however, does not state that statutory Government contracts requirements may be waived. Cf. 39 USCA § 410(a) (providing that "no Federal law dealing with public or Federal contracts ... shall apply to the exercise of the powers of the Postal Service," except certain provisions listed in subsection (b)). The FAR, however, implements many Government contracts-related statutes. Therefore, at a minimum, this EESA language strongly suggests that Government contracts-related statutes may be waived insofar as they have implementing FAR language.

Most federal executive agencies have FAR supplements—e.g., Treasury has the Department of Treasury Acquisition Regulation (DTAR)—that implement and supplement the FAR. FAR 1.101; see 48 CFR § 1001.301(a) (DTAR "establishes uniform Treasury policies and procedures for all

acquisition activities within the Department of the Treasury, except the United States Mint.”). Unfortunately, EESA does not clearly state that the provisions of agencies’ FAR supplements may be waived, but presumably EESA’s waiver is intended to apply to agency supplements because such supplements implement and supplement the FAR. If the relevant FAR language is waived, the supplements would have nothing to implement or supplement. Nevertheless, FAR 1.101 states that the “Federal Acquisition Regulations System consists of the [FAR], which is the primary document, and agency acquisition regulations that implement or supplement the FAR.” This language suggests that agency supplements may be separate from the FAR and, thus, are not subject to EESA’s waiver.

Among the more important FAR provisions that the Treasury secretary may desire to waive are those related to the statutory—as implemented by the FAR—requirement that “with certain limited exceptions contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.” FAR 6.101(a); see 41 USCA § 253(a); 10 USCA § 2304(a). “[W]ith respect to a contract action,” this means that “all responsible sources are permitted to compete.” FAR 2.101(b).

However, Treasury already may waive the full-and-open competition requirement in certain circumstances. FAR 6.301(a); 41 USCA § 253(c). For example, the FAR provides authority to waive the requirement if, among other reasons, (1) only one responsible source exists and no other supplies or services will satisfy agency requirements, (2) the agency’s need for the supplies or services is of “such an unusual and compelling urgency that the Government would be seriously injured” if not allowed to limit the number of sources from which it solicits offers, (3) the “disclosure of the agency’s needs would compromise the national security,” or (4) the “agency head determines that it is not in the public interest in the particular acquisition concerned.” FAR 6.302. It may be easier to waive the full-and-open competition requirement through this preexisting FAR provision, which requires, for example, a showing of either “unusual and compelling urgency” or “not in the public interest,” instead of under EESA’s waiver, which permits “specific [FAR] provisions” to be waived “upon a determination that urgent and compelling circumstances make compliance with such provisions contrary to the public interest.”

It is unclear whether there is any relevant distinction between the FAR’s “unusual and compelling urgency” and EESA’s “urgent and compelling circumstances.” The standard “Urgent and compelling circumstances which significantly affect the interest of the United States,” FAR 33.104(b)(1)(i), and “urgent and compelling circumstances that significantly affect the interests of the United States,” FAR 33.104(c)(2)(ii), which are similar to the EESA standard, are used in the FAR to describe the findings that must be made, respectively, to permit contract performance in the event of a pre-award or postaward GAO bid protest that is subject to the Competition in Contracting Act’s automatic stay of contract award or performance. The phrase “urgent and compelling circumstances” is used in various other FAR sections, e.g., FAR 1.501-3, FAR 3.104-7 and FAR 18.124; “unusual and compelling urgency” is also referenced in various other FAR sections, e.g., FAR 5.202, FAR 8.002 and FAR 18.103.

Engaging Private Companies under EESA—In its “Procurement Authorities and Procedures,” Treasury observed that, in implementing EESA, it has “available two mechanisms for engaging private-sector firms. These mechanisms are ... procurement under the [FAR]” and through its “financial agent authority.” Treasury “will make a determination on which of these authorities best applies on a case by case basis.” See “Procurement Authorities and Procedures” (“Treasury procurement document”), at www.treas.gov/initiatives/eesa/authorities.shtml; see also “Department of the Treasury’s Emergency Economic Stabilization Act Procurements: Small Business Participation” (“Treasury small business document”) at 1, www.treas.gov/initiatives/eesa/docs/small-business-participation.pdf.

With respect to FAR procurements, the Treasury procurement document states:

In general, the FAR requires the solicitation of offers from all interested sources. However, competition for procurements may be limited for various reasons, including in circumstances of unusual or compelling urgency. Certain procurements may be set aside for certain small businesses. Due to the paramount need for expeditious implementation of the Secretary’s authorities under the Act, Treasury anticipates that a number of contracts will be awarded through other than full and open competition, using the previously established FAR provisions [discussed

above] applicable under conditions of unusual and compelling urgency.

Treasury procurement document *supra*. Treasury further observed that “[i]nformation on contracts awarded by Treasury will be posted at *www.fedbizopps.gov* (Federal Business Opportunities website) and/or at *www.fpds.gov* (Federal Procurement Data System). ... Businesses may submit capability statements to the Department’s Office of the Procurement Executive at *ootpe@do.treas.gov*.” *Id.*

With respect to its financial agent authority, the Treasury procurement document explains that

Treasury has long had the statutory authority to retain financial agents to provide services on its behalf. [EESA] broadens that authority to encompass all reasonable duties related to [EESA] that may be required and permits the retention of a broader class of financial institutions as agents. In general, financial agent authority will be used when a firm is needed to conduct transactions on Treasury’s behalf, for example where Treasury needs the services of an asset manager.

Id.; see also EESA § 103(c)(3) (“The Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, without limitation, ... [d]esignating financial institutions as financial agents of the Federal Government, and such institutions shall perform all such reasonable duties related to this Act as financial agents of the Federal Government as may be required.”). According to GAO, Treasury stated that it will use financial agents when the required services involve managing public assets. GAO report at 35. Furthermore, “[s]election of financial agents will occur through processes which will be posted on the Treasury website. Although the process may be tailored to a specific situation, typically Treasury prepares a notice to interested and qualified financial institutions, evaluates the response to that notice, and negotiates one or more financial agency arrangements.” See Treasury procurement document *supra*. To date, Treasury has posted notices for financial agents to provide asset management for (a) whole loans, (b) mortgage-related securities, and (c) equity securities, debt obligations and warrants.

Significantly, the standard (e.g., FAR- and CICA-based) procurement laws do not apply to awards or selections that are properly under Treasury’s financial agent authority, which EESA broadened.

The U.S. Court of Appeals for the Federal Circuit has ruled that Treasury’s designation of financial agents under the National Bank Act, 12 USCA §§ 90, 265, “does not constitute a ‘procurement’ of property and services within the meaning of the Federal Property and Administrative Services Act of 1949[, 41 USCA §§ 251–260,] ... as amended by the Brooks Act.” *U.S. v. Citizens & S. Nat’l Bank*, 889 F.2d 1067 (Fed. Cir. 1989). The Federal Circuit emphasized the importance of

the character of the relationship: the government as principal and in its sovereign capacity delegates to its financial agents some of the sovereign functions that the government itself would otherwise perform. The relationship is governed by the National Bank Act and attendant Treasury regulations. The body of procurement law which includes the Property and Brooks Acts, by contrast, applies to Treasury only when it is acting as a commercial purchaser of goods and services.

Id. (citation omitted). Thus, the Federal Circuit concluded that the General Services Board of Contract Appeals had no jurisdiction to consider a protest of a contract award under Treasury’s financial agent authority.

What Treasury did here was designate or authorize, in the exercise of its discretion, a financial institution to act in its stead for the stated purposes. Regardless of appearances, this was akin to appointment of public employees, which is not a matter of contract even when terms and conditions guide the employment relationship. Just as public employment results from the conferral of a status, so does [the contractor’s] financial agency: Treasury conferred a status on [the contractor], whose undertaking was set out in return.

Id. at 1070.

Subsequently, in *Transactive Corp. v. U.S.*, 91 F.3d 232 (D.C. Cir. 1996), the U.S. Court of Appeals for the D.C. Circuit limited the applicability of the financial agent doctrine and Treasury’s ability to designate entities as financial agents. In that case, unlike in *Citizens*, Treasury was not acting as a principal and did not delegate any of its sovereign functions (e.g., the private contractor did not disburse public funds). The court therefore concluded that Treasury did not need to designate a financial agent, and, thus, its failure to apply standard procurement laws (e.g., the FAR and CICA) was improper.

Other decisions have applied “financial agent” case law to analogous situations. See *Grigsby Bradford & Co. v. U.S.*, 869 F. Supp. 984 (D.D.C. 1994) (relying on *Citizens* to conclude that the secretary of education’s selection of a designated bonding authority (DBA) under the Historically Black Colleges and Universities Capital Financing program did not constitute a procurement—i.e., the “Secretary of Education’s selection of a DBA conferred status upon a private entity, and thereby more closely resembled the appointment of a public employee or agent than it resembled the procurement of any goods or services”; thus, CICA and the FAR did not apply); *Nat’l Loan Servicer, Inc. v. Dep’t of Hous. & Urban Dev.*, GSBCA No. 12193-P, 93-2 BCA ¶ 25853 (finding “agency” relationship established by the Department of Housing and Urban Development statute for “Master Servicer” of HUD loans, which precluded a finding of a procurement under *Citizens*, although term “agent”—and not “financial agent”—used by statute; therefore, protest dismissed for lack of jurisdiction); see *Saratoga Dev. Corp. v. U.S.*, 21 F.3d 445 (D.C. Cir. 1994) (“when the [Pennsylvania Avenue Development Corporation (PADC)] conducted ‘development competitions’ to select developers for projects ... it was not ‘acquiring’ or ‘procuring’ anything; far from expending public funds to purchase public property, the PADC was simply offering developers the right to spend their funds on private projects”; thus, CICA and the FAR did not apply); *Mktg. & Mgmt. Info., Inc. v. U.S.*, 57 Fed. Cl. 665 (2003) (analyzing what constitutes a procurement and finding no procurement action, under the FAR, where appropriated funds were not used) (citing *Citizens*); *Aerolíneas Argentinas v. U.S.*, 31 Fed. Cl. 25 (1994).

Thus, although Treasury has broad authority to select or award services under its financial agent authority without having to comply with most federal procurement laws, as demonstrated, this authority is arguably constrained by the requirements of the use of non-appropriated funds, the Government delegation of certain sovereign functions and, of course, the existence of an agent-principal relationship. Furthermore, certain federal agencies—notably, HUD—have conducted procurements for asset managers and asset management under CICA and the FAR without application or use of the financial agent or agent status theories. E.g., *CitiWest Props., Inc.*, Comp. Gen. Dec. B-274689.4, 98-1 CPD ¶ 3; *Tidewater Homes Realty, Inc.*, Comp. Gen. Dec.

B-274689, 96-2 CPD ¶ 241; *Hall/McCabe Realty, Inc.*, Comp. Gen. Dec. B-272875, 96-2 CPD ¶ 162; *Intown Props., Inc.*, Comp. Gen. Dec. B-272524, 96-2 CPD ¶ 149; *McSwain & Assocs., Inc.*, Comp. Gen. Dec. B-271071, 96-1 CPD ¶ 255; *Ervin & Assocs. v. U.S.*, 44 Fed. Cl. 646 (1999); *Embrey v. U.S.*, 17 Cl. Ct. 617 (1989); *Sunbelt Props., Inc.*, HUDBCA No. 94-G-121-C1, 99-1 BCA ¶ 30255; *Elaine Dunn Realty*, HUDBCA Nos. 97-C-110-C3, 97-C-111-C4, 99-1 BCA ¶ 30112; *All S. Props., Inc.*, HUDBCA Nos. 92-G-7604-C12, 93-G-C5, 97-2 BCA ¶ 29329; see *Bus. Consulting Assocs., LLC*, Comp. Gen. Dec. B-299758.2, 2007 CPD ¶ 134; *Shel-Ken Props., Inc.*, Comp. Gen. Dec. B-277250, 97-2 CPD ¶ 79; see also General Services Administration Federal Supply Schedule program (discussed below), which devotes Special Item Number (SIN) 520-5 to “Loan Servicing and Asset Management.” In fact, it is not clear that certain of the Treasury EESA asset manager contracts will use non-appropriated funds—the relevant solicitations state that the selection of a financial agent “shall be contingent upon and subject to availability of funding,” which ordinarily is a reference to appropriated funds—or necessarily involve delegation of sovereign Government functions, which could subject these “awards,” as discussed below, to a protest by a disappointed offeror.

With respect to its selection of asset managers, Treasury has stated that “[a]sset managers will be financial agents of the United States, and not contractors. ... As financial agents, asset managers will have a fiduciary agent-principal relationship with the Treasury with a responsibility for protecting the interests of the United States.” See “Process for Selecting Asset Managers Pursuant to the EESA of 2008” at 1, www.treas.gov/press/releases/reports/assetmanagers.pdf (emphasis added). EESA § 107(c) further provides that the Federal Deposit Insurance Corporation “shall be eligible for, and shall be considered in, the selection of asset managers for residential mortgage loans and residential mortgage-backed securities; and ... shall be reimbursed by the Secretary for any services provided.”

In one notice, Treasury states that “[a]s a financial agent, the Financial Institution will have a fiduciary responsibility to perform all services in the best interests of the United States. ... All asset managers selected will have a direct relationship with the Treasury as designated financial agents of the United States. ... Neither this notice, nor the services sought by the Treasury, is a procurement subject to the [FAR].”

See “Notice to Financial Institutions Interested in Providing Asset Management Services for a Portfolio of Equity Securities, Debt Obligations, and Warrants” at 6, 15, www.treas.gov/initiatives/eesa/solicitations.shtml (emphasis added). The notice also states that “Treasury shall have no requirement to discuss the reasons, in either general or specific terms, that the Financial Institution’s response was not selected or that the selection process may have been terminated.” Thus, according to Treasury, no debriefing of a disappointed offeror is required. *Id.* at 14. The designated financial institutions must “[w]ork in good faith and coordinate with” (1) “Treasury’s designated custodian that will hold the Financial Institution securities and obligations,” and (2) “any Treasury contractors processing or adjudicating documents for the [CPP] and other programs under [EESA].” *Id.* at 5. Significantly, potential offerors should know that the notice states that Treasury “shall have the unlimited right to use, for any governmental purpose, any information submitted in connection with this notice.” *Id.* at 15.

The requirement that a financial institution has a “fiduciary responsibility” to, and is an agent of, the Government should be considered carefully by potential offerors. Such fiduciary responsibility and agent status can involve responsibilities and obligations beyond those ordinarily incurred as a result of entering into a Government contract. See, e.g., Restatement Third, Agency § 1.01, cmt. e (2006).

Summary of Treasury EESA Contract Awards—From EESA’s passage through November 25, Treasury entered into one financial agent agreement and seven TARP-related contracts, which GAO has reviewed. See GAO report at 35–36. Significantly, only parts of these contracts are posted online at www.treas.gov/initiatives/eesa/contracts.shtml; many contract documents are redacted or not posted. In a chart, the GAO report at 35–37, provides an excellent summary of the key aspects of these contracts. For example, Treasury invoked the FAR’s unusual and compelling urgency exception to avoid using full-and-open competition to obtain (a) legal services from Simpson Thacher & Bartlett and (b) investment consulting services from Ennis Knupp & Associates. These contracts are indefinite-delivery, indefinite-quantity agreements. *Id.* at 36–37.

Treasury also made five awards—apparently in accordance with the FAR—under GSA’s FSS (through blanket purchase agreements (BPAs) for “legal, investment consulting, accounting and other services

that are generally available in the commercial sector.” For all of these contracts, Treasury solicited its requirements and made the contract awards “within a matter of days.” *Id.* at 35, 37. Although most of these contracts (including task orders) were priced on a time-and-materials basis, Treasury may—“as TARP requirements become more established”—make some future awards on a fixed-price basis. *Id.* at 38. Treasury also expects to monitor contract performance closely to prevent possible abuse of these time-and-materials contracts and is adding additional oversight personnel for EESA procurements. *Id.* Finally, GAO also has “preliminary information on three other [Treasury EESA] contracts ranging from about \$8,500 to \$2.2 million for a budget model, legal services, and leased office space.” *Id.* at 36.

GSA Schedule Awards Related to EESA—Certain EESA Treasury procurement requirements have been awarded through the FSS. These FSS awards are task orders awarded under FSS BPAs. FAR 8.405-3(a)(1). For example, on October 8, Treasury issued two requests for quotes to 12 firms on two GSA schedules. Treasury received six responses for each request and, on October 16 and 18, awarded BPAs to PricewaterhouseCoopers, LLP (PWC) and Ernst & Young (E&Y). The initial task orders are for \$191,469 and \$492,007, respectively. See Oct. 21, 2008 Treasury Press Release, hp-1225, www.treas.gov/press/releases/hp1225.htm. “The firms will help [Treasury] with accounting and internal controls services needed to administer the complex portfolio of troubled assets the Department will purchase, including whole loans and mortgage backed securities. [PWC] will help the Department establish a sound internal control posture and [E&Y] will provide general accounting support and expert accounting advice.” *Id.*; see E&Y BPA at Attachment No. 3.

Both BPAs, which expire in September 2011, can be “canceled by the Government at any time,” and there is “no dollar limitation for each individual purchase.” However, Treasury “is obligated [to make purchases] only to the extent authorized by task orders issued under [a] BPA.” All Government requirements “will be fulfilled on a task order basis,” and such task orders “may be issued on a firm fixed-price or time-and-materials basis, or any combination thereof.” *Id.*; PWC BPA at 2–3; E&Y BPA at 2–3. The BPAs further state that the “contractor shall invoice only for hours, travel and Other Direct Costs (ODCs) that are in direct support of contractor’s efforts in performing the

task/delivery [statement of work].” *Id.*; PWC BPA at 10; E&Y BPA at 10. Not surprisingly, only an authorized Treasury CO can issue (a) a task order under the BPAs, (b) a change to the BPA or task order issued thereunder and (c) additional work to the contractor. *Id.*; PWC BPA at 6–7, 13; E&Y BPA at 5–6, 13.

PWC’s BPA was awarded under FSS Mission Oriented Business Integrated Services (MOBIS) Contract No. GS-10F-0466N, see PWC BPA at 1; PWC’s MOBIS contract is under FSS 874. E&Y’s BPA was awarded under FSS Financial and Business Solutions (FABS) Contract No. GS-23F-8152H. See *id.*; E&Y BPA at 1; E&Y’s FABS contract is under FSS 520.

Each BPA “specifically incorporate[s]” the contractor’s “conflict of interest mitigation plan,” PWC BPA at 4; E&Y BPA at 4, requires signed nondisclosure agreements “for each contractor employee requiring [Government] staff-like access (e.g., unescorted or unsupervised physical access or electronic access),” and provides that the “Contractor agrees that it shall have a fiduciary duty to the Government in its performance under this contract.” See *id.*; PWC BPA at 8, 9, 15; E&Y BPA at 8, 9, 15, and Attachment No. 4 (Non-Disclosure Clause).

EESA Bid Protests—EESA § 119(a)(1) provides that “[a]ctions by the [Treasury] Secretary pursuant to the authority of this Act shall be subject to chapter 7 of title 5, United States Code, including that such final actions shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.” Chapter 7 of Title 5 is a reference to the Administrative Procedure Act, 5 USCA §§ 701–706. This EESA section, therefore, appears to provide for judicial review under the APA of Treasury awards of Government procurement contracts. As noted, the failure of certain of Treasury’s EESA asset manager contracts to use non-appropriated funds and to involve delegation of sovereign Government functions, or an otherwise improper Treasury decision to use the financial agent authority, could also subject such awards to an agency level, GAO or U.S. Court of Federal Claims bid protest. E.g., *Transactive Corp.*; see generally Schaengold, Guiffre & Gill, “Choice of Forum for Bid Protests,” Briefing Papers No. 08-11 (October 2008).

In general since 2001, the COFC has had exclusive jurisdiction over bid protests of agency contract awards. *PGBA, LLC v. U.S.*, 389 F.3d 1219 (Fed. Cir. 2004). Before Jan. 1, 2001, U.S. district courts

exercised concurrent jurisdiction with the [COFC] over government contract procurement challenges [i.e., bid protests]. In 1996, however, Congress amended the Tucker Act by enacting [the Administrative Disputes Resolution Act of 1996 (ADRA)]. ... [T]he amending statute contained a sunset provision which gave the [COFC] exclusive jurisdiction over bid protests on January 1, 2001.

Id.; see *Banknote Corp. of Am. v. U.S.*, 365 F.3d 1345 (Fed. Cir. 2004).

Under ADRA, P.L. 104-320, § 12 (codified, in relevant part, at 28 USCA § 1491 & note), the COFC has

jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

As the Federal Circuit has observed, this language is broad. *RAMCOR Servs. Group, Inc. v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999), quoted in *Savantage Fin. Servs., Inc. v. U.S.*, 81 Fed. Cl. 300 (2008); *Distributed Solutions, Inc. v. U.S.*, 539 F.3d 1340 (Fed. Cir. 2008); *Frazier v. U.S.*, 79 Fed. Cl. 148 (2007). The COFC reviews agency procurement decisions under the APA (which is consistent with EESA § 119(a)(1)) and will set aside a contract award if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 28 USCA § 1491(b)(4) (referencing 5 USCA § 706(2)); *Banknote Corp. of Am. v. U.S.*, 365 F.3d 1345 (Fed. Cir. 2004); *Savantage Fin. Servs. v. U.S.*, 81 Fed. Cl. 300 (2008). However, as discussed above, Treasury’s award of financial agent contracts or its designation of financial agents likely will not be subject to judicial review (i.e., through a judicial bid protest), if such award or designation was properly made within the scope of Treasury’s financial agent authority.

Significantly, the COFC

has found [bid protest] jurisdiction proper not only where an actual procurement is being challenged, but also where the claim is that a government agency is “procuring goods and services through a process that should have been the subject of competition; and that the failure to compete the procurement is in violation of law.”

Savantage Fin. Servs., Inc. v. U.S., 81 Fed. Cl. 300 (2008), quoting *CCL, Inc. v. U.S.*, 39 Fed. Cl. 780 (1997). Similarly, GAO “will review ... a timely protest that an agency is improperly using a non-procurement instrument, ... where a procurement contract is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations.” *Exploration Partners, LLC*, Comp. Gen. Dec. B-298804, 2006 CPD ¶ 201, at 5; *Energy Conversion Devices, Inc.*, Comp. Gen. Dec. B-260514, 95-2 CPD ¶ 121, at 2; *Rocketplane Kistler*, Comp. Gen. Dec. B-310741, 2008 CPD ¶ 22; see *Strong Envtl., Inc.*, Comp. Gen. Dec. B-311005, 2008 CPD ¶ 57; *SBMA, Inc.*, Comp. Gen. Dec. B-255780, 93-2 CPD ¶ 292, at n.1; *Renewable Energy, Inc.*, Comp. Gen. Dec. B-203149, 81-1 CPD ¶ 451. Although EESA does not explicitly provide for GAO and agency-level protests, which arguably could be waived under Treasury’s § 107 authority to “waive specific provisions of the [FAR],” such protests most likely will be allowed, with the probable exception of those procurements properly conducted under the financial agent authority.

Thus, the COFC and GAO likely will have jurisdiction over protests alleging that Treasury improperly conducted a procurement under its financial agent authority when, instead, the procurement should be conducted pursuant to the FAR and CICA. The D.C. Circuit reached this conclusion—with respect to a Treasury financial agent authority award—under its previous jurisdiction to hear protests on appeal from U.S. district courts. See *Transactive Corp.* The Court held that because Treasury did not act as a principal and did not delegate sovereign functions (e.g., the private contractor would not disburse public funds) that Treasury would otherwise perform, Treasury did not need to designate a financial agent and, thus, it improperly failed to apply standard procurement laws, e.g., the FAR and CICA.

GAO and the COFC also have jurisdiction to hear protests in certain limited situations to which CICA and the FAR do not apply. *OTI Am., Inc. v. U.S.*, 73 Fed. Cl. 758 (2006) (although FAR inapplicable to procurement, COFC had jurisdiction to consider protest); *OTI Am., Inc. v. U.S.*, 68 Fed. Cl. 646 (2005) (same); *YRT Servs. Corp. v. U.S.*, 28 Fed. Cl. 366 (1993); see *Emery Worldwide Airlines, Inc. v. U.S.*, 264 F.3d 1071 (Fed. Cir. 2001); *NAC Int’l, Inc.*, Comp. Gen. Dec. B-310065, 2008 CPD ¶ 3; *Great S. Bay Marina, Inc.*, Comp. Gen. Dec. B-293649, 2004 CPD ¶ 108; *Shields & Dean Concessions, Inc.—Recon.*, Comp. Gen. Dec.

B-292901.4, 2004 CPD ¶ 71; *AIU N. Am., Inc.*, Comp. Gen. Dec. B-283743.2, 2000 CPD ¶ 39, n.12; *Fidelity & Cas. Co. of N.Y.*, Comp. Gen. Dec. B-281281, 99-1 CPD ¶ 16; *The Real Estate Ctr.*, Comp. Gen. Dec. B-274081.4, 97-1 CPD ¶ 85; *Kennedy & Assocs. Art Conservation*, 68 Comp. Gen. 261, 89-1 CPD 186 (1989).

Although ADRA appears to give the COFC exclusive jurisdiction over protests of Treasury contract awards, some questions remain about COFC jurisdiction over EESA procurement protests and whether the U.S. district courts have jurisdiction over EESA bid protests. EESA § 119(a)(2)(C) provides that “[a]ny request for preliminary injunction,” which typically is requested in a judicial bid protest, “against the Secretary for actions pursuant to this Act shall be considered and granted or denied by the court on an expedited basis *consistent with the provisions of rule 65(b)(3) of the Federal Rules of Civil Procedure, or any successor thereto.*” See also EESA § 119(a)(2)(D) (citing Fed. R. Civ. P. 65(a)(2) in connection with “[a]ny request for a permanent injunction against the Secretary for actions pursuant to” EESA). However, a request for an injunction in a COFC bid protest case would be pursuant to the Rules of the Court of Federal Claims, specifically RCFC 65, and not the Federal Rules of Civil Procedure. Although, in relevant part, Fed. R. Civ. P. 65 is virtually identical to RCFC 65, see foreword to the RCFC (“[t]he Federal Rules of Civil Procedure applicable to civil actions tried by a United States district court sitting without a jury have been incorporated into the following [COFC] rules to the extent appropriate for proceedings in this court.”); RCFC 83(a) (RCFC “must be consistent with the Federal Rules of Civil Procedure”), EESA’s reference to the Federal Rules of Civil Procedure could be interpreted as suggesting that U.S. district courts—and not the COFC—have jurisdiction over bid protests of Treasury awards of EESA-related contracts.

EESA § 119(a)(2)(A), however, provides that “[n]o injunction or other form of equitable relief shall be issued against the Secretary for actions pursuant to [EESA] section 101, 102, 106, and 109, other than to remedy a violation of the Constitution.” Since EESA § 119(a)(2)(A) does not identify EESA § 107, “Contracting Procedures,” one could argue that injunctions may be issued against Treasury in conjunction with the bid protest of a Treasury EESA contract award. However, since EESA § 119(a)(2)(A) explicitly references EESA § 101, which authorizes the Treasury secretary to enter into contracts, one could argue

that injunctions or other equitable relief cannot be issued for the award of Treasury EESA contracts or the bid protest of such awards. If the latter theory is accepted, this might explain EESA § 119's reference only to the Federal Rules of Civil Procedure because, if no injunction can be issued in a bid protest, there is no reason to reference the RCFC. However, if there is a constitutional bid protest ground, which is possible, see *Advanced Sys. Tech., Inc. v. U.S.*, 69 Fed. Cl. 474 (2006), for an EESA contract award, it would not explain EESA § 119's reference only to the Federal Rules of Civil Procedure. In summary, although it is unclear whether the COFC and the U.S. district courts will each be found to have jurisdiction over bid protests concerning EESA procurement awards, at least one of those fora should have such jurisdiction.

Contracting Opportunities for Small Businesses under EESA—EESA § 107(b) states that

in any solicitation or contract where the Secretary has ..., pursuant to subsection (a), waived any provision of the [FAR] pertaining to minority contracting, the Secretary shall develop and implement standards and procedures to ensure, to the maximum extent practicable, the inclusion and utilization of minorities ... and women, and minority- and women-owned businesses ..., in that solicitation or contract.

This provision “includ[es] contracts to asset managers, servicers, property managers, and other service providers or expert consultants.”

In developing and implementing these small business standards, EESA § 107(b) references 12 USCA §§ 1411a(r)(4) and 1811 note, which established certain preference programs for minority- and women-owned businesses for the disbanded Resolution Trust Corporation. These programs, like all race-based preference programs, must meet the constitutional “strict scrutiny” standard described in *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995) (applying standard to Federal Government). See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying standard to state and local governments). The programs referenced in EESA could be challenged on a constitutional basis, particularly because EESA was not accompanied by specific legislative findings of actual discrimination. Alternatively, EESA's implementing regulations may make clear, when issued, that “disadvantage” is an individual determination under a “preponderance of the evidence” standard, mirroring regulatory changes to the Small Business Administration's 8(a) program

in the aftermath of the *Adarand* decision. See 63 Fed. Reg. 35726 (June 30, 1998).

EESA and the Treasury small business document generally embrace the Government's policy on small businesses and their subcategories. See Treasury small business document at 1–2. Assistant Treasury Secretary for Financial Stability Neel Kashkari has stated that “we believe, to the extent possible, everyone should have a right to compete for these contracts, especially small businesses, veteran-owned businesses, and minority and women-owned businesses.” See Kashkari Remarks at the SIFMA Summit on the Troubled Assets Relief Program (Nov. 10, 2008), www.treas.gov/press/releases/hp1262.htm. As of Nov. 25, 2008, Treasury awarded one EESA contract to a small business. See GAO report at 44. Three other awarded contracts indicate the likely participation of small businesses, or minority- or women-owned subcontractors: one through a teaming arrangement with a minority-owned small business; another with the “plans” to use a small business and a women-owned business as subcontractors, although for less than one percent of the prime contract value; and one with a stated intention to use a minority- and women-owned subcontractor. *Id.* at 44–45.

As for procurement contracts, Treasury's small business document explicitly acknowledges that “certain procurements may be set aside for certain small businesses,” including veteran-owned and service-disabled veteran-owned small businesses, Historically Underutilized Business Zone businesses, small disadvantaged businesses, and women-owned small businesses. Although the small business document suggests that Treasury may use set-asides for all categories of small business, federal law does not permit set-asides for certain of these categories, including the SDB program, and permits only limited set-aside capabilities for VOSB and WOSB programs. For three of the EESA contracts, “Treasury evaluated the proposals received based in part on the offerors' approach to ensuring that small businesses had opportunities to participate.” GAO report at 39.

However, for the hiring of financial agents, Treasury announced that under long-standing authority it is not required to use set-aside procurements for any small businesses. Treasury small business document at 1. Treasury has stated that, notwithstanding the lack of set-aside authority, it “has included these groups as part of the [financial agent] selection process.” *Id.*

The Treasury document advises small businesses that they may participate as subcontractors to financial agents, particularly if they do not meet all of the minimum requirements stated in a notice issued to interested and qualified financial institutions. *Id.* Treasury's October 6 financial agent solicitations require offerors to describe their approach to using "small and minority- and women-owned businesses" as subcontractors. These solicitations, however, do not indicate how an entity qualifies as small, minority-owned or women-owned, or what law applies to qualification decisions. Treasury also indicated that it "will at a future date issue a separate notice for smaller and minority- and women-owned Financial Institutions that may not meet the minimum qualifications for the size of assets under management" to act as submanagers within the portfolio of mortgage-related securities. See "Notice to Financial Institutions Interested in Providing Securities Asset Management Services for a Portfolio of Troubled Mortgage-related Assets," www.treasury.gov/initiatives/eesa/solicitations.shtml. A similar notice for whole loan asset managers indicates that Treasury "may" issue a separate notice. See "Notice to Financial Institutions Interested in Providing Whole Loan Asset Management Services for Portfolio of Troubled Mortgage-related Assets," www.treasury.gov/initiatives/eesa/solicitations.shtml.

Treasury's guidelines recommend that small businesses submit electronically one-page capabilities statements to the department's Office of Small and Disadvantaged Business Utilization at TreasuryOSDBU@do.treas.gov. The Treasury procurement document also advises that "[f]or information on how small businesses can participate in Treasury contracting, contact Treasury's Office of Small and Disadvantaged Business Utilization at TreasuryOSDBU@do.treas.gov." See also Treasury small business document at 2.

EESA and Treasury's Interim COI Guidelines—EESA § 108 directs the Treasury secretary to issue regulations or guidelines to "address and manage or to prohibit [COIs] that may arise in connection with the administration and execution of the authorities provided under [EESA]." Specifically, regulations or guidelines are required for COIs arising in (a) the selection or hiring of contractors or advisors, including asset managers; (b) the purchase of troubled assets; (c) the management of the troubled

assets held; (d) post-employment restrictions on employees; and (e) any other potential COI, as the Treasury secretary deems necessary or appropriate in the public interest.

On October 6, Treasury issued interim COI guidelines to address three likely scenarios for "impaired objectivity" COIs among contractors performing under EESA. "Interim Guidelines for Conflicts of Interest" (Oct. 6, 2008) (guidelines), www.ustreas.gov/initiatives/eesa/conflict.shtml. As identified by Treasury, likely COI scenarios include (1) impairment of judgment because the contractor's performance could affect other interests of the contractor, (2) potential COIs if contractors "obtain access to sensitive, non-public information (belonging to Treasury or to third parties) while performing the contract," and (3) personal COIs involving contractor employees because they "are not always subject to the same ethical restrictions that are imposed by law on Federal Government employees." *Id.*

The guidelines establish a procedure for managing or prohibiting potential COIs through (a) offeror and employee disclosures; (b) offerors' submission and review of COI mitigation plans; and (c) the potential incorporation of clauses into resulting contracts to address a contractor's fiduciary duty (if any) to Treasury, nondisclosure provisions (if appropriate) and any approved mitigation plan. The Treasury senior procurement executive is responsible for reviewing and approving all COI provisions, and the secretary or a designee may waive COIs. *Id.*

Impact on the Contracting Process—The guidelines impact important aspects of the Government contracting process: presolicitation, solicitation, bid review, and award and performance of a contract. Under the guidelines, Treasury must, before issuing a solicitation, determine whether nondisclosure agreements and COI agreements are appropriate. Treasury's senior procurement executive must "review and approve all provisions related to COIs prior to issuance of the solicitation." *Id.*

EESA solicitations "should instruct prospective offerors that they must disclose any actual or potential COIs (including those associated with an affiliate, consultant, or subcontractor) which could arise from performance of the contract." Treasury also may require a prospective offeror to identify COIs among employees who would perform the work. *Id.*

An EESA solicitation typically will require an offeror's initial proposal to include a mitigation plan, if

an actual or potential COI is identified. A solicitation will identify, if appropriate, “minimum requirements or standards for the COI mitigation plan” and “an evaluation factor or criteria whereby Treasury will assess the likely effectiveness of the proposed COI mitigation plan.” Solicitations also will state that “Treasury will oversee and enforce the proposed mitigation plan as part of the contract.” The chief compliance officer within Treasury’s Office of Financial Stability is “responsible for making certain that firms comply with agreed upon mitigation procedures.” *Id.*

Solicitations will include nondisclosure provisions applying to the prime contractor. (A sample nondisclosure agreement is included as Exhibit D to the “Financial Agency Agreement for Custodian, Accounting, Auction Management and Other Infrastructure Services for a Portfolio of Troubled Mortgage-related Assets,” Oct. 14, 2008, available at www.treasury.gov/press/releases/reports/custodiancontract.pdf.) At Treasury’s discretion, solicitations also may require a prime contractor to obtain nondisclosure and COI agreements from subcontractors or individual employees. See guidelines.

After offers are submitted, a CO “may negotiate the mitigation plan with the offeror, taking into account the type of procurement being conducted.” However, Treasury evaluators, source selection personnel and legal counsel are responsible for examining “any mitigation plans included in the offeror’s response to the solicitation” to determine whether those plans provide sufficient protection against actual or potential COIs. Per the guidelines, Treasury “should not assume that a mitigation plan which is acceptable under one situation would also be acceptable under different circumstances.” If a mitigation plan does not “neutralize or mitigate” all COIs, an offeror “will not be eligible for award unless conflicts are waived.” A request for a waiver is coordinated by the Treasury senior procurement executive, but must be approved by the secretary or a designee. See guidelines. Kashkari has stated that Treasury will hire firms “when we are confident in our and their ability to manage any conflicts.” See Assistant Secretary for Financial Stability Kashkari’s Remarks Before the Institute of International Bankers (Oct. 13, 2008), www.ustreas.gov/press/releases/hp1199.htm.

The guidelines provide that, at the time of award, the “mitigation plan will be incorporated into the contract” and becomes “a contractually binding

obligation.” Treasury “will oversee and enforce the proposed mitigation plan as part of the contract.” “If the contractor will owe a fiduciary duty to Treasury in performing the contract,” that provision in the solicitation is part of the resulting contract. See guidelines. As of December 2, Treasury had no process for managing or monitoring COIs. See GAO report at 8.

The guidelines resemble and generally are consistent with the FAR COI provisions. For example, to the extent that a COI is identified, the FAR and the guidelines allow for an offeror to propose a mitigation plan and, if the COI cannot be resolved, it may be waived with approval of the agency head or a designee. See FAR 9.504(e). Under both sets of rules, (1) a CO may not award a contract to an offeror with an unacceptable mitigation plan absent a waiver, see *id.*; (2) to the extent that contractors obtain access to sensitive, non-public information, restrictions must be imposed, see FAR 9.505-4; and (3) any restraints imposed on the contractor will be included in the contract, see FAR 9.507-2. However, if the FAR applies to an EESA contract award, it is not clear how a potential conflict between the guidelines and the FAR will be resolved.

Current Treasury EESA COI Practice—Treasury has issued additional information about identifying and mitigating COIs. E.g., “Notice to Financial Institutions Interested in Providing Custodian, Accounting, Auction Management and Other Infrastructure Services for a Portfolio of Troubled Mortgage-related Assets,” www.ustreas.gov/initiatives/eesa/docs/notice_custodian-services.pdf; see also Notice to Financial Institutions Interested in Providing Securities Asset Management Services for a Portfolio of Troubled Mortgage-Related Assets, www.ustreas.gov/initiatives/eesa/docs/notice_securities-assetmgr.pdf. Such notices require potential contractors to “identify any real or potential [COIs they] would have ... and explain how [they] would avoid, mitigate, or neutralize any such conflicts.” The notices also require a contractor, as part of a bid, to “describe [its] philosophy in fulfilling [its] duty to the Treasury and the U.S. taxpayer in light of [its] proprietary interests and those of other clients.” *Id.*

Treasury requires firms “to disclose their potential [COIs] and recommend specific steps to manage those conflicts” under the mitigation plans required under the guidelines. See Assistant Secretary for Financial Stability Kashkari’s Remarks Before the Institute of International Bankers (Oct. 13, 2008).

Treasury will conduct an independent examination of a firm's potential COI to help ensure that the firm has fully disclosed potential concerns. *Id.* In practice, it appears from those portions of the agreements that have been publicly released that the EESA COI provisions may affect financial agents differently from contractors. A comparison of the financial agency agreement between Treasury and The Bank of New York Mellon, for Mellon to provide custodial, accounting, auction management and other infrastructure services to administer the portfolio of purchased troubled assets, to the contract between Treasury and Ennis Knupp & Associates, Inc., for Knupp to serve as a financial advisor, suggests that contractors (as opposed to financial agents) may be under more stringent contractual COI controls. Financial agents, however, also have obligations and restrictions arising from their fiduciary and agent relationships with Treasury, which contractors may not have.

The Mellon agreement imposes a fiduciary duty on Mellon and requires nondisclosure agreements. Mellon also must establish policies and procedures to avoid, mitigate and neutralize COIs, and to maintain an ethical wall between "its personnel and those of its affiliates assigned to provide services under this FAA[, so that they] do not divulge information to other personnel involved with [Mellon's] other business activities that may conflict with its duties owed to the Treasury." Mellon also covenanted to disclose organizational COIs and "to the extent feasible and to the Treasury's satisfaction any personal or organizational" COIs identified by Treasury or Mellon. Mellon covenanted "to disclose any other facts or information that the Treasury should reasonably expect to know about [Mellon] to help protect the reputational interests of the portfolio of troubled assets." It does not appear that Mellon had to submit a formal mitigation plan, and no such plan is incorporated in the agreement as released by Treasury, although Mellon must annually certify to its disclosure of potential COIs and "avoid, mitigate, or neutralize to the extent feasible and to the Treasury's satisfaction any personal or organizational conflicts of interest." See "Financial Agency Agreement for Custodian, Accounting, Auction Management and Other Infrastructure Services for a Portfolio of Troubled Mortgage-related Assets" (Oct. 14, 2008), www.treasury.gov/press/releases/reports/custodiancontract.pdf.

In contrast, the Knupp agreement incorporates multiple FAR provisions. Like the Mellon

agreement, the Knupp agreement includes a fiduciary obligation by the contractor, nondisclosure agreements, and a confidentiality provision. However, the contract incorporates a COI mitigation plan, allows for termination of the contract for convenience to avoid a potential COI and requires Knupp to incorporate the COI provision in all "subcontracts, consultant agreements, and in lower tier subcontracts." See Contract No. TOS09008 between Treasury and Knupp (Knupp agreement), www.ustreas.gov/press/releases/reports/contract.pdf. Knupp, its subcontractors and consultants must annually certify that no COIs exist or that any existing COI has been disclosed to Treasury and mitigated. As part of this certification, Knupp must also warrant that all related entities have been informed of the COI requirements and that it understands that it has a continuing obligation to search for and report actual or potential COIs. *Id.*

The Knupp agreement includes express prohibitions against certain concurrent or subsequent actions, primarily relating to its involvement with other aspects of TARP. For instance, Knupp cannot provide asset management, custodial services or "other investment services," or assist other entities "seeking to enter into any such agreement" with Treasury or in the "performance of any such agreement." See Knupp agreement. This prohibition is limited in scope to troubled assets for which Knupp provided "any substantive advi[c]e, guidance, management, or oversight" to Treasury. During the term of the contract, Knupp may not "sell or offer to sell, or act on behalf of anyone selling or offering to sell, any asset to Treasury" under TARP. Knupp also "cannot act for the Treasury in the same particular matter in which it or a related entity has a business or financial interest." The contract further requires that Knupp may "not purchase or offer to purchase, or act on behalf of anyone purchasing or offering to purchase" any assets for which Knupp "advise[d] or otherwise assist[ed] the Treasury with respect to the purchase, management, valuation or sale" of the assets. *Id.*

Treasury hired Squire Sanders & Dempsey, LLP (Squire Sanders) to help implement the CPP by "executing transactions under the program, which includes reviewing executed investment agreements, working directly with accepted financial institutions to identify and resolve any legal issues before closing, and conducting the closing of transactions." See Contract No. 09BPA001 between Treasury and Squire Sanders (Squire Sanders agreement), www.ustreas.gov/press/releases/reports/contract.pdf.

treas.gov/press/releases/reports/squirebpa.pdf, at 5–6 (Squire Sanders agreement); “Treasury Hires Legal Firms Under the Emergency Economic Stabilization Act” (Nov. 3, 2008), *www.treas.gov/press/releases/hp1251.htm*. Although the contract includes Squire Sanders’ proposed mitigation plan, it notes three caveats and one interpretation of personal COIs. These Treasury caveats (a) require Treasury’s prior consent before Squire Sanders may represent “financial institutions that combine with other financial institutions that may have a TARP-related conflict”; (b) clarify that although Squire Sanders will “not perform legal services for Treasury with regard to certain institutions because [Squire Sanders] may be representing those institutions in TARP matters,” it “may not represent such clients in litigation or claims against Treasury with respect to TARP matters”; (c) include a requirement that Squire Sanders “abide by the ethical restrictions for individuals performing under a task order ... even though [it] did not specifically address such requirements in its proposal”; and (d) advise that “a person ... would not be deemed to have a ‘financial interest’ in an entity if such interest derives from a diversified mutual fund.” Id.

Similarly, Treasury took exception to one provision in a mitigation plan incorporated into its E&Y BPA. That contract, which includes what appears to be a standard COI clause in Attachment No. 4, states that under E&Y’s mitigation plan for organizational COIs,

the proposed language ... reads, “Should a potential conflict be identified by Ernst & Young or the Treasury in considering or undertaking performance of the services under a resultant Task Order, in the interest of protecting the integrity of both parties Ernst & Young reserves the right to decline to accept or perform any task order where either Ernst & Young or the Treasury determines that a potential or actual conflict of interest exists.” The Government takes exception to any interpretation of this statement that would provide Ernst & Young with a unilateral right to decline task order work. Treasury may waive potential or other identified conflicts of interest and require that the Contractor perform task order work under this BPA. Failure to proceed with task order work under these circumstances may be cause to terminate this BPA.

See *www.treas.gov/press/releases/hp1225.htm* (E&Y BPA at 2).

The Squire Sanders contract, at Attachment 3, and a separate contract for Hughes Hubbard & Reed LLP, also include a provision requiring the contractors to abide by regulations issued by the secretary pursuant to EESA § 108(b). The E&Y BPA is less restrictive, permitting E&Y to “negotiate in good faith” the inclusion of § 108(b) COI provisions if final guidelines or rules “differ from or expand upon” those incorporated in the contract. See E&Y BPA. The publicly available version of Treasury’s contract with Simpson, Thacher & Bartlett, LLP, hired to serve as legal advisor for EESA implementation, does not reference a COI mitigation plan or address COIs. See Contract No. TOS09007 between Treasury and Simpson, Thacher & Bartlett, LLP, *www.treas.gov/press/releases/reports/lawfirmcontract.pdf*.

GAO recently determined that six of the eight EESA service providers identified potential or actual sources of conflict. GAO report at 41–42. In its summary of these contracts, GAO found that (1) five contractors indicated that they either already had or could have clients receiving TARP assistance, (2) one contractor indicated that a potential COI would arise if it received information proprietary to multiple clients with competing interests, and (3) one company identified conflicts regarding troubled assets owned either directly by the company or by clients that were eligible for TARP assistance.

The contractors proposed various approaches to mitigating actual or potential COIs, including codes of conduct, company policies and procedures, senior executive meetings, confidentiality agreements, specialized information security methods and open communication with Treasury. Treasury does not require mitigation plans to include a uniform mechanism for notification of actual or potential COIs that arise during performance, and, in some instances, mitigation plans have no notification procedure. GAO report at 42–43.

Status of Treasury Guidelines—The guidelines “remain in effect until final guidelines are developed.” See guidelines. House Speaker Nancy Pelosi (D-Calif.) criticized the guidelines as “fail[ing] to meet the tough conflict of interest standard directed by Congress in the legislation.” See Letter from Speaker Pelosi to Secretary Paulson (Oct. 7, 2008), *www.house.gov/pelosi/press/releases/Oct08/letterpaul.html*. Pelosi expressed concern that companies benefiting from TARP may be eligible “to offer asset management or other contractor services if Treasury personnel ap-

prove a mitigation plan,” and that permitting institutions with a clear COI to help manage TARP “provides insufficient protection to taxpayers.” She urged Treasury Secretary Henry Paulson to strengthen the guidelines to avoid “even the appearance” of COIs by participating institutions. However, there appears to be no clear consensus on the rigorousness of the guidelines. Treasury has cited other unnamed commenters as describing some of the existing COI requirements under the guidelines as “some of the ‘toughest’ out there.” Kashkari Remarks on Financial Markets and TARP Update (Dec. 8, 2008), www.ustreas.gov/initiatives/eesa/.

In its TARP report, GAO mentioned its prior recommendation to the Department of Defense that DOD “contractually require its contractors to impose [COI] restrictions similar to those for federal employees on employees who were providing advice or assistance in certain ... contracting matters,” but did not include this in its recommendations to Treasury. See GAO report at 41. Although the report does not indicate whether Treasury will adopt a measure similar to the one GAO recommended to DOD, Treasury likely will contractually impose some “postemployment limitations for contractors and their employees.” *Id.* The guidelines do not specifically address post-employment restrictions, an area in which the final COI guidelines or regulations may differ from or expand upon the interim guidelines.

Treasury has submitted proposed COI regulations to the Office of Management and Budget for review and anticipates issuing the regulations soon. After the COI regulations are published, Treasury will work with existing contractors and agents “to bring their mitigation plans into conformance with the regulations.” See Kashkari Remarks on Financial Markets and TARP Update (Dec. 8, 2008). A provision in the Squire Sanders contract requires the company to “agree that its future attorney-client relationship with Treasury may be more restrictive than the ABA’s Model Rules [or than those COI regulations] that may

be issued by the Secretary of the Treasury” pursuant to EESA § 108(b). See Squire Sanders agreement. The E&Y BPA requires only good faith negotiation on the incorporation of future § 108(b) COI determinations and final guidelines or regulations. See E&Y BPA. Contractors under EESA may be similarly required as part of any TARP-related contract to agree either to comply with or to “negotiate in good faith” on the incorporation of final COI guidelines or regulations and any other COI provisions issued by the secretary under EESA § 108(b) in advance of their issuance. It appears that Treasury also will review and renegotiate mitigation plans to enhance specificity and compliance with the new regulations after they are issued. Contractors should expect Treasury to implement oversight of financial agents’ and contractors’ mitigation plans that likely will entail monitoring and certification requirements and that may also include third-party reviews and audits. GAO report at 9–10, 58; Kashkari remarks on Financial Markets and TARP Update (Dec. 8, 2008).



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Michael J. Schaengold (mschaengold@pattonboggs.com), Robert K. Tompkins (rtompkins@pattonboggs.com) and Michael J. Lowell (mlowell@pattonboggs.com), who specialize in Government contracts and national security law. Messrs. Schaengold and Tompkins are resident in the Washington, D.C. office of Patton Boggs LLP, while Mr. Lowell is resident in the firm’s Northern Virginia office. Mr. Schaengold is Co-Chair of the Advisory Council for the U.S. Court of Appeals for the Federal Circuit and is a Member of the Advisory Council for the U.S. Court of Federal Claims. The authors of this FEATURE COMMENT are contributing authors to the The Emergency Economic Stabilization Act of 2008 Handbook (Thomson Reuters/West 2009), which is scheduled for publication in February 2009.

