

# The Clause

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A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION



## THE PRESIDENT'S COLUMN

Robert L. Schaefer

HUGHES MISSILE SYSTEMS

It is with a great sense of anticipation that I assume the Presidency of the BCABA. We have come a long way in the few years since our Association was founded in 1989, but even greater challenges are before us. I would like to use this column to share a few goals for the BCABA during the year ahead. In each column to follow we can share our progress. I hope you, the members, will accept this open invitation to comment directly to me on how you feel about the various programs proposed and to suggest ideas of your own.



But before addressing the future, a few words of thanks. We have been most fortunate to have highly capable and dedicated members who have kept the BCABA focused and active in achieving the purposes of the BCABA and the needs of our members. We owe Marcia Madsen a hearty thanks for her forward-looking leadership this past year, and there is no doubt that Pete McDonald is a driving force in our Association as Chair of our Publications Committee and editor of "The Clause." He has worked long and hard, but not without humor, to assure we have a first-class publication and the ability to communicate with our members.

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## EDITOR'S CORNER

Peter A. McDonald

DELOITTE & TOUCHE

[Standard disclaimer.]

[Above average disclaimer.]

I enjoyed the Annual Meeting, up to the time that next year's president-elect was announced. I still harbor a grudge about the way COL Porter used to boss me around when I was in the Army (I hated how he used to come up and say, "You missed a spot.") What I should have done at the meeting was to protest his election. He won the president-elect position with the unanimous vote of those present, but there were 2,674 write-in votes for Pete McDonald to be "Emperor Maximus." Unfortunately, all of these ballots, which were on *authentic* Deloitte & Touche stationery, were declared invalid due to so-called "voting irregularities" (picky, picky). As we were leaving the Annual Meeting, COL Porter demonstrated that his election victory did not affect his regard for me. He asked if I still had that old mop... (!!)

On the serious side, the articles in this issue mirror the trend toward arbitration (and other ADR techniques) as government contractors gravitate toward less time consuming and less expensive resolutions of contract disputes. Also, Rob Schaefer, our new President, proposes a number of new initiatives in



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Thanks to Carl Peckinpaugh, Chair of our Practice and Procedures Committee, the BCABA has responded to some of the vital interests of our members. His committee has sponsored the highly successful focus groups and have, among many other things, worked with the ABA Section of Public Contract Law to recreate the Trial Preparation and Advocacy in Federal Procurement program. Barbara Wixon, Annual Committee Chair (another outstanding effort this year) and Ty Hughes, Legislation and Regulation Committee Chair, have also served the BCABA with distinction. Finally, our officers and Board of Governors have provided exceptional imagination and support. And to the many others, too numerous to mention here, who have given of their time and resources to the BCABA, your contributions have not gone unnoticed and are sincerely appreciated.

The challenge before us is to continue membership growth while we solidify our organizational structure. We should periodically revisit the purposes of the BCABA to assure that our programs are meaningful to our members. The following initiatives should keep us pointed in the right direction:

1. The Association's Constitution should be amended to establish the "Practicing Associate" as a new class of membership. This nonvoting, dues-paying membership category would be for non-attorneys who assist attorneys and judges in their practice with the boards of contract appeals. The non-attorney assistants are critical to the contract appeals process. We can help them grow professionally while they help the BCABA better understand where it can serve best.
2. Increase our training offerings. Ty Hughes has agreed to organize a series of mini-programs, and Robert Moore has been appointed Chair of the Trial Preparation and Advocacy in Federal Procurement

Committee. He will coordinate with the ABA and assure the Program is a success. A special thanks to Craig Clarke who created the case to be studied in this year's Program. Dave Metzger has accepted the Chair of the Annual Meeting Committee and will have oversight of both the educational program and physical arrangements.

3. Creation of a Registry of Attorneys who will represent clients before the boards of contract appeals. Although not an endorsement of specific attorneys, it could serve as a starting point for *pro se* appellants seeking representation. Jeff Stonerock will chair the Attorney Registry Committee.
4. Publication of a BCA Practice Manual which is currently being organized by the Practice and Procedures Committee.
5. Implement a feasibility study and, if appropriate, create a certification program which would identify those having the qualifications to practice before the BCAs. Steven Porter, President-elect, and Pete McDonald, Publication's Committee Chair, will be heading this task force.
6. Establish liaisons with the various boards of contract appeals and the BCA Judges Association. We can all benefit from open lines of communication.
7. Establish a Membership Committee to assure we have members' input on membership issues and to better understand how we can more effectively recruit new members.
8. Establish a Finance Committee to focus on dues policies and the finances of the Association. This committee will be chaired by Jim Angle, our new Treasurer.
9. Assure that the Association is a positive influence in the ongoing reorganization of government process as it impacts the boards of contract appeals and

the practice before the boards of contract appeals.

10. Foster an environment of cooperation and enthusiasm within our membership and between the BCABA and the boards of contract appeals. We all need to share a common vision if the BCABA is going fulfill its purposes (set forth below).

The exciting part of these ten goals is that our members are already stepping forward to assure they are realized - attorneys and judges, working side by side, will enhance the practice of law before the boards of contract appeals. If you would like to be recognized as part of the solution for any deficiencies you perceive in the boards of contract appeals process, please contact me or Steve Porter.

#### CONSTITUTION OF THE BCA BAR ASSOCIATION

Section 1.2 Purposes. The purposes of this Association are as follows:

1. To support and improve the administration of justice in the Boards of Contract Appeals of the Federal Government;
2. To improve the proficiency and promote the highest standards of integrity and ethics in the practice of law before the Boards of Contract Appeals;
3. To promote improved communication between and among practitioners before the Boards of Contract Appeals and the judges of the Boards of Contract Appeals;
4. To provide, support and facilitate continuing legal education in government contract law and in practice before the Boards of Contract Appeals; and
5. To undertake such activities as are appropriate to enhance the effectiveness of the Boards of Contract Appeals.

his column that all members should consider. One that has already stirred a good deal of discussion is having the BCA Bar certify attorneys as specialists in government contract law. Another is to have the BCA Bar maintain a registry of attorneys for referrals to *pro se* appellants. I urge all of you to let the BCA Bar officers know your views on these initiatives.

Finally, Barbara Wixon originally captioned her report of what occurred at the Annual Meeting, "Pete McDonald Flees Angry Mob!" (I found it necessary to make a few editorial changes). On that point, there was the usual collection of interesting articles not accepted for publication: "Parrot Inherits Fortune!," "Catcher's Mit Found on Mars!!," and "Congress Defines a Claim - Judges Ecstatic!!!"

And remember people, don't take all this government contract law stuff too seriously.

#### J. KENT HOLLAND WINS WRITING AWARD

The 1993 BCA Bar Association Writing Award went to J. Kent Holland, Jr., of Wickwire Gavin. He authored "EPA Final Guidelines for Contractor Indemnification," which appeared in the last issue.

The five-member Award Committee consisted of two BCA judges (different Boards), two law firm partners (different firms), and one corporate counsel. They considered all articles appearing in last year's issues but, by policy, submissions from regular contributors were not considered.

The award was formally presented to the author by Marcia Madsen, BCA Bar President, at the annual meeting on October 26th.

Because the Award Committee's vote was so close (3-2), the second place authors are also to be highly commended. Ron Schechter and Susan Cassidy at Arnold & Porter submitted the Feature Article in the July issue entitled, "Contractor Claims: The Procedural Morass Continues."





## TOPICAL BIBLIOGRAPHY

by  
Jim Nagle

OLES, MORRISON & RINKER

When most people think of the Boards of Contract Appeals, they think of post-award disputes. However, since the Competition in Contracting Act granted bid protest jurisdiction to the General Services Board of Contract Appeals (GSBCA), a large portion of that Board's time is spent hearing protests. Lately, it seems that best value procurements have been getting more than their share of attention at conferences, in the literature, and most importantly, in protests at the GSBCA and General Accounting Office.

To facilitate research into this evolving topic, I have compiled a short bibliography of pertinent articles. I have included articles on specific topics that are frequently included in best value procurements such as cost realism and evaluating past performance. With that exception, all the other articles are specifically identified as best value procurement/contracting/source selection.

Lieg. Cost Realism: A Critical Factor in the Procurement of Professional and Technical Services, Contract Management, July 1993, at 4.

Hernandez. Best Value Contracting, TIPS, National Contract Management Association, May 1992.

Webber. Best Value Procurement: What's a Company To Do?, Acquisition Issues, July 1993.

Peckinpugh, Goldstein. Best Value Source Selection - Contracting for Value, or Unfettered Agency Discretion?, 22 Pub.Cont.L.J. 275 (Winter 1993).

Kenney, Sweeney. Best Value Procurement, Briefing Paper, March 1993.

Madden, Coravos. Best Value Procurement, Federal Publications Course Manual, 1993.

Babbin. Winning Best Value Procurements, National Defense, at 37, February 1993.

Edwards. Questions & Answers About Best Value Source Selection, George Washington University, Government Contracts program, June 1993.

Femino. Evaluating Past Performance, The Army Lawyer, April 1989.

## WELCOME NEW MEMBERS

The BCA Bar Association warmly welcomes the following new members:

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## POSTAL SERVICE

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James A. Cohen x2128

**Vice-Chairman:**

James D. Finn, Jr. x2133

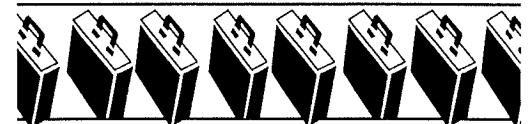
**Judges:**

David I. Brochstein x3385

Norman D. Menegat x2132

**Recorder:**

Olytha E. Martin x2134



## PRACTICE & PROCEDURES COMMITTEE

Carl Peckinpaugh

AKIN, GUMP, STRAUSS, HAUTE & FELD

### EVENTS AND PROJECTS

The Practice and Procedures Committee continues to meet on a monthly basis. During the November meeting, the Committee will be having the third of its periodic "Focus Group" sessions.



This session will focus on appropriate attorney conduct in Board proceedings. The session will include a discussion of how to deal with uncooperative counsel, *ex parte* contacts, and *pro se* litigants. It will also address the issue of whether the Boards have sufficient powers to sanction perceived attorney misconduct or failure to follow Board orders.

A primary area of discussion will be whether it might be desirable to have a Code of conduct to which attorneys would agree to adhere when admitted as counsel in a Board case. The idea is to establish a set of common goals to which counsel would agree to strive. It would not, however, include a disciplinary procedure for failing to meet the goals.

The Committee will not be meeting in December. For planning purposes, the meeting schedule for 1994 is as follows: January 25, February 22, March 29, April 26, May 31, June 28, July 26, August - no meeting, September 27, October 25, November 29, and December - no meeting.

Committee meetings are held at the offices of Akin, Gump, Strauss, Hauer & Feld, L.L.P., 1333 New Hampshire Avenue, N.W., 5th Floor, Washington, D.C. 20036. Please call

Connie McVay at 202-416-5410 at least one day before if you plan to attend. Lunch is provided for a charge of \$8.00.

If you have any questions, please call me at 202-887-4521, or Donald Suica at 202-401-4062.

## TREASURER'S REPORT



Laura Kennedy

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON



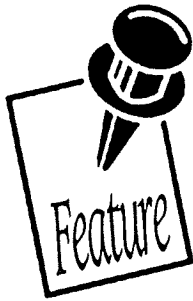
BOARDS OF CONTRACT  
APPEALS BAR  
ASSOCIATION

### STATEMENT OF FINANCIAL CONDITION FOR THE FISCAL QUARTER ENDING 30 SEPTEMBER 1993

Beginning Cash Balance, 30 June 1993	\$7,218.33	
Fund Income:		
Membership dues <sup>1</sup>	5,200.00	
Total Fund Income		+ 5,200.00
Subtotal		12,418.33
Fund Disbursements:		
Newsletter (Summer)	2,034.54	
June BCA Bar reception (D.C.)	447.00	
Postal Service <sup>2</sup>	150.00	
BCA/ABA reception (San Diego)	247.07	
Total Fund Disbursements		<u>2,878.61</u>
Ending Cash Balance, 30 September 1993		\$9,539.72

<sup>1</sup>This includes all dues paid up to the annual meeting. Approximately half of the membership have not yet paid their annual dues, but payments continue to come in daily.

<sup>2</sup>The IRS has determined that we are a non-profit association. Accordingly, we applied to the U.S. Postal Service for a non-profit association mailing permit. Our application was denied on the grounds that the Postal Service ruled we were a "business league." A timely appeal of that determination was made, and we expect to receive their decision sometime in the next few weeks.



## THE ARBITRATION ALTERNATIVE

by

Daniel A. Kile, Esq.

CENTER FOR BUSINESS DISPUTE RESOLUTION



ON NOVEMBER 15, 1990, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT<sup>1</sup> (ADRA) SWEEPED AWAY THE ROADBLOCK TO USING BINDING ARBITRATION FOR GOVERNMENT CONTRACT DISPUTES - AT LEAST UNTIL OCTOBER 1, 1995<sup>2</sup>.

Two years remain to test the arbitration alternative. At present, however, only the statutory language is in place. There are still no government-wide arbitration rules for federal contracts, code of ethics for arbitrators, or an arbitrator's manual. These three building blocks need to be in place for the federal government to institutionalize and adequately rate the benefits of the arbitration alternative.

Among the criteria for good business is saving resources and providing service. Arbitration meets both. A survey by Deloitte & Touche<sup>3</sup> clearly shows that arbitration and mediation are superior methods of dispute resolution when compared to litigation. Arbitration and mediation definitely save money and time, which explains why arbitration is exploding in the commercial world.

The survey confirms that dollar savings range between eleven and fifty percent<sup>4</sup>. Why, then, are arbitration and mediation not used more? The survey says people do not use it because of "fear - a lack of familiarity with the process and a sense that the rules are still uncertain and the results are unpredictable<sup>5</sup>."

In the commercial world, this fear is diminishing as the use of arbitration becomes more commonplace. There is a greater acceptance and understanding of arbitration, and there is a large body of substantive and procedural law. When contracting officers and their staffs become more familiar with arbitration, their fear will diminish also.

Besides the traditional collective bargaining issues, arbitrators today are deciding very complicated issues: RICO<sup>6</sup>, anti-trust claims<sup>7</sup>, fraudulently induced contracts<sup>8</sup>, punitive damages<sup>9</sup>, equitable relief<sup>10</sup>, age discrimination<sup>11</sup>, racial and sexual harassment<sup>12</sup>, to name a few. Surely, arbitrators are capable of deciding issues involved in federal government contracts.

This article will summarize the arbitration process and point out the major differences from traditional litigation. Finally, it will raise issues that the federal government needs to resolve concerning its arbitration practice.

The basic legal framework for any arbitration is the contractual agreement itself. Supplementing the contract is the United States Arbitration Act, also called Federal Arbitration Act (for maritime transactions and contracts evidencing a transaction involving commerce among the States, District of Columbia, Territories or foreign nations)<sup>13</sup>; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>14</sup>; the Inter-American Convention on International Commercial Arbitration<sup>15</sup>; state arbitration statutes; and common law. More than half the states and the District of Columbia use The Uniform Arbitration Act of 1955 as their model. For federal government contracts, add ADRA to the framework.

By definition, arbitration is the submission of a dispute to one or more impartial persons for a decision on the submitted issue. Arbitration may be either voluntary<sup>16</sup> or mandatory.



Under ADRA, it is always voluntary, and the parties may limit the decision to certain issues<sup>17</sup>. ADRA explicitly gives agencies broad discretion to decide whether to arbitrate or use any other method of alternative dispute resolution (mediation, mini-trial)<sup>18</sup>. Rather than proscribing the use of alternatives in certain situations, ADRA tells agencies that they should "consider not using" alternatives when:

- (1) they need a precedent;
- (2) there are significant questions of policy;
- (3) they need a consistent policy;
- (4) the decision will significantly affect non-parties;
- (5) they need a full public record; or
- (6) there are changing circumstances requiring continuing jurisdiction<sup>19</sup>.

Even if any of these criteria are present, a balancing test must first be done<sup>20</sup>. Thus, most government contract disputes are suitable for binding arbitration. The government's decision whether or not to arbitrate is not judicially reviewable<sup>21</sup>, except by a non-party adversely affected by an arbitral award<sup>22</sup>.

The arbitration process is closely akin to the judicial process, but less formal. It takes place in a private setting with confidentiality<sup>23</sup>. The impartial person, called a neutral, reviews evidence and hears arguments. Legal precedent is not binding on a neutral, and the rules of evidence do not apply. The arbitrator issues either a final and binding decision or a non-binding advisory decision.

As stated above, arbitration gets its life from a contractual agreement. The parties can agree either in advance or after a dispute arises to submit to arbitration instead of litigation. This also is true under ADRA<sup>24</sup>.

Some may argue that the U.S. Court of Federal Claims cannot be ousted of its jurisdiction because ADRA did not amend its section in the Contract Disputes Act<sup>25</sup>. This question gets more complicated because estoppel does not apply<sup>26</sup>, unlike in non-federal contract cases<sup>27</sup>. However, this argument should fail on statutory construction grounds,

and because of the strong preference for arbitration by the U.S. Supreme Court.

If the government contract does not have an arbitration provision, the contracting officer (who has settlement authority or is specifically authorized to use arbitration) could suggest arbitration after making a final decision<sup>28</sup>. If agreeable to the contractor, the contracting officer needs to issue a modification setting forth the subject matter for the arbitrator<sup>29</sup>, which should include the arbitration rules issued by the agency. If there are no rules, then counsel needs to draft them. Here is a suggestion: "Incorporating by reference the Administrative Dispute Resolution Act, 5 U.S.C. 581-591; U.S. Arbitration Act, 9 U.S.C. 1-15; and American Arbitration Association Commercial Arbitration Rules (May 1, 1992), Rule Nos.: [insert applicable rules], that are not inconsistent with or violate<sup>30</sup> limitations imposed by Federal statute."

The agreement to arbitrate should contain a provision about the mechanics of how to begin the arbitration. It should require a brief statement of the matter in dispute, the amount involved (if any), the remedy sought, and the hearing locale requested. Further, it should specify whether a respondent's general denial precludes the assertion of affirmative defenses. If a party asserts a counterclaim, the agreement should require a statement setting forth the nature of the counterclaim, the amount involved (if any), and the remedy sought. The agreement should contain a provision concerning changes in the claim or counterclaim. Normally, after appointment of the arbitrator, there are no changes without his or her consent. By incorporating the American Arbitration Association's Rules, you automatically have these provisions with a time line, except the general denial limitation on defenses.

Both parties need to provide (if there is a preexisting agreement to arbitrate) or submit (if there is an agreement to arbitrate after a dispute arises) all of the above information on a single page, plus claim certification for federal contracts<sup>31</sup>. This is a major change from

litigation with its lengthy complaints and answers.

The next step is selecting the neutral(s). The agreement should contain a method of selecting the arbitrator. The parties may either choose from a list, or select an arbitrator who then selects the neutral. All arbitrators have an

equal voice and vote, and decisions are by majority vote.

ADRA spells out in broad terms who can be a neutral<sup>32</sup>. This selection is the key to a successful arbitration. A neutral has broader powers than a judge and is rarely subject to review. The parties should select an individual that displays honesty, integrity, impartiality, and basic competence in the subject matter. Of course, the neutral must be free from any conflicts of interest<sup>33</sup>. Those who subscribe to the American Arbitration Association's Code of Ethics voluntarily disclose any remembered relationships. Finally, it is helpful if the individual has experience or training as an arbitrator or judge.

After selecting the arbitrator, a party may need provisional relief. Provisional relief takes the form of an injunction, temporary restraining order, or seizure to maintain the existing conditions. Normally, the party will seek the provisional relief from the courts. While The United States Arbitration Act and ADRA are silent on this issue, most courts permit provisional relief pending arbitration. Sometimes the party even asks the arbitrator to grant it. The agreement to arbitrate should specifically cover this situation. Arbitrators operating under the American Arbitration Association's Rules believe they have powers of provisional relief<sup>34</sup>. If a court agrees that the arbitrator has those powers, it will enforce the arbitrator's order except in very limited circumstances. On provisional relief matters, the arbitrator is essentially acting like an U.S. District Court judge.

Under The United States Arbitration Act, arbitrators have the power to subpoena persons as witnesses or to produce documents<sup>35</sup>. Enforcement of the subpoena is in the U.S. district courts. ADRA limits the arbitrator's subpoena power to when the agency has it<sup>36</sup>. The government attorney needs to clarify this subpoena authority, and note it in the arbitration agreement.

If needed, there will be administrative conferences and preliminary hearings<sup>37</sup>; larger

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## NEW BCA BAR ASSOCIATION OFFICERS

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### President-Elect

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### Treasurer

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complex cases will always have them. One word of caution is in order. A party must never engage in *ex parte* communication relevant to the merits with the arbitrator at anytime, unless the parties agree otherwise. If unauthorized *ex parte* contact occurs, severe sanctions follow. One sanction is resolving the claim against the violating party<sup>38</sup>. Conferences and preliminary meetings may be by telephone, computer or other electronic means.

In complex cases, the arbitrator will request a brief written statement (maximum five pages), setting forth each party's claim. The arbitrator will encourage the parties to specify the dollar amounts involved, and stipulate to uncontested facts. The arbitrator will have the parties commit to a document and information exchange schedule. Listing witnesses with outlines of expected testimony is a minimum requirement. Failure to list a witness will normally prevent that witness from testifying except in limited circumstances. Another requirement is identifying and exchanging exhibits before the evidentiary hearing. Also, the parties must estimate realistically the length of the hearing, so a prompt hearing schedule can occur. The schedule may include weekends and evenings. Lastly, there may be a post-hearing discussion on briefs and their schedule.

The arbitrator has wide latitude in discovery issues. The parties will not be subject to or have available full-blown litigation like discovery. Rather, the arbitrator will permit depositions only in rare instances, such as future unavailability of the witness or for just cause. The arbitration discovery process results in major savings of resources, and is a key difference when contrasting it to litigation. The parties by agreement can always vary the discovery process to provide for more litigation-like discovery, but that defeats the goal of prompt hearings and decision, which are the benefits of arbitration.

ADRA has rules for hearings that parallel the hearing rules for commercial arbitration<sup>39</sup>. They contain the traditional hallmarks of infor-

mality and expeditiousness<sup>40</sup>. They also make use of modern technology. For example, ADRA will permit replacing meeting at the traditional hearing room by telephones, television, computers, and other electronic means<sup>41</sup>. The arbitrator sets the time and place for the hearing<sup>42</sup>, and has authority to regulate its course and conduct and to administer oaths<sup>43</sup>. The making of a stenographic record of the proceedings occurs only when a party arranges for it and provides a copy to the other party and to the arbitrator<sup>44</sup>. Because of limited appeal rights, arbitrators discourage making a verbatim record as a waste of money. The above rules result in major savings.

The hearing opens by the arbitrator making a brief statement outlining the procedures and ground rules. The arbitrator, who previously executed his or her oath before a notary, swears the other arbitrators, parties and witnesses. The arbitrator acknowledges the reading of any submitted material and summarizes the issues, claims, and counterclaims.

A party may request sequestration of witnesses. All parties present their positions, and the arbitrator(s) decides. If sequestration occurs, the parties still have present at the hearing their attorney and experts besides themselves.

The claimant goes first with a brief opening statement followed by the respondent. Next come the claimant's witnesses. Being heard, presenting material evidence, and cross examining witnesses at the hearing is each party's right<sup>45</sup>. The parties will submit any testimony, affidavits, and documentary evidence they want the arbitrator to consider. The arbitrator will receive it unless it is irrelevant, immaterial, unduly repetitious, or privileged<sup>46</sup>. Invariably, almost all evidence is let in because the exclusion of a party's material evidence is grounds to vacate an arbitrator's award<sup>47</sup>. The arbitrator accords all evidence its weight and creditability. This is similar to practice before the Boards of Contract Appeals.

THE NINE MEMBERS OF THE BCA BAR BOARD OF GOVERNORS SERVE STAGGERED THREE-YEAR TERMS. EACH YEAR, THE TERMS OF THREE MEMBERS EXPIRE AND THREE NEW MEMBERS ARE ELECTED TO REPLACE THEM (SEE SECTION 4.5, BCA BAR ASSOCIATION CONSTITUTION). ELECTIONS COINCIDE WITH THE ANNUAL MEETING IN OCTOBER.

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Parties have broad latitude in presenting testimony. Even hearsay comes in, and the arbitrator decides its weight and credibility. The arbitrator will only cut off leading questions when they cross the fine line between the attorney's style and 'feeding lines'. The arbitrator will not receive testimony about previous offers of compromise. Further, the arbitrator will not participate in settlement discussions. After the parties complete their questioning of a witness, the arbitrator may ask clarifying questions.

When there is documentary evidence that is large or unwieldy, such as a computer print-out, the arbitrator will direct the party to summarize it. The taking of judicial notice occurs when appropriate, which speeds up the hearing. Unlike litigation, site visits and inspections by the arbitrator, in the presence of the parties, often occur. If the parties agree, the arbitrator can do it alone, and make a record describing it.

The issues of burden of proof are small because of the arbitrator's broad discretionary powers. Simply stated, the arbitrator must be satisfied. Thus, each side will try to persuade the arbitrator to its point of view. The arbitrator decides all objections and motions after hearing all parties, and their decisions are not reviewable as a rule. ADRA tells the arbitrator to interpret and apply relevant statutory and regulatory requirements, legal precedent, and policy directives<sup>48</sup>. Similar to objections and motions, the arbitrator's decisions on them are not reviewable.

Closing arguments come after all parties have had an opportunity to present their case. Unlike litigation, the respondent goes first, followed by the claimant under the American Arbitration Association's practice<sup>49</sup>. The hearing then moves to the briefing stage. When the arbitrator asks for briefs, they are normally due ten days after the hearing. There are no reply briefs. The closing date of the hearing starts the award time clock. If there are no briefs, the arbitrator closes the hearing, and the award time clock starts immediately.

Again, these differences distinguish arbitration from litigation.

Making the award by the arbitrator<sup>50</sup> is the next step. There are no oral bench decisions. The award must be in writing, and done within the time specified. Failure to meet the time limit is grounds for vacating the award<sup>51</sup>.

Now comes the biggest difference from litigation. Under ADRA, the arbitrator must render a decision within 30 days from the closing of the hearing. An agency's rule or agreement may change the time period<sup>52</sup>. However, once the arbitrator makes the award, the arbitration ends. The arbitrator is *functus officio* (translation: having performed its office; legally defunct)<sup>53</sup>. It also means there will be no rehearings. For claims not exceeding \$50,000, the agency should consider using simpler procedures and a 14-day rule for awards<sup>54</sup>.

In the commercial world, the arbitrator's decision covers only a single page and rarely states reasons. It is clear and definite, leaving no doubt what each party is to do. When requested, it may include a breakout of the items awarded. This is helpful for dealing with subcontractors. The award decides every issue presented, and does not rule on anything outside the scope of the arbitration.

ADRA specifically prohibits awards from including formal finding of facts and conclusions of law<sup>55</sup>. This is a major change from the U.S. Court of Federal Claims' and Boards of Contract Appeals' decisions, and another major time saver. ADRA does require a brief summary of the facts and legal basis for the award<sup>56</sup>. Citing the remedy-granting clause in the contract should satisfy the legal basis requirement. The award should still fit on one page, but no more than two pages. Again, for claims not exceeding \$50,000, an agency should follow the American Arbitration Association's practice of not summarizing the facts or even stating the legal basis.

Stated earlier in the definition of arbitration is a comment that the arbitrator does not need to follow legal precedent. This is the commercial arbitration practice<sup>57</sup>. It developed

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*ADRA spells out in broad terms who can be a neutral. This selection is the key to a successful arbitration.*

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because an arbitrator is not always an attorney. The arbitrator does not research the law; instead he or she will rely on the parties for it. Whether the idea of *no stare decisis* continues under ADRA may be open to question. ADRA states that the arbitrator is to apply legal precedents<sup>58</sup>. The arbitrator cannot ignore it. This should give consistency in government dealings, and avoid arbitrariness in an award.

Taking advantage of the benefits of arbitration, ADRA allows limiting the scope of the award's outcome to specified ranges<sup>59</sup>. Otherwise, the scope under the American Arbitration Association's Rules is very broad<sup>60</sup>. It permits "any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." The arbitrator has immense powers to resolve the dispute and fashion creative remedies. For example, the arbitrator could direct the contractor to redo the work instead of awarding monetary damages. Accordingly, an agency needs to decide in advance whether it will permit an arbitrator to award specific performance, suspension or debarment, punitive damages, RICO<sup>61</sup>, false claims<sup>62</sup>, misrepresentation or fraud damages and penalties<sup>63</sup>, attorney fees<sup>64</sup>, et cetera.

Under ADRA, the arbitrator's decision becomes final and binding<sup>65</sup> thirty days after it is announced. The agency can extend this thirty days by another thirty after giving notice to all parties<sup>66</sup>. During this period, the agency evaluates whether the award does an injustice, or violates limitations imposed by law. If so, the agency vacates the award, and it becomes null<sup>67</sup>. Another key feature of this provision is that an agency can stop arbitration proceed-

ings whenever it chooses<sup>68</sup>. Moreover, this power of vacating an award or ending proceedings is not subject to court review<sup>69</sup>. These provisions strongly protect the government's interests. If an agency exercises this discretion, it must pay the contractor's attorney's fees and expenses that were incurred solely for the arbitration proceedings<sup>70</sup>.

Once the decision is final, it can be enforced<sup>71</sup> or appealed<sup>72</sup>. The decision is neither a precedent nor will it serve as an estoppel<sup>73</sup>. The United States district court for the award locale enforces the decision, or hears its appeal<sup>74</sup>. There are only five grounds to vacate an award<sup>75</sup>: (1) fraud, (2) bias, (3) misconduct by failure to either grant postponement, or accept relevant evidence, or misbehavior that prejudices rights, (4) exceeded or irrationally executed authority, and (5), improper use of arbitration by a federal agency (limited only to non-parties adversely affected). There are just three grounds to modify or correct an award<sup>76</sup>: (1) clear and material miscalculation of figures or description, (2) award upon a matter beyond its scope, and (3) imperfect in form.

The standards of judicial review make it exceedingly difficult to overturn an award. Errors of fact or law are not reviewable. The following statements illustrate the standards: "manifest disregard of the law"<sup>77</sup>; "[m]oreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it"<sup>78</sup>; and "whether it is abundantly clear that the award was obtained through fraud, corruption, or undue means."<sup>79</sup>

There are three key rules for a successful arbitration. Only engage in arbitration with

ethical opponents who have a sincere desire to present openly the dispute to the neutrals. Second, select only top-notch neutrals, and last but not least, avoid clouding the issues with extraneous matters. Instead, marshal and succinctly present relevant evidence.

Agency attorneys have some work to do to make the arbitration alternative work. They need to address the points noted above. Finally, they need to be willing to try something different. Government contractors and their attorneys can move the process along by asking contracting officers to employ arbitration to resolve their disputes. We are wasting everybody's precious resources by resorting exclusively to the litigation process for all issues. For many contract disputes, arbitration is a better method.

## ENDNOTES

<sup>1</sup>5 U.S.C. §§581-593 (general provisions, confidentiality, authorization of arbitration, administrative arbitration); 5 U.S.C. §556(c) (ALJ authority); 9 U.S.C. §10 (arbitration, judicial review); 41 U.S.C. §§604-607 (contract disputes); 29 U.S.C. §173 (FMCS authority); 28 U.S.C. §2672 (tort claims); and 31 U.S.C. §3711(a)(2) (government claims); enacted November 15, 1990 by Pub.L. No. 101-552, 104 Stat. 2736.

<sup>2</sup>Contract Disputes Act, 41 U.S.C. §§601-613 at 605e.

<sup>3</sup>Deloitte & Touche Litigation Services, 1993 Survey of General Counsels, Alternative Dispute Resolution (ADR); Deloitte & Touche, 180 N. Stetson Avenue, Chicago, IL 60601, (312) 946-3227.

<sup>4</sup>*Id.* at 14.

<sup>5</sup>*Id.* at 1.

<sup>6</sup>Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467 (2d Cir. 1991) (upholding a RICO trebling of damages in a private arbitration case).

<sup>7</sup>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1984).

<sup>8</sup>Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

<sup>9</sup>Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063 (9th Cir. 1991); Lee v. Chica, 983 F.2d 883, 887 (8th Cir. 1993)(even if Minnesota law does not allow an award of punitive damages, "when the choice of law provision in an arbitral clause incorporates the rules of the AAA, some circuits have held, and we agree, that AAA arbitrators may grant any remedy or relief including punitive damages." Cf. Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) (enforcing an arbitration agreement's choice-of-law provision is consistent with The United States Arbitration Act); contra., Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976); Fahnestock & Co. v. Waltman, 935 F.2d 512 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 380 (1991), and *cert. denied*, 112 S.Ct. 1241 (1992) (contract did not incorporate AAA Securities Arbitration Rule 43 providing for "any remedy"; thus, the possibility of a different result).

<sup>10</sup>In re Arbitration betw'n Grayson-Robinson Stores, Inc. and Iris Constr. Corp., 168 N.E.2d 377 (N.Y. 1960)(specific performance); arguably also includes injunctions and temporary restraining orders under AAA Commercial Arbitration Rules, Rule 34; see also AAA A Guide For Commercial Arbitrators, p. 20 ("Interim Relief[.] On occasion, a party will request that you grant interim relief to safeguard the subject matter of the

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## DEPARTMENT OF ENERGY

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arbitration, in accordance with Section 34 of the rules. Interim orders may be used for a wide variety of disputes."); normally the parties go to court for prejudgment remedies.

<sup>11</sup>Gilmer v. Interstate/Johnson Lane Corp. — U.S. —, 111 S.Ct. 1647 (1991)(Age Discrimination in Employment Act of 1967).

<sup>12</sup>Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e-2000e-17; Alford v. Dean Witter Reynolds, 939 F.2d 229 (5th Cir. 1991).

<sup>13</sup>The United States Arbitration Act (Federal Arbitration Act), 9 U.S.C. §§1-15.

<sup>14</sup>Id. at Chapter 2, §§201-208.

<sup>15</sup>Id. at Chapter 3, §§301-307.

<sup>16</sup>Supra, Endnote 1 at §585(a)(1).

<sup>17</sup>Id. at §585(a)(1)(A).

<sup>18</sup>Id. at §582(b).

<sup>19</sup>Id.

<sup>20</sup>Federal Administrative Procedure Sourcebook, Statutes and Related Materials, 2d edition, Administrative Conference of the United States, Office of the Chairman, Washington, DC (1992), 230; "Implementing The ADR Act: Guidance For Agency Dispute Resolution Specialists," Administrative Conference of the United States, Office of the Chairman, Washington, D.C., (February 1992), 12.

<sup>21</sup>Supra, Endnote 1 at §591(b)(1).

<sup>22</sup>Id. at 591a and 593; 9 U.S.C. §10(b); the United States district court is limited to deciding whether decision to arbitrate was "clearly inconsistent" with §582(b)'s criteria for appropriate use of alternative dispute resolution.

<sup>23</sup>ADRA places strict requirements on the confidentiality of the process. Id. at §584.

<sup>24</sup>Id. §585(a)(1); but, the government cannot make arbitration a condition of entering into a contract, Id. at §585(a)(3); arbitration is supplementary rather than

limiting other available dispute resolution techniques. Id. at §582(c).

<sup>25</sup>"[instead of appealing to an agency Board of Contract Appeals]. . . may bring an action directly on the claim in the [U.S. Court of Federal Claims], notwithstanding any contract provision, regulation, or rule of law to the contrary." Supra. Endnote 2 at §609(a)(1).

<sup>26</sup>Supra. Endnote 1 at §590(e).

<sup>27</sup>Restatement (Second) of Judgments, §84.

<sup>28</sup>Supra. Endnote 1 at §585(b).

<sup>29</sup>Id. at §585(a)(2).

<sup>30</sup>Supra. Endnote 2 at §607(g)(3).

<sup>31</sup>Id. at §605(d).

<sup>32</sup>Supra. Endnote 1 at §587 that refers to criteria in §583.

<sup>33</sup>Id. at §583(a).

<sup>34</sup>Supra. Endnote §10.

<sup>35</sup>Supra. Endnote 13 at §7.

<sup>36</sup>Supra. Endnote 1 at §588(3).

<sup>37</sup>Under ADRA, the arbitrator derives his or her power to hold preliminary hearings from Id. at §588(1).

<sup>38</sup>Id. at §589(d).

<sup>39</sup>Id. at §589.

<sup>40</sup>Id. at §589(c)(3).

<sup>41</sup>Id. at §589(c)(2).

<sup>42</sup>Id. at §589(a).

<sup>43</sup>Id. at §588(1) and (2).

<sup>44</sup>Id. at §589(b).

<sup>45</sup>Id. at §589(c)(1).

<sup>46</sup>Id. at §589(c)(4).

<sup>47</sup>Supra. Endnote 13 at §10(a)(3).



<sup>48</sup>Supra, Endnote 1 at §589(c)(5).

<sup>68</sup>Id.

<sup>49</sup>American Arbitration Association's "Checklist For AAA Arbitrators," 16.

<sup>69</sup>Id. at §591(b)(2).

<sup>50</sup>Supra, Endnote 1 at §588(4).

<sup>70</sup>Id. at §590(g).

<sup>51</sup>The arbitrator can only exercise his or her power during the time period specified by the parties. An award beyond the time period exceeds the arbitrator's powers. Supra, Endnote 13 at §10(a)(4).

<sup>71</sup>Id. at §590(d).

<sup>72</sup>Id. at §591(a).

<sup>73</sup>Id. at §590(e).

<sup>52</sup>Supra, Endnote 1 at §589(e).

<sup>74</sup>Id. at §§590(d) and 591; Endnote 13 at 9-10.

<sup>75</sup>Supra, Endnote 13 at 10.

<sup>53</sup>There may be some limits to the doctrine of functus officio. Colonial Penn Insurance Co. v. Omaha Indemnity Co., 943 F.2d 327, 331-32 (3d Cir. 1991).

<sup>76</sup>Id. at 11.

<sup>54</sup>"Commercial Arbitration Rules," American Arbitration Association, Inc., 140 West 51st Street, New York, NY 10020, (May 1, 1992), Rules 53-57.

<sup>77</sup>Dictum in Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (overruled by Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)).

<sup>55</sup>Supra, Endnote 1 at §590(a)(1).

<sup>78</sup>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

<sup>56</sup>Id.

<sup>79</sup>Peabody v. Rotan Mosle, Inc., 677 F.Supp. 1135, 1137 (M.D. Fla. 1987).

<sup>57</sup>"Alternative Dispute Resolution In A Nutshell," Jacqueline M.Nolan-Haley, West Nutshell Series, West Publishing Co., 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526 (1992), 124-125.

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## DEPARTMENT OF VETERANS AFFAIRS

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<sup>58</sup>Supra, Endnote 1 at §589(c)(5).

<sup>59</sup>Id., at §585(a)(1)(B).

<sup>60</sup>Supra, Endnote 54 at Rule 43.

<sup>61</sup>Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§1964-1968 (civil RICO provisions).

<sup>62</sup>False Claims Act, 31 U.S.C. §3729.

<sup>63</sup>Supra, Endnote 2 at §604.

<sup>64</sup>Equal Access to Justice Act, 5 U.S.C. §§504, 504 note; 28 U.S.C. §2412, 2412 note (1988).

<sup>65</sup>Supra, Endnote 1 at §590(b).

<sup>66</sup>Id.

<sup>67</sup>Id. at §590(c).

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## INTERVIEW WITH... ARTHUR H. HILDEBRANDT

CHIEF TRIAL ATTORNEY

U.S. NAVY

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(THE OPINIONS EXPRESSED BY MR. HILDEBRANDT ARE HIS OWN AND DO NOT REPRESENT THE OFFICIAL POSITION OF THE OFFICE OF THE GENERAL COUNSEL, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF DEFENSE OR THE U.S. GOVERNMENT.)

### **1. The Navy Litigation Office is organized differently than the Air Force and Army. Could you explain your organization?**

The Navy Litigation Office provides litigation support not only in the government contract law area, but also in the environmental and civilian personnel law areas. All appeals before the Armed Services Board of Contract Appeals (ASBCA) and most federal court litigation flow through my office for assignment. Since this interview will appear in "The Clause," I will confine my answers to the government contract law area specifically involving ASBCA matters.

### **2. As the Chief Trial Attorney of the Navy, how do you respond to the view by some that the Navy is overly litigious?**

I manage a terrific group of trial attorneys. They are extremely professional, aggressively defending the government's interests and achieving excellent results. Given this understanding, I am concerned by this view and my first reaction is to get the specifics to understand the situation. I believe in the trial attorneys and do not want to jump to conclusions. After all, the comment could have been made by someone who was biased because we successfully met our challenges and the commentator might not like our success.

This view does not seem to be case specific but rather, a general feeling held by some.

This is perplexing because dealing with a perception is difficult. I'm calling it a perception because it's really a very vague phrase. The Navy is a very large organization and it not exactly clear to whom the phrase refers: program attorneys, contracting officers, trial attorneys, or something else. The word litigious is also an ambiguous one especially when applied to an organization which is almost always in a defensive posture. So where do you start? I don't have specifics. I can't, however, ignore the statements. I learned long ago that you can't argue away perceptions. You have to deal with them. I decided to take the broad approach. By improving Office of General Counsel (OGC) litigation management, supervision, communications, and training (things we needed to do anyway), we will deal successfully with the perception.

So what are we doing? Here are some of the initiatives:

- I am actively working situations as they occur to refine litigation policies, eliminate misunderstandings, and provide training opportunities.
- In the Navy Litigation Office, active management and supervision of attorney's workload, better communication between trial attorneys and the contracting officers, standardization and automation of procedures, and continuous application of improvements to enhance performance are some of the initiatives.
- With trial attorneys assigned ASBCA appeals who work throughout the OGC organization, we are using better communications, establishing procedures for review, and encouraging more active discussion of policy.

Without a doubt, this broad approach will improve upon the success OGC in general, and the Navy Litigation Office in particular, has had and will continue to have in representing the interests of the government.

**3. What are some litigation trends you have seen since you assumed this position?**

ASBCA litigation shares some of the trends found in other forums. For instance, discovery in many cases has become far more extensive and, in too many instances, clearly excessive. It is clear to me that such discovery is the significant factor contributing to the increased cost and duration of litigation. While the proposed Federal Rules of Civil Procedure respond to this trend presumptively limiting the number of depositions and interrogatories, I want greater emphasis placed on managing discovery through the use of prehearing agreements and by having the parties working to make the process work, i.e., resolving differences as quickly as possible.

Another disturbing trend is increased contentiousness and a lack of civility exhibited by too many lawyers. I could only guess at the reasons for this attitude but the practice of law loses much of its appeal when too many members of the bar do not demonstrate the collegiality which should accompany all dealings among members of the bar. I urge our trial attorneys to be very professional. We can successfully represent our positions without lowering our standards, regardless of the actions of opposing counsel.

**4. Your office is presently handling the highly publicized A-12 T4D litigation. How does your office manage such "monster" cases?**

Navy Litigation Office attorneys work on the A-12 Trial Team defending the A-12 case in the United States Court of Federal Claims. The Department of Justice, as is normal, provides representation for the United States in the Court of Federal Claims.

From any perspective, the A-12 case is enormous. The case involves claims seeking recovery in excess of \$1 billion. The unliquidated progress payments alone exceed \$1 billion. Each party's documents number in the millions. Hundreds upon hundreds, if not thousands, of people are involved. The complaint has twenty counts touching upon every government contract issue. The contract was,

and the case is, more complicated because of the classified special access information involved.

My experience is that trial attorneys, by their nature, are not necessarily good managers. They personally want to do everything. I want the "monster" case trial attorney or, actually every trial attorney to act much like a program manager. Every case requires management, i.e., the application of resources, such as people and equipment, to a systematic step-by-step process towards a stated goal, generally along a time-line. The senior attorney assigned a "monster" case faces a dilemma, i.e., the bigger the case the more to manage, which equates to less time for hands-on lawyering.

The key to management of the large cases is the assignment of the senior lawyer. I want an attorney who can find the balance between the responsibilities of the "litigation manager" and the need for hands on lawyering. We are trying to develop the processes and tools to assist litigation managers

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## *U.S. ARMY CORPS OF ENGINEERS*

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**Recorder:**

Ruth Price

as well as the training necessary to develop these special skills.

**5. What is your opinion of ADR's role in resolving government contract disputes?**

I have been and continue to be a strong proponent of the use of alternative dispute resolution (ADR). As you may know, since 1986 the Navy has officially promoted the use of ADR techniques. The reasons for initiating the 1986 policy — scarce resources, budgetary constraints — are now even more apparent to managers of Federal Government litigation, with the reality of increased case loads, and dwindling budgets and resources.

While the Navy Litigation Office will continue to use ADR, I encourage the ASBCA (and other boards) to take an active role in recommending ADR procedures to the parties, e.g., mini-trials, especially in appeals in which the issues are principally straightforward factual disputes or where the judge believes the parties themselves are receptive to this type of proceeding. If the case is not amenable to ADR, I would like the board to continue to the other even more traditional dispute resolution techniques, such as motions for summary judgment, which can dispose of very large and complex cases, in whole or in part.

**6. In terms of case management, how is a typical case assigned to a trial attorney in your office?**

Assignment of trial attorneys to cases is, at best, an imprecise science. We rely on a number of factors: the size, complexity, and visibility of the case; the experience of the attorney; the workload of the attorney; the workload of the other attorneys in the office, and any other relevant information. These factors are blended with the supervisory decision that a certain attorney is the best for that case/situation.

The Navy Litigation Office workload is mostly the relatively high dollar, significant cases. Cases not assigned within this office are assigned to other offices within the OGC organization where the action originated.

These offices assign the trial attorney who will handle the case.

**7. Several of your trial attorneys are former trial attorneys for the Army. Does this mean your office looks for experienced government contract litigators to meet its staffing needs?**

This office always searches for experienced government contract litigators when we need to fill a vacancy. Experience, however, is not the only factor. I'm not only interested in experience but also with how well the person works with clients, written and oral advocacy skills, and supervisory appraisals.

We have been very pleased with not only the former Army attorneys but also with the Navy JAG attorneys, Air Force JAG attorneys, and attorneys from private practice that we have hired.

**8. What is the policy in your office concerning settlements?**

Our settlement policy continues to be to settle whenever an agreement, perceived to be in the best interests of the government, can be obtained.

The Navy Litigation Office, with the advice of counsel from Navy commands and activities, actively recommends or otherwise pursues settlement of contract disputes before the ASBCA, in appropriate circumstances, on a case-by-case basis. Settlement is appropriate in those cases in which, in the trial attorney's best judgment, the risks of proceeding with the litigation are outweighed by the benefits to the Navy in resolving the matter.

Settlement is by far the most common disposition of contract disputes. A Government-wide policy favoring settlement of litigation was established by executive order several years ago. Our litigation managers encourage the settlement of appropriate cases. We ensure that all Navy trial attorneys are aware of the various means of alternate dispute resolution.

I do not believe in protracted or pointless litigation. This does not mean, however, that we settle cases regardless of issues. Litigation continues in some instances, not because we are un-

willing to settle, but because the appellant, in our view, wants more than the case is worth.

**9. Do you favor the BCA Bar Association establishing an attorney referral service for government contractors needing representation in contract disputes?**

I am unaware of a need for such a service. I believe, however, the question of the need for such a referral service is one that should be addressed to contractors.



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**1993 BCA  
BAR ASSOCIATION  
ANNUAL MEETING HIGHLIGHTS**

Barbara Wixon

WILLIAMS & JENSEN

The Association's Annual Seminar, held at the Holiday Inn Crowne Plaza at Metro Center on October 26th, offered practitioners and judges alike the opportunity to discuss many of the issues arising from practice before the Boards.

In the morning, Pete McDonald briefly related some of the more prominent recent legislative developments, with an emphasis on Vice President Gore's National Performance Review. The attendees were then given a demonstration about the practical use of computers in organizing and providing better access to litigation files. D. Brent Israelsen, President of Jurisoft, and Charles Pear, Jr., of counsel to Holland & Hart, used the latest innovations in word search techniques and software to supplement standard word processing programs.

The second panel discussed the effective use of experts. William Bradford, Jr., of Hogan & Hartson, and William Keevan, Arthur Andersen & Co., examined the advantages and disadvantages, as well as the ins and outs, of using expert witnesses in a Board trial.

At lunch, J. Kent Holland, Jr., was awarded the Association's first annual writing

**10. What programs would you like to see the BCA Bar Association initiate for its members who are in the Government?**

Any program encouraging dialog between the Government and members of the private bar would be welcomed.

Training specifically aimed at practice before the ASBCA should also be explored.

**11. We appreciate you making yourself available for this interview.**

Thank you very much.

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award for his article in the July issue. The luncheon speaker was Robert P. Scott, Assistant Deputy Undersecretary of Defense for Acquisition Reform. Mr. Scott outlined DoD's recent efforts in this area.

The first panel after lunch took a practical look at the Boards' Rules of Procedures. Judge Catherine Hyatt from the GSBCA reviewed the pending changes to the Board's rules. Judge Barclay Van Doren of the EBCA discussed his Board's Model Scheduling Order, which is used in cases involving procurements between \$100,000 and \$1 million. Typically, the Order allows 150 days from the schedule conference to hearing.

The final panel of the day was a roundtable discussion by several Board judges. The format gave those in attendance the opportunity to sit in on conversations between Judge Shackleford of the ASBCA, Judge Gilmore of the EBCA, Judge Devine of the GSBCA, and Judge Finn of the PSBCA, on how they oversee their appeals with differing theories of case management.

Next year's seminar is already in the planning stages. If you have any suggestions or would like to be on the Annual Meeting Committee, please call Dave Metzger at 202-822-8660.



## A PROJECT SOLOMON: A CONCEPT WHOSE TIME HAS COME

Lynn B. Larsen

Eliminate litigation costs. Maintain project harmony. Increase profit. Receive quick payment. Eliminate uncertainty. Increase efficiency. Eliminate excessive record keeping. Solve problems promptly. Eliminate delay. Sound like heaven? These are benefits that can result from the prompt resolution of disputes. This is possible with the designation of a project Solomon.

If the project personnel cannot resolve a problem, the parties submit the problem while it is still fresh to a preselected neutral person or panel knowledgeable in contract law and engineering who promptly renders a decision. The decision can be binding or merely advisory, depending on the parties' agreement. This Solomon might be called a "standing mediator," "project referee," "standing arbitrator," "dispute review board," "project judge," or "dispute-resolver."

On the great majority of projects, problems that management cannot promptly resolve are left to fester. This postpones the

resolution of many disputes to the end of performance. The

personnel become increasingly less cooperative fearing they might compromise their positions. Unresolved problems may hold up payment and create adversarial relationships. Project meetings become unpleasant. Each party makes its own notes and records to justify its position. This lack of harmony affects the parties' performance and may even affect the quality of the end product.

The usual result is to have the parties' attorneys, after performance has been completed, reconstruct the entire project and its history for a judge, jury, or arbitration panel. The project personnel relive time and time

again the events which occurred. Experts must be hired and educated to explain why and how the problems arose. Before the experts can testify they must read and analyze all the project documentation. Costs escalate. Management continues to worry about the project for years following completion.

The result is a loss for all concerned. The prevailing party in litigation might have the satisfaction of eventually knowing its position was correct, but at a tremendous price with perhaps only a minimal net economic gain.

Retaining a project problem solver is consistent with the current drive to increase product quality, to do things right the first time. Total Quality Management (TQM) encourages good communication and good working relationships among customers and supplies. It attempts to foster trust and teamwork to prevent disputes and to create a cooperative attitude. With a Standing Arbitrator any dispute may be quickly resolved based on the contract and project specifications, allowing the parties to proceed in a harmonious fashion as they desire under TQM. If the parties make the commitment, communicate, and are willing to cooperate, then the problems to be resolved by the Standing Arbitrator become fewer. That person's presence ensures that cooperation and communication can continue without disruption even if disputes do develop.

The parties must agree on the person(s) to act as the Standing Arbitrator. This should be done as early as possible. The Standing Arbitrator can help even if selected during the middle of the project, but can be most effective if he or she is chosen before work begins. Then the appointment can become part of the original contract agreements. Subcontractors and suppliers can be brought into the process



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by specification requirement. Project harmony, prompt payment, and other benefits of immediate dispute resolution start as soon as the Standing Arbitrator is selected.

This concept of preselecting a neutral Standing Arbitrator was first used on deep tunnel construction projects but has since been successfully applied on other types of projects. Dispute review boards have been established on some 100 major projects exceeding \$6 billion in contract value. All of the disputes arising on these projects were settled by the parties or by the recommendations from the preselected neutral dispute review boards. There have been no court challenges. Millions of dollars in legal costs have been saved. Companies have had the benefit of eliminating uncertainty and of obtaining prompt payment.

James P. Groton and William R. Wildman, "The Role of Job-Site Dispute Resolution in Improving the Chances for Success on a Construction Project," *The Construction Lawyer*, Vol. 12, Number 3, August 1992, polled the members of a Dispute Avoidance and Resolution Subcommittee of the American Bar Association. All those responding had very positive opinions on the standing-arbitrator concept. It appears that the existence of a Standing Arbitrator caused the parties to solve most of the problems themselves. As one respondent stated, "the threat of [immediate] arbitration was sufficient to get the party's attention to resolve the bigger problem at hand." Other respondents stated, "this process put a lot of nonsense to bed;" "this process would work well on any size project. The cost is less than

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## **ARMED SERVICES**

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Board of Contract Appeals  
Skyline 6, 7th Floor  
5109 Leesburg Pike  
Falls Church, VA 22041-3208  
(W) 703-756-8500  
(F) 703-756-8535

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Lisa Anderson Todd x8531  
Elizabeth A. Tunks x8516  
Rollin Van Broekhoven x8516  
William T. Watkins x8522  
Judith Ann Yanello x8527  
Alexander Younger x8531

**Recorder:**

Edward S. Adamkewicz x8502

litigation and results are probably fairer;" "having the [same] arbitrators consider all the claims was vastly more efficient and the time spent educating the panel as to the basic facts of the matter was saved during subsequent hearings;" "many small disputes would remain small if they could be resolved promptly. As small disputes and . . . disagreements fester, they grow into major disagreements and claims."

Groton and Wildman summarized the benefits of the process as follows:

(a) The quality of the recommendation or decision is superior, because:

(1) The dispute can be resolved speedily.

(2) The neutral is voluntarily selected by the parties, before any dispute arises.

(3) The neutral has expertise.

(4) Preselection of the neutral saves the time and difficulty which would be required to select the neutral after a dispute has arisen.

(5) The neutral has the benefit of familiarity, continuity, and accumulated experience on the project.

(6) The dispute can be resolved while facts are still fresh.

(7) The parties are more likely to accept the recommendation or decision as fair because they have confidence in the expertise, knowledge, and integrity of the neutral.

(8) Where the decision is made by an arbitrator, it is final and binding, and thus there is no uncertainty about the outcome of the dispute.

(b) The recommendation or decision achieves immediate practical and economic benefits because:

By including the provision in bidding documents the owner [and prime contractor] obtains lower bids because this procedure shows that the owner or prime contractor is interested in prompt and fair decision, in cooperative relationships, and in fair payment for changes and changed conditions, and the bid-

der need not include as high a contingency for unresolved claims.

(1) Payment for any changes is speeded up.

(2) The dispute is resolved before it becomes unmanageable.

(3) The disruptive effects on project progress of deferred/accumulated unresolved disputes are avoided.

(4) The heavy expenses, risks, and uncertainties to all parties of a massive project-end lawsuit or arbitration proceeding are avoided.

(5) All parties save money.

(c) The process improves attitudes and performance because:

(1) It requires the parties to identify problems early & deal with them promptly.

(2) It encourages the parties to communicate with each other.

(3) It encourages the parties to evaluate their positions realistically.

(4) It encourages straightforward dealing and discourages game playing and posturing.

(5) It improves relationships between the parties.

The certainty that the problem will be resolved promptly and fairly by the neutral encourages the parties to seek a mutual solution to their problem without even involving the neutral.

Life can be less adversarial. Disputes can be resolved quickly, fairly, and without excessive costs. A project Solomon may be the answer.

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MR. LARSEN IS SENIOR PARTNER IN A SALT LAKE CITY PUBLIC CONTRACT LAW FIRM. HE WAS GRADUATED MAGNA CUM LAUDE IN MATHEMATICS, RECEIVED A MASTER'S DEGREE IN ENGINEERING, AND LATER RECEIVED HIS JURIS DOCTOR WITH HONORS FROM THE NATIONAL LAW CENTER AT GEORGE WASHINGTON UNIVERSITY IN WASHINGTON D.C. HE IS EXPERIENCED IN MEDIATING, ARBITRATING, AND LITIGATING CONTRACT DISPUTES. HIS NUMBER IS 801-355-5300.



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## LIST OF NATIONAL LEGAL ORGANIZATIONS

This listing should be of interest to our eclectic membership. It is extracted from the "1993 Guide to Legal Washington," published in the July/August issue of The Washington Lawyer, the newsletter of the D.C. Bar Association.

### ALLIANCE FOR JUSTICE

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(F) 202-265-2150

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Washington, D.C. 20033-0053  
(W) 202-331-1955  
(F) 202-293-2309

### AMERICAN ARBITRATION ASSOCIATION

1150 Connecticut Ave., NW, 6th Fl.  
Washington, D.C. 20036-4104  
(W) 202-296-8510  
(F) 202-872-9574

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(W) 202-543-1234  
(F) 202-543-2762

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Washington, D.C. 20036  
(W) 202-331-2200  
(F) 202-331-2220

### AMERICAN COLLEGE OF REAL ESTATE LAWYERS

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(W) 202-393-1344  
(F) 202-783-3780

### AMERICAN CORPORATE COUNSEL ASSOCIATION

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(W) 202-296-4522  
(F) 202-331-7454

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(F) 202-371-9449

### AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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(W) 202-371-9377  
(F) 202-371-9449

### AMERICAN INNS OF COURT FOUNDATION

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(F) 703-684-3607

### AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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(F) 703-415-0786

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1400 Eye Street, NW, Ste 400  
Washington, D.C. 20005  
(W) 202-371-1212  
(F) 202-842-3211

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## THE ACCOUNTANT'S CORNER

Darrel A. Sourwine, CPA

### CAS APPLICABILITY, COVERAGE & DISCLOSURE

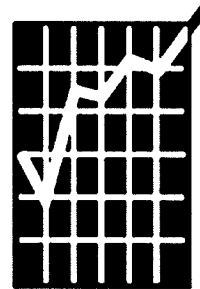
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Cost accounting standards (CAS), estab-  
lished by the Cost Accounting Standards Board  
(CASB), have applied to negotiated federal  
government contracts over \$500,000 since the

recodified standards were published in the  
Federal Register on April 17, 1992. Since then,  
all federal departments from Agriculture to Vet-  
erans Affairs have had a new set of procure-  
ment rules to administer. One year after these  
other rules become applicable, many of these  
departments still don't realize they could have  
CAS-covered contracts.

Businesses with CAS-covered federal  
government contracts have had to implement  
nineteen new accounting rules that address the  
assignment, measurement and allocation of  
costs (see Table 1). Some standards restrict



the latitude permitted by generally accepted accounting principles (GAAP), while others go beyond GAAP and the tax laws. The standards require careful reading; if they are not applied correctly, the financial impact on a company can be disastrous and penalties may result.

The standards are not the only complex and confusing rules; the rules for applicability and coverage and submission of a formal CASB disclosure statement also can be difficult to understand. (The disclosure statement is a formal description of the contractor's cost accounting system, prepared by the contractor or a CPA, and submitted to the contracting officer.) Because there are so many novices (government agencies, contractors, accounting practitioners) and CAS expertise is limited, there is considerable opportunity for government contractors to make mistakes in applying and interpreting the standards and rules. This is where a company may rely on a CPA's expertise.

#### CPA INVOLVEMENT

CPAs in industry and commerce already employed by companies with government contracts will be involved in the process even before a contract is awarded. If CAS applies to the contract to be awarded, the proposal must be priced using the standards in effect at that time. In addition, the disclosure statement may have to be submitted before the contract is awarded. Both situations could involve an accounting firm if the company does not have in-house expertise.

The six largest U.S. accounting firms (the "Big 6") already have government service divisions that deal with more than just CAS. However, now that CAS has been extended to all parts of the federal government, many more CPAs in smaller firms will need to become involved.

CPA involvement might range from being a consultant to being an expert witness. Consulting might begin with helping a contractor implement CAS, and extend to negotiating on a client's behalf when the government and the

contractor have different interpretations of the standards and rules. CPAs have been used by both the government and contractors when a CAS issue has been litigated. CPAs have also helped attorneys in CAS cases.

#### CAS COVERAGE

Before analyzing the standards themselves, all parties need to understand

- when a contract is covered by CAS;
- the extent of coverage; and
- who must complete the CASB disclosure statement

(CASB Form 1).

The purpose of this article is to alleviate the confusion in each of these areas by clarifying the rules (not the standards) and eliminating myths and misconceptions.

The CASB rules, regulations and standards were recodified at title 48 of the Code of Federal Regulations, chapter 99. Part 9903 contains sections that set forth the requirements for applicability, coverage, solicitation provisions, contract clauses and disclosure. This is the source of citations used in this article.

#### APPLICABILITY

When is a contract covered by CAS? All contracts subject to CASB rules and regulations should include either the full coverage clause or the modified coverage clause (9903.201-4). Full coverage requires compliance with all standards in effect on the contract award date. Modified coverage only requires compliance with CAS 401 and 402.

A list of contract and subcontract categories that are exempt from all CAS requirements can be found at 9903.201-1 (see Table 2). A contract meeting any of these exemptions should not contain a CAS clause.

Whether or not a CAS clause is in a contract, it is still incumbent on each contractor or subcontractor to know if CAS applies. Contracting offices have been known to include a laundry list of clauses in a contract. However, some of these clauses may not be binding be-

cause of the applicability rules and exemptions. This list of clauses has misled many contractors and auditors into believing a contract is CAS-covered when it is not. A company can be ready for this problem if it arises by understanding the applicability rules - the government buying office probably does not.

CAS applicability is prospective and pertains to a contract and not a contractor. Receipt of a CAS-covered contract does not mean CAS automatically applies to all of the contractor's existing government contracts. Applicability is determined on a contract-by-contract basis. Therefore, a contractor can have some contracts that are covered by CAS and others that are not.

Subcontracts are also subject to CAS but applicability is not automatic. A subcontract is CAS-covered if the prime contract is CAS-covered and the subcontract does not meet any of the applicability exemptions.

A CAS clause flows down to a lower level subcontract only if that clause is in the contract in hand. Subcontract applicability is important because an order from one business unit of a company to another is considered a subcontract under CAS. Furthermore, adjustments for a subcontractor's CAS noncompliance are made against the prime contract.

## COVERAGE

After applicability has been determined, the next step is to determine whether a contract is covered in full or modified form. Full coverage does not necessarily mean a new contractor must immediately comply with all nineteen standards. Even though the effective date for each standard is the same (April 17, 1992), all standards are not applicable immediately.

The flowchart at Table 3 depicts the coverage rules. The first two tests concern a single award of \$10 million or more in the current period. The last two pertain to the total CAS-covered contract awards in the preceding cost accounting period. Accordingly, a new contractor could receive a series of \$9.9 mil-

lion contracts in the current period, each of which is eligible for modified coverage. However, once a contractor receives a contract subject to full CAS coverage, all future contracts in the same period are fully covered under the single-award rule. Contracts that are awarded in the following period also are fully covered under the preceding-period test.

It should be noted that if a contractor is eligible for modified coverage, the contractor must claim it by checking the box in the solicitation (9903.201-3). Failure to make this claim results in the government buying office inserting the full-coverage CAS clause in the contract.

As is the case with applicability, the type of coverage is determined on a contract-by-contract as well as a period-by-period basis. Coverage also is prospective and does not change the status of existing contracts. In other words, the award of a fully CAS-covered contract does not change the status of existing modified CAS-covered contracts or non-CAS-covered contracts. Accordingly, it would be possible for a contractor to have all three categories of contracts in one cost accounting period.

Coverage also flows down to subcontracts; however, the same type of coverage does not automatically flow down to the subcontract. Each contract or subcontract is evaluated at the business unit (performer) level to determine the type of coverage. Thus, a prime contract with full CAS coverage could have subcontracts with modified CAS coverage.

The coverage type indicates the extent of compliance. Compliance means not only adhering to the standards in effect on the contract award date, but also following existing accounting practices, whether they are formally disclosed or not.

## DISCLOSURE

Who must complete the formal CASB disclosure statement describing the accounting practices used to estimate, accumulate and report costs? The offeror's disclosure statement

is reviewed by government auditors to determine its adequacy and compliance.

Adequacy means that the statement is current, accurate and complete, and clearly describes the contractor's current or intended accounting practices. It does not mean compliance because a noncompliant practice could be described clearly. Compliance means the described practices follow the standards.

A disclosure-statement compliance determination is not a contractual guaranty that all areas of noncompliance have been discovered. The ASBCA decided this issue in PACCAR, Inc., ASBCA No. 27978, 89-2 BCA P21,696. Hence, it is incumbent on the contractor to comply with CAS.

Just because a CAS-covered contract has been awarded does not mean disclosure is automatic. There are specific disclosure requirements shown in Table 4 that are separate from the applicability and coverage rules.

The disclosure requirements involve two tests: one at the business unit level and the other at the company (corporate) level. The first test concerns a single award to a single business unit or segment in the current period. The second looks at the total net awards of the entire company (home office plus segments) in the most recent cost accounting period.

Even if the entire company received net awards exceeding \$10 million in the preceding cost accounting period, only the segment receiving the CAS-covered contract in the current period must submit parts I through VII of the disclosure statement. Disclosure also is required of any other segment providing more than \$500,000 of cost input to another segment's CAS-covered contract or subcontract. There is also a requirement that the corporate or home office that allocates costs to one or more disclosing segments performing CAS-covered contracts must submit part VIII of the disclosure statement.

#### ELIMINATING CONFUSION

Many contractors, government employees and CPAs view CAS as a confusing and com-

plex morass. This is especially true in the three areas (applicability, coverage and disclosure) discussed in this article. Much of the confusion occurs when rules from one area are erroneously applied to another. Confusion is compounded when all three areas are considered at the same time. The abundance of confusion leads to self-perpetuating myths and misconceptions, including

- the law makes CAS applicable to all contracts;
- CAS coverage automatically flows down to a subcontract; and
- disclosure is automatic.

To make matters worse, a proposed CASB rule will extend CAS to colleges and universities, which widens the universe of confusion and creates more room for errors and misinterpretations.

As more and more contractors are exposed to CAS, litigation in this area may increase. Government contract attorneys will need expert advice and, on occasion, expert witnesses. In either event, knowledge of CAS will be necessary.

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Darrel A. Sourwine, CPA, is an instructor at the U.S. Army Logistics Management College, Ft. Lee, Virginia. He is a member of the American Institute of CPAs, the American Society of Military Comptrollers and the National Contract Management Association.

TABLE 1.  
COST ACCOUNTING STANDARDS

No.	Title
401	Consistency in estimating, accumulating and reporting costs
402	Consistency in allocating costs incurred for the same purpose
403	Allocation of home office expenses to segments
404	Capitalization of tangible assets
405	Accounting for unallowable costs
406	Cost accounting period
407	Use of standard costs for direct material and direct labor
408	Accounting for costs of compensated personal absences
409	Depreciation of tangible capital assets
410	Allocation of business unit general and administrative expenses
411	Accounting for acquisition costs of material
412	Composition and measurement of pension cost
413	Adjustment and allocation of pension cost
414	Cost of money as an element of the cost of facilities capital
415	Accounting for the cost of deferred compensation
416	Accounting for insurance costs
417	Cost of money as an element of the cost of capital assets
418	Allocation of direct and indirect costs
420	Accounting for independent research and development costs and bid and proposal costs

TABLE 2.  
CONTRACTS AND SUBCONTRACTS  
EXEMPT FROM CAS

1. Sealed bid
2. Negotiated contracts for \$500,000 or less.
3. Small business
4. Foreign governments
5. Price set by law or regulation
6. Catalog or market prices of commercial items
7. Educational institutions
8. Labor surplus area set-aside
9. United Kingdom contracts
10. Foreign subcontractors under NATO ship program
11. Contracts executed and performed outside the U.S.
12. No requirement to submit any cost or pricing data

TABLE 3  
**CAS Coverage Flowchart**

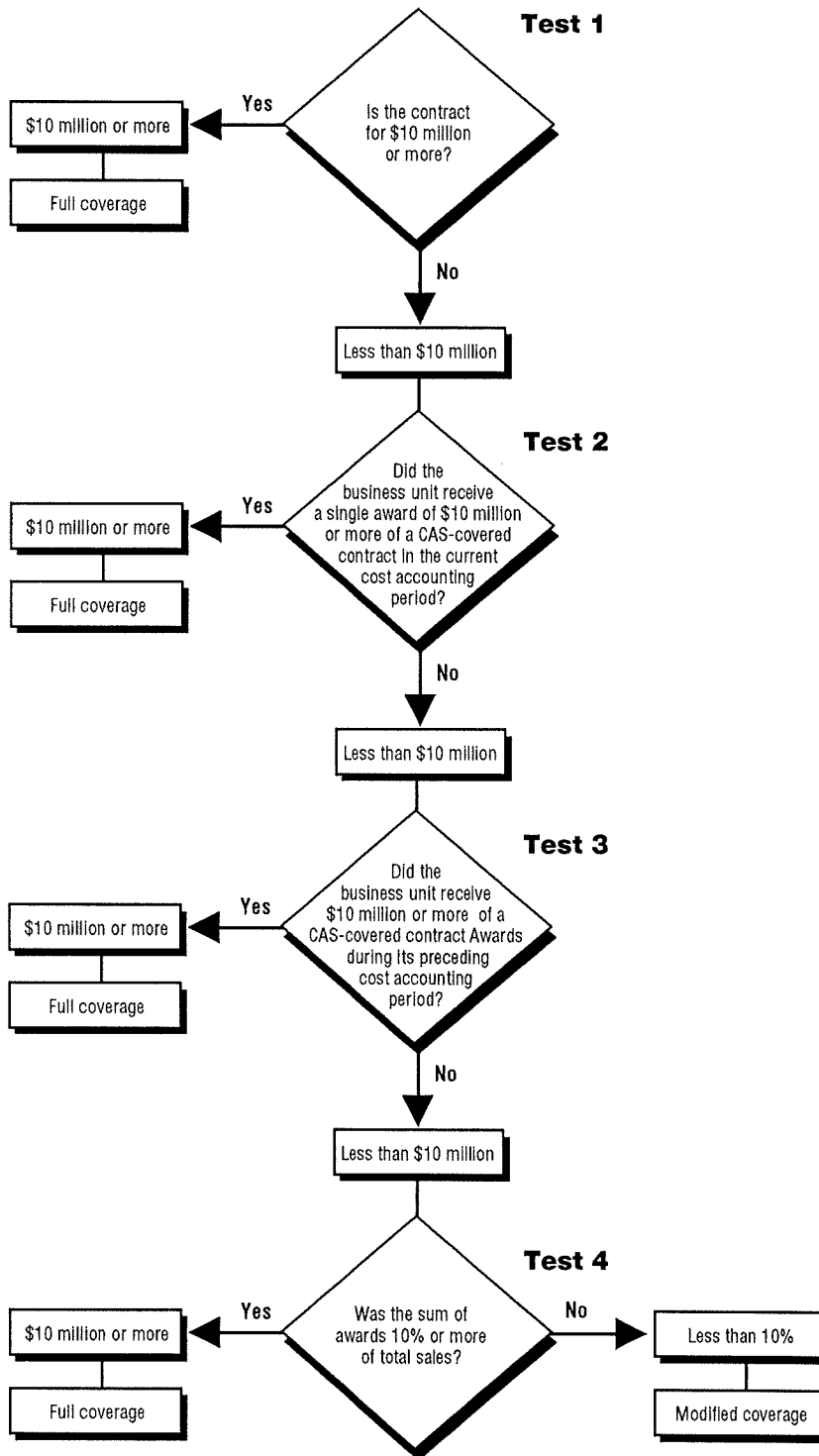
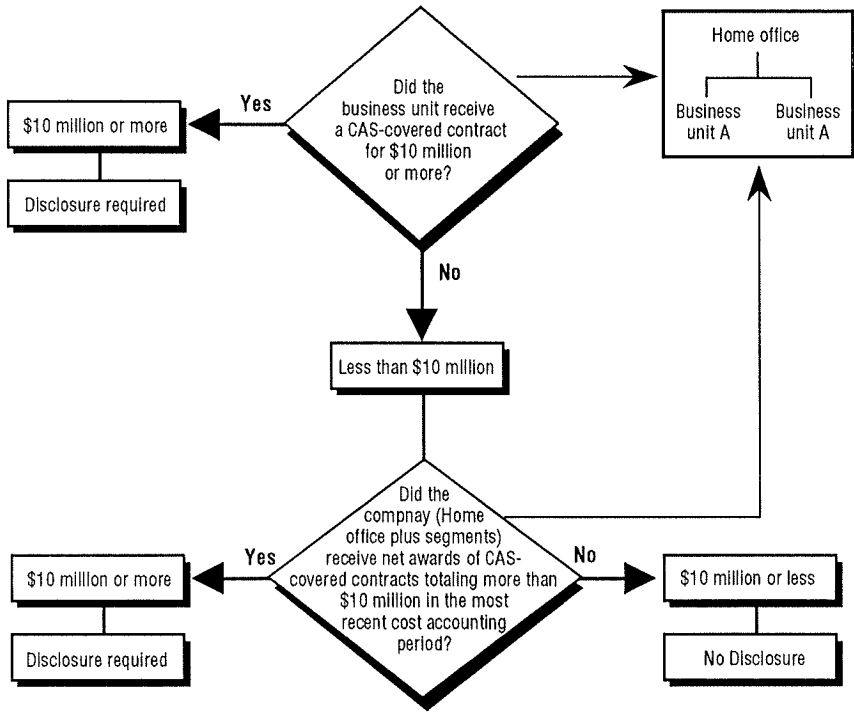




TABLE 4  
**Disclosure Flowchart**



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July 19, 1993

The Honorable Hazel R. O'Leary  
Secretary  
United States Department of Energy  
The Forrestal Building, Rm. 7A257  
1001 Independence Avenue, SW  
Washington, D.C. 20585

Re: Reorganization of the DOE Board of Contract Appeals

Dear Secretary O'Leary:

The Boards of Contract Appeals Bar Association (BCABA) respectfully submits the following comments for your consideration in connection with the April 1, 1993 proposed organizational realignment of the Department of Energy (DOE) as it relates to the DOE Board of Contract Appeals (DOEBCA). As stated herein, the BCABA believes that the inclusion of the DOEBCA with the DOE Office of Hearings and Appeals should be separate from the other portions of the DOE reorganization and must not be implemented.

The Board of Contract Appeals Bar Association is an organization of attorneys who practice before the various Boards of Contract Appeals (BCAs) of the Federal Government. The BCABA was organized in 1988 to support and improve the administration of justice in the BCAs.

We believe that folding the DOEBCA into the Office of Hearings and Appeals will compromise the independence and effectiveness of the DOEBCA and is wholly inconsistent with the Contract Disputes Act of 1978. We fear that this action will adversely affect the procurement process at DOE at the very time when the improvements to that process are needed. As the emphasis on environmental restoration of DOE's facilities expands and budgets increase, the adequacy and fairness of the Department's procurement process has and will come under increasing scrutiny. The DOEBCA plays a critical role in assuring that DOE procurement is fairly and effectively administered.

The current statutory system of contractor dispute resolution was created by the Contract Disputes Act of 1978 ("CDA"), Public Law No. 95-563. In passing the CDA, Congress recognized that "[k]ey elements of this system would be agency boards of contract appeals, acting as quasi-judicial forums and strengthened by adding additional safeguards to assure objectivity and independence." S.Rep. No. 95-1118, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 5235, 5247. Contractors were given the option under the Act to have their disputes resolved either at a BCA or in the Court of Federal Claims, with subsequent appeal in either case to a Court of Appeals. Congress believed that proceedings in the BCAs would be less formal and expensive but more expeditious than proceedings at the Court of Federal Claims. See id. at 5259; 5263.

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The independence and impartiality of the BCAs were critical to the success of this system. Thus, Congress included in the Act provisions that were intended to make the boards' proceedings more court-like. Congress believed that

[t]he contractor should feel that he is able to obtain his "day in court" at the agency boards and at the same time have saved time and money through the agency board process. If this is not so, then contractors would elect to go directly to court and bypass the boards since there would be no advantage in choosing the agency board route for appeals.  
Id. at §5259.

Thus, the CDA requires that each BCA shall have at least three members who shall have no other inconsistent duties. 41 U.S.C. 607(a)(1). The statute requires the BCAs to provide, to the fullest extent practicable, informal, expeditious, an inexpensive resolution of disputes, and to issue a decision in writing or take other appropriate action on each appeal submitted. Id. 607(e). On appeal to the Court of Appeals, decisions of the BCAs on questions of fact are final and conclusive and shall not be set aside unless the decision is fraudulent, arbitrary, capricious, so grossly erroneous as to necessarily imply bad faith, or not supported by substantial evidence. Id. 609(b).

Unlike other administrative forums, BCAs are not charged with enforcement of agency directives, but are required to fairly and independently resolve disputes between their agencies and outside contractors. In order for this system to work, the BCAs must be able to function independently of their agencies both in fact and appearance. For this reason, the BCABA believes that the proposal to combine the DOEBCA within the DOE Office of Hearings and Appeals may well undermine at least the appearance of independence, and therefore the effectiveness of the dispute resolution process for DOE contractors. Accordingly, we recommend that the proposal to include the DOEBCA within the DOE Office of Hearings and Appeals not be implemented.

Our organization would be pleased to provide any additional information which might be helpful to you in this matter.

Respectfully,

Marcia G. Madsen  
President



**Department of Energy**  
Washington, DC 20585

August 20, 1993

Ms. Marcia G. Madsen  
President, Boards of Contract  
Appeals Bar Association  
1800 M Street, N.W.  
Suite 900 North  
Washington, D.C. 20036

Dear Ms. Madsen:

Thank you for the recent letter providing comments on the organizational alignment of the Department of Energy Board of Contract Appeals (Board).

Placement of the Board within the Office of Hearings and Appeals in the Departmental Realignment is intended to achieve a higher level of administrative efficiency. The Department has committed to maintain the decisional independence and effectiveness of the Board by retaining the Board as an independent, separate entity within that Office. Access to the Board by contractors who are seeking remedies under provisions of the Contract Disputes Act of 1978 has not been altered by the organizational alignment. Further, it should be understood that none of the responsibilities and authorities of the Board for contract dispute resolution has been altered.

There are many benefits of organizational streamlining such as the steps being taken within the Department. For instance, the organizational relocation of the Board within the Office of Hearings and Appeals should, in fact, enhance the Board's effectiveness and independence through the Director's ability to advocate issues of importance to the Board in senior staff meetings and similar forums from which the Board has traditionally abstained. Additionally, organizational streamlining may permit more efficient use of staff by consolidating administrative and support service capabilities to the extent reasonable. These objectives will be realized without any loss of dispute resolution independence by the Board.

Your interest by commenting on this matter is appreciated. Please be assured that your concerns have been taken into account in our implementation of the Departmental Realignment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Archer L. Durham".

Archer L. Durham  
Assistant Secretary for Human  
Resources and Administration

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FROM RED TAPE TO RESULTS

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CREATING A  
GOVERNMENT  
THAT  
WORKS BETTER  
& COSTS LESS

Report of  
the National  
Performance Review

**Vice President Al Gore**

September 7, 1993

## Recommendations

- HRM12 **ELIMINATE EXCESSIVE RED TAPE AND AUTOMATE FUNCTIONS AND INFORMATION**  
Phase out the entire 10,000 page Federal Personnel Manual (FPM) and all agency implementing directives by December 1994. Replace the FPM and agency directives with automated personnel processes, electronic decision support systems and "manuals" tailored to user needs.
- HRM13 **FORM LABOR-MANAGEMENT PARTNERSHIPS FOR SUCCESS**  
Identify labor-management partnerships as a goal of the executive branch and establish the National Partnership Council.
- HRM14 **PROVIDE INCENTIVES TO ENCOURAGE VOLUNTARY SEPARATIONS**  
Provide departments and agencies with the authority to offer separation pay. Decentralize the authority to approve early retirement. Authorize departments and agencies to fund job search activities and retraining of employees scheduled to be displaced. Limit annual leave accumulation by senior executives to 240 hours.

### REINVENTING FEDERAL PROCUREMENT

- PROC01 **REFRAME ACQUISITION POLICY**  
Convert the 1,600 pages of the Federal Acquisition Regulation from a set of rigid rules to a set of guiding principles.
- PROC02 **BUILD AN INNOVATIVE PROCUREMENT WORKFORCE**  
Establish an interagency program to improve the governmentwide procurement workforce. Provide civilian agencies with authority for improving the acquisition workforce similar to that of the Defense Department's.
- PROC03 **ENCOURAGE MORE PROCUREMENT INNOVATION**  
Provide new legislative authority to test innovative procurement methods. Establish a mechanism to disseminate information governmentwide on innovative procurement ideas.
- PROC04 **ESTABLISH NEW SIMPLIFIED ACQUISITION THRESHOLD AND PROCEDURES**  
Enact legislation to simplify small purchases by raising the threshold for the use of simplified acquisition procedures from \$25,000 to \$100,000 and raise the various thresholds for the application of over a dozen other statutory requirements that similarly complicate the process. To ensure small business participation, establish a single electronic bulletin board capability to provide access to information on contracting opportunities.
- PROC05 **REFORM LABOR LAWS AND TRANSFORM THE LABOR DEPARTMENT INTO AN EFFICIENT PARTNER FOR MEETING PUBLIC POLICY GOALS**  
Enact legislation to simplify acquisition labor laws such as the Davis-Bacon Act, the Copeland Act, and the Service Contract Act. Improve access to wage schedules through an on-line electronic system.
- PROC06 **AMEND PROTEST RULES**  
Change the standard of review at the General Services Board of Contracts Appeals to conform to that used in the relevant courts. Allow penalties for frivolous protests. Allow contract negotiation to continue up to the point of contract award, even though a protest has been filed with the General Services Board of Contract Appeals.
- PROC07 **ENHANCE PROGRAMS FOR SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS**  
Repeal statutory limitations on subcontracting and substitute regulatory limitations to provide greater flexibility. Authorize civilian agencies to establish small disadvantaged business set-asides.
- PROC08 **REFORM INFORMATION TECHNOLOGY PROCUREMENTS**  
Increase the delegation of authority to agencies to purchase information technology. For purchases less than \$500,000 for products, and \$2.5 million for services over the life of a contract, eliminate indepth requirements for analyses of alternatives. Pilot-test alternative ways of buying commercially available information technology items.
- PROC09 **LOWER COSTS AND REDUCE BUREAUCRACY IN SMALL PURCHASES THROUGH THE USE OF PURCHASE CARDS**  
Provide managers with the ability to authorize employees to purchase small dollar value items directly using a government purchase card. Require internal government supply sources to accept this card.
- PROC10 **ENSURE CUSTOMER FOCUS IN PROCUREMENT**  
Revise Procurement Management Reviews to incorporate NPR principles such as "focusing on results" for the line managers.
- PROC11 **IMPROVE PROCUREMENT ETHICS LAWS**  
Create consistency across the government in the application of procurement ethics laws.
- PROC12 **ALLOW FOR EXPANDED CHOICE AND COOPERATION IN THE USE OF SUPPLY SCHEDULES**  
Allow state and local governments, grantees, and certain nonprofit agencies to use federal supply sources. Similarly, allow federal agencies to enter into cooperative agreements to share state and local government supply sources.
- PROC13 **FOSTER RELIANCE ON THE COMMERCIAL MARKETPLACE**  
Change laws to make it easier to buy commercial items. For example, revise the definition of commercial item. Revise governmentwide and agency regulations and procedures which preclude the use of commercial specifications.
- PROC14 **EXPAND ELECTRONIC COMMERCE FOR FEDERAL ACQUISITION**  
Establish a governmentwide program to use electronic commerce for federal procurements.