BCA BAR ASSOCIATION

A QUARTERLY PUBLICATION OF THE BOARD OF CONTRACT APPEALS BAR ASSOCIATION

FALL 1990

EDITOR'S COMMENT

by Jim Nagle

The Chinese have a saying: "A journey of a thousand miles must begin with a single step". That is our view as we present this first newsletter of the BCA Bar Association. As we embark on the ever continuing job of providing our members with information on BCA practice, we solicit your ideas and input. Our main criterion for material for the newsletter is - does it relate to BCA practice and will it interest our readers. Bibliographies, case notes, announcements, book reviews, practice tips or articles can all aid our members and would be welcome. There is no minimum number of words nor is there any absolute maximum. Obviously a newsletter format does not lend itself to a tome like exegesis on the Greco-Roman ancestry of the Rule 4 file but if it is relevant and would interest our readers, we may still publish it - in 216 installments.

Some members have already come forward with projects; for example, Linda Schramko from the Air Force Contract Law Center at Wright-Patterson AFB in Ohio will try to prepare a column on developments in ADR; Sandy Faulkner, the membership director, will present a column on the Comings and Goings of BCA Bar Association members. Please do not hesitate to contact me with any ideas you might have for columns, projects or one time announcements. Because I am in the middle of moving, our treasurer, Marcia Madsen of Morgan, Lewis and Bockius has graciously offered to help produce this first newsletter until I am settled in Seattle. I should be settled in plenty of time for the next newsletter; so please send your articles to my Seattle address, Oles, Morrison & Rinker, 3300 Columbia Center, 701 Fifth Avenue, Seattle, WA 98104-7007 or call me at (206)623-3427. If you submit items, it would help if you submit them in hard copy and on a 5 1/4" disk, saved in ASCII.

Besides Linda and Sandy's columns and some brief announcements on courses and our annual meeting, we are graced in this first issue with an article from Paul Williams, the Chairman of the ASBCA.

We hope that this article will be the first in a continuing series, THE JUDGE'S CORNER, in which BCA judges will share their insights with us. Peter McDonald, one of our members who is also a CPA, has submitted an article on Audits. LTC Clarence Long, the chief of the Army's GSBCA bid protest team, has submitted an article on sanctions - always a topic of great interest.

Finally, attached is a directory of ASBCA judges and their direct dial telephone numbers.

IN THIS ISSUE

Our president, Marshall Doke, suggested such a directory would be very useful. I did not realize how right he was until I was speaking to one BCA judge and asked him to transfer me to another judge. He could not figure out how to do it! Future issues will contain the directories of other Boards and other offices that you may detach and keep for reference. If you have such a list, please share it with us.

Finally, let me add my welcome to the Association. BCA practice is highly specialized and the number of regular practitioners is relatively small. So an Association like ours can really be a collegial clearinghouse in which the experienced counsel can share their secrets and the novices can share a new perspective.

Together they can comprise a formidable team.

A learned judge once said that a lawyer's learning comes in three stages. In the beginning, lawyers learn the right answers. In the second stage, they learn the right questions. Finally, they learn which questions are worth asking.

PRESIDENT'S COLUMN

Marshall J. Doke, Jr.

A learned judge once said that a lawyer's learning comes in three stages. In the beginning, lawyers learn the right answers. In the second stage, they learn the right questions. Finally, they learn which questions are worth asking. Many members of this Association have passed through much of the first stage, but we all can participate productively in the second and third stages of learning in boards of contract appeals practice.

The first two purposes of this Association include improving the administration of justice in, and improving the proficiency of practice before, the boards of contract appeals. These purposes, alone, would justify our existence and efforts.

We could not begin these efforts at a more important time in the history of federal contract disputes resolution. The current prospects of reduced federal spending (particularly in defense) emphasize that we must remember the experience of past procurement cycles – when funds are scarce, claims and disputes increase.

Any increase in contract disputes will present a challenge to both bench and bar. With the heavy dockets now carried by the boards (evidenced by the emphasis on alternate disputes resolution to help the problem), even a slight additional burden on the system must be viewed with concern.

The challenge we face, I believe, requires this Association initially to address two important issues. Have we learned the right questions, and which questions are important? This Association, with the active participation of BCA judges and lawyers from both the public and private sectors, is uniquely qualified to accept this challenge.

All challenges present opportunities, including the challenge faced by the BCA Bar Association. Some people fail to recognize opportunities, however, because they often come disguised as hard work.

Our opportunities are disguised in the hard work of participation in committee activities. We all have the choice – will we remain part of the problem or become part of the solution?

MARSHALL J. DOKE, JR.

Marshall J. Doke, Jr., is a partner in the Dallas law firm of Doke & Riley, where he specializes in government contract law. He was graduated with high honors from the Souther Methodist University School of Law where he was Editor-in-Chief of the Southwestern Law Journal. He served as General Counsel to the Army Contract Adjustment Board in Washington, D.C. from 1959 to 1962 while serving as Chief of the Boards Section, Contract Law Branch, the Procurement Law Division of the Office of the Judge Advocate General of the Army.

Mr. Doke is a former Chairman of the American Bar Association's Section of Public Con-

tract Law and currently is the Section's Delegate to the ABA House of Delegates. He previously served on the ABA's Board of Governors and as Co-Chairman of the National Conference of Lawyers and Certified Public Accountants.

He currently is a member of the Board of Governors and President of the federal Boards of Contract Appeals Bar Association. He is a member of the Advisory Council of the United States Claims Court, the Board of Governors of the U.S. Claims Court Bar Association, the Board of Governors of the Federal Circuit Bar Association, the Council on Procurement Policy of the Chamber of Commerce of the United States, the National Board of Advisors to the National Contract Management Association, and the Board of Advisors to both the Bureau of National Affairs' Federal Contracts Report and Federal Publications Inc.'s Government Contract Costs, Pricing & Accounting Report.

Mr. Doke frequently writes and lectures in the field of government contracts, including co-authoring the annual Procurement Review Briefing Paper for Federal Publications, Inc.

MARK YOUR CALENDAR NOW

The first annual meeting of the BCA Bar Association will convene on Monday, October 29, 1990, at the Ramada Renaissance Hotel Techworld, 9th and K Streets, N.W., Washington, D.C. The hotel is located across from the Washington Convention Center, not far from the Gallery Place Metro stop and the Metro Center stop. There is ample parking within the hotel for those who are driving.

Coffee and late registration are scheduled for 8:30 a.m., with the program (tentatively) to begin at 9:00.

The planing committee is in the process of organizing the agenda. They plan at this point to have two panel presentations in the morning, one on ADR and the other on pre-trial; problems. Luncheon will feature a prominent speaker. After lunch there will be a short business meeting, following by committee meetings for the balance of the afternoon.

The final agenda and registration details will be announced shortly. Point of contact for information is Lieutenant Colonel Steve Porter, (202) 756-1352.

COURSES OF INTEREST

TJAGSA Contract Claims, Litigation, and Remedies Course

Because so many of our members are federal attorneys, many of you might be interested in the following announcement.

The Army Judge Advocate General's School offers a four and one-half day course to government attorneys on litigating contract disputes. The course was last held 10 - 14 September 1990. The course is intended for government attorneys who conduct or support contract litigation before Boards of Contract Appeals or the United States Claims Court.

The course focuses on Contract Disputes Act substance and procedure. Topics covered include review of claims, board jurisdiction, board procedures, remedies, Claims Court procedures, and several other topics. For the field attorney, the instructors will cover analyzing claims, preparing final decisions, and preparing appeal files. For the trial attorney, the instructors will cover pleadings, discovery techniques, negotiating settlements, alternative dispute resolution, and Claims Court practice. Previous courses have included special topics, such as termination claims, cost accounting, and network analysis.

The course was held at the Judge Advocate General's School, on the North Grounds of the University of Virginia in Charlottesville, Virginia, and is taught by the instructors of the Contract Law Division, The Judge Advocate General's School, and by guest speakers. Attendance is limited to active duty and reserve military attorneys, and federal civilian attorneys employed by the Department of Defense and civilian agencies.

Civilian practitioners may not attend. For further information regarding this, or other, JAG School courses, call (804) 972-6307 or write the following address:

Commandant
The Judge Advocate General's School
Attn: JAGS-ADN
Charlottesville, VA 22903-1781

ADR NEWS

LEGISLATION: Congress has taken another step in its drive to promote the use of alternative dispute resolution methods among Federal agencies. On June_5, 1990, the House passed HR 2497. This bill, which in its original form was drafted by the American Bar Association Standing Committee on Alternate Dispute Resolution, is intended to be comprehensive. It encourages and explicitly authorizes Federal agencies that have administrative procedures to use ADR.

Among other things, the bill requires agencies to evaluate and adopt policies regarding the use of ADR. IT sets up criteria for when such methods should and should not be used. It also defines the roles of neutrals, sets up means to protect confidentiality, prescribes a format for arbitration, and authorizes amendment of the Federal Acquisition Regulation where necessary.

The same bill was introduced in the Senate as S971, the Administrative Dispute Resolution Act. Hearings on the Senate bill were held on September 19, 1989, by the Oversight of Governmental Management Subcommittee of the Governmental Affairs Committee. This bill is still under consideration by the Subcommittee.

NEUTRALS: The Administrative Conference of the United States now maintains a list of neutrals., Contact ACUS at (202) 254-7020 if you are seeking a neutral to serve in an ADR proceeding.

MEETING: Plan to attend the first annual meeting of the BCA Bar Association (see the announcement elsewhere in this issue). The planning committee has met and at this point they expect to devote one of the two morning panel presentations to ADR.

This article originally appeared in The Army Lawyer, June 1990 at 37 and is reprinted here through the gracious permission of that publication and the author.

The author wishes to make clear that this article does not purport to represent the official view of the Department of the Army, or the Judge Advocate General, or any other DOD component.

WHEN WINNING ISN'T ENOUGH

Boards Of Contract Appeals and Monetary Sanctions for Frivolous and Bad Faith Conduct in Administrative Litigation

Clarence D. Long

Chief, ADP Bid Protest Team

Department of the Army

Consider the following fact patterns:

Agency counsel in a post-award dispute falsely denies the existence of a technical evaluation of Appellant's claims for nine months, despite the fact that Appellant had requested just such an evaluation. The theory behind the denial is apparently that, since the technical evaluation was sent to counsel rather than to the contracting officer, it is therefore privileged. At hearing, the agency attempts to introduce portions of the technical evaluation through the testimony of the technical evaluator.

The solicitation for an extremely high dollar ADP procurement closed many months ago. Suddenly, a protest against the terms of the solicitation is filed with the GSBCA. The protester claims an agreement was made to waive timeliness, and further claims that the solicitation has been constructively cancelled. After depositions and extensive written argument, the protest is dismissed for untimeliness. (Both of the protester's assertions are found to be untrue.) Meanwhile, the procurement has been partially suspended for a number of weeks. About 500 hours have been spent litigating the case, with many more hours spent by support personnel at the requiring and buying activities.

The protester in a vitally needed CPU upgrade claims that the evaluation scheme is stacked against the computers it desires to propose. During discovery, it becomes apparent that the protester has no alternative scheme of evaluation it is willing to describe, nor apparently is it restricted to the machines that it claims are disadvantaged by the system. Moreover, in a previous protest it has taken a position opposite to that it is now taking, and it refuses to produce the relevant brief. The

protest is dismissed for frivolousness, but in the meantime the procurement is suspended for four weeks, and the attorneys, the buying command, and the requiring activity have spent one-thousand or more man hours litigating the protest.

What can be done about deterring such behavior? Probably little, under the current state of decisional law. The administrative boards charged with resolving protests and post-award disputes have been reluctant to impose monetary sanctions on either agencies or appellants and protesters for even the most flagrant abuses of the administrative legal process. They have been reluctant to state even that they have such authority. This reluctance has been exacerbated by the fact that few government agencies will move on their own to impose monetary sanctions. Appellants and protesters are only somewhat more likely to do so. The problem, thus, has been two fold; unaggressive attorneys satisfied with merely winning cases, while leaving outrageous conduct otherwise undeterred, and Boards' reluctance to impose sanctions, especially monetary, on their own initiative.

Serious protesters and appellants do not receive the attention and consideration their cases deserve. Even protesters and appellants with real grievances may not bother to separate the wheat from the chaff in filing the protest or appeal, surrounding the real complaint with a host of unsupported allegations.

The consequences of unpunished frivolous or bad faith behavior are extremely serious. Both government agencies and contractors develop a degree of contempt for the administrative litigation process. The process comes, on occasion, to be perceived as a game in which the object is to see how much can be gotten away with, rather than the swift resolution of real disputes. Serious protesters and appellants do not receive the attention and consideration their cases deserve. Even protesters and appellants with real grievances may not bother to separate the wheat from the chaff in filing the protest or appeal, surrounding the real complaint with a host of unsupported allegations. [1]Similarly, agencies may feel encouraged to file a host of meritless defenses, because they know that the only real penalty will be a sustained appeal or protest.

Why are monetary sanctions needed to deter such behavior? After all, the Boards do, on occasion, dismiss cases for frivolous behavior.[2] Sometimes these dismissals are accompanied by harsh words for counsel. Is this not enough to deter such behavior in the future, to the extent it can be deterred? The author thinks not. Monetary sanctions carry a message mere dismissal does not. The protester, appellant, or agency is being required to pay for its irresponsible behavior. The prevailing party is being compensated for the endless hours spent by counsel, contracting personnel, and supporting staff in defending or prosecuting administrative litigation that should not have been brought in the first place, has been irresponsibly defended or prosecuted, or was unreasonably complicated or prolonged by obstructive or dilatory tactics.

The Federal Court Standard

A. INHERENT POWER

Most practicing attorneys think in terms of Fed. R. Civ. P. 11 (discussed infra) or perhaps one of its state equivalents when the issue of sanctions is raised. But the authority to impose sanctions, including monetary sanctions, is older, deeper, and broader than that or any other formal rule.[3]

Nor is this authority limited to particular delineated types of conduct. In a recent decision affirming the sanctions imposed by a federal district court, the 5th Circuit stated:[4]

We are not persuaded the Court [in Alyeska] intended to upset the view, nigh unchallenged in the history of the country, that the federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs, and the shifting of fees. . . .

It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned. Rather the task is one of defining its limits.

The Court went on to specifically reject the argument that "inferior federal courts may look only to rules of procedure and specific statutes providing remedies for obstructive conduct,[5] holding instead that the inherent authority doctrine both overlaps and exceed the particular rules addressing particular problems, such as Fed. R. Civ. P. 11. Rather, the court continued, adopting such particular rules supplements inherent power, which derives from necessity and can be exercised on a case-by-case basis as required.

It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned. Rather the task is one of defining its limits.

B. Fed. R. Civ. P. 11

This rule is both more specific than inherent power and less restricted in its application.

Rule 11 provides in pertinent part that: . . . the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fees.[6]

The purpose of Rule 11 is to require "[g]reater attention by the district courts to pleading and motion abuses and . . . [to] impose[e] . . . sanctions when appropriate . . . [to] discourage . . . abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses," and, "to reduce the reluctance of the courts to impose sanctions . . . by emphasizing the responsibilities of the attorney." Westmoreland v. CBS Inc.[7]

Rule 11 was amended in 1983. The intended effect of the amended rule was to expand "the equitable doctrine permitting the court to award expenses, . . . to a litigant whose opponent acts in bad faith in instituting or conducting litigation."[8] With this expansion, a party seeking Rule 11 sanctions need not specifically show that a litigant acted in bad faith. Instead, Rule 11 incorporates a standard of "due diligence" which requires parties and attorneys to make a "reasonable inquiry" before signing pleadings and motions, and to act in a way that is "reasonable under the circumstances." Saunders v. Lucy Webb Haynes - National Training School.[9] In effect, amended Rule 11 transforms what had been a very restrictive subjective test into a less restrictive "objective" test.[10]

The amended rule has had two main effects. First, parties who have been adversely affected by frivolous or unnecessary litigation now have more incentive to pursue Rule 11 relief.

Second, courts have more flexibility to impose Rule 11 sanctions on deserving parties. The obvious objective in amending Rule 11 was to reduce the amount of unnecessary litigation to foster a more efficient and effective legal process. The amendment sought to accomplish this objective by holding litigants accountable for frivolous or wasteful litigation.

As the seminal case discussing the amended rule has noted, the federal courts may impose Rule 11 sanctions if a reasonable inquiry would have disclosed that the pleading, motion, or paper is:

(1) not well grounded in fact, **(2)** not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay.[11]

Authority of the Board(s) in Regard to Rule 11 Type Sanctions:

A. NON-MONETARY SANCTIONS AT THE BOARD LEVEL

The major boards of contract appeal have at one time or another imposed sanctions on either appellants or agencies for inappropriate behavior during the appeals or protests (usually failure to cooperate in discovery). These sanctions have included dismissal, exclusion of exhibits, exclusion of testimony,[12] and findings of fact based on non-appearance of witnesses or non-answers to interrogatories.[13] In doing so, the boards have generally relied upon their inherent authority to control their dockets. For example in YUCCA, a Joint Venture, the GSBCA stated:

> Our ultimate coercive power over GSA is our statutory authority to issue decisions that are final unless appealed and that may commit the agency to the payment of money to contractors. 41 U.S.C. {607(d)(g). As an incident thereto, we are also permitted by statute to "authorize discovery and discovery proceedings." 41 U.S.C. {610 (1982). This includes the power to impose sanctions for non-compliance.
>
> If the imposition of sanctions upon a contumacious party is not an incident of our statutory power to authorize discovery, the statute and the board are all bark and no bite.[14]

The major Boards of Appeal have at one time or another imposed sanctions on either appellants or agencies for inappropriate behavior during the appeals or protests.

B. MONETARY SANCTIONS AT THE BOARD LEVEL

As the Third Circuit noted in Eash v. Riggins Trucking,[15] the authority to impose cost sanctions on litigants is an integral part of the federal courts' inherent authority to manage their dockets. The Claims Court has also ruled multiple times that the inherent authority of the boards of contract appeals to impose sanctions is coextensive with that of the federal courts, and it follows inexorably that the boards also have the authority to impose cost sanctions where appropriate.[16]

Boards of contract appeals have sometimes accepted (either explicitly or implicitly) this notion of inherent authority. For instance, in both Department of Energy,[17] and Times Mirror Land and Timber Company,[18] two different boards of contract appeals, were requested to impose monetary sanctions under Rule 11. In either case, if the board involved had felt it lacked authority it could have simply rejected the request on that ground.

Instead, both boards looked at the facts and found that monetary sanctions simply were not warranted under the circumstances.

One board considered the matter squarely and found it had the "inherent authority" to impose such sanctions. In The Wm. Powell Company,[19] the Engineering Board articulated more than one rationale for its imposition of monetary sanctions, but it specifically stated its belief that it had the "inherent authority as an adjudicative tribunal" to impose such sanctions,[20] and that the Federal Rules of Civil Procedure "are regarded as establishing appropriate standards of administrative due process and, accordingly, serve as valuable guidelines generally."[21]

In the only decision issued by the ASBCA which appeared to rule squarely on the issue, the board declined to impose monetary sanctions against the government for failure to comply with discovery in a timely fashion, despite observing that:

> . . . the Government conduct in the discovery phase of this litigation has been less than helpful to the fair and expeditious resolution of this appeal. The Government has failed to cooperate in voluntary discovery and displayed a lackadaisical attitude towards compliance with board orders.[22]

But the board went on to conclude that it had no jurisdiction to award such fees, despite its asserted inherent power to control the discovery process, and to impose a variety of non-monetary sanctions. Stating that sovereign immunity applied, the board ruled that Congress had not expressly authorized monetary awards for such behavior.[23]

In more recent decisions the ASBCA has appeared to back off somewhat from the absolute jurisdictional disclaimer in Turbomach. In Charles G. Williams Construction, Inc.,[24] the board determined that sanctions were appropriate because the agency had falsely denied that it had conducted a technical evaluation of the appellant's claim for a period of nine months.

No board order had been requested by the appellant in regard to the technical evaluation, but the board held:

We are aware that no board order was issued in this case and that Rule 35, "Sanctions" applies to failure or refusals to obey an order of the Board. However, appellant did not request an order for the obvious reason that it was being told that a technical evaluation did not exist. Our Rule 14(a) encourages the parties to engage in voluntary discovery. In this case the rule was subverted by the Government, which violated the fundamental obligations of fair dealing which underlie voluntary discovery. Accordingly, some sanction is due, otherwise the innocent party who follows our lead under 14(a) - rather than demand board orders - is penalized.[25]

The appellant in Williams had asked for summary judgment on the appeal, for removal of the contracting officer from quantum determination, for payment of costs for having to undergo bad faith settlement negotiations, and for payment of legal fees and case preparation costs.

The board granted none of the requests, but it did bar all documents generated by the technical evaluation and also the testimony of the technical evaluator. It briefly alluded to possible lack of authority, without going into details or formally stating that it lacked authority, in denying the request for monetary compensation.[26]

In other recent decisions, the ASBCA has sometimes appeared to shy away even more from its rigid disclaimer of authority in Turbomach, without ever actually reversing that holding.[27]

The DOT CAB and the PSBCA have both issued similar decisions.[28]

But the ASBCA and its concurring counterparts have not yet dealt squarely with this power to award such fees to the government.

The Early GSBCA Position

The GSBCA appeared to face the problem of whether it could impose monetary sanctions against a private litigant in Commercial Data Center, Inc.[29] Commercial Data was an intervenor which won a computer maintenance services contract, and then successfully defended a protest which claimed that the Defense Logistics Agency had failed to evaluate the competing proposals in accordance with the announced evaluation criteria.

Although not carefully articulated, Commercial Data's request for attorney's fees from the protester appeared to be based on bad faith behavior by the protester, rather than the due diligence standard of Fed R. Civ. P.11.

The board denied the request, stating that it did not consider the protest to be frivolous. It then went on to state at length that the GSBCA did not possess the jurisdiction to make such awards anyway. Citing Roadway Express, Inc. v. Piper, the board stated:

Among federal tribunals, only courts established under Article III of the Constitution of the United States generally have such power, and power is inherent in the necessity to protect the ability of these courts to manage their dockets.

This Board is a tribunal established by Congress in the Executive Branch, and our jurisdiction is entirely limited to those matters which Congress has entrusted to us.[31]

An earlier GSBCA decision, Hetra Computer and Communications, Inc.,[32] could also be interpreted as holding that the board does not have the inherent authority to impose a monetary sanction. However, the Hetra decision was not cited as authority in the later Department of Energy decision, and its brief reasoning does not seem to take into account the Board's inherent authority to control its docket, its pronouncements that it will look to

the Federal Rules of Civil Procedure for guidance in matters not covered by its own rules, or its statutory authority to grant remedies available to litigants in the United States Claims Court.

The New Standard at the GSBCA

The latest evolution of GSBCA doctrine on the subject of monetary sanctions is embodied in International Technology Corporation.[33]

ITC had filed a protest against a solicitation to supply off-the-shelf software, hardware, and maintenance services for an office automation support system, asserting that the terms were both unduly restrictive and ambiguous. The closing date for receipt of the proposals was August, 1988, but ITC did not file its protest until the following Spring. As bases for its late filing, ITC alleged that the procurement had been constructively cancelled following the solicitation date, and that the agency officials had agreed to waive objections on the grounds of timeliness.

The latest evolution of GSBCA doctrine on the subject of monetary sanctions is embodied in International Technology Corporation.

In regard to the first contention, the board held that there was simply "no evidence whatever" to support the theory that the agency had cancelled the procurement. With regard to the second, the board found that the Army's offer to consider the protester's objections informally did not amount to an agreement to waive timeliness objections. The protest was dismissed as untimely filed.

The Army then moved for monetary sanctions, claiming attorneys fees and related costs.

In its sanctions motion, the Army did not allege a specific desire to mislead on the part of the protester, but did claim that there had been an utter failure to adequately investigate the timeliness issue prior to filing the protest, or to drop the claim in a timely fashion after discovery commenced. The Army further asserted that the board had the authority to impose sanctions both under Fed. R. Civ. P. 11 and under its inherent authority to control its docket.

The board, in issuing its lengthy decision, followed numerous board precedents in declining to decide whether it had authority to impose sanctions under Rule 11, stating that to do so "would be inappropriate in the context of a pending case."[34]

The board then went on to state that it agreed with the Army position that the board possessed inherent authority to impose sanctions for bad faith behavior. Citing various Supreme Court decisions as precedent, the board held that sanctions authority was necessary for the fulfillment of board functions, and is inherent in the vesting in the tribunal of subject matter jurisdiction.[35]

The board held further that Boards of Contract Appeals' case management authority is coextensive with that of the Federal Courts, and that monetary sanctions were no different than the more common sanctions for dismissal. In doing so, the board explicitly overruled what it termed to be "inconsistent" dicta in Commercial Data Center.[36]

Conclusion

Most boards have so far declined to rule as to whether they possess "Rule 11" powers, although they appear to accept that they may impose at least non-monetary sanctions, as a result of their inherent authority to manage their dockets. The GSBCA has gone so far as to assert its right to award monetary damages against appellants and protesters for bad faith behavior under the inherent authority doctrine.

But proving bad faith, as opposed to the less stringent Fed. R. Civ. P. 11 test is too difficult a chore. It is the author's belief that the equivalent of Fed. R. Civ. P. 11 should be formally adopted by the various Boards of Contract Appeal in order that parties defending, appealing or protesting before those bodies receive appropriate relief when confronted with frivolous behavior that does not quite reach the bad faith level, but nonetheless violates the reasonable inquiry or due diligence standard.

The federal courts found it necessary to adopt such a rule long ago, and to amend it to make the award of monetary sanctions less difficult in the not-too-recent past. Part of the reason given for the amendment was the clogging of the courts with meritless claims.

But the administrative Government contract litigation system has not yet adopted such a rule, except for one board. Some boards may feel they lack the statutory authority. Others may feel that this power exists, but feel that the time is not yet ripe. Still others may feel that such a rule must be adopted, not by decisional fiat, but through the standard administrative rule-making process.

But the only way to protect appellants, protesters, and agencies who litigate in good faith is to deter those who do not.

A board level equivalent of Fed. R. Civ. P. 11, with attendant monetary sanctions, is essential to this process. In the meantime the Boards can legitimately follow the lead of the GSBCA and serve notice that bad faith behavior will be costly, even if lack of due diligence goes, for the time being, unpunished.

The author wishes to make clear that the foregoing does not purport to represent the official view of the Department of the Army, or the Judge Advocate General, or any other DOD component.

Editor's Postscript

As we were going to press, LTC Long sent a note that a recent decision by the CAFC mandated an addendum to his article. It follows now and we thank LTC Long for his conscientiousness:

Unfortunately, a recent decision by the Court of Appeals for the Federal Circuit has thrown the authority of the boards to use dismissal as a sanction into considerable disarray. In ViON[37], the Court held that the GSBCA (and by extension perhaps the other boards) did not have the power to dismiss actions as frivolous as long as the protester had made a claim which had an arguable basis in law or fact. The Court further went on to say that the board lacked the authority to dismiss cases for bad faith behavior, since the statute giving the board authority does not expressly authorize such dismissals, and the board lacks, the Court said, inherent authority similar to the Federal Courts.

The Department of Justice and the Army are considering an appeal of this decision. If not reversed, the decision will subject "government agencies and awardees to the burden of defending all protests that are not in themselves frivolous but are brought as the fruit of improper conduct or for the clear purpose of harassment.[38]

The ViON decision also bears with it, as the board in Synsorex noted, the possibility that the GSBCA and all other boards will lose the power to control their own dockets, including the power to impose monetary sanctions or other disciplinary measures on misbehaving counsel.[39]

FOOTNOTES

1/ The GSBCA, which awards attorneys fees as a matter of course to prevailing protesters, will, on occasion, reduce attorney fee requests substantially if it perceives that the protester used a "shotgun" approach. See U.S. West Information Systems, Inc., GSBCA Nos. 9114-C (8995-P), 9255-C (9103-P), 89-2 BCA 21,774, 1989 BPD 119.

2/ See ViOn Corporation, GSBCA No. 10218-P, 90-1 BCA 22,287; See also, Bullock International, Inc., GSBCA No. 10244-P, 90-1 BCA 22,330.

3/ Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59, 95 S.Ct. 1612 (1975). The Supreme Court held, inter alia, that notwithstanding the "American Rule," the federal courts possess the inherent power to impose attorney's fees upon a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

4/ Nasco v. Calcasieu Television and Ration, et al, 894 F. 2d 696, 702 (5th Cir. 1990).

5/ Id. at 13, 14. This decision may represent something close to the outer limits of the inherent authority doctrine in its particulars. Inter alia, defendant's counsel had twice transferred or removed property in violation of a court order, had filed baseless counterclaims, had listed 100 witnesses and called two, had filed a meritless recusal motion, and a frivolous appeal.

Plaintiff moved for monetary sanctions, which were granted, and the district court, sua sponte, suspended or disbarred defendant's attorneys. In doing so, the court rested on its inherent power. The 5th Circuit affirmed all of the punishment, remanding the case only to have the District Judge take a look at whether he had, in fact, wanted one of the attorneys disbarred in his home state, as well as in Louisiana.

6/ Fed. R. Civ. P. 11, 28 U.S.C.A.

7/ 770 F.2d 1168, 1173-74 (1985).

8/ Fed. R. Civ. P. 11, Advisory Committee Note.

9/ 124 F.R.D. 3, 8 (D.D.C. 1989). Citing Westmoreland, Id. at 1177. See also Rowland v. Fayed, 115 F.R.D. 605, 606-07 (D.D.C. 1987).

10/Westmoreland, Id. at 1177.

11/Westmoreland, Id. at 1174-75.

12/See, e.g., VION, supra; Griffin and Dickson, AGBCA No. 74-104-4, 86-1 BCA 18,601, at 93,311-12; Wordplex Corp., GSBCA No. 8194-P, 86-1 BCA 18,553, at 93,180; Yucca, a Joint Venture, GSBCA Nos. 6768, 7319, 85-3 BCA 18,551, at 92,982 (imposing sanctions against the Government). See also, for failure to cooperate in discovery, Charles G. Williams Construction, Inc. (again imposing sanctions against the Government), ASBCA 33766, 89-2 BCA 21,733, discussed infra.

13/Eagle Management, Inc., ASBCA No. 35902, 90-1 BCA 22,513, 1989 ASBCA LEXIS 484. This case came very close to being a grant of motion for summary judgment, but was not quite. The agency's main witness on the issue of harassment of the contractor failed to show up as directed by the Board. Needless to say, this failure to appear resulted in the Board finding that the contractor's assertions concerning harassment were correct. See also Travelodge of Des Moines, Iowa, Docket No. 512-89-2-1-0, SBA No. 3091, 1989 SBA LEXIS.

14/Yucca, supra, at 98,982. This case, which involved dismissal of contractor claims for failure to answer discovery, includes a fairly lengthy discussion of the inherent authority doctrine. See also, Griffin and Dickson, supra.

15/757 F.2d 557, at 561 (3rd Cir. 1985).

16/See, e.g., Metadure Corp. v. United States, 6 Cl. Ct. 61,32 CCF. 72,755 (Cl. Ct. 1984) at 77,723-24; Jo-Mar Corporation v. United States, 15 Cl. Ct. 602, 35 CCF 75,571 (1988); Griffin and Dickson v. United States, 16 Cl. Ct. 347 (1989). All three of these Claims Court cases involve upholding dismissal sanctions rather than monetary sanctions. However, as the Engineering Board noted, "[t]he assessment of a monetary penalty is a less drastic sanction than dismissal," The WM. Powell Company, EBCA 341-10-85, 86-3 BCA 19,253 at 97,378, and thus if the boards have the authority to impose the more drastic sanction they surely have the authority to impose the lesser. In any event, none of the Claims Court cases limits itself to the sanction of dismissal - all three clearly stand for the proposition that the board's inherent authority for purposes of docket management is coextensive with that of the federal courts.

17/GSBCA No. 8558-P, 86-3 BCA 19,075.

18/AGBCA No. 86-312-1, 87-1 BCA 19,505.

19/EBCA No. 341-10-85, 86-3 BCA 19,210, on reconsid. 86-3 BCA 19,253. This is the only Board known to have actually imposed monetary sanctions against a litigant.

20/Id. at 97,378.

21/ Id. at footnote 4.

22/Turbomach, ASBCA No. 30799, 87-2 BCA 19,756, at 99,953.

23/Id. at 99,954.

24/ASBCA No. 33766, 89-2 BCA 21,733.

25/Supra, at 109,249.

26/Id. at 109,250.

27/See LTV Aerospace Defense Company, ASBCA No. 37571, 89-3 BCA 27,249, at 111,820, in which the Armed Services Board cited Turbomach, and stated . . . Appellant cites the more recent Claims Court cases [citation omitted] in support of its contentions that we may award attorneys fees as a sanction. Since we do not feel that such a sanction is warranted by the facts presented, we do not choose, in the present matter to revisit the question of our jurisdiction to make such an award (emphasis supplied).

29/See, e.g., Southwest Marine, Inc., DOT CAB Nos. 1497, 1577, 1645-1666, 1687, 1704-1725, 86-2 BCA 18,773; Shorthaul Trucking Co., PSBCA No. 1046, 84-1 BCA 17,012.

30/GSBCA No. 8496-C (8372-P), 86-3 BCA 19,129.

31/447 U.S. 752, 765-67 (1980).

32/Supra at 96,702, 96,703.

33/ GSBCA No. 8316-P, 86-2 BCA 18,882.

34/GSBCA No. 10056-C (10010-P), 1990 BPD 2, 90-1 BCA 22,341. This decision includes a lengthy and excellent discussion of the inherent authority doctrine generally, and its applicability to Boards in particular.

34/ Supra, at 112,282.

35/Id. at 112,284. One reason for the GSBCA's apparent willingness to go one step ahead of the other Boards of Contract Appeals may be the fact that protests before that Board, if timely filed, automatically invoke suspension of the procurement. Moreover, all such protests, which involve oral and written discovery, full evidentiary hearings, and post hearing briefs, must be completed 45 working days (usually about 64 calendar days). Another reason may be that every time an agency loses a protest, it must pay automatically attorneys fees as determined by the Board. In other words, a losing agency is assessed the equivalent of Rule 11 monetary sanctions whenever a protest is sustained, although the standard, is of course, neither bad faith nor "due diligence" but purely statutory.

36/Id. at 11,282, 283.

37/ VION Corp. v. U.S., 1190-90, Slip. Op. at 6 (C.A.F.C. June 25, 1990).

38/ See Synsorex, GSBCA 10642-P, Slip. Op., at 7 (GSBCA June 26, 1990).

39/ Synsorex supra, at 4, n.4.

AUDITING:

It's Not What You Think

by Peter A. McDonald

B.S., M.B.A., C.P.A., J.D., Esq.

An audit is not a product, as many attorneys believe, but the verification by an independent party of financial data by a company in its financial statements or in its claims. Auditors render their professional judgment whether the contractor's financial statements are materially misstated, i.e., whether its accounts are substantiated by the contractor's corporate and financial records. In the private sector, an auditor is an employee of a C.P.A. firm, and a C.P.A. is fully responsible for the audit report that is made (his license rides on it). In the Federal government, most audits are done by the Defense Contract Audit Agency (DCAA), whose employees are usually not C.P.A.'s and who may or may not have a degree in accounting.

An audit is not a product, as many attorneys believe, but the verification by an independent party of financial data by a company in its financial statements or in its claims.

In any audit, an auditor applies his best professional judgment to determine the level of confidence he has in the contractor's records and accounting system. Larger businesses have internal auditors who ensure that the corporation's internal controls operate effectively. Internal control is a system of checks and doublechecks that seek to diminish the opportunity for fraud. Because internal auditors (who may or may not be C.P.A.s) work for and report to company management, they do not have the necessary independence to audit the company's own financial statements. However, outside auditors know that corporations with an internal audit program have records that are more reliable than those without such systems. For this reason, auditors can and do place greater reliance on the records and accounting system of a company with internal auditors. This is just one (albeit significant) factor that auditors consider in deciding on the degree of reliance. Other factors are the nature of the business being audited, his experience with that company, the sales volume and geographical extent of the company's operations, its accounting policies and procedures, and so on.

To dispel one widely held myth, an auditor rarely reviews each and every item in a contractor's inventory, nor does he always inspect each and every entry in its books (such audits are sometimes referred to as "100% audits"). The major constraining factors in any audit are time and money. The more time consuming an audit is, the more it will cost, and the more detailed an audit is, the more time it consumes. Accordingly, to evaluate more data in less time, auditors use statistics to verify a contractor's representations. The statistical analysis techniques are similar to those used in quality assurance, where items are accepted or rejected based on an evaluation of a representative sample. In some cases, the professional judgment exercised by an auditor in the selection of a sample's size or characteristic can be attacked.

Suppose that the auditor determines that he cannot rely on the company's records. His level of confidence is therefore low. Accordingly, the auditor knows that his examination must encompass a large number of items, but of course time and expense prohibit him from examining them all individually. The statistical analysis techniques are similar to those used in quality assurance, where items are accepted or rejected based on an evaluation of a representative sample. Specifically, a portion of the total population are examined against pre-established criteria and either accepted (meet the criteria) or rejected (do not meet the criteria). In the quality assurance arena, if the number of items rejected in a sample exceeds a predetermined number, then the total population of items is rejected. When this situation occurs in an audit, however, the auditor performs more detailed testing of the particular account to ascertain what level of confidence (if any) can be placed in the company's documents. An auditor does not apply the same percentage of

error to each account because he knows that some accounts have more errors than others. For example, the cash account is normally closely watched and therefore should have very little error in the stated amount. Inventory, however, may be located at several different sites or be in transit, and a company's recordkeeping methods may be inefficient. The inventory account should consequently have a larger amount of error that the cash account. In a worst case scenario, the auditor's professional judgment might be an adverse opinion, which is an audit report that states the company's financial statements do not fairly represent the amounts set forth in their records.

Recall that audits occur so auditors can determine in their best professional judgment whether the financial information prepared by the company is materially misstated. The key word in this sentence is "materially." The definition of materiality according to the Financial Accounting Standards Board (FASB, pronounced FAZ-BEE) is:

The magnitude of an omission or misstatement of accounting information that, in light of the surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement.

The reasonable person should appreciate the elusive nature of materiality. Neither FASB nor the American Institute of Certified Public Accountants (AICPA) will promulgate specific figures to measure materiality because C.P.A.s may mechanically substitute them for the exercise of sound professional judgment. Instead, materiality depends upon the situation. For example, $500 in office supplies could be material to a small business, but is not likely to be material to a large enterprise. Many accounting firms establish parameters for materiality, such as "errors exceeding 8% are material, errors less than 3% are immaterial, and errors between 3% and 8% call for the auditor's best professional judgment in light of the surrounding circumstances." However, such policies do not apply to all audits, and the auditor is always expected to exercise his professional judgment.

At this juncture, it would be helpful to understand certain terms auditors use. All trades and professions have their own peculiar language where ordinary words take on particular meanings, or intend one result and not another. Along these lines, the words "error" and "irregularity" have special meaning to C.P.A.s. An error is an unintentional mistake in the financial records of a company, while an irregularity is intentional. Obviously, an auditor who reports an irregularity to the board of directors is communicating a serious problem about the integrity of the personnel involved (or even company management itself).

When an auditor makes his judgment about materiality, it concerns the total amount of all the errors in all the accounts. The amount of materiality for a particular account is known as the tolerable error for that account. The determination of tolerable errors for each account are tough professional judgments on the part of the auditor and force him to walk a thin line. On the one hand, if the auditor makes the tolerable errors too small, then he is expecting a higher level of perfection in the contractor's records than may reasonably exist. This may cause more audit tests than necessary to be performed. Because more tests are required, the audit takes more time and is thus more costly to the company, and higher audit fees make the auditor himself less competitive against other C.P.A.s. On the other hand, if the auditor makes the tolerable errors too large, he accepts a much lower standard of accuracy in the contractor's accounts and may not detect errors that could affect his judgment of the contractor's financial statements. This increases the auditor's liability exposure to those who rely on his professional opinion.

In addition to the evaluation of a contractor's accounts, analytical procedures, usually performed by the partner assigned to the audit, compare certain financial rations of the company against industry standards to indicate the company's standing with respect to its competitors and to discern trends. The financial information on various industries is compiled and published by several sources (Dunn and Bradstreet, Robert Morris Associates, trade association, and many others). Bank and commercial loan companies rely on this data when evaluating a loan application. The audit includes not only a comparison of a company's financial results with that of its industry, but also figures from previous years.

A ratio analysis of this data could disclose significant trends to an auditor.

Another line of inquiry for the auditor is to contrast the results an auditor expects to obtain with the results he actually receives. Obviously, the greater the disparity in a particular account, the more information the auditor will seek.

In the financial analysis, the auditor's best professional judgment determines whether to render an unqualified opinion on the company's financial statements. That judgment draws upon the auditor's familiarity with both the company and its industry, the results of audit tests and examination, and the auditor's knowledge of the risks inherent in any audit.

On that last point, remember that auditors are not investigators. Criminal conduct, such as embezzlement, may not be detected in an audit because an auditor did not look for it, but then again he is not supposed to. The purpose of an audit is to verify the representations made by management in its financial statements. All sorts of devious schemes have been (an are) used to circumvent an auditor's scrutiny, most of which avoid the internal controls companies use to protect themselves from fraud from within. Those in a company who are aware of its internal safeguards are positioned to get around them, and some have learned from experience that auditors do not check every item in every account. Moreover, even unintentional miscalculations can escape detection, i.e., not every irregularity or error surfaces. Knowledge of the methods used and limits on auditors can lead to a better understanding of what an audit is and what is isn't.

Major Peter A. McDonald, JA, is presently the Staff Judge Advocate at the U.S. Army Tank-Automotive Command, Warren, Michigan. He was previously the Staff Judge Advocate of the 7th Signal Command, Fort Ritchie, Maryland, and prior to that a Trial Attorney at the Army's Contract Appeals Division in Washington, D.C.

THE JUDGE'S CORNER

A Retrospective - Time to Begin Anew

By Paul Williams

Chairman, ASBCA

The Armed Services Board of Contract Appeals (ASBCA), like the other executive department BCA's, has had a long and proud history of service and accomplishment. May 1, 1989 marked the 40th anniversary of the creation of the ASBCA.

There are those who would say that the administrative organizations and procedures for adjudicating government contract claims have evolved over these past several decades, from a sleepy, informal process to an overjudicialized, formal adjudication. I for one do not believe that this characterization of either period is correct. Contemporaneous articles belie these memories of the Board's "good old days." See Shedd, Disputes and Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contemp. Problems 39 (1964), 2 Yearbook of Procurement Articles 1225. Current statistics and operation policies at the BCA's negate these views of today's practices. See ASBCA annual reports.

For all practical purposes, the processing of approximately eighty percent of the appeals on the ASBCA's current docket will parallel the processing of most of the appeals handled by our predecessors. Articles and lectures, long before the Contract Disputes Act, extolled the need and listed the techniques for shortening hearings. I suspect that similar articles will continue ad infinitum. Yesteryears' struggles were fraught with delays and disruptions caused by a continuous stream of jurisdictional disputes which defined the coverage of remedy granting clauses. Those activities were but a preview of coming attractions. Are today's seemingly never ending new twists faced by board members in determining which certifications properly fit under the umbrella of the Contract Disputes Act requirements any different in their impact on the Board's resources?

Perceptions of the Board's day-to-day procedures are often gleaned from articles written in a limited number of legal publications. We in the government contract business, like mem-

bers of any other narrow specialty, tend to a parochial group. Unfortunately, the overwhelming majority of articles relating to the Board's activities are written by individuals who have little, or no, involvement with the typical appeal on the Board's docket. Most articles deal with the large appeal and other "glamourous" subject matters. Conclusions drawn from these articles, while generally scholarly and accurate, may have the unintended effect of creating misperceptions regarding the Board's daily activities. To fine tune the system based on these misperceptions, would cause more harm than good.

There is no question that the Board, its jurisdiction, procedures, and personnel have undergone significant changes during the last several decades. Even a general review of these changes is surprising as to the number and breadth of coverage. The "Disputes" clause, the cornerstone of the Board's jurisdiction, has evolved to provide the contractor the right to file pleadings, be heard, and to offer evidence in support of an appeal. This clause and its attendant listings of the parties' rights has undergone major restructuring, ranging from the choice of forum, the number of days permitted to file an appeal, the elimination of the necessity for exhausting one's administrative remedy to the technical definition of a claim, with its need for certification signed by a proper party.

Currently, the Board has appeals at the Claims Court (Wunderlich Act), the U.S. Court of Appeals for the Federal Circuit (Contact Disputes Act), District Courts (Maritime appeals) and a regional circuit court (probably an erroneous choice of forum). Occasionally, unlike the old days, an appeal from a Board decision is a Government appeal. The subject matter of the Board has expanded from resolving disputes "arising under the contract" to include disputes related to, or arising "outside," the contract. While appeals based on theories of reformation, rescission or breach of contract will not be a significant number in relation to the number of appeals on the Board's docket, the problem of the fractionalization of remedies has for the most part been resolved. The power of the Claims Court to transfer cases to or from the Board, which occurs approximately a half dozes times per year, also assists in consolidating all disputes under one contract in one forum. The source of precedents binding on the boards has changed as well as the method of paying judgments, including the obligation to pay interest on contractor claims. The dark clouds of bankruptcy and fraud and criminal investigation, while not new, continue to have their impact on the efficient and timely resolution of disputes. Hopefully, the recent intensity of these troubling matters has peaked.

Government claims are now required to be the subject of a contracting officer's final decision. The law regarding Government discretionary actions appears to include a trend which may subject these actions to a test including "reasonable basis and good faith" standards. The jurisdictional roles of other agencies, such as GAO, Department of Labor, and the Small Business Administration have been more clearly defined in relation to the contract claim dispute process.

Members of the boards continue to see their role as independent decision makers whose function is to offer an opportunity for a full and fair hearing, if material facts are in dispute, and to decide disputes based on the record made before them and in accordance with the provisions of the contract and applicable law and regulations. Administrative judges are acutely conscious that, for all practicable purposes, they afford either party its only opportunity for its "day in court." Judges are particularly cognizant of the need, particularly when faced with a small contractor unrepresented by counsel, of having an opportunity to present its facts without interference by undue legal technicalities.

Judges are taking a more active management role in the processing of the appeals on their dockets. When appropriate, they hear entitlement only, set firm schedules for scheduling discovery and other activities, limit the number of days of hearings, the number of witnesses and the scope of the issues. The judges, particularly when requested by the parties, are participating actively in encouraging settlements.

The last several decades have witnessed numerous changes in the process of resolving contact disputes. Were these changes a part of the natural evolution of the board processes? Were these changes in response to the ligation environment at the time of change? So often, we react as opposed to devising a well conceived plan to improve the process. Have these

changed served their purpose well? What is the current environment as viewed from the perspective of making additional changes? Should these changes be procedural or substantive? Should some of the changes be a return to some of our "old ways"? Where do we want to be in five years? Are we the tail wagging the dog? Who has the authority and the will to address and make any appropriate changes? There is a natural tendency to continue with the familiar and with what is comfortable — the good, the bad, and the snugly. Do the judges retain needless security blankets? What does the Board do well? What does the Board do poorly? Are the perceptions of the Board accurate? If not, how can they be changed? Is it important to change misperceptions? Is it time for bench decisions to be the rule rather than the exception? What kind of training is needed by the bench and the bar? These questions need to be discussed.

I anticipate that the Boards of Contract Appeals Bar Association will fill a wide gap in the literature catering to the practical needs of the bench and the bar and will open a necessary line of communication between the judges and the practitioners to improve the disputes resolution system. Knowing a good many of the initial members of the organization and their desire to "do good," we can't miss. Let's get on with it!

Comings and Goings of BCA Bar Association Members

by Sanford W. Faulkner

Chairman, Membership Committee

Ronald A. Kienlen, President-Elect of the BCA Bar Association, has been appointed to the Armed Services Board of Contract Appeals. Judge Kienlen was formerly Deputy Chief Trial Attorney, Contract Appeals Division, Department of the Army.

James F. Nagle has joined the firm of Oles, Morrison & Rinker in Seattle, Washington. Mr. Nagle has recently authored a book, published by the American Bar Association Press, entitled How to Review a Federal Contract and Research Federal Contract Law.

Lieutenant Colonel Jose Aguirre has been named Chief, Contract Law Division, The Judge Advocate General's School, U.S. Army, in Charlottesville, VA.

Clifford D. Brooks has joined the firm of Spriggs and Holingsworth in Washington, D.C.

John J. Nichols has joined the Corporate Law Department, Government Electronics Group, Motorola, Inc. in Scotsdale, AZ.

Charles P. Hovis, former member of the Armed Services Board of Contract Appeals, has become of counsel to the firm of Rives and Peterson in Birmingham, AL.

Colonel Robert L. Schaefer (U.S. Air Force Ret.), has been named Counsel, Missile Systems Group, Hughes Aircraft Company, Canoga Park, CA. Mr. Schaefer was formerly Chief Trial Attorney, Department of the Air Force. **Anthony P. Underwood**, has been named Director of Contracts, Industrial Electronics Group, Hughes Aircraft Company, Rancho Santa Margarita, CA. **Raymond C. McCann** has joined the General Counsel Office, Hughes Aircraft Company, Los Angeles, CA.

Please send your "Comings and Goings of BCA Bar Association Members" to 1700 Financial Center, 505 North Twentieth Street, Birmingham, Alabama 35203-2607.

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Directory Of BCA Judges' Direct Dial Telephone Numbers

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Skyline Six, 7th Floor, 5109 Leesburg Pike
Falls Church, Virginia 22041-3208
Commercial: (202) 756-8500
Autovon: 289-8500

RECORDER'S OFFICE

Adamkewicz, Edward S., Recorder —(202) 756-8502

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