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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

The President's Column

Dear BCABA Members, Friends and Colleagues:

Welcome to the final *Clause* of 2013, and my final President's Column. As anticipated, this year of federal budget squabbles, impasse, and sequestration has been a model of inefficiency in our nation's capital and the source of great frustration throughout the nation.

Notwithstanding the tumultuous year our firms, companies, and agencies have faced, the BCABA emerges from 2013 as strong as ever. The BCABA's strength comes directly from our vigorous and robust membership. We are a volunteer organization; our members are consistently willing to share knowledge with those newer to the art and science of efficient, merits-based resolution of federal procurement disputes. Year in and year out we have met our mission of supporting and improving the practice of law before the Boards of Contract Appeals of the Federal Government. In 2013, we put on several well attended and informative programs. We are able to execute our mission due in no small measure to the Chairs and Judges of the BCAs -- we are grateful for the gift of their precious time in support of our programs and activities. We are also very grateful for the support received from our Gold Medal Firms. As a small token of our appreciation, and to assist our members with one-stop shopping for the latest and most

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**Boards of Contract Appeals Bar Association, Inc.
Officers**

President:

Donald M. Yenovkian
Fluor Government Group
100 Fluor Daniel Drive (HP03D)
Greenville, SC 29607
(w): 804-938-7297

Secretary:

Kristen Ittig
Arnold & Porter LLP
1600 Tysons Boulevard, Ste. 900
McLean, VA 22102
(w): 703-720-7035

Vice President:

Hon. Gary Shapiro
PSBCA
2101 Wilson Boulevard, Ste. 600
Arlington, VA 22201
(w): 703-812-1900

Treasurer:

C. Scott Maravilla
FAA Office of Dispute Resolution
800 Independence Ave., SW
Washington, DC 20591
(w): 202-267-3290

**Boards of Contract Appeals Bar Association, Inc.
Board of Directors**

Anthony Palladino (2012-2014)
FAA Office of Dispute Resolution
for Acquisition
800 Independence Avenue, SW
Washington, DC 20591

Erin B. Sheppard (2012-2014)
McKenna, Long & Aldridge LLP
1900 K Street, NW
Washington, DC 20006

David Edelestein (2013-2015)
Asmar, Schor & McKenna LLP
5335 Wisconsin Avenue, NW, Ste. 400
Washington, DC 20015

Matt Ponzar (2011-2013)
Defense Human Resources Activity
4040 N. Fairfax Drive, Ste. 200
Arlington, VA 22203

Katherine Allen (2012-2014)
Department of the Treasury
Bureau of Engraving & Printing
Washington, DC 20005

William Wozniak (2013-2015)
Williams Mullen LLP
8300 Greensboro Drive, Ste. 1100
Tysons Corner, VA 22102

Ita Snyder (2013-2015)
General Electric Aviation
1299 Pennsylvania Ave., NW
Washington, DC 20004

Jonathan DeMella (2012-2014)
Dorsey & Whitney, LLP
701 5th Avenue, Ste. 6100
Seattle, WA 98104

Daniel Strouse (2013-2015)
Wittie, Letsche & Waldo LLP
915 15th Street, NW
Washington, DC 20005

Immediate Past President:

Francis E. "Chip" Purcell
Cooley LLP
777 6th Street, NW, Ste. 1100
Washington, DC 20001

President's Column (cont'd):

thoughtful federal procurement law information and guidance, we have revamped our website (www.bcaba.org) to include a link to the latest content from each of our Gold Medal Firm websites.

Just a few years ago, when I started in my dream (federal) job at the Pentagon, a past BCABA President, Joe McDade, strongly suggested that I get involved in the BCABA. He emphasized the BCABA's accessibility to those who wanted to get involved and recommended that I stick around after the annual meeting and introduce myself -- and I could not be happier that he did. The next thing I knew . . . I was the President! The annual BCABA business meeting will immediately follow the annual program on December 18th. If you are interested in getting involved, please stick around and let us know. There are plenty of opportunities to help, share, educate, learn, network, and have fun. And we will need a President in 2017! For the foreseeable future, however, we are in great hands. The 2014 President, Judge Gary Shapiro, and 2014 Vice-President, Kristin Ittig, have been wonderful partners this year, as have the Board of Governors and Past Presidents, Pete McDonald, Judge Rich Walters, Susan Ebner, and David Black. It has been my pleasure to serve as President of this awesome organization.

I wish you all a healthy, happy, and prosperous 2014, and hope to see you around the BCABA activities.

Best regards,

Donald M. Yenovkian
President
BCABA, Inc.





BCABA ANNUAL PROGRAM

December 18, 2013

Arnold & Porter LLP
555 Twelfth Street, NW
Washington, D.C. 20004

- 8:30-9:00 Registration**
Welcoming Remarks: Donald M. Yenovkian II (Fluor), President, BCABA, Inc. and Program Chair
Hon. Gary E. Shapiro (PSBCA), Vice-President
- 9:00 - 10:00 BCA DECISIONS: YEAR IN REVIEW**
 Panelists will discuss significant decisions from the Boards of Contract Appeals the past year.
Panel Chair/Moderator: David S. Black, Partner, Holland & Knight LLP
Panelists: Thomas H. Gourlay, Jr., Chief Trial Attorney, U.S. Army Corps of Engineers;
Susan Warshaw Ebner, Asmar, Schor & McKenna, PLLC; **TBD**
- 10:00 -11:00 SCARED STRAIGHT: WHY LEGAL PRACTITIONERS SHOULD CARE ABOUT CYBERSECURITY**
 The panel will discuss the cybersecurity threats facing private practitioners, in-house counsel, and government counsel for their respective organizations.
Panel Chair/Moderator: Elizabeth Ferrell, Partner, McKenna Long Aldridge LLP
Panelists: Daniel E. Chudd, Partner, Jenner & Block; **Courtney Edmonds**, SAIC;
Brian Tierney, Veterans Administration
- 11:00-11:15 BREAK**
- 11:15-12:15 WHAT YOU SHOULD KNOW ABOUT DCAA AND ITS ROLE IN DISPUTE RESOLUTION**
 Panelists will assist attendees in better understanding DCAA's role in the resolution of contract issues in controversy.
Panel Chair/Moderator: David G. Anderson, Couch White, LLC
Panelists: Greg Bingham, The Kenrich Group; **David L. Cotton**, Cotton & Co., LLC; **Judge Diana Dickinson**, ASBCA; **Joseph Bucsko**, DCAA
- 12:15 - 1:30 LUNCHEON**
Speaker: Professor Kathleen Clark, Washington University Law School
- 1:30 - 2:45 BCA JUDGES PANEL**
 Board judges will discuss methods for achieving a cost effective resolution of matters before the various Boards. The panel will discuss alternative dispute resolution techniques, as well as other non-ADR practices that can increase efficiency.
Panel Chair/Moderator: Kristen E. Ittig, Partner, Arnold & Porter LLP
Panelists: Judge Alan Caramella, PSBCA; **Judge Elizabeth Grant**, ASBCA; **Chief Judge Marc Loud**, DCCAB; **Judge Anthony Palladino**, FAA ODRA; **Judge Patricia Sheridan**, CBCA
- 2:45-3:00 BREAK**

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BCABA ANNUAL PROGRAM

December 18, 2013

Arnold & Porter LLP
555 Twelfth Street, NW
Washington, D.C. 20004

- 3:00-4:00** **PROTECTING THE WHISTLEBLOWER**
The panel will discuss the recently enacted Whistleblower Protection Enhancement Act of 2012 and other whistleblower protection regimes as they affect both government and contractor whistleblowers.
Panel Chair/Moderator: Judge C. Scott Maravilla, FAA ODRA
Panelists: Kathleen Clark, Washington University Law School; Shirine Moazed, Chief, Washington Field Office, U.S. Office of Special Counsel; Jessica Tillipman, George Washington Law School
- 4:00-4:30** **BCABA, INC. ANNUAL BUSINESS MEETING**

Approval pending for 5 Hours
Virginia CLE Credit



BCABA ANNUAL PROGRAM

Registration Form

Registration Deadline: December 10, 2013

Company/Agency: _____

Address: _____

City, State, Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

BCABA Member: _____ Gold Medal Firm* Member: _____ Total Paid: \$ _____

Questions?

Contact **Don Yenovkian**
864-593-3057
Don.Yenovkian@Fluor.com

PAY BY CHECK

Mail your check **payable to "BCABA, Inc."** together with this completed form to:
BCABA, Inc., c/o Annual Program Registration, P.O. Box 66612, Washington, D.C. 20035.

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2013 Reduced Annual Program Fees

Recognizing the fiscal constraints many organizations are facing in 2013-2014, the BCABA has instituted a one-time rate reduction to assist our members and member organizations in securing CLE.

Government Employees, Academics, and Student Members	\$50
Gold Medal Firm Members	\$75
Other BCABA Members	\$100
Non-Members (less expensive to join!)	\$150

(Annual membership dues: \$30 for Government employees; \$45 for all others.)

* - A Gold Medal Firm is a law firm or organization in which all of its government contracts lawyers are members of the BCABA, Inc. Gold Medal Firms signing up all their government contracts attorneys for the 2013-2014 year are eligible for this discount. We appreciate the support of our Gold Medal Firms.



BCABA ANNUAL PROGRAM

Registration Form

Registration Deadline: December 10, 2013

If you wish to pay for the BCABA Annual Program registration fee(s) and/or membership dues by credit card (VISA or Mastercard only) *in lieu of a check*, please provide the following information:

- (1) **Name(s) of Registrant(s):** _____
[Please attach a separate list, if necessary.]
- (2) **Name on the Credit Card:** _____
- (3) **Type of Credit Card (VISA/Master Card):** _____
- (4) **Name of your Firm or Agency:** _____
- (5) **Total Dollar Amount to be charged – breakdown:**
 - a. **For Annual Program Registration Fee(s)** \$ _____
 - b. **For Membership Dues** \$ _____
- (6) **Credit Card Number:** _____
- (7) **Credit Card Expiration Date:** _____
- (8) **CBC (three digit) Code — on reverse of the credit card:** _____
- (9) **USPS Zip Code for the location to which your card is billed:** _____

Mail completed form—with a separate registration form for each individual—to:

BCABA, Inc.
c/o Annual Program Registration
P.O. Box 66612
Washington, D.C. 20035

Or email to thomas.h.gourlay@hq02.usace.army.mil.

Bored of Contract Appeals (a.k.a. The Editor's Column)

by

Peter A. McDonald

C.P.A., Esq.

(A nice guy . . . basically.)

Leading this issue is a comprehensive review of the multi-billion dollar ADR the ASBCA resolved, and the lessons learned are very instructive for anyone handling a monster case. Jim Kirlin then provides a detailed review of the ethics and compliance requirements for subcontractors. Scott Freling and Kayleigh Scalzo comment about the likely impact of the ASBCA's recent *Honeywell* decision. Finally, Dan Gordon, who needs no introduction to government contract practitioners, sets forth persuasive arguments about the efficacy of the bid protest process.

The Clause will reprint, with permission, previously published articles. We are also receptive to original articles that may be of interest to the government contract community. But listen everybody, you really shouldn't take all this government contract stuff too seriously. As usual, we received some articles that were unsuitable for publication, essentially because these are events that are very unlikely to happen: "Identity Thieves Discard Pete's Data!"; "Army Beats Navy!!"; and "Pete's 'Navigator' Application *Denied!!!*"



Reminder of Cheap Annual Dues

This is to remind everyone about the BCABA, Inc., dues procedures:

- ☺ Dues notices will be emailed on or about **August 1st**.
- ☺ Annual dues are **\$30** for government employees, and **\$45** for all others.
- ☺ Dues payments are due NLT **September 30th**.
- ☺ There are no second notices.
- ☺ Gold Medal firms are those that have all their government contract practitioners as members.
- ☺ Members who fail to pay their dues by September 30th do not appear in the Directory and do not receive *The Clause*.
- ☺ Members are responsible for the accuracy of their information in the Membership Directory, which is maintained on the website (bcaba.org).

Members are reminded that they are responsible for maintaining the accuracy of their information in the BCABA Directory.

The ASBCA's Path to the "Mega ADR" In *Computer Sciences Corporation*

by
Judges Paul Williams
and Reba Page*

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A recent mediation at the Armed Services Board of Contract Appeals (ASBCA) has garnered considerable attention for the significant dollar amount at stake, the complexity of the issues, and the innovative use of combined ("hybrid") dispute resolution procedures. This article examines the resolution of controversies underlying the appeals of *Computer Sciences Corporation*, ASBCA Nos. 56162-56175 (*CSC*), as well as undocketed matters arising under the same contract, which, together, were valued in excess of \$2 billion dollars. The article examines the growth and maturation of alternate dispute resolution (ADR) at the ASBCA and within the federal government to resolve matters arising under the auspices of the Contract Disputes Act of 1978, 41 U.S.C. §§7101-7109 (*CDA*).¹

Historical and Legal Background

With the use of ADR now firmly embedded in our legal culture, it may be difficult to recall a time when the use of ADR in federal government contracts was challenged on the bases that (1) there was no authority for employing these procedures, (2) confidential settlement proceedings lacked transparency, and (3) judges were not necessarily involved in the ADR process. In the 1980s, before the use of ADR was embraced by the *CDA* or the Federal Acquisition Regulation (*FAR*), and before the enactment of Administrative Disputes Resolution Act of 1996, 5 U.S.C. §§571 *et seq.* (*ADRA*), federal agencies took note of the private sector's successes in this arena and explored the use of ADR to resolve government contract disputes. It was against the backdrop of the lack of specific statutory or regulatory authority, and the lack of an articulated policy or defined process, that a seminal DoD inspector general (*DoDIG*) investigation took place that helped secure the future of ADR by the federal government.²

The *DoDIG* investigation arose from an anonymous whistleblower complaint regarding the use of ADR to reach settlement in *TennTom Constructors, Inc.*, ENG BCA No. 5128 (*TennTom*).³ The appeal arose from a \$270 million fixed-price construction contract between the US Army Corps of Engineers (*COE*), Nashville District, and the joint venture of Morrison-Knudsen Company, Inc., Brown & Root Inc., and Martin K. Eby Construction Co. for the construction of an 11-mile segment of the Tennessee Tombigbee Waterway in northern Mississippi. The appeal, which was docketed in 1984,⁴ involved a \$63 million claim for a differing site condition and alleged that soils were far less amenable to excavation than depicted in the underlying contract.⁵ It arose about the time the *COE* embarked on an ADR pilot program under the farsighted leadership of Lester Edelman, then chief counsel for the *COE*. With permission of the Corps of Engineers Board, before which the appeal was docketed,

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ASBCA's Path to the "Mega ADR" (cont'd):

litigation was stayed while the parties attempted to resolve the matter through the use of a mini-trial. The COE elevated the dispute from the district to the next higher command level for decision making, with the objective of obtaining an impartial business perspective. In June 1985, with the assistance of Professor Ralph Nash as a privately-hired neutral, the *TennTom* appeal was settled for \$17.2 million after four days of proceedings and two additional days of negotiations spread out over a two-week period.⁶

Despite (or perhaps because of) this success obtained through confidential negotiations, a subsequent audit and anonymous complaint to the DoDIG led to a thorough investigation into the use of ADR that garnered attention from the national media.⁷ The COE's ADR program, and, arguably, all federal government ADR initiatives, grew after the DoDIG report found that the *TennTom* settlement was not objectionable despite the fact that (1) an audit beforehand would have been prudent, and (2) the parties had engaged in controversial, confidential settlement discussions. The DoDIG indicated that the government faced sufficient litigation risk for the contractor's claim to warrant resolution, and that the settlement amount appeared acceptable. Overall, the report concluded that the "use of the mini-trial procedure appears to have been valid and in the best interests of the government." Although the DoDIG report concluded that the mini-trial was an efficient and cost-effective method for settling federal procurement disputes, it recommended that future use of the relatively new procedure be carefully considered on a case-by-case basis.⁸

Today we take for granted that ADR procedures are available to address federal procurement disputes, and such procedures are generally used on a voluntary and consensual basis within most agencies. The CDA was modified by the ADRA specifically to permit "a contractor and a contracting officer [to] use any alternative means of dispute resolution" set forth in ADRA, "or other mutually agreeable procedures, for resolving claims."⁹ The FAR implements the use of ADR in several provisions. Among these is FAR 33.214 Alternative Dispute Resolution (ADR), which at paragraph (a) states that the "objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy." These procedures may be used at any stage of contract disagreement, consistent with the CDA's progression of encouraging resolution beginning at the lowest possible level and encompassing disputes, claims, and appeals.¹⁰ FAR 33.214 (c) expansively provides that "ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy" and that "ADR procedures may be applied to all or a portion of the claim." These provisions echo the mandate of the CDA for the boards of contract appeals "to the fullest extent practicable [to] provide informal, expeditious, and inexpensive resolution of disputes."¹¹ Indeed the purpose of the CDA is "to help to induce resolution of more contract disputes by negotiation prior to litigation."¹² Federal agencies "are encouraged to use ADR procedures to the maximum extent practicable" in appropriate circumstances.¹³ The FAR protects the "confidentiality of ADR proceedings consistent with 5 U.S.C. §574."¹⁴

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ASBCA's Path to the "Mega ADR" (cont'd):

The ASBCA's ADR Program

The ASBCA has a robust ADR program with an enviable success rate for the resolution of issues on appeal as well as undocketed disputes raised by the parties, and it is often used to obtain a global resolution of all matters. As noted in the board's 2012 annual report,¹⁵ there were 680 appeals pending before the ASBCA as of October 1, 2012. During fiscal year (FY) 2012, 24 requests were made for the board to provide ADR services covering 47 appeals and two undocketed disputes; nonbinding procedures were requested each time. At the writing of the FY 2012 report, eight requests were pending. Of the 27 requests concluded during FY 2012, three requests for three matters were withdrawn, ADR was unsuccessful in three requests covering three matters, and 21 requests covering 57 matters, including six undocketed disputes, were successfully resolved by ASBCA ADR procedures.¹⁶

A compilation of internal ASBCA statistics shows that the board's ADR program has been a long-term success. Beginning with data accumulated from FY 1987-1999 through FY 2012, there have been a total of 1,726 appeals docketed before the board that were processed using ADR. Of these and the 140 off-docket matters included in the ADR proceedings, binding procedures were used for 446 matters, whereas nonbinding techniques were used for 1,280 matters. The board's success rate in helping the parties resolve both docketed and undocketed matters averages above 95 percent.

From the outset of an appeal, the ASBCA informs parties of ADR options, and encourages the voluntary and consensual use of these means to resolve disputes as early as feasible. The Notice of Docketing acknowledges the filing of the appeal, and furnishes the parties with important information including the ASBCA's Rules¹⁷ and the board's February 23, 2011, "Notice Regarding Alternative Methods of Dispute Resolution."¹⁸ On multiple occasions the parties are reminded of the opportunity for ADR, such as by the board's order inquiring about the parties' election of proceedings. If ADR is elected, the parties jointly submit a proposed ADR agreement, including a schedule for proceeding.

The ASBCA's ADR notice sets forth the board's policy encouraging the parties' voluntary, consensual, and early use of ADR, consistent with the CDA's mandate at 41 U.S.C. §7105 to resolve disputes in an informal, expeditious, and inexpensive manner and to the fullest extent practicable.¹⁹ The board's website at www.asbca.mil contains useful information for parties interested in ADR. In addition to the ADR notice, parties are provided with sample ADR agreements that may be used as a template but should be tailored by the parties to meet the needs of each proceeding. The parties must obtain the board's approval of the proposed ADR agreement, which should specify, among other things, (1) the scope of matters to be addressed, (2) the ADR procedures to be followed and whether the proceeding will be binding or nonbinding, (3) how limited discovery will take place, (4) the submission of position papers, and (5) a schedule and agenda for the proceedings.²⁰

The ASBCA's ADR notice makes clear that these techniques are intended to

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ASBCA's Path to the "Mega ADR" (cont'd):

supplement the judicial process, and to be conducted in good faith. It informs the parties of several ADR methods. The first of these is the use of a "settlement judge," a board judge who is appointed by the chairman for the purpose of facilitating settlement. This nonbinding form of ADR functions as either facilitative or evaluative mediation. The term "settlement judge" is now more aptly replaced by "neutral" or "mediator" (the latter titles are used in anticipation of revisions to the board's rules). The neutral is authorized to meet with the parties jointly or severally and may engage in *ex parte* communications. By prior agreement, the neutral may express a verbal, nonbinding assessment of the litigation risks faced by the parties.

The second form of ADR listed in the board's notice is the "mini-trial," which is described as "a highly flexible, expedited, but structured, procedure." Today, this process is seldom used, and is generally encompassed within nonbinding mediation procedures. The board will appoint a judge as a neutral to advise and assist the parties' senior-level designated representatives, who retain decision-making authority.

The third form of ADR described is a "summary trial with binding decision," in which a shortened hearing is conducted on an expedited basis before either a single ASBCA judge or a panel of judges. As agreed by the parties and the board in advance, a final and conclusive summary "bench" decision will be issued at the conclusion of the trial, or as agreed, a summary written decision will be issued within an agreed, abbreviated period.

The board lists as a fourth approach "other agreed methods," to allow the parties and the board to "agree upon other informal methods which are structured and modified to suit requirements of the appeals." The ASBCA has adopted a wide view of ADR techniques that may be used, and will consider any of the processes described above, a combination of hybrid techniques, or such creative procedures as the parties may propose and the board regards as acceptable.

The board's commitment to ADR goes beyond the philosophical endorsement of the parties' use of ADR. Although the parties sometimes privately hire a neutral for ADR proceedings, the board routinely provides judges for that purpose. Upon request, the ASBCA will appoint a judge to serve as an ADR neutral without cost to the parties. When appointing an ADR neutral the chairman will give weight to a list of names submitted by the parties. ASBCA judges, serving as ADR neutrals, work with the parties to develop and implement a suitable process for resolving the issues at hand. Unlike current experience at the ASBCA, Professor Nash's role in *TennTom* was typical of some early governmental agency pilot programs in ADR, such as that of the COE, which relied upon privately hired neutrals and focused upon mini-trials as the procedure of choice.²¹ By contrast, initial ADR guidelines from the Department of the Navy called for the ASBCA to assign a judge as the neutral.²²

As evidenced by the board's repeated mention of ADR options in standard correspondence in an appeal, the parties are encouraged at many stages to consider resolving appeals through ADR. The presiding judge will confer initially with litigants "to explore the

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ASBCA's Path to the "Mega ADR" (cont'd):

desirability and selection of an ADR method."²³ Generally, if the parties elect ADR aided by an ASBCA judge acting as the neutral, that judge will be recused from further participation in the appeal should the matter not be fully resolved. The philosophy underlying recusal is that the parties should feel free to engage in frank and candid *ex parte* discussions with the neutral regarding the strengths and weaknesses of their positions, without concern that any confidences might adversely influence a subsequent ruling. Nevertheless, the board has given permission for the ASBCA neutral to handle subsequent litigation in limited, appropriate circumstances where the parties stipulate that both fundamental due process and judicial economy are best served this way. For example, as will be further examined below, if the controversies underlying the ADR in *CSC* had not been completely resolved, by agreement of the parties as reflected in their ADR agreement, Judge Park-Conroy would have resumed the role as presiding judge over the appeals.

In addition to making ASBCA judges available for ADR purposes to resolve appeals under its jurisdiction, the board has provided an ADR neutral for matters before other boards of contract appeals and the U.S. Court of Federal Claims, and has been involved in ADR in U.S. district court matters.

In recognition of the increased use of ADR at its facilities in Falls Church, Virginia, and to better accommodate the parties' needs, the ASBCA converted and refurbished one of its four courtrooms and adjacent office spaces into a dedicated ADR Center.²⁴ The board placed an emphasis on an expanded and dedicated space for the proceedings, designed to give the parties ample room to confer jointly or caucus alone. The spacious ADR Center contains a meeting room that can seat more than 30 people and has lockable conference rooms for use by the parties.

The ASBCA's ADR Center is fully functional from a technological standpoint, and capable of meeting today's automated litigation needs. In addition to wireless Internet access, the ADR Center provides telephone audio conferencing and high-definition video teleconferencing. The conferencing aspects are helpful in ADR and other matters where participants and witnesses may not be readily available, and are useful in carrying out the board's geographically unlimited jurisdiction. This capability becomes essential for those matters where, as is increasingly the case, the ASBCA is involved in matters arising from contracts taking place in foreign and battlespace areas, including Iraq and Afghanistan.

The ASBCA Rules provide qualified parties with simplified options that in many ways bridge traditional litigation and ADR by allowing a process that involves less than full-blown litigation. ASBCA Rule 11, Submission Without a Hearing, allows either party to "elect to waive a hearing and to submit its case upon the record before the Board."²⁵ Under ASBCA Rule 12, optional small claims (expedited) and accelerated procedures are available solely at the election of the appellant. These remedies include ASBCA Rule 12.1, Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures, which at paragraph (a) provides that the expedited process may be elected if the amount in dispute is \$50,000 or less.

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ASBCA's Path to the "Mega ADR" (cont'd):

If the appellant is a "small business concern (as defined in the Small Business Act and regulations under that Act)," it may elect the expedited proceeding if the amount in dispute is \$150,000 or less. An expedited matter "requir[es] a decision of the appeal, whenever possible, within 120 days after the Board received written notice of the appellant's election to utilize this procedure."

Decisions rendered in accordance with the expedited option will be short and will contain only summary findings of fact and conclusion and be rendered for the board by a single administrative judge. Such decisions "shall have no value as precedent, and in the absence of fraud, shall be final and conclusive and may not be appealed or set aside." Paragraph (b) of ASBCA Rule 12.1 provides that where "the amount in dispute is \$100,000 or less," the appellant may elect the accelerated procedure. Under ASBCA Rule 12.3 this procedure encourages the parties to streamline the proceedings and shorten time periods "to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election." If the parties are in agreement, the decision may be issued by a single judge with the concurrence of a vice chairman.

There are two statutory requirements that the parties should consider in deciding whether to use ADR, particularly for those undocketed matters they wish the ASBCA to consider. The first is whether the proponent has satisfied the CDA's statute of limitations. The statute requires at 41 U.S.C. §7103(a)(4)(A) that "[e]ach claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." Even though in an ADR proceeding the ASBCA may agree to include an undocketed matter that has not been the subject of a CDA claim, this does not confer CDA jurisdiction over the matter unless all statutory and regulatory conditions are met. Remember that it is the claim proponent (and *not* the board) that bears the responsibility of satisfying the applicable statute of limitations requirements.

The second statute that the parties should keep in mind is 31 U.S.C. §1304, pertaining to the United States Permanent Indefinite Judgment Fund (Judgment Fund). This permanent appropriation was first enacted by Congress in 1956, and acts as "an unlimited amount of money set aside to pay judgments against the United States."²⁶ Resort to the Judgment Fund can be an invaluable resource as an expeditious way for the government to make payment on a settlement agreement. Parties interested in the use of the Judgment Fund should discuss the matter with the ASBCA neutral, who will provide guidance on how this may be accomplished. Note that the board must issue a decision in the nature of a consent judgment, which can only encompass matters within its CDA jurisdiction, before use of the Judgment Fund is authorized.

The Computer Sciences Corporation ADR

In retrospect, it is not surprising that a "mega ADR" was necessary to resolve the disagreements that arose between the Army and CSC. Everything about the underlying project,

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ASBCA's Path to the "Mega ADR" (cont'd):

contract, and ensuing litigation was bold and ambitious, and when things went wrong, they did so on a similarly outsized scale. The claims and disputes involved billions of dollars, and put at issue the efficient operation and management of the Army's depot system. Although CSC and the government entered into the subject contract in 1999, the work the company carried out in depot and supply management became a critical aspect of our nation's response to the events of September 11, 2001.

The indefinite quantity/indefinite delivery (ID/IQ) contract was an enormous undertaking by both CSC and the Department of the Army. The "Wholesale Logistics Modernization Program" (LMP) called for updating capabilities and retaining certain essential aspects of the fragmented, legacy "Wholesale Logistics Management System" (WLM). This aggregate of old systems, which supported the real-time logistics functions of the Army's program managers and depots, carried out a nationally critical mission. The depots, which supported over 23,000 users in the Army's supply chain activities, were responsible for acquiring and positioning strategic stock/war reserves, managing wholesale ammunition, and accounting for property and inventory, installation management, depot maintenance, and financial management. The government wanted to increase the transparency and accessibility of the procurement process using modern and sustainable technology.²⁷

Fixed-price Contract No. DAAB07-00-D-E252 was awarded to CSC on December 29, 1999, in the original amount of \$680,668,576, and called for both replacement of multiple aging and obsolete computer systems and increased interface with the Army's financial systems. The contract was set to expire in December 2011. The contractor was required to convert the Army's existing WLM systems into a technologically current automated system that was based upon a commercially available, off-the-shelf system (COTS) that CSC was to adapt to meet the government's needs. Updating the WLM required that information and systems then in use had to be variously transferred, modernized, and/or sustained during the transition. The updated system was to be released in three deployments. Once these were successfully done, the contractor was to operate and implement the newly configured LMP. The government hoped that a COTS-based system would allow the eventual transition of the LMP use to government and other contractors' employees. CSC was to be compensated by monthly fixed-price payments, and was eligible for periodic performance bonuses for successful "modernization" and "data processing" efforts.²⁸

Key to the underlying issues addressed by the CSC ADR were contract provisions for ordering particular tasks, scheduling and delays, acquisition of intellectual property (IP) rights by the government for future use of the LMP system by additional users, and contractor compensation for work accomplished and performance bonuses.²⁹ The contract contained both "requirements" and "indefinite quantity" provisions, depending upon the task involved. The "requirements" portion of the contract called for the government to place orders with CSC for services involving those parts of the old WLM that were to be transferred, sustained, and

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ASBCA's Path to the "Mega ADR" (cont'd):

modernized as well as those that were to be transferred and sustained, but not modernized. The indefinite-quantity portion of the contract allowed the government to place orders for other services specified in the statement of work for WLM components that were to be transferred but neither modernized nor sustained. Contract clause H-8, Intellectual Property Rights, provided, in relevant part, for CSC to transfer to the government "unlimited rights" for "that portion of the New System that is comprised of modification to the Transferred System." The contractor agreed to grant the government "Special Purpose License Rights" in "Computer Software or Computer Software Documentation sold in substantial quantities to the general public in the commercial open market." The purpose of the latter was "to allow the Government and its contractors" the use of the new, modified COTS "for the purposes of Army Logistics, but not for any commercial purposes." The parties agreed, in the event an "Equitable Adjustment for Certain Costs" was warranted, to "negotiate an amount of equitable adjustment directly related to the Contractor's unrecovered investment in software development for the modernized system."³⁰

Suffice it to say that the parties encountered many difficulties in transferring information from the WLM legacy systems to the newly developed, commercially-based LMP system, and their disagreements were exacerbated by the enormity, importance, and high visibility of the project and technical challenges. They disagreed over which party was responsible for unfulfilled contract obligations, significant project delays, cost overruns, and the contractor's inability to develop and implement the new LMP as planned. The government was concerned that CSC was not timely developing the modernized LMP while sustaining essential elements of the WLM. The contractor regarded the government as, among other things, failing to provide essential support for transitioning out of the WLM, delaying work, and compromising CSC's intellectual property rights in the new system.³¹

By 2003, the government was insisting upon corrective actions following the postponed first deployment; the contractor regarded these demands as compensable changes to the contract. While the parties' 2005 negotiations failed to resolve the controversy, they did result in a restructured contract with which to go forward, but did not ultimately solve the problems encountered. In 2006, CSC filed 14 requests for equitable adjustment (REAs), which in 2007 were denied by the contracting officer's final decision. Each side continued to hold the other responsible for the LMP's disappointing lack of success, and eventually a number of the parties' disputes progressed into claims that CSC appealed to the ASBCA. Beginning in September 2007, 14 CSC appeals were docketed as ASBCA Nos. 56162 through 56175 and assigned to the docket of Judge Carol Park-Conroy. Initially CSC sought a total of \$858 million, but that claim grew over time. Contract disagreements continued along with both sides' frustration during performance, particularly after the Army in 2009 notified CSC of its forthcoming intention to transition services to other users and contractors under contract clause H-8. The government submitted a counterclaim, and CSC advised in 2010 that it intended to submit an additional REA and would seek in excess of \$1.2 billion for the government's alleged breach of contract, including impingement of CSC's unrecovered software investment and intellectual property rights in the new system.³²

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ASBCA's Path to the "Mega ADR" (cont'd):

From the outset, the litigation was complex and time-consuming for both sides and the board, with very complicated discovery disputes including demanding requests for electronically stored information (ESI), and multiple motions for summary judgment that were extensively briefed. Among other rulings, Judge Park-Conroy denied the government's motion for summary judgment on the contractor's \$19,612,320 demand for lost performance bonuses and \$8,997,501 request for lost data processing revenues. Judge Park-Conroy also denied the government's motion for partial dismissal of four of the 14 consolidated appeals without prejudice for lack of jurisdiction due to CSC's failure to assert a sum certain. The government had predicated its motion on the contractor's alleged failure to properly state its monetary demand, because the amounts sought in four claims included costs that had already been paid by the Army. As a result, according to the government, the claims were not stated in a sum certain because the contracting officer was unable to allocate amongst them the previously-made \$42,400,000 payment credit and thus could not ascertain the extent to which the claims duplicated satisfied demands. Judge Park-Conroy held that the jurisdictional validity of a claim is determined at the time of submission of a claim to the contracting officer, whereas the accuracy of the amount sought goes to claim merits.³⁴

By 2010, the board had docketed 14 appeals, which included the government's 2007 counterclaim and CSC's requests for equitable adjustments that exceeded \$1 billion dollars. A trial for entitlement only was set for 2011.³⁵ Additional issues arose during the ADR that were also considered. These primarily concerned intellectual property (IP) matters, and brought the total amount in dispute to over \$2 billion dollars. It was clear that these appeals and other disputes would continue to present a mammoth litigation challenge that would consume significant time, money, and other resources of the parties and the board.

The government's and CSC's decision to engage in ADR was a practical one. They had been in litigation before the board since 2007 and in protracted discovery. The prospect of a final resolution was dim, and at best on a far distant horizon. Due to the extreme complexity of the evidence, as well as procedural and substantive issues, the scheduled 2011 trial was set to address entitlement only. The bifurcation was made at the parties' request. Quantum was premature, as the government had not completed the appropriate claim and REA audits. If the ASBCA had held that CSC was entitled to recover in full or in part, the board would typically remand the appeals to the parties to negotiate quantum. Had they not succeeded in resolving quantum, it would have been necessary for the board to conduct a trial on quantum, complete with further discovery and preparation. The uncertain date of the ultimate conclusion of the appeals was a daunting prospect, particularly for the government, as potential CDA interest costs ran as high as \$60,000 a day. Each party understood that it faced significant litigation risks that came at great expense for the 14 appeals lodged before the board, and that matters were increasingly complicated by newer allegations that had not yet ripened into appeals within the board's jurisdiction.³⁶

In addition to potential litigation exposure, ADR at the ASBCA offered other attractive incentives to the parties. Chief among these were the abilities to seize control over the timing

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ASBCA's Path to the "Mega ADR" (cont'd):

and outcome of the appeals, address controversial matters not yet before the board, and streamline proceedings in a cost-effective and efficient manner. ADR also allows the parties to fashion remedies that lie beyond the capacity of a CDA tribunal. And, very importantly for CSC and the Army, the use of ADR would allow the parties, aided by ASBCA judges sitting as neutrals, to collaboratively solve their differences while preserving and hopefully strengthening business relationships during the ongoing effort to complete the LMP.

The parties approached Judge Park-Conroy and Chairman Paul Williams regarding their interest in the use of ADR and sought input from the board. All recognized that while ADR offered the opportunity to expedite resolution, it would be necessary to fashion procedures of an again outsized nature to handle the matters.

The ADR Agreement Between CSC and the Army

The typical ADR agreement describes the "who, what, when, where, and why" in naming the parties, identifying matters to be resolved, and describing the process and agenda for the proceedings. Although the CSC/Army agreement included all these elements, it expanded on them to meet the parties' special needs.

The agreement made clear that the parties intended to address the contractor's 14 appeals (ASBCA Nos. 56162 through 56175), as well as the Army's counterclaim and CSC's two REAs for the government's alleged breaches of contract for IP rights and for CSC's unrecovered investment in software development for the modernized LMP system. The parties emphasized their desire to capture, to the greatest extent possible, all issues then in controversy as well as those that might arise during the pendency of the ADR. The ASBCA approved the parties' inclusion of "undocketed" matters to the mediation, including controversies that had not been the subject of a docketed appeal but were in the claim, in dispute, and even at earlier stages of controversy. Although the board could neither assert jurisdiction over nor grant remedies for these off-docket matters in traditional litigation, with the parties' permission, these issues could be addressed and resolved as part of the ADR. In short, with board approval, the parties redefined the scope of disputes within the ASBCA's consideration.

CSC and the Army agreed to use a "disciplined, efficient, and cooperative process to address and resolve" not only the docketed appeals but also "any potential Contract and program issues that may arise during the pendency of the ADR." They chose to utilize a nonbinding form, thus leaving open the option of resuming litigation if the ADR did not fully resolve all matters considered. Although the parties agreed to an evaluative mediation as the initial ADR process, this effort was to be preceded by fact-finding, data-gathering, and an information exchange. In the event that the evaluative mediation did not fully succeed, the agreement provided for "escalation components to a minitrial procedure, if necessary,"³⁸ to afford the parties an even more structured process to facilitate development of a resolution. Optimistically, the parties specifically "retain[ed] the right to resolve the issues in an alternate

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ASBCA's Path to the "Mega ADR" (cont'd):

manner and/or in less time than that set forth in this Agreement.”³⁹ The parties’ designation of flexible procedures, contemplating that the evaluative mediation could transition to a mini-trial or other ADR method to better facilitate resolution, is consistent with the ASBCA’s ADR Notice. The board specifically encourages the use of “other informal methods which are structured and tailored to suit the requirements” of the controversies at hand.⁴⁰

Because litigation was underway at the time the parties elected to use ADR, they were well aware of sophisticated discovery issues, particularly intricate ESI needs involving both legacy and newly developed computer systems and data content. CSC and the Army recognized that it was essential for the parties to thoroughly understand the issues under consideration. It was necessary for Judges Park-Conroy and Williams to be well-versed, and to “ensure the [parties’] decision-makers have received information sufficient to thoroughly understand the alleged facts, issues, and areas of agreement and disagreement, thereby maximizing the likelihood of resolving all issues in the time frame contemplated.”⁴¹

In expanding matters under consideration for resolution beyond claims that had been the subject of a contracting officer’s final decision, the parties were mindful that it was essential for them and the neutrals to have a firm grasp of issues pertaining to entitlement and quantum for these undocketed matters. The ADR agreement called for expedited discovery relating to these issues. CSC agreed to submit its REAs, including assertions of government breach, promptly to the contracting officer for decision. In return, the government agreed to furnish similar information pertaining to its counterclaim against the contractor. The parties stipulated that they would make readily available, within mere days, knowledgeable personnel and supporting documentation for the undocketed matters. Included with the key information considered was proof of costs asserted by appellant that could be used by the Defense Contract Audit Agency (DCAA) in conducting an audit. It was helpful that the parties had already sorted through some difficult problems associated with discovery of ESI, and agreed to resort as necessary to previously developed protocols. The parties authorized Judges Park-Conroy and Williams to resolve any discovery disputes that might arise from this additional information gathering.⁴²

As is generally done in board-annexed ADR proceedings, the parties specified that this “ADR procedure will be confidential and subject to Federal Rule of Evidence 408 and may also be protected from disclosure by the [ADRA] of 1996 (5 U.S.C. [§]574).” They agreed upon an expanded view of protecting documents, evidence, and statements made by any person during the “ADR procedure” or “prepared for any phase of the ADR procedure,” meeting or session. Included in these protections were “any communications between counsel relating to the ADR or settlement,” which would be “inadmissible in the Appeals or any other appeals for any purpose and shall not be used or referred to in the Appeals or any other appeals if settlement is not achieved.”⁴³

The agreement encompassed information provided to the neutrals. Judges Park-Conroy and Williams agreed to keep confidential any “[d]ocuments or information designated as

ASBCA's Path to the "Mega ADR" (cont'd):

privileged under the attorney-client or attorney work product" doctrine unless "the disclosing party otherwise agrees in writing." "Contemporaneous project records and other documents that are otherwise admissible or discoverable" did not become inadmissible or not susceptible to discovery "merely because of their use in this ADR proceeding." The government made clear that nothing in the ADR agreement "precludes the Government from disclosing information within the Government, when disclosure is necessary for review, approval, or justification of any settlement." The parties agreed to require any consultants hired for ADR purposes to sign a confidentiality agreement restricting any subsequent use of documents and information. At the conclusion of the ADR, the consultants had to agree to either "return or certify the destruction of such documents or information."⁴⁶

In recognition of the high profile of the *CSC* litigation, the parties, counsel, and neutrals stipulated "not to discuss any matter relating to the ADR with any member of the press or media or any non-U.S. Governmental third party" without the express written permission of the other party. Exceptions were made for authorized consultants, experts, and disclosures the contractor was obligated to make, such as to the U.S. Securities and Exchange Commission.

In a departure from most ASBCA-conducted ADR proceedings that involve the use of a single judge sitting as the neutral, *CSC* and the Army agreed that "ASBCA Chairman Paul Williams and ASBCA Judge Carol Park-Conroy shall serve as co-neutrals." Consistent with ASBCA policy, the neutrals served at no cost to either party. Judge Williams had served as a co-neutral along with retired ASBCA Judge Martin J. Harty in numerous "Big Dig" proceedings, an earlier "mega ADR" that was conducted under the auspices of the ASBCA at the request of the United States Department of Transportation.⁴⁷ Judge Park-Conroy also has significant experience in serving as a neutral in large ADRs including as a co-mediator. The *CSC* ADR agreement provided that, should one of the co-neutrals be unable to serve on either a long- or short-term basis, the agreed-upon ADR process would continue.⁴⁸

The *CSC* ADR agreement contained other familiar provisions for ASBCA judges serving as neutrals in evaluative mediations, making clear that the "neutrals' recommendations are not binding upon the parties." It provided for the neutrals to "facilitate discussions and negotiations between the parties" and assist the parties "by, among other things, providing feedback on the relative strengths and weaknesses of each party's positions, identifying areas of agreement between the parties and helping to generate options that promote settlement." The agreement also provided the same "common law immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence" based upon the ADR proceeding, and for the parties to refrain from calling or subpoenaing the neutrals in any subsequent proceeding.⁴⁹

In addition to these usual provisions, the *CSC* ADR agreement contained clauses tailored for this proceeding. Consistent with the exceptionally large amount in dispute (in excess of \$2 billion dollars), the "parties recognize[d] that the neutrals in their discretion may

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ASBCA's Path to the "Mega ADR" (cont'd):

retain an independent third-party accounting or other expert who shall be approved by the parties and shall also serve at no expense to either party." In the end, Judges Park-Conroy and Williams did not require such experts, but the parties were forward-thinking in permitting the neutrals to obtain such resources if deemed useful to promoting resolution.

There has been considerable discussion regarding whether a judge sitting as an ADR neutral should preside over the matter if the ADR does not succeed and litigation resumes. With the consent of the board, the parties agreed that if they were unable to fully resolve all matters under consideration in the ADR, then "neither party may seek recusal of a neutral on the grounds that they participated in the ADR." However, the neutrals, at their discretion, had the right to "recuse themselves from further participation in the ASBCA Appeals and/or a potential appeal of the presently-undocketed REAs to the ASBCA."⁵⁰ This use of a sitting judge to retain appeals on her docket following service as an ADR neutral reflects the parties' high degrees of trust in the ASBCA's ADR system and its judges.

The parties' ADR position papers serve the same purpose as pretrial briefs in aiding both parties and judges in more narrowly defining factual and legal underpinnings of matters in controversy. The ASBCA usually constrains position papers to about 25 pages or less, with the intention of eliminating extraneous, duplicative, or marginally useful argument. The board deliberately focuses the parties directly upon the narrowed issues and the relative burdens of proof, and requires them to cull through supporting evidence. In the *CSC* ADR agreement, the parties agreed to position papers in which each proposed "types of options that might be available to facilitate settlement." They agreed to exchange position papers, with the exception of those portions describing potential settlement options.⁵¹

However, the sheer magnitude of matters in controversy in the *CSC* ADR required a correspondingly broad view of the position papers. In March 2011, *CSC* and the government entered into a "Supplemental ADR Agreement Regarding Position Papers and Mediation Sessions" (supplemental ADR agreement) to address the breadth and complexity of entitlement and quantum matters covered by the upcoming mediation. Among other things, the parties agreed to more extensive information gathering over an expanded period of time, which they regarded as particularly necessary to obtain an understanding of the undocketed matters. Each party was permitted to submit a position paper on each of the 14 docketed ASBCA appeals, as well as the contractor's two additional REAs and the Army's counterclaim, for a maximum of 17 position papers, although the parties were given the discretion of combining all or some of the matters in controversy in a single position paper.⁵² The typical brevity of position papers used in ASBCA ADR proceedings yielded to these parties' unusual needs. *CSC* and the Army were each limited to an aggregate total of 700 pages for their position paper(s), "excluding cover pages, tables of contents, tables of authorities, and any attached documentary exhibits and deposition excerpts."⁵³

The parties agreed to furnish copies of (or excerpts from) documentary exhibits and depositions along with the position papers. This was done for the ready reference and

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ASBCA's Path to the "Mega ADR" (cont'd):

convenience of the neutrals and parties. Unless requested by the neutrals, replies to the position papers were not called for.⁵⁴

The parties recognized the key participants in the ADR proceedings, and made special provisions for these. In addition to designating Judges Park-Conroy and Williams as co-neutrals and describing the roles they would play in the mediation, CSC and the Army named the "business leads for each party." The supplemental ADR agreement states that the parties anticipated that these persons would attend all mediation sessions.⁵⁵ The business leads' consistent involvement in the ADR sessions was a critical factor, considering the investment each participant brought to the negotiating table. The necessity of the business leads' involvement can prove challenging during the extensive and intense period set aside for the ADR sessions.⁵⁶

The parties' legal teams included specialized counsel who had not been part of the original trial team.⁵⁷ Sometimes this choice reflects only the vicissitudes of scheduling conflicts. However, the use of so-called settlement or independent counsel, who had not served as litigation advocates, has been recommended to bring a different view to settling, as opposed to fighting for or against, issues in controversy.⁵⁸

The ADR agreement designated principal representatives for each party, who had decision-making authority over the matters under consideration. Each principal was supported by teams that included "a senior business lead and a senior legal lead, and such contracting personnel, legal advisors, technical consultants, third-party experts, and support personnel as each party determines necessary."⁵⁹

The CSC initial and supplemental ADR agreements specified both process and a schedule for the ADR sessions.⁶⁰ With the approval of the board, the parties agreed upon a mediation process that provided both joint and private sessions. The neutrals conducted joint, face-to-face sessions attended by the parties, counsel, consultants, and client teams as appropriate. The parties decided to group certain matters to facilitate these sessions, and each side was given equal opportunity to present a summary of the factual and legal issues involved, in a manner of that party's choosing and with input from the neutrals. The neutrals were given the discretion of using any time remaining from these presentations, in addition to time specifically set aside, for additional discussion, questioning, or clarification of the issues. The neutrals were permitted to engage in *ex parte* communications with each party as they deemed appropriate.⁶¹

The agenda set aside times for the neutrals to engage the parties in separate sessions. In carrying out this evaluative mediation, the neutrals were afforded the opportunity to furnish insight into the relative merits of positions asserted by the parties, propose a more efficient use of time and resources for the proceeding, suggest improved communications and clarified positions, and aid in developing and exploring settlement options.⁶² The neutrals also used these opportunities to give the parties "homework assignments" requiring CSC and the

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ASBCA's Path to the "Mega ADR" (cont'd):

government to produce additional work products and/or submit further documentation.

The parties' supplemental ADR agreement recognized the difficulty of preserving order while dealing with 17 matters that involved thousands of supporting documents and exhibits and sometimes overlapping issues and/or damages. At the neutrals' request, the parties maintained a mediation decision matrix (the "matrix"), used as an organizational score card to "identify for each claim, additional REA, and counterclaim at issue any agreement reached, any key issues that remain in dispute, the respective settlement positions of the parties, and any other information that the neutrals and parties may deem advisable." The matrix was regularly updated as appropriate to reflect the contemporaneous status of each item to aid both parties and the neutrals in navigating resolution.⁶³ At early stages of the *CSC* ADR, the parties developed separate matrices used variously for discussions internally or with the neutrals, and to further negotiations with the other side. Eventually, the matrices were melded into a master document.

The parties set a schedule for the mediation sessions, and envisioned that the proceedings would take about three weeks. Specific times were set aside for joint and private sessions by group, as well as periods set aside for the neutrals to engage with the parties. They allowed for a final wrap-up session to address any remaining issues, and to conclude negotiations with the goal of a global agreement. At the same time, the parties agreed to permit flexibility in the schedule to best respond to the mediation in progress.⁶⁴

The ADR agreement recognized up front that the mediation might not resolve all of the issues. The parties decided that, at such point or impasse as they and the neutrals agreed, the proceeding would progress stepwise from the evaluative mediation to a minitrial process or other such process as requested by the parties. The parties' principals retained decision-making authority, but had resort to assistance from the neutrals.

Outcome of the *CSC* ADR and Conclusions

The *CSC* ADR exacted an enormous effort from everyone concerned, whether contractor or government, decision-maker or neutral, counsel or witness. Ultimately, the *CSC* ADR achieved a result that each side agreed upon. According to the contractor:

During the second quarter of fiscal 2012, [CSC] reached a definitive settlement agreement with the U.S. Government in its contract claims asserted under the [CDA]. Under the terms of the settlement, [CSC] received \$277 million in cash and a five-year extension (four base years plus one option year) with an estimated value of \$1 billion to continue to support and expand the capabilities of the systems covered by the original contract scheduled to expire in December 2011. In exchange, the Government received unlimited rights to [CSC's] intellectual property developed to support the services delivered under the contract, and CSC dismissed the claims and terminated legal actions against the

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ASBCA's Path to the "Mega ADR" (cont'd):

Government and the Government dismissed its counter claims against CSC.⁶⁵

The successful outcome of the CSC ADR is summarized well in the ASBCA's FY 2012 report, which emphasized that:

The ASBCA is proud to note that one of the successful mediations involved a number of disputes that totaled more than two billion dollars relating to a long term logistics contract which was nearing completion. Approximately half of the claims were on the Board's docket and involved complex contract interpretation, performance and payment issues. The non-docketed claims primarily related to various intellectual property matters, including allegations of breach of contract. . . . All claims were successfully resolved with a cash payment, award of a multi-year, follow-on contract, and the determinations of the use, ownership, and rights relating to the intellectual property claims.⁶⁶

As a practical matter, the *CSC* mega ADR demonstrated that the ASBCA is able to adapt its ADR and appeal processes to accommodate the parties in a highly complex and stressful dispute. The board provided flexibility as dictated by the circumstances. Other proceedings at the board's offices were carefully coordinated during this ADR to accommodate the parties' extensive and around-the-clock needs for office space and conference rooms. The contractor and the government had teams consisting of dozens of members with skill sets including legal, technical, financial, contract, administrative research, and information technology, as well as experts and individuals familiar with the award and performance of all aspects of the contract. It became routine to see CSC and Army teams working in the ASBCA premises from early in the morning to 10:00 p.m. and beyond. The parties repeatedly expressed appreciation for the board's flexibility in making the process as convenient, inexpensive, and comfortable as practicable under the circumstances.

An interesting by-product of the ASBCA's award winning ADR program is its impact on the board's regular docket. At the time of the writing of this article, the docket totaled approximately 750 active appeals and a small number of classified and off-docket matters. The docket also includes over 350 active motions. During the last several years, the average size and complexity of new appeals has grown enormously. Of the 750 pending appeals, approximately 30 percent include claims over \$1 million dollars including at least a dozen for over \$100 million dollars. These dollar numbers do not include the nearly 100 terminations for default on the docket. The strain on the board's limited resources is also impacted by the fact that over 150 of these active appeals, or 20 percent of the docket, arise from Afghanistan and Iraq contracts that often involve procedural nightmares and consume significant amounts of judges' time. But for the resolution of a large number of complex appeals using other than

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standard litigation processes, the board would be facing a significant backlog of "old," ready-to-write decisions. Instead, as of this writing there are only three decisions on the merits, all in the process of being written, that have been ready-to-write for over six months.

The ASBCA is grateful to the parties and all at the board for making the ASBCA's ADR program a highly innovative success.

* - Reba Ann Page and Paul Williams are administrative judges on the Armed Services Board of Contract Appeals (ASBCA). Judge Page was chairman of the Army Corps of Engineers Board of Contract Appeals when it merged with the ASBCA in 2000; Judge Williams has been Chairman of the ASBCA since 1985. The views expressed in this article are theirs, and not those of the ASBCA or the Department of Defense (DoD).

Endnotes

- 1 - In addition to focusing upon the ASBCA, this article references the ADR program with the merged Corps of Engineers Board.
- 2 - Report of Investigation, Tennessee Tombigbee Claim Settlement, Department of Defense Office of the Inspector General, Special Inquiries: July 29, 1986.
- 3 - Reba Page and Frederick J. Lees, *Roles of Participants in the Mini-Trial*, 18 PUB. CONT. L.J. 54, 63 (1988).
- 4 - Report of Investigation, n. 3 at II, Background.
- 5 - Wesley C. Jockisch, *Mini-trial: First Impressions*, August 1985 (unpublished manuscript).
- 6 - Administrative Conference of the United States, Office of the Chairman, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 238 (1987).
- 7 - Jockisch, *supra* note 4.
- 8 - Report of Investigation, n. 3 at III, Findings and Recommendations.
- 9 - 41 U.S.C. §7103(h)(1); *see also* 41 U.S.C. §7103(h)(3), requiring a party rejecting the use of ADR to provide written justification for rejecting the request in accordance with 5 U.S.C. §572(b), or other specific reason.
- 10 - *See, e.g.*, 41 U.S.C. §§7103–7107.
- 11 - 41 U.S.C. §7105(g).
- 12 - S. Rep. No. 95-111, reprinted at 1978 U.S.C.C.A.N. 5235.
- 13 - FAR 33.204, Policy.
- 14 - FAR 33.214(e).
- 15 - The Chairman of the ASBCA's "Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 Sept 2012," dated October 26, 2012.
- 16 - *Id.* at 3.
- 17 - "Rules of the Armed Services Board of Contract Appeals," dated May 11, 2011 (ASBCA Rules).
- 18 - The ASBCA's "Notice Regarding Alternative Methods of Dispute Resolution," revised February 23, 2011 (ASBCA's ADR Notice).
- 19 - At this writing, the ASBCA is in the process of revising its rules. No date has been established for finalization of the revised rules.
- 20 - Carol Park-Conroy and Martin J. Harty, *Alternative Dispute Resolution at the ASBCA*, 00-07 West's Briefing Papers.
- 21 - Page and Lees, *supra* note 3.

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Endnotes (cont'd)

- 22 - See Memorandum from Navy Secretary John Lehman, dated December 23, 1986, providing guidelines for the use of ADR by the Navy.
- 23 - ASBCA's ADR Notice.
- 24 - The Board is indebted to Judges Carol N. Park-Conroy and Diana S. Dickenson; Chief Counsel Catherine A. Stanton; Martin Wetzler, ASBCA Administrative Officer; and Board IT professionals Jeffrey B. Remer and Ralph E. Craiger, Jr. for their hard work in making the ADR Center a useful and attractive reality.
- 25 - ASBCA Rules 11 and 12 may be combined with the Board's ADR procedures. For example, parties may agree upon a record submission under ASBCA Rule 11, and at the same time seek a final and conclusive single-judge decision under the ASBCA's ADR options.
- 26 - Vivian S. Chu and Brian T. Yeh, *The Judgment Fund: History, Administration, and Common Usage*, Congressional Research Services, March 7, 2013.
- 27 - Donald M. Yenovkian, *Logistics Modernization Program, Alternative Dispute Resolution: Using ADR to Effectively Resolve Large and Complex Government Contract Issues in Controversy*, presented to the American Bar Association Section of Public Contract Law Annual Meeting (August 6, 2012).
- 28 - Contract No. DAAB07-00-D-E252.
- 29 - *Id.*
- 30 - *Id.*
- 31 - Yenovkian, *supra* note 26.
- 32 - *Id.*
- 33 - Computer Sciences Corp., ASBCA Nos. 56168, 56169, 09-2 BCA ¶34,221; *motion for reconsideration denied*, 09-2 BCA ¶34,261.
- 34 - Computer Sciences Corp., ASBCA Nos. 56165-67, 56170, 10-2 BCA ¶34,572.
- 35 - Yenovkian, *supra* note 26.
- 36 - Yenovkian, *supra* note 26. See also Levator Norsworthy, Jr., *Items from my Mailbox*, presented to the 40th Annual Symposium on Government Acquisition, Federal Bar Association North Alabama Chapter (November 2012).
- 37 - ADR Agreement between Computer Sciences Corporation and the Department of the Army (CSC ADR Agreement) at 3.
- 38 - *Id.* at 2.
- 39 - *Id.* at 4.
- 40 - ASBCA's ADR Notice.
- 41 - *Id.* at 3-4.
- 42 - *Id.* at 7-11.
- 43 - *Id.* at 4.
- 44 - *Id.* at 4.
- 45 - *Id.* at 5.
- 46 - *Id.* at 7.
- 47 - Kurt L. Dettman, Martin J. Harty, and Joel Lewin, *Resolving Megaproject Claims: Lessons from Boston's "Big Dig,"* 5 CONSTR. LAW. (Spring 2010).
- 48 - CSC ADR Agreement at 6.
- 49 - *Id.* at 5-6.
- 50 - *Id.* at 6.
- 51 - *Id.* at 11.
- 52 - Supplemental ADR Agreement at 1-2.
- 53 - *Id.* at 2.
- 54 - *Id.* at 3.
- 55 - *Id.* at 4.

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ASBCA's Path to the "Mega ADR" (cont'd):

Endnotes (cont'd)

56 - Reba Page and Wesley C. Jockisch, *The Corps of Engineers Board of Contract Appeals Use of Alternative Dispute Resolution*, 24 PUB. CONT. L.J. 453 (1995).

57 - Yenovkian, *supra* note 26.

58 - Page and Lees, *supra* note 3.

59 - CSC ADR Agreement at 13.

60 - *See, e.g.*, CSC ADR Agreement at 12 and Supplemental ADR Agreement at 4-7.

61 - Supplemental ADR Agreement at 4-5.

62 - *Id.* at 5.

63 - *Id.* at 6; *see also* CSC ADR Agreement at 12-13.

64 - CSC ADR Agreement at 6-7.

65 - "Settlement of Claims with the U.S. Government" filed by Computer Sciences Corporation with the U.S. Securities and Exchange Commission on March 30, 2012, *available at* <http://www.sec.gov/Archives/edgar/data/23083>.

66 - *Id.*



Federal Government Subcontracting Ethics and Compliance

by
Jim Kirilin*

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This article discusses the Federal Acquisition Regulation (FAR) ethics and compliance requirements that significantly affect the subcontracting process. The focus is on the duties of a prime contractor as it subcontracts to fulfill a U.S. federal government prime contract.¹

FAR 3.1002(a) states, “Government contractors must conduct themselves with the highest degree of integrity and honesty.” The FAR could easily have said, “Government contractors and subcontractors must conduct themselves with the highest degree of integrity and honesty.” Not only must a government prime contractor conduct itself with the highest degree of integrity and honesty, but the contractor must also ensure that its subcontractors are also conducting themselves with the highest degree of integrity and honesty.

Importance of Subcontracting Ethics and Compliance

Subcontracting ethics and compliance is important for three reasons. First, it is common for a prime contractor to subcontract the majority of its cost of goods sold. This can mean that up to 80 percent of the goods or services are subcontracted.² In some cases, this means the prime contractor may have to deal with dozens of subcontractors. This is a substantial third-party risk to the contractor’s ethics and compliance program. Second, many of the government ethics and compliance requirements do not stop with the prime contractor. Despite the lack of privity between the government and the subcontractor, the FAR requires that the contractor flow down many of the ethics and compliance requirements to the subcontractors, which in turn must flow down the requirement to its subcontractors, etc., until the flow-down is no longer required by regulation. Third, the consequences for a prime contractor failing to ensure subcontractor ethics and compliance can be severe, including debarment and suspension from doing business with the government.

Source of the Subcontracting Ethics and Compliance Requirements

The source of the FAR ethics and compliance requirements is found in FAR Part 3, “Improper Business Practices and Personal Conflicts of Interest,” and the clauses that implement FAR Part 3 policy.³ Many of the requirements deal solely with the behavior of government or prime contractor personnel. The requirements specifically affecting the subcontracting process are shown in Figure 1.⁴ These requirements are discussed as follows,

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Federal Government Subcontracting (cont'd):

with emphasis on when the requirement appears in the prime contract, when the requirement must be flowed down, and what the prime and subcontractor must do.

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Figure 1 FAR Ethics and Compliance Requirements Affecting Subcontracting

1. Subcontractor Kickbacks
2. Unreasonable Restrictions on Subcontractor Sales
3. Display of the Hotline Poster
4. Contractor Code of Business Ethics and Conduct:
 - FAR Policy for All Contractors
 - Disclosure Regarding Certain Violations
 - For Contracts Greater than \$5 Million and 120 Days:
 - Business Ethics Awareness and Compliance Program (BEACP)
 - Internal Control System (ICS)

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Subcontract Kickbacks

The “Anti-Kickback Procedures” clause does not apply to commercial items. It applies to all solicitations and contracts exceeding the simplified acquisition threshold.⁵ The contractor is required to flow down the substance of the “Anti-Kickback Procedures” clause in all

covered subcontracts that exceed \$150,000. Kickback, as used in the FAR clause, means:

...any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.⁶

The Anti-Kickback Act of 1986 was passed to deter subcontractors from making payments and contractors from accepting payments for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.⁷ The act prohibits any person from:

- 1) Providing or attempting to provide or offering to provide any kickback;
- 2) Soliciting, accepting, or attempting to accept any kickback; or
- 3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime contractor to the United States or in the

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Federal Government Subcontracting (cont'd):

contract price charged by a subcontractor to a prime contractor or higher-tier subcontractor.⁸

The act requires a contractor to:

- Have in place and follow reasonable procedures designed to prevent and detect possible violations in its own operations and direct business relationships,
- Promptly report in writing the possible violation to the government when the contractor has reasonable grounds to believe that a violation may have occurred, and
- Cooperate fully with any federal agency investigating a possible violation.⁹

Unreasonable Restrictions on Subcontractor Sales

The “Restrictions on Subcontractor Sales” clause applies to all solicitations and contracts exceeding the simplified acquisition threshold.¹⁰ The contractor must incorporate the substance of the clause in all covered subcontracts that exceed the simplified acquisition threshold.¹¹ The law requires that subcontractors not be unreasonably precluded from making direct sales to the government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.¹²

The contractor must not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, that has or may have the effect of restricting sales by such subcontractors directly to the government of any item or process (including computer software) made or furnished by the subcontractor under the contract or under any follow-on production contract.¹³ For the acquisition of commercial items, the clause is used with its “Alternate I,” which provides that for acquisitions of commercial items, the prohibitions apply “only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial item(s).”¹⁴

Display of Hotline Poster(s)

Except when the contract “is for the acquisition of a commercial item or will be performed entirely outside the United States,” the FAR clause “Display of Hotline Poster(s)” is required if “[t]he contract exceeds \$5,000,000 or a lesser amount established by the agency... [and] the agency has a fraud hotline poster... [or when] [t]he contract is funded with disaster assistance funds.”¹⁵ The contractor is required to include and have included the substance of this clause in all covered subcontracts that exceed \$5 million, except when the subcontract is for the acquisition of a commercial item or will be performed entirely outside the United States.

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Federal Government Subcontracting (cont'd):

The general requirement is to prominently display any agency fraud hotline poster (or any identified Department of Homeland Security (DHS) fraud hotline posters) in common work areas within business segments performing work under the contract and at contract work sites.¹⁶ If the contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the contractor does not need to display any agency fraud hotline posters other than any required DHS posters.

Contractor Code of Business Ethics and Conduct - FAR Policy

According to FAR 3.1002:

- a) Government contractors must conduct themselves with the highest degree of integrity and honesty.
- b) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that—
 - 1) Are suitable to the size of the company and extent of its involvement in government contracting;
 - 2) Facilitate timely discovery and disclosure of improper conduct in connection with government contracts; and
 - 3) Ensure corrective measures are promptly instituted and carried out.¹⁷

The policy does not have a companion clause. Instead, the FAR states that this policy “applies as guidance to all government contractors.” Note the “should” nature of 3.1002(b), especially as it relates to (b)(2), where the contractor “should” discover and disclose improper conduct in connection with government contracts with the reasonable interpretation that a subcontract is “in connection with government contracts.”

Disclosure Regarding Certain Violations

The contractor must timely disclose to the government, in connection with the award, performance, or closeout of a government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code or a violation of the civil False Claims Act.¹⁸

For Contracts Greater than \$5 Million and 120 Days

When the value of the contract is expected to exceed \$5 million and the performance period is 120 days or more, the FAR clause “Contractor Code of Business Ethics and Conduct”

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Federal Government Subcontracting (cont'd):

is used in solicitations and contracts.¹⁹ The contractor must include the substance of this clause, including the requirement to further flow-down the clause in subcontracts that have a value in excess of \$5 million and a performance period of more than 120 days. The flow down must make clear that “all disclosures of violations of the civil False Claims Act or of federal criminal law shall be directed to [the government].”²⁰

For these contracts, FAR 52.203-13(b)(1)–(3) states:

- 1) Within 30 days after contract award, unless the contracting officer establishes a longer time period, the contractor shall—
 - i) Have a written code of business ethics and conduct; and
 - ii) Make a copy of the code available to each employee engaged in performance of the contract.
- 2) The contract shall—
 - i) Exercise due diligence to prevent and detect criminal conduct; and
 - ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
- 3) i) The contract shall timely disclose, in writing, to the agency Office of the Inspector General..., with a copy to the contracting officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the contractor has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed—
 - A) A violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
 - B) A violation of the civil False Claims Act (31 U.S.C. §§3729–3733).²¹

The Requirements for a Business Ethics Awareness and Compliance Program (BEACP) and an Internal Control System (ICS)

There are further requirements, but they do not apply to small businesses and to commercial items. The requirements call for a BEACP and an ICS.²²

The BEACP must include:

...reasonable steps to communicate periodically and in a practical manner the contractor’s standards and procedures and other aspects of the contractor’s [BEACP] and [ICS], by conducting effective training programs and otherwise disseminating information

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Federal Government Subcontracting (cont'd):

appropriate to an individual's respective roles and responsibilities.²³

Further, "The training conducted under this program shall be provided to the contractor's principals and employees, and as appropriate, the contractor's agents and subcontractors."²⁴

The ICS must "[e]stablish standards and procedures to facilitate timely discovery of improper conduct in connection with government contracts...[and] [e]nsure corrective measures are promptly instituted and carried out."²⁵

At a minimum, the contractor's ICS must provide for the following:

- A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.
- B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the contractor's code of business ethics and conduct.
- C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the contractor's code of business ethics and conduct and the special requirements of government contracting, including—
 - 1) Monitoring and auditing to detect criminal conduct;
 - 2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
 - 3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.
- D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.
- E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.
- F) Timely disclosure, in writing, to the agency [Office of the Inspector General], with a copy to the contracting officer,

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Federal Government Subcontracting (cont'd):

whenever, in connection with the award, performance, or closeout of any government contract performed by the contractor or a subcontract thereunder, the contractor has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. §§3729–3733).

- 1) If a violation relates to more than one government contract, the contractor may make the disclosure to the agency [Office of the Inspector General] and contracting officer responsible for the largest dollar value contract impacted by the violation.
 - 2) If the violation relates to an order against a government-wide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the [Office of the Inspector General] of the ordering agency and the [inspector general] of the agency responsible for the basic contract, and the respective agencies' contracting officers.
 - 3) The disclosure requirement for an individual contract continues until at least [three] years after final payment on the contract.
 - 4) The government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.
- G) Full cooperation with any government agencies responsible for audits, investigations, or corrective actions.²⁶

Summary

The federal government ethics and compliance requirements significantly impact the subcontracting process. The requirements can vary from basic to complex. The requirements may be required to be flowed down to many tiers. The flow-down criteria for the ethics and compliance requirement are different and sometimes overlapping. The result is the prime contractor must not only ensure that its own organization is in compliance, but also must ensure that its subcontractors are conducting themselves with the highest degree of integrity and honesty.

* - Jim Kirlin, CCEP, CPCM, CFCM, is an acquisition leader with 29 years of contracting, subcontracting, and compliance experience in government and industry. He may be contacted at nilrik1@outlook.com.


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Federal Government Subcontracting (cont'd):

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The views and opinions in this article are entirely those of the author and should not be considered those of any organization with which he is affiliated.

Endnotes

1. Per FAR 3.502-1 and 52.203-7, prime contract means a contract or contractual relationship entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind. Subcontract means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.
 2. See Alan R. Raedels, *The Supply Management Process* (Institute for Supply Management, 2000): 5.
 3. See Michael Palmer, *Complying with the Ethics Mandates of the Federal Acquisition Regulation* (Ethics by Design, 2011) for an excellent discussion of the complete requirements.
 4. Another topic that is not discussed here but discusses subcontracting ethics and compliance requirements is the whistleblower protections under the American Recovery and Reinvestment Act of 2009 at FAR 3.907 and 52.203-15, which are used when the contract uses Recovery Act funds.
 5. Per FAR 2.101, simplified acquisition threshold means \$150,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (41 U.S.C. 428a). The term also means: 1) \$300,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; or 2) \$1 million for any contract to be awarded and performed, or purchase to be made, outside the United States.
 6. FAR 52.203-7(a).
 7. FAR 3.502-2 and 41 U.S.C. §51–58.
 8. FAR 52.203-7(b).
 9. Derived from FAR 52.203-7(c).
 10. FAR 3.503-2.
 11. FAR 52.203-6.
 12. 10 U.S.C. §2402 and 41 U.S.C. §253g.
 13. FAR 52.203-6.
 14. FAR 52.203-6, Alternate I. The definition of a “commercial item” is found at FAR 2.101.
 15. FAR 3.1004(b).
 16. FAR 52.203-14.
 17. FAR 3.1002
 18. This requirement is listed as a “must” because the contractor may be suspended and/or debarred for failure to disclose under the requirements of FAR 3.1003(a)(2).
 19. FAR 3.1004(a).
 20. FAR 52.203-13(d).
 21. FAR 52.203-13(b)(1)–(3).
 22. FAR 52.203-13(c).
 23. FAR 52.203-13(c)(1)(i).
 24. *Ibid.*, at (c)(1)(ii).
 25. FAR 52.203-13(c)(2)(i)(A)–(B).
 26. FAR 52.203-13(c)(2)(ii)(A)–(G).
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ASBCA Disrupts Settled Expectations Concerning Green Energy Initiatives

by
Scott A. Freling
and
*Kayleigh Scalzo**

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The Armed Services Board of Contract Appeals recently upset settled expectations regarding the sale of Solar Renewable Energy Certificates (SRECs) in federal contracts in a decision that has the potential to slow the federal government's adoption of green energy. *Honeywell International Inc.*, ASBCA No. 57779 (Aug. 7, 2013), is the ASBCA's first and thus far only decision addressing SRECs, and one of only a handful of instances in which the ASBCA has confronted a renewable energy contract. In *Honeywell*, the ASBCA concluded that proceeds from the sale of SRECs cannot constitute “energy savings” for purposes of an Energy Savings Performance Contract (ESPC), thereby invalidating key compensation provisions in a contract between Honeywell and the United States Army. This decision creates considerable uncertainty for existing and future renewable energy contracts with the government.

What Are SRECs?

SRECs are a creation of state law—here, New Jersey. One SREC represents the generation of one megawatt-hour of electricity by a solar energy facility. Once a facility earns SRECs from the state government, it may sell them—often to electricity suppliers that need to meet the requirements of state renewable-energy laws. By purchasing SRECs, an electricity supplier can fulfill those requirements without changing its own production processes (thereby avoiding possible penalties). Conversely, a solar energy facility benefits from the revenue generated by these sales. Companies other than electricity suppliers also may purchase SRECs as part of clean energy initiatives. For instance, a corporation may buy SRECs in order to offset its electricity use without having to develop and maintain its own renewable energy system.

What Went Wrong?

In 2008, the Army awarded a Delivery Order (DO) to Honeywell under an existing indefinite-delivery/indefinite-quantity (ID/IQ) contract for energy- and water-conservation equipment and services. The ID/IQ contract had been awarded to Honeywell by the Department of Energy under 42 U.S.C. §8287, which authorizes federal agencies to enter into ESPCs. Under an ESPC, a contractor furnishes energy conservation measures (ECMs) to an agency, absorbs the costs of doing so, and is compensated based on the agency's resultant savings in energy costs, or “energy savings.” *Id.* §8287(a)(1).

ASBCA Disrupts Settled Expectations (cont'd):

Under the DO issued by the Army, Honeywell was to install various ECMs, including solar arrays, at Fort Dix, New Jersey. The DO conformed with the general ESPC structure: the solar arrays, provided at Honeywell's expense, would produce renewable energy for the government, and Honeywell would be compensated from the guaranteed energy savings to the government resulting from the solar arrays. What is more, because the solar arrays would produce solar-generated electricity, the government would earn SRECs issued under New Jersey clean-energy laws. The DO contemplated that the resultant energy savings would include both the value of electricity produced by the solar arrays *and* the value of the SRECs earned. Scheduled payments to Honeywell were based on projected savings calculated in this way. In subsequent correspondence with Honeywell, the Contracting Officer also authorized Honeywell to “facilitate the sale of” the SRECs, as well as “manage and market” them, in order to obtain the funds that would be used to pay Honeywell.

In April 2010, Honeywell completed work on the second phase of the solar arrays, but the government refused to move forward with inspection, acceptance, or payment. Honeywell submitted a certified claim to the Contracting Officer, asserting that the government breached the DO by failing to inspect or accept the second phase of the solar arrays, and also failing to pay an invoice and interest on late payments. The Contracting Officer denied the claim, finding the DO “voidable as related to the solar arrays.” Honeywell appealed the decision to the ASBCA.

The ASBCA granted partial summary judgment for the government on two alternative bases. First, it concluded that the ESPC statute does not include SREC sales in its definition of “energy savings,” meaning that ESPC payments cannot be based on those sales. Alternatively, it found that SRECs are personal property owned by the government and thus are outside the Contracting Officer's authority to dispose of or sell.

SRECs Not ‘Energy Savings’ Under the ESPC Statute

The ASBCA determined that proceeds from the sale of SRECs do *not* qualify as energy savings, as that term is defined by Congress in 42 U.S.C. §8287c(2). The Board characterized the statutory definition as including two types of savings: (1) “reductions in the cost of energy . . . from a base cost, or increased efficient use of existing energy . . . , resulting from a contractor's performance,” *id.* §8287c(2)(A)–(B); and (2) “the sale of excess electricity from a renewable energy source if otherwise authorized by law,” *id.* §8287c(2)(C). According to the ASBCA, SRECs fit in neither of these categories.

Regarding the first category, the ASBCA stated that SRECs are merely representations of a certain amount of renewable energy already produced, not a per se reduction in overall energy costs. Similarly, SRECs themselves do not improve the efficiency of existing energy sources, but only represent the “clean, renewable aspect” of already-produced electricity.

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ASBCA Disrupts Settled Expectations (cont'd):

Regarding the second category, the ASBCA determined that SRECs cannot be “excess electricity” because they are not electricity at all, but instead “marketable certificates.” Indeed, this “excess electricity” category was not incorporated into Honeywell's ID/IQ contract with the Department of Energy because it was added to the ESPC statute years after the contract was formed. Therefore, the Board reasoned, because SRECs did not fit any of the statutory definitions of energy savings, their sale could not be used as a basis for compensating Honeywell under the DO.

In coming to this conclusion, the ASBCA focused on the SRECs' abstract, emblematic nature rather than their derivation from and connection to renewable energy production. It regarded the SRECs as a kind of gold star: although they are acquired in a way linked to energy conservation, once the certificates are earned, they are merely fungible placeholders for accrued value. By that reasoning, the government could use that accrued value in a number of ways—to offset energy costs, buy supplies, or pay salaries, among other things. In other words, the ESPC statute's definition of energy savings is not satisfied if the ECM merely results in revenue that *could* be used to reduce energy costs; rather, the savings must be a direct and inherent result of the ECM.¹

Contracting Officer Authority

In its alternative holding, the ASBCA looked to federal and New Jersey common law to conclude that the SRECs were personal property and, as such, were subject to General Services Administration (GSA) regulations governing the disposal of personal property by federal agencies. 41 C.F.R. §§102-35 to -42. In light of these regulations, the Board determined that a contracting officer could not unilaterally sell SRECs as part of an ESPC's compensation provisions. Instead, the SRECs would be subject to the intricate GSA disposal procedures.

As a result, even if sale of the SRECs could constitute valid energy savings as defined in the ESPC statute, the Contracting Officer would still lack the legal authority to sell them. The ASBCA therefore invalidated provisions in the DO relating to the sales value of the SRECs as energy savings, the associated payment calculations, and Honeywell's authorization to sell the SRECs, thus preventing Honeywell from benefiting from a key source of payment under the contract.

Implications for Contractors

The *Honeywell* decision deserves attention by government green-energy contractors and indeed by all government contractors.

First, Honeywell offers a harsh reminder to all contractors that, even if all parties agree on the validity of a contract provision, that provision may be invalidated if a board or court deems it contrary to law or promulgated without actual authority.² The Contracting Officers in

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ASBCA Disrupts Settled Expectations (cont'd):

Honeywell possessed unlimited warrants and, at all relevant times, believed that they were empowered to authorize the sale of the SRECs. Even at the time of appeal, both parties agreed that the DO provided for payment to Honeywell in part based on proceeds from the sale of the SRECs. However, the parties' agreement and the Contracting Officers' apparent authority provided no relief to Honeywell, and the ASBCA invalidated the offending provisions.

Second, *Honeywell* creates profound uncertainty regarding the extent to which SRECs can play a part in contracts with the federal government. Prior to this ruling, the sale of SRECs and other renewable energy certificates was considered a salutary alternative financing mechanism for federal renewable-energy initiatives. Because the government often lacks funding to pay in full for renewable energy installations, contractors have looked to the sale of these certificates as a creative funding mechanism. The *Honeywell* decision has the potential (if not overturned on appeal or by statute) to end this use of SRECs as a funding source in ESPC contracting.

What is more, the decision raises the question of whether SRECs earned by the government may be sold in non-ESPC contracting arrangements. The ASBCA's alternative holding is based on a contracting officer's actual authority and the categorization of SRECs as personal property—legal determinations that theoretically could apply to all government contracts, not only ESPCs. Thus, the decision may be read to mean that, regardless of contract type, SRECs earned by the government can be sold only in accordance with GSA personal property disposal regulations (and thus not by an agency contracting officer or contractor acting pursuant to contract).

These holdings have the potential to stymie not only government green-energy contracting, but the entire SREC scheme. Renewable energy certificates, like SRECs, are designed to be sold and traded as part of a broader energy conservation system, and the federal government is the single largest user of energy in the country. By limiting the ability of agencies to contract away certificates in exchange for ECMs, value is removed from both ESPCs and the SREC marketplace: contractors' potential compensation shrinks, and otherwise-salable SRECs could languish. Even if *Honeywell* is not read as an outright prohibition on the sale of SRECs in government contracts, at the very least, it will cause uncertainty; contractors and agencies may be hesitant to incorporate SRECs into future contracts, and the validity of existing contract provisions relating to SRECs may be called into doubt.

Finally—and importantly—the ASBCA noted that Honeywell was not entirely without recourse. Despite the invalidation of the compensation provisions, Honeywell may still be able to earn the compensation that it negotiated with the Army. The Board held that Honeywell may seek payment for the solar arrays under the doctrine of reformation via further proceedings. Although this provides some consolation for contractors, it fails to alleviate the broad uncertainty created by the *Honeywell* decision.

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ASBCA Disrupts Settled Expectations (cont'd):

* - Scott Freling is a senior associate in the government contracts practice at Covington & Burling LLP. He represents civilian and defense contractors, including some in the renewable energy industry, in their dealings with federal, state, and local government customers. Kayleigh Scalzo is an associate at Covington & Burling LLP, with a practice that focuses on government contracts and litigation matters.

Endnotes

1 - It is not clear that the ESPC statute forecloses the inclusion of SRECs as energy savings. In fact, the text of the ESPC statute suggests the opposite. The net effect of the accrual of SRECs is a reduction in energy costs. Although it is true that revenue from the sale of SRECs could be used for purposes unrelated to energy costs, the same could be said for money freed-up by front-end reductions in energy costs. A hypothetical example illustrates this distinction without a difference. Agency A decides to “reduc[e] . . . the cost of energy . . . from a base cost” (the ASBCA’s language) by installing an ECM that allows agency operations to function on less electricity. Before the ECM, Agency A’s monthly energy costs were \$10,000; after the ECM, the costs are reduced to \$5000. This resultant energy savings frees up \$5000 each month that would otherwise be used for energy costs and is now available for other use. Compare that scenario to Agency B, whose monthly energy costs are also \$10,000. Agency B installs a solar array as an ECM, which generates \$5000 worth of SRECs each month. Agency B’s net monthly energy costs are now \$5000—exactly the same as Agency A. Whether the reduction in energy costs occurs on the front end (electricity-use reduction) or on the back end (sale of SRECs) does not change the ultimate result.

2 - Although it may come as a surprise to some contractors, there is longstanding precedent on this point. *See, e.g., United States v. Amdahl Corp.*, 786 F.2d 387, 392–93 (Fed. Cir. 1986); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1153–54 (Fed. Cir. 1983).



Bid Protests: The Costs Are Real, But the Benefits Outweigh Them (Part 2 of 2)

by
*Daniel I. Gordon**

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In the first part of this article, which was featured in the September 2013 issue of *Contract Management*, we examined the history of bid protests in the United States and discussed where some common misperceptions about bid protests come from and how they can be corrected. In this issue, we will conclude our discussion by examining the costs of the bid protest process, as well as its benefits.

Costs of the Bid Protest Process

Protests impose litigation costs on the parties, including attorney costs, although the author is unaware of any data regarding those costs. Moreover, even when a bid protest is denied, it usually holds up the protested acquisition. Specifically, when a protester files in time to trigger the automatic stay under the Competition in Contracting Act (CICA), the agency must hold off on awarding the contract at issue (for pre-award protests) or direct the awardee to stop work (for post-award protests).¹ The automatic stay for protests filed with the Government Accountability Office (GAO) can last up to 100 days,² which is generally longer than the period of time other jurisdictions worldwide allow for their bid protest processes.³ Even if GAO dismisses a protest, the dismissal can take several weeks, and even the most promptly dismissed protests may trigger a CICA stay that is in place for at least a few days.⁴ In short, the CICA stay does disrupt procurements.

However, the CICA stay applies only to a small percentage of all federal procurements. In fiscal year 2011, approximately 1,470 procurements were protested to GAO.⁵ While specific information is not publically available, it is likely that not all of these 1,470 protested procurements would have been stayed, given that only protests filed within specified deadlines trigger a CICA stay.⁶ At least some of these 1,470 protests were untimely filed for GAO protest purposes, so that they were dismissed (indeed, timeliness is one of GAO's most common bases for dismissing protests⁷) and even some of the protests that were timely filed may have been filed too late to trigger a CICA stay.⁸ For example, a protest filed six to 10 days after a debriefing will usually be found timely for GAO's filing purposes, but it will not trigger a CICA stay because a protest must be filed within five days of a debriefing to trigger a stay.⁹

Moreover, the fact that a protest has triggered a CICA stay does not mean that the procurement will be on hold for 100 days. Most protests are resolved well before the 100th

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day, which is the maximum length of time GAO has for resolving a protest.¹⁰ In 2009, GAO reported to Congress that it “consistently closed more than half of all [Department of Defense] protests within 30 days.”¹¹ While that report related to protests of Department of Defense (DOD) procurements,¹² there is no reason to believe that protests of civilian agencies’ procurements (which are fewer in number than DOD protests¹³) take longer for GAO to close.¹⁴ A CICA stay may end because the protester has withdrawn the protest, or because GAO has dismissed the case.¹⁵ When an agency takes corrective action, that also ends the stay, but, of course, the corrective action itself will generally delay progress in the procurement.¹⁶ Even for the minority of protests that make it to the published decision stage, GAO has reported that, on average, it issues a decision within 80 days.¹⁷

Not only is the delay caused by the CICA stay shorter than it may appear, when a delay, even a relatively short one, could cause harm, CICA provides a mechanism for agencies to move forward with protested procurements while protests remain pending.¹⁸ This “override” mechanism is available to agencies and is used, although information on the frequency of overrides is not readily available.¹⁹

Truly long procurement delays lasting for months really only occur when GAO issues a decision sustaining a protest and the agency implements GAO’s recommendation, which typically calls for the agency to redo at least part of the competition for the contract.²⁰ The universe of such cases, however, is quite small: There are only a few dozen sustained protests in a year (there were 45 decisions in which GAO sustained protests in fiscal year 2010),²¹ and, of those, some do not lead to delay in the procurement after GAO has issued its decision, either because the decision did not contain a recommendation for corrective action or because the agency declined to follow GAO’s recommendation.²² That leaves a relatively small number of procurements, which the author estimates is certainly fewer than 40 out of the 200,000 procurements per year estimate used in this article, in which there is any substantial delay due to a successful protest.²³

Finally, in the author’s view, there is adequate justification for a substantial delay in a procurement where GAO has determined that the agency violated procurement law, and that the violation has harmed the protester. At the very least, any delay that such an agency’s unlawful action has caused should not be blamed on the bid protest system.

Critics of the protest system may also view GAO’s authority to recommend that successful protesters be reimbursed the costs of filing and pursuing their protests, including costs attributable to attorneys’ fees, as another cost associated with bid protests.²⁴ This situation arises only when GAO finds that a protest is clearly meritorious, which means that the contracting agency violated procurement law to the detriment of the protester, and when the agency has unduly delayed taking corrective action.²⁵ In the author’s view, reimbursing protesters for their actions as “private attorneys general” is justifiable.²⁶ In any event, the reimbursable rates for attorneys’ fees in those situations are now capped, except for small business protesters.²⁷

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Bid Protests (cont'd):

That said, critics point to abuse of the protest system in particular contexts as causes for concern. Specifically, there are persistent complaints that abuse arises in the form of “frivolous” protests, and the author has often heard calls for imposing sanctions on firms that file frivolous protests.²⁸ In the 2009 report to Congress on DOD procurements, GAO responded to a request from the House Armed Services Committee to address frivolous protests filed in connection with DOD procurements.²⁹ GAO pointed out that the fact that a protest is denied or even dismissed does not mean that it is frivolous; instead, GAO expressed the view that only a protest filed in bad faith should be viewed as frivolous.³⁰ In any event, GAO reported that it did not “categorize protests as frivolous,” and therefore it had no data on the number of frivolous protests filed.³¹ It did point out, however, that contracting agencies rarely assert that protests are frivolous.³² In a footnote, GAO indicated that the last reported decision noting that an agency had characterized a protest as frivolous was issued in 1996, and in that case the agency subsequently acknowledged that the evaluation scheme used in the protested procurement was flawed.³³

In its 2009 report, GAO asserted that its practice of promptly dismissing protests indicated that there was no problem with frivolous protests.³⁴ GAO also expressed concern that any effort to impose sanctions on frivolous protests (such as imposing a fine or requiring the protester to reimburse the government for costs incurred in defending against the protest) would risk “the unintended consequence of discouraging participation in federal contracting and, in turn, limiting competition.”³⁵ GAO also pointed out that penalties could not properly be imposed on “frivolous” protesters without adding a new layer of litigation, for which GAO would then need to determine whether protesters had filed their protests in bad faith.³⁶ Besides the burden that such litigation would place on GAO, distracting it from its focus on resolving protests as quickly as possible, a new layer of litigation could impose additional costs on agencies and protesters, the burden for which might fall disproportionately heavy on small businesses and protesters not represented by counsel that may have protested in good faith but acted with a misunderstanding of the facts or the law.³⁷

Those who allege that some protesters abuse the system sometimes point to one scenario in particular: situations where a service contractor has lost a competition for a follow-on contract and then files a protest in order to continue working during the period of the CICA stay.³⁸ This concern would be particularly great if:

1. Many protesters were found to have been filed by service contract incumbents that had lost competitions for follow-on contracts; and
2. Their protests were completely without merit; but
3. GAO was so slow in resolving the protests that the incumbent was able to continue performing well after its contract had been due to expire.

However, the author is not aware of any data suggesting that many protests meet these conditions. The appropriate response, in any event, would appear to be to press GAO to

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continue (or intensify) its efforts to resolve protests promptly, not to create a new round of litigation about the imposition of sanctions, and certainly not to limit or abolish vendors' right to have an independent body consider their claims of unlawful action by contracting agencies.

The final category of costs often associated with the protest system concerns sequential protests, where a protester loses a protest at GAO and then protests at the Court of Federal Claims.³⁹ Presumably, the situation could be made to sound worse by imagining that many cases protesting procurements are first brought to the contracting agency, then to GAO, then to the Court of Federal Claims, and finally to the Federal Circuit.⁴⁰ This scenario is mere speculation, however, with no evidence that the pattern occurs often. Indeed, even when it does occur, it is not clear that the procurement would always be disrupted, since there might be no CICA stay at GAO,⁴¹ and the courts would certainly have discretion not to impose a preliminary injunction.⁴² While there are some protesters that start at GAO and then go to the Court of Federal Claims,⁴³ the number is apparently so small and the evidence that the underlying procurements to these protests have been substantially delayed is so thin (again, there is no automatic right to a stay at the court⁴⁴), that this cannot legitimately be seen as a significant cost of the bid protest system. More important, the court occasionally reaches a different outcome than GAO did,⁴⁵ which suggests, if nothing else, that the protest was not frivolous.

Another concern about the cost of the protest system relates to what might be called its "indirect impact." Fear of protests is often given as the explanation for contracting officers' preference for certain courses of action over others.⁴⁶ In particular, contracting officers have told the author that they are acting to avoid bid protests when they decide that a contract should be awarded to the lowest price technically acceptable (LPTA) proposal, rather than to allow for a tradeoff.⁴⁷ There does not appear to be any data that would indicate how often contracting officers actually decide to make an award on an LPTA basis for this reason alone, nor any data on how often source selection officials avoid making tradeoffs in award decisions, even when permitted to by the terms of a solicitation, just to avoid protests. If the phenomenon is common, it is unfortunate, since discretion to make tradeoffs is a positive option in the U.S. procurement system.⁴⁸

Similarly, the author has heard for many years that some contracting officers prefer to make awards based on initial proposals, rather than to conduct discussions, because they fear that discussions with offerors are a legal minefield such that conducting discussions will increase the likelihood of a bid protest and improve the protester's chances of prevailing if a protest is filed.⁴⁹ Again, that would represent a loss, since the ability to conduct discussions with offerors is a good feature of our acquisition system and is not often used in other systems around the world.⁵⁰ Similar to the extent to which contracting officers use LPTA rather than tradeoff to avoid protest, there is a lack of data about how common it is for contracting officers to award based on initial proposals in order to reduce the likelihood of a successful protest. In any event, the author is skeptical that there is any good reason to "protest-proof" an

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acquisition in this way, especially in light of how rare protests are, and how exceedingly rare successful protests are.⁵¹ Moreover, neither using LPTA as the basis for award nor making award based on initial proposals without conducting discussions will ensure that no protest will ever be held, as GAO and the Court of Federal Claims decisions ruling on protests of LPTA awards and initial-proposal awards demonstrate.⁵² That said, it must be recognized that in both areas, and potentially in others as well, it is quite possible that the fear of protests, whether justifiable or not, is harming the acquisition system by driving bad decisions by federal contracting personnel. To mitigate this harm, efforts should be made to improve contracting officers' knowledge about the rarity of protests and the fact that making LPTA awards or awards based on initial proposals will not prevent protests, as well as the benefit to the government of using tradeoffs and discussions as means to obtain a better deal for taxpayers.

Benefits of the Protest Process

Countries around the world are developing bid protest systems, and such systems have become, or are fast becoming, part of the norm for good government in the acquisition arena.⁵³ That can be attributed to several benefits associated with bid protests.

First, protests introduce a relatively low cost form of accountability into acquisition systems by providing disgruntled participants a forum for airing their complaints.⁵⁴ Protesting firms decide which procurements are to be investigated: If no one protests, then neither GAO nor the Court of Federal Claims would look into a procurement, but if someone does protest, then GAO and the court would consider the procurement if the protest passes procedural hurdles, such as timeliness.⁵⁵ While reliance on audits by government officials would also inject accountability into the workings of procurement systems, it may be more efficient to focus on procurements where a participant is dissatisfied by a government agency's conduct; that is what the "private attorney general" model of a protest provides.⁵⁶ In blunt terms, if no one is dissatisfied with the way the government conducted a procurement, then it may not be a wise use of auditors' time to investigate it.⁵⁷

Second, by being directly responsive to participants' complaints, protests can increase potential bidders' confidence in the integrity of the procurement process, and thereby lead more players to participate, thus increasing competition.⁵⁸ Increasing competition, in turn, can translate into bidders offering lower prices, higher quality, or both, to contracting agencies.⁵⁹

Third, protests can increase the public's confidence in the integrity of the public procurement process. While the public only rarely focuses on public contracting, having a protest process mentioned in the press—as happened when The Boeing Company successfully protested the U.S. Air Force's award of a tanker contract to Northrup Grumman⁶⁰—may raise the public's trust in the fairness of the government's acquisition system and the way it spends taxpayer funds.

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Fourth, because protests are a known avenue for complaints, their availability empowers those in contracting agencies who face pressure to act improperly. Thus, if a contracting officer were to be pressed by users within an agency to award a sole-source contract to a favored firm, the contracting officer, who may lack the bureaucratic clout to resist the pressure, could point to the risk of a successful protest as one additional reason to follow the statutory and regulatory requirements for competition.⁶¹

Fifth, protest decisions, because they are public, and have been released publically since GAO issued the first one in 1926,⁶² provide a high level of transparency into what is happening in the federal procurement system.⁶³ While, in theory, databases such as the Federal Procurement Data System (FPDS) should provide transparency into the system,⁶⁴ protest decisions can often provide more useful information than databases. This is particularly the case where protests demonstrate how problematic certain issues are. For example, when GAO sustained a significant number of protests challenging the way agencies were conducting public/private competitions under Office of Management and Budget Circular A-76 in the 1990s, the importance of improving the way those competitions were conducted was highlighted, and the decisions ultimately led to revisions to the Circular as well as the creation of the congressionally chartered Commercial Activities Panel.⁶⁵ Similarly, it was GAO's sustaining of a number of protests alleging organizational conflicts of interest that focused attention on this area and may have led to congressional and regulatory action.⁶⁶

Finally, the fact that protest decisions are published and widely read by practitioners brings an additional benefit: The decisions provide guidance, particularly to agency counsel and attorneys representing potential protesters, as well as their clients. To give one example that has been true for decades: Any corporate counsel who follows GAO bid protest decisions knows how strictly GAO applies the "late is late" rule,⁶⁷ so that counsel will ensure that his or her client appreciates the importance of submitting bids on time.

Conclusion: The Costs of the Bid Protest System are Overstated, and the System's Benefits Outweigh Them

The costs that bid protests impose on the acquisition system are often misunderstood and therefore overstated, in terms of frequency of protests, the length of time they last, and the risk that an agency's choice of contractor will be overturned in the process. Moreover, the benefits of the protest system may not be fully appreciated, as is the fact that the United States is required by its international trade agreements to have a protest system. Whatever costs protests impose on the procurement system are outweighed, at least in the author's view, by the benefits that protests bring, in terms of transparency, accountability, education, and protection of the integrity of the U.S. federal acquisition system.

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* - Daniel I. Gordon is the associate dean for Government Procurement Law Studies at The George Washington University Law School and the former administrator for Federal Procurement Policy. Prior to his nomination to the administrator position by President Barack Obama, Gordon worked in the Office of the General Counsel of the Government Accountability Office, where, for several years, he led the unit that handles bid protests. He would like to thank Hilary Gallo, a second year student at The George Washington University Law School, for her valuable assistance in researching this article.

Endnotes

1. 31 U.S.C. §3553(c) (2006).
2. *Ibid.*, at §3554(a)(1).
3. *See, generally, Getting the Deal Through, Public Procurement: An Overview of Regulation in 40 Jurisdictions Worldwide*, Hans-Joachim Priess et al. (eds.) (2012) (discussing bid protest processes in various countries worldwide). As examples, in France, where contracts may not be awarded until the conclusion of a “standstill” provision, an administrative judge has only 20 days from the conclusion of the standstill period to decide (*ibid.*, at 106); Ghana’s administrative authority is given 21 days to decide complaints (*ibid.*, at 123); Macedonia’s Appeals Commission must decide cases within 15 days of receiving documentation (*ibid.*, at 175); Portugal’s administrative review takes about three weeks (*ibid.*, at 209); and Ukraine’s administrative review must be completed within 30 working days of receipt of a complaint (*ibid.*, at 247).
4. *See* GAO, B-401197, “Report to Congress on Bid Protests Involving Defense Procurements,” 5–6 n.8 (2009) (describing the discrepancy between the number of protests that GAO reports as filed and the number of procurements that are actually protested).
5. *See* previous discussion.
6. *See* 31 U.S.C. §3553(d)(4).
7. *See* Daniel I. Gordon, “Dismissals of Bid Protests at the General Accounting Office,” *Procurement Law* (Winter 2002): 15, 16.
8. *See* 31 U.S.C. §3553(d)(4).
9. *See ibid.*, at §3553(d)(4)(b) (noting that a protest must be filed within five days of a requested and required debriefing in order to trigger a CICA stay); *and* 4 C.F.R. 21.2(a)(2) (2012) (noting that a protest must be filed within 10 days of requested and required debriefing in order to be timely at GAO).
10. 31 U.S.C. §3554(a)(1) (requiring GAO to resolve protests within 100 days after they are filed); *see also* “Bid Protests Involving Defense Procurements,” note 7, at 5.
11. “Bid Protests Involving Defense Procurements,” note 7, at 10.
12. *Ibid.*, at 5 n.7.
13. *See ibid.*, at 7.
14. *See ibid.*, at 5 n.7.
15. *Ibid.*, at 4, 10.
16. *See* Moshe Schwartz and Kate M. Manuel, Congressional Research Service, R40227, “GAO Bid Protests: Trends, Analysis, and Options for Congress” (2011): 10.
17. *See* GAO, GAO-05-208R, “GAO Bid Protest Annual Report to the Congress for Fiscal Year 2004” (2005): 2. The citation refers to information for 2004; subsequent reports have not reported this information.
18. *See* 31 U.S.C. §3553(c)(2), (d)(3)(C) (2006) (authorizing the head of a procuring activity to override the automatic CICA stay in specified circumstances).
19. For fiscal year 2002, the last year that GAO included information on overrides in its annual report on protests, GAO reported that, with respect to the 1,101 protests filed that year, there were 65 instances of agencies’ using

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their override authority to move forward with the procurement, notwithstanding the protest. (GAO, GAO-03-427R, “Bid Protest Annual Report to the Congress for Fiscal Year 2002” (2003): 3, 4.)

20. See 31 U.S.C. §3554(b)(1)(B).

21. See previous discussion.

22. See previous discussion.

23. See previous discussion.

24. See, generally, 31 U.S.C. §3554(c)(1)(A)–(B) (permitting the comptroller general to recommend that the procuring agency pay successful protesters’ protest-related fees).

25. See, e.g., *Advanced Env'tl. Solutions, Inc.-Costs*, B-296136.2, 2005 CPD ¶121, at 2–3 (Comp. Gen. June 20, 2005) (noting that protest costs may be awarded where an agency unduly delayed taking corrective action on a meritorious protest); and *Takota Corp.-Costs*, B-299600.2, 2007 CPD ¶171, at 3 (Comp. Gen. September 18, 2007) (finding no need to award attorney fees because the U.S. Coast Guard complied with regulations by swiftly taking corrective actions).

26. See, generally, *Scanwell Labs, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (describing the role of “private attorneys general” in monitoring compliance with federal procurement law).

27. 31 U.S.C. §3554(c)(2). Under CICA, only small businesses may be reimbursed attorney fees at a rate over \$150 per hour unless the contracting agency and GAO find that a higher reimbursement of attorney fees at a higher rate is warranted. (*Ibid.*)

28. See Robert S. Metzger and Daniel A. Lyons, “A Critical Reassessment of the GAO Bid-Protest Mechanism,” *Wisconsin Law Review* (2007): 1240–1241; and Jonathan R. Cantor, Note, “Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone,” *Public Contracting Law Journal* (1997) (recounting proposed regulations aimed at preventing “frivolous” protests).

29. “Bid Protests Involving Defense Procurements,” note 7, at 11–15.

30. *Ibid.*, at 11–12.

31. *Ibid.*, at 12.

32. *Ibid.*, at 12 n.13.

33. *Ibid.*

34. *Ibid.*, at 2.

35. *Ibid.*

36. *Ibid.*, at 13.

37. *Ibid.* It is worth noting that protesters have only limited information about what happened during a procurement at the time that the strict time limits require them to decide whether to file a protest, because many agencies disclose to firms that lost competitions or contract only the bare minimum required by law. See, generally, Federal Acquisition Regulation (FAR) 15.505–506 (requiring pre-award and post-award debriefings).

38. See, e.g., Kovacic, note 3, at 489 (describing this type of criticism); and *Keeton Corrs., Inc. v. United States*, 59 Fed. Cl. 753, 754–755 (2007).

39. See Michael J. Schaengold et al., “Choice of Forum for Federal Government Contract Bid Protests,” *Federal Circuit Bar Journal* (2009): 318 (noting the possibility of sequential protests); see, e.g., *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (where protester was unsuccessful at GAO and then sought review by the Court of Federal Claims).

40. See, e.g., *Honeywell, Inc. v. United States*, 870 F.2d 644, 646–647 (Fed. Cir. 1989) (where a disappointed bidder then protested GAO’s decision to the Court of Federal Claims, and the successful bidder appealed the Court of Federal Claims’ decision to the Federal Circuit).

41. There may be no CICA stay if either the protest does not meet the timeliness rules for CICA stay or if there is an agency override. (See FAR 33.104(b) and (c)(1) (indicating the timeliness rules for an automatic CICA stay); and 31 U.S.C. §3553(c)(2), (d)(3)(C) (2006) (permitting an agency to override the automatic stay in certain circumstances.)

42. See 28 U.S.C. §1491(b)(2) (2006) (granting the Court of Federal Claims jurisdiction to provide injunctive relief); and *Akal Sec., Inc. v. United States*, 87 Fed. Cl. 311, 316–317 (2009) (delineating the factors considered in

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granting injunctive relief).

43. See, e.g., *Analytical & Research Tech.*, B-276064, 97-1 CPD ¶200 (Comp. Gen. May 7, 1997); and *Analytical & Research Tech., Inc.*, 39 Fed. Cl. 34, 40 (1997).

44. See 28 U.S.C. 1491(b)(2) (2006).

45. See, e.g., *Turner Constr. Co. v. United States*, 94 Fed. Cl. 561, 586 (2010) (holding that the U.S. Army acted improperly in setting aside a previously awarded contract, pursuant to GAO's recommendation).

46. See "Memorandum from Daniel I. Gordon, Adm'r for Fed. Procurement Policy, Office of Fed. Procurement Policy, to Chief Acquisition Officers, Senior Procurement Execs., & Chief Info. Officers" (February 2, 2011): 7 (noting that contracting officers sometimes attempt to "protest-proof" procurements when that should not be the overriding goal).

47. See, generally, FAR 15.101-1(a) (permitting agencies to use tradeoff processes when it would be "in the best interest of the government").

48. See *ibid.*

49. See, e.g., *Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 420 (2006) (holding that the contracting officer's failure to hold negotiations was not an abuse of discretion).

50. See Christopher R. Yukins, "Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law," *Public Contracting Law Journal* (2007): 327–328 n.70 (suggesting that the United States' preference for negotiated procurement is a strong advantage, but is not widely used worldwide because the United States enjoys relatively low levels of corruption); Ivar Strand, *et al.*, *Public Procurement in Europe: Cost and Effectiveness* (2011) (noting that the Eurozone rarely uses negotiation); and Shigeki Kusunoki, "Japan's Government Procurement Regimes for Public Works: A Comparative Introduction," *Brooklyn Journal of International Law* (2006) (noting that, historically, negotiated procurements were rarely used in Japan).

51. See previous discussion.

52. See, e.g., *Guzar Mirbachakot Transp. v. United States*, 104 Fed. Cl. 53 (2012) (LPTA case at the Court of Federal Claims); and *Ahtna Facility Servs., Inc.*, B-404913 *et al.*, 2011 CPD ¶134 (Comp. Gen. June 30, 2011) (LPTA case at GAO).

53. See previous discussion.

54. See Steven L. Schooner, "Fear of Oversight: The Fundamental Failure of Businesslike Government," *American University Law Review* (2001) (contending that "[i]n economic terms, the protest and dispute regimes are a bargain" and that "[o]pponents of litigation are hard pressed to demonstrate a more cost effective, less intrusive compliance regime.").

55. See 31 U.S.C. §3553(a) (2006) (conferring jurisdiction on GAO to review procurements protested by an interested party); *ibid.*, at 3551(2) (defining *interested party* as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract" or an agency official or agent representing federal employees who stand to be injured by private competition); 28 U.S.C. §1491(b)(1)(2006) (granting the Court of Federal Claims jurisdiction to hear claims brought by "interested parties"); R. Ct. Fed. Cl. (procedural rules governing the Court of Federal Claims); and 4 C.F.R. 21.1–2 (2012) (procedural rules governing bid protests at GAO).

56. See *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) ("The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'"); and Schooner, note 57, at 630, 680–684 (arguing that "private attorneys general" litigation is a public good).

57. It should, though, be noted that in situations where all the bidders are colluding, none may have an interest in protesting, so that the protest system would not provide accountability in that case. Indeed, if anything, in those situations protests may serve as a means for colluding bidders to police their collusive agreement. See Kovacic, note 3, at 490–491.

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58. See, generally, Steven L. Schooner, “Desiderata: Objectives for a System of Government Contract Law,” *Public Procurement Law Review* (2002) (discussing the goals of a procurement system, including competition).
59. See *Am. Fed’n of Gov’t Emps. v. Rumsfeld*, 262 F.3d 649, 657 (7th Cir. 2001) (noting that CICA, by requiring full and open competition, was intended to “save money, curb cost growth, promote innovation and the development of high-quality technology” (quoting *Am. Fed’n of Gov’t Emps., Local 219 v. Cohen*, 171 F.3d 460, 472 (7th Cir. 1999))).
60. See *Boeing Co.*, B-311344 et al., 2008 CPD ¶114 (Comp. Gen. June 18, 2008); and Leslie Wayne, “Audit Says Tanker Deal Is Flawed,” *New York Times* (June 19, 2008): C1.
61. See, generally, Vernon J. Edwards and Ralph C. Nash Jr., “Postscript II: The Role of the Contracting Officer,” 24 *Nash & Cibinic Report* ¶15 (discussing pressures that contracting officers routinely face).
62. See *Autocar Sales & Serv. Co.*, 5 Comp. Gen. 712 (1926).
63. See, generally, Schooner, note 57 (describing transparency as a goal of an effective procurement system).
64. The FPDS was created by the Office of Federal Procurement Policy (OFPP) in response to a congressional requirement in the Office of Federal Procurement Policy Act that the OFPP “establish... a system for collecting, developing, and disseminating procurement data which takes into account the needs of the Congress, the executive branch, and the private sector.” (Office of Federal Procurement Policy Act, Pub. L. 93-400, 88 Stat. 796, 798 (1974) (codified at 41 U.S.C. 1§§101-1131 (Supp. IV 2010)); see also FAR 4.602 (describing the FPDS); and GAO, GAO-05-960R, “Improvements Needed to the Federal Procurement Data System-Next Generation” (2005): 1-2. Although the FPDS is meant to provide transparency in federal contracting by enabling the public and members of the government to access accurate data about government procurements, the accuracy and timeliness of the data in the FPDS have been criticized. See *ibid.*, at 2-5; and “Letter from Sen. John F. Kerry, U.S. Senator, to Robert A. Burton, Assoc. Adm’r of the Office of Fed. Procurement Policy” (November 14, 2005), available at http://asbl.com/asbl.resource/content/supdoc/kerry_letter.pdf (noting several limitations of the FPDS that hinder transparency).
65. Following a number of the GAO bid protest decisions arising from public/private competitions under OMB Circular A-76, the Congress created the Commercial Activities Panel through the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. See Pub. L. 106-398, 114 Stat. 1654, 1654A-221 (2000); and Commercial Activities Panel, “Improving the Sourcing Decisions of the Government: Final Report” (2002): 90-99 (summarizing GAO protest decisions arising from public/private competitions under OMB Circular A-76). The Panel recommended a number of changes, many of which were adopted in the 2003 revision of the OMB Circular A-76. (Commercial Activities Panel, *ibid.*, at 51-52.)
66. See Daniel I. Gordon, “Organizational Conflicts of Interest: A Growing Integrity Challenge,” *Public Contracting Law Journal* (2005): 32-41 (discussing organizational conflict of interest bid protests). Section 207 of the Weapons Systems Acquisition Reform Act of 2009 (WSARA) called for tightening of the rules governing organizational conflicts of interest. See Pub. L. 111-23, 123 Stat. 1704, 1728. As of the time of this writing, a proposed rule is being considered to revise the FAR provisions on organizational conflicts of interest. (76 Fed. Reg. 23,236 (proposed April 26, 2011) (proposed rule) (to be codified at FAR Parts 2-4, 7, 9, 11-16, 18, 37, 42, and 52-53).)
67. See Gregg A. Engler, “Limiting Application of the Late Proposal Rule: One Time, One Place, One Method,” *Army Law* (October 2003): 15. See, generally, FAR 15.208(b)(1) (providing that proposals, modifications, and revisions are considered “late” if received after the time specified).

