

The Clause

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**The Honorable Cheryl S. Rome
BCABA President-Elect**

**BCA BAR ASSOCIATION
BOARD OF GOVERNORS**

Roger Boyd (1994-1997)
Crowell & Moring
1001 Pennsylvania Avenue, NW
Washington, DC 20004

James A. Dobkin (1997-2000)
Arnold & Porter
555 12th St. NW
Washington, DC 20004

James A. Hughes (1997-2000)
Patton & Boggs
2550 M St. NW
Washington DC 20037

Andre Long (1997-2000)
Air Force Institute of Technology
2950 P St.
WPAFB, OH 45433-7765

Marcia Madsen (1996-1999)
Morgan, Lewis & Bockius
1800 M Street, NW, Ste 900N
Washington, DC 20036

James McAleese (1994-1997)
McAleese & Associates
8201 Greensboro Drive, Suite 820
McLean, VA 22102

Peter A. McDonald (1995-1998)
KPMG Peat Marwick
2001 M St. N.W.
Washington, DC 20036

Hon. Elizabeth A. Tunks (1996-1999)
ASBCA, Skyline Six, 7th Floor
5109 Leesburg Pike
Falls Church, VA 22041

Hon. E. Barclay Van Doren (1994-1997)
Chairman
DOE Board of Contract Appeals
4040 N. Fairfax Drive, Suite 1006
Arlington, VA 22203

BCA BAR ASSOCIATION OFFICERS

President
Jim Nagle
Oles, Morrison & Rinker
701 5th Avenue
Seattle, WA 98104

President-Elect
Judge Cheryl Rome
Department of Interior
Board of Contract Appeals
4015 Wilson Boulevard
Arlington, VA 22203

Secretary
Dave Metzger
Holland & Knight
2100 Pennsylvania Ave.
Washington, DC 20037-3202

Treasurer
Barbara Wixon
Williams & Jensen
1155 21st Street, NW
Washington, DC 20036

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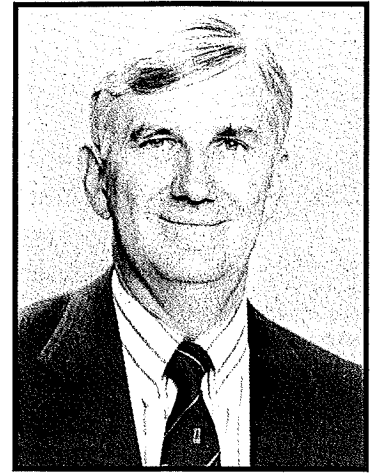
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PRESIDENT'S COLUMN

by James F. Nagle

Oles, Morrison & Rinker Seattle, Washington



James F. Nagle

Over the last twenty or thirty years the material whose use has expanded most exponentially in contracting projects, has not been steel or concrete or transistors, but paper.

When I was at the United States Army Communications and Electronics Command in the mid-seventies, we were talking about the paperless contract. We may get there eventually but we have certainly taken some major detours along the way. When people got their first brand new shiny computer with their printer attached, they could not rid themselves of their paperwork mentality. So they printed extra copies of every letter, memo, message and all other documents. Often they copied them multiple times and sent them to more people than they would have ever sent them before, all of the recipients, thrilled with the ease of their word processing equipment, prepared comments which they sent to even more people.

The result was a blizzard of paperwork, even before we get to the actual contractual requirements. Contracts now (and not just government contracts - I have seen the same thing on many commercial contracts) require a deluge of submittals on material, personnel, schedule, safety, environment and not just once or even quarterly or monthly, but often weekly.

Why do I vent my spleen about all of this paperwork in the President's Column? It brings me to a point that is particularly important to those of us in the Boards of Contract Appeals Bar Association - How do we manage this massive paperwork? No-where is that massive paperwork more pronounced than in preparing for litigation involving a government contract. The government through the contracting officer, the engineers, the using activities, and numerous other organizations, is required by FAR Part 4 to keep and retain numerous documents. The contractor, often because of contract requirements or simply good business practices, has hoards of people preparing reports, daily logs and detailed records of meetings. All of this material, even its numerous copies on which various people have written marginalia, becomes grist for the litigator's mill. That third copy of one nearly forgotten memo from four years ago may contain a handwritten note in the margin that shows conclusively that notice was or was not given.

We have all seen attorneys, and probably have done it ourselves, hopelessly grope through piles trying to find a document to counter what a witness has just uttered on the stand. That was hard enough twenty years ago when a relatively small case might have a Rule 4 file three feet high. It is virtually impossible now for any one individual or even team of lawyers to have instant recollection and more, importantly the ability to manually track down a particular document when its use is instantaneously needed. Whatever else the O. J. Simpson trial did for America's trial lawyers, it gave us a glimpse of what a multi-million dollar high profile case could do in terms of technology to manage the flow of documents and make them readily available to the witness, opposing counsel and to the fact finder.

Computer coding of documents, discovery of computer archived files, imaging of depositions and a host of other advances are easily available now on the marketplace. Unfortunately for many attorneys, they are as unknown or at least as unfamiliar as personal computers or faxes were in the mid-1970s. But if you have ever confronted an adversary that was technologically on the cutting edge, you will realize what a force multiplier that can be. I know sole practitioners who can go to trial and overwhelm a team of bright hardworking attorneys, still functioning in the horse and buggy era, and do it at a fraction of the billable hour cost.

To keep you abreast of these changes we plan on devoting important segments of our annual meeting program to discussing and demonstrating the new technology and what it can do in terms of trial preparation and trial presentation, not just on entitlement issues, but also on quantum- Elsewhere In this issue, Jim Dobkin will provide a greater glimpse into our annual meeting. Please read Jim's article, look for the flyer and registration information that should come to you shortly and plan on attending. Our annual meeting is our pre-eminent event in which we bring together the judges, practitioners, academicians, to focus on Board practices and the substantive law affecting that practice. Besides being a wonderful educational event, it also is an outstanding networking opportunity.

This represents my final President's Column, as I will soon be succeeded by the Honorable Cheryl Rome as the President of the BCA Bar Association. I have thoroughly enjoyed my time as your president. I have been especially proud as president to co-sponsor a variety of functions with the DC Bar Association, the Federal Bar Association and the ABA Section of Public Contract Law. The work done by our committees to further the professionalism and prestige of the boards and those who practice before them has been outstanding, I urge all of you to continue to get involved in the Association in any way you can- Thank you all and I look forward to seeing you at the annual meeting.

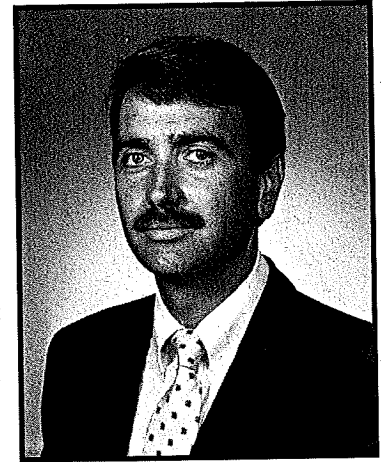
EDITOR'S COLUMN

by Professor Andre Long, CPCM
Air Force Institute of Technology

We started off this membership year in October 1995 with the goal of publishing four editions of the *Clause*. Unfortunately, our membership ranks did not grow enough to financially support four issues so we managed with three. With dues increasing this 1 October to \$30 for members employed by the Government and \$35 for all others, an additional issue may be financially possible in 1998.

Last year there was some confusion concerning the annual directory. This was caused when members renewed and registered for the annual program at the same time, but failed to update the information they wanted printed in the directory. Similarly, some new members joined when they registered for the program, but never completed an application for membership form like the one contained on the back page of this issue of *The Clause*. Please take the time to review the 1996 directory. If changes need to be made, include them in a written notice when you renew for 1997. Also be sure to include your e-mail address. The directories will probably be printed in early December. I maintain the membership data base so if you have any problems please feel free to contact me at (937) 255-7777 x3146 or email me at along@afit.af.mil

In this edition to the *Clause*, we have two articles from two well-known board judges. Since September of 1996, we have been fortunate enough to feature articles from BCABA judges in all but one edition. Hearing from our judges is obviously a matter of great interest to our membership. It also gives the judges an opportunity to more effectively advance positions that can improve practice proficiency and the administration of justice in general. I hope we can continue with this strong level of participation in the future. See you all at the annual program and meeting.



Andre Long

THE 1997 ANNUAL PROGRAM AND MEETING

by James A. Dobkin

It is an honor to serve again this year as Chair of the BCABA Annual Program. The Annual Program and Meeting will be held at the Washington, D.C. office of Arnold & Porter on Wednesday, October 22.

I would like to share some information with you about what I believe will be a stimulating and informative event. This year's morning address will be presented by Judge Guy H. McMichael, III, Chairman of the VABCA. Judge McMichael will give us his perspective on the past year's boards of contract appeals activity and related developments. We have not yet selected a luncheon speaker, but I can assure you that the subject will be provocative and timely.

We are fortunate to have Laura K. Kennedy of Seyforth, Shaw, Fairweather & Geraldson; Peter A. McDonald of KPMG Peat Marwick, LLP; and Joseph D. West of Arnold & Porter as moderators for this year's three program panels.

Laura Kennedy's panel, entitled "A Tale of Two Appeals," will examine two appeals in which the ASBCA converted a termination for convenience to a termination for default. The panel will compare and contrast the two decisions, in which various unique procedural issues were identified, and discuss the trial tactics of the parties, Board procedural decisions and other elements of advocacy before the Boards. The panelists are David P. Metzger (Hol-

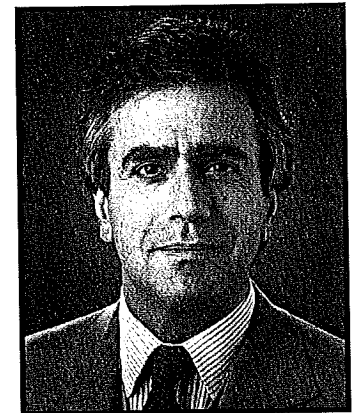
land & Knight), Michael J. Hoover (Chief Trial Attorney, U.S. Air Force), and Judge Ruth C. Berg, (ASBCA, Retired).

Pete McDonald's panel, entitled "Litigating Effectively with Technology," will demonstrate effective techniques for presenting large quantities of technical, operational, accounting and other data arising in contract disputes. Panelists who will evaluate the various techniques include Judge Ronald Kienlen (ASBCA), Judge Gene Bond (Chairman, Interior BCA), and Judge Wesley C. Jockisch, (Chairman, COEBCA).

Joe West's panel will discuss how procurement reform will affect the future of the boards of contract appeals. The panel consists of Judge Robert Parker (GSBCA), Patricia McNall (Deputy Chief Counsel, FAA) and Steven L. Schooner (OFPP).

All BCABA members are encouraged to attend the business meeting, which follows the Annual Program. BCABA President Jim Nagle will preside over the meeting and elections.

Program invitations with agenda and registration materials will be mailed in early September. In the meantime, if you have any questions about the Program, please feel free to contact Ted Stone (Arnold & Porter) at (202) 942-5293. I am very excited about our fast-approaching event and hope to see you there.



James A. Dobkin

ALTERNATIVE DISPUTE RESOLUTION AT THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS



by The Honorable Allan H. Goodman

The author is a judge on the General Services Administration Board of Contract Appeals. The opinions expressed are those of the author. This is a revision of an article originally published by the American Bar Association for The ABA's Second Annual Federal Procurement Institute, Baltimore, Maryland, May, 1996, and resubmitted at the Board of Contract Appeals Judges Seminar on April 8, 1997.

I. Introduction

Alternative dispute resolution (ADR) techniques are used to resolve many cases before the General Services Administration Board of Contract Appeals (referred to as "the Board" or the "GSBCA"). The general public is not aware of the efficacy of ADR. There is no reported decision or record in an ADR proceeding, except that the Board's dismissal order may state that the case was resolved by ADR. Unlike hearings on the merits, ADR proceedings are confidential and not open to the public.

This paper describes the availability of ADR at the Board, the methods used to initiate ADR, and the various ADR procedures. Examples of actual cases in which I have served as the Board Neutral are discussed.

II. Availability of ADR

A. Appeals Docketed at the Board

ADR is an option for resolving all appeals from contracting officer final decisions which are docketed before the Board. Board Rule 204 (also referred to as "the current rule") sets forth the procedures for initiating ADR proceedings at the Board and the techniques available. This rule emphasizes the availability of ADR to resolve appeals which are docketed at the Board. Parties are encouraged to consider the feasibility of using ADR as soon as their case is docketed. If, however, at any time during the course of a Board proceeding, the parties agree that their dispute may be resolved through the use of an ADR technique, the panel chairman may suspend proceedings for a reasonable period of time while the parties and the Board attempt to resolve the dispute in this manner. The use of an ADR technique will not toll any relevant statutory time limit for deciding the case.

B. Disputes from Other Agencies - Contract and Procurement Matters In addition to providing ADR in appeals docketed before the Board, the GSBCA recently expanded its availability to any agency that requests ADR services. The current rule states: "The Board will make its services available for ADR proceedings in contract and procurement matters involving any agency, regardless of whether the agency uses the Board to resolve its Contract Disputes Act appeals." As the result of this expanded availability, the GSBCA may now provide ADR services for all agencies whose Contract Disputes Act appeals are resolved at another Board of Contract Appeals.

The current rule also allows parties to seek ADR services from the Board to resolve disputes "at any stage of a procurement, even if no contracting officer decision has been issued or is contemplated." Board Rule 204(a)(2). Thus, one may request ADR of a dispute at the GSBCA, even if the dispute is not ripe to be docketed as an appeal at a Board of Contract Appeals. This includes bid protests as well as disputes arising from contract performance. While the Board previously had jurisdiction over protests arising from the procurement of automated data processing equipment, requests for ADR are not limited to this type of procurement. Requests for ADR in bid protest matters may encompass all types of procurement.

It should be noted that the Board has provided ADR services in matters which have been initiated in other forums. As discussed below, the Board has provided neutrals in request for ADR with regard to appeals docketed at other Boards and a protest which was initiated in the Court of Federal Claims. In such circumstances, the Board or Court is requested to issue an order staying proceedings pending the completion of ADR proceedings.

III. Initiation of ADR

During the past four years, I have seen an increased willingness on the part of both contractors and the Government to engage in ADR proceedings at the Board. I believe there are several reasons for this. ADR is constantly receiving attention in the press and in the legal community. Clients are becoming aware that there are alternatives to litigation and are asking about such options. Attorneys are having positive experiences while representing clients in ADR proceedings. I used to sense a fear of ADR, because many had the perception that it was a process without rules and procedures. There is now an awareness that ADR proceedings do have rules and procedures which can be learned and practiced by the advocate, just as litigation skills can be learned and practiced. [For those interested in representing clients in arbitration, mediation, and other forms of ADR, I highly recommend "Mediation Advocacy" and "Arbitration Advocacy" authored by John W. Cooley and published by the National Institute for Trial Advocacy.]

For disputes over which the Board has Contract Disputes Act jurisdiction, a three-judge panel is assigned immediately after the case is filed. The judge with primary responsibility to hear the case is known as the "panel chairman." The Board cannot compel ADR in appeals which are docketed before the Board. The Board, through the panel chairman, can only encourage the use of ADR and discuss the options with counsel and the parties. All parties must agree to use ADR before the process can be initiated.

It is my practice in appeals in which I am panel chairman to conduct an initial conference after the complaint and answer have been filed. During this conference, I emphasize that the parties have the option of using ADR and I discuss available ADR procedures in detail. I have found that pro se appellants and protesters are enthusiastic about suggestions that might save time and effort, and promote a swift, informal resolution of the dispute. For parties represented by counsel, I find it helpful if both counsel and clients participate in the initial conference. This assures that the client understands that ADR is available and allows me to answer any questions the client may have.

To initiate an ADR proceeding for a contract or procurement matter from another agency, or for a matter in which a contracting officer's final decision has not been issued or is not contemplated, the rule requires that "the parties shall jointly request the ADR in writing and direct such request to the Office of the Clerk of the Board. For agencies other than GSA, the Board will provide ADR services on a reimbursable basis." In such instances, the parties must agree to ADR before making the request to the Board. Such requests are usually transmitted to the Board by letter on behalf of the parties to the dispute. Agencies other than GSA must enter into a memorandum of understanding and agreement (MOU) with the Board.

IV. Appointing the Board Neutral

The judge who is to conduct the ADR is referred to as the "Board Neutral." Selection of the Board Neutral is described in the current rule as follows:

If ADR is agreed to by the parties and the Board, the parties may request the appointment of one or more Board judges to act as a Board Neutral or Neutrals. The parties may request that the Board's chairman appoint a particular judge or judges as the Board Neutral, or ask the Board's chairman to appoint any judge or judges as the Neutral. If, when ADR has been requested for a case that has already been docketed with the Board, as provided in subparagraph (a)(1) of this rule, the parties may request that the panel chairman serve as the Board Neutral. In such a situation, if the ADR is unsuccessful, (i) if the ADR has involved mediation, the panel chairman shall not retain the case, and (ii) if the ADR has not involved mediation, the panel chairman, after considering the parties' views, shall decide whether to retain the case.

For cases which are docketed as appeals at the Board, the Board Neutral may be the panel chairman or another Board judge. For ADR proceedings requested by other agencies which are not docketed as appeals, a Board judge is appointed or the parties may request a particular Board judge. For appeals in which I am the panel chairman, I prefer to be the Board neutral unless the parties request otherwise. I believe that this is the most efficient procedure. If the ADR is not successful, the ADR process has educated me, and the knowledge I have acquired during the ADR is helpful if I continue as the panel chairman. If the ADR is conducted as a mediation, with ex parte contact between the Board Neutral and the parties, however, I may not continue as the panel chairman if the ADR is unsuccessful.

Note that the rule provides that the parties may request a specific judge or judges as the Board Neutral. Such requests are neither encouraged nor discouraged by the Board. This option was included because the Board recognizes that parties would be able to request the services of a specific individual if they pursued ADR in the private sector, and therefore might similarly wish to request a specific Board judge. As a practical matter, for appeals which are already before the Board, the panel chairman is usually the individual who is the Board Neutral, unless the panel chairman or the parties agree otherwise. For instance, if the parties request mediation after substantial time has been spent by the panel chairman (such as ruling on dispositive motions), the decision may be made to appoint a neutral other than the panel chairman, so that the panel chairman will continue to hear the case if the ADR fails. If some other method of ADR is employed which does not involve ex parte contact, then the panel chairman will usually continue to hear the case. On the other hand, for disputes which are not the subject of contracting officer final decisions or from other agencies not serviced by GSA, it is not unusual for the parties to approach the Board and request a specific judge as the neutral.

V. Advantages of ADR

The obvious advantage of successful ADR is a swifter resolution of the dispute. An ADR session can be commenced as soon as the parties are prepared to go forward. In protests, I have held ADR sessions within forty-eight hours of the parties' request. In appeals, the parties will usually request some limited discovery to prepare for the ADR session. It has been my experience that parties who engage in ADR before extensive discovery or prehearing motions come to the ADR with a greater commitment to resolve the matter and more flexibility in their negotiating positions. The parties perceive that cost savings have occurred because resolution has been achieved before substantial resources have been committed. For example, in appeals dealing with contract interpretation, in which the parties have differing views as to the implementation of contract language, I have had the parties request ADR without discovery in order to receive an opinion from the Board neutral as to the reasonableness of the parties' interpretations. This has been particularly useful in instances in which contract performance has continued while the appeal proceeded.

There are also intangible advantages. ADR, by its very nature, tends to be less adversarial than litigation. After cases have been resolved by ADR, counsel have told me that their clients appreciated the opportunity to speak candidly and "off-the-record" with the judge and to the opposing side with the judge present. Clients who have participated in ADR have felt that they have had their "day in court" even though they did not participate in formal proceedings. When mediation and neutral case evaluation were used, clients felt that they were afforded an opportunity to tell their story directly to the judge in a less stressful, informal setting. The

cathartic effect of having the opportunity to speak directly with the judge who is acting as a mediator or neutral case evaluator is a valuable experience for the client, and conducive to a settlement of the dispute.

ADR demands that the parties communicate with each other during the process. The resolution may be fashioned by the parties in a way that a judge may not have considered, or possibly in a manner that could not be achieved if the case proceeded in litigation. In this sense, the parties retain control of the process and the resolution, rather than relinquishing all control to a third party. Ultimately, the parties determine the success or failure of the ADR process. For example, I recently conducted an ADR proceeding involving a lease where part of the resolution was an agreement by the Government to exercise a partial option for extending the lease much earlier than contemplated by the lease. This innovative resolution could not have been ordered by a Board of Contract Appeals as a remedy.

Another advantage of ADR is that it may encompass other issues arising out of the same contract or fact situation which the Board could not otherwise resolve. There is often an impetus to reach a global settlement of outstanding disputes once the parties begin to negotiate. For example, in the mini-trial discussed below, the parties voluntarily submitted various performance disputes to ADR which had arisen after the initial appeals had been filed. These matters were successfully settled.

The ADR may also encompass parties which are not subject to the Board's jurisdiction, but who participate voluntarily. For example, I recently was the panel chairman in an appeal arising from the lease of a GSA building. The parties agreed to attempt to resolve the appeal through ADR. I served as the Board neutral. The appellant and current owner of the building also had filed a lawsuit in state court against the former owner of the building. Common circumstances were involved in both the appeal and the suit in state court, and the outcome of the state action was dependent on the resolution of the appeal. The former owner was invited to participate in the ADR for informational purposes, with the understanding that they were and could not be parties to the appeal. The state court granted a stay of proceedings in the state action pending the conclusion of the ADR proceedings. The ADR proceeding resulted in a settlement of both the appeal and the state court action.

VI. Cases Amenable to ADR

I believe that any case is resolvable by ADR, if the parties make a commitment to the process. I have heard many reasons why a party does not want to engage in ADR — the case is fact intensive and the record has not been sufficiently developed; the level of emotion is too high; one party is convinced that it will prevail. These are very good reasons to use ADR. If the case is fact intensive and will require extensive discovery before a hearing on the merits, why not have some limited discovery and attempt to resolve it by ADR before spending additional resources? If the case is highly emotional, why not defuse the emotion by a non-adversarial process? If one party is convinced it will prevail, why not seek a non-binding opinion early in the proceedings and save additional costs?

There is one type of case that is certainly amenable to ADR — a sure loser. In the early stages of the case, I may not know that a case is a loser, but counsel and/or the client may know. A client may take a position that counsel realizes is unrealistic, and counsel may advise the client accordingly. Even so, it is not unusual that the client may insist on proceeding with the case. In such a situation, counsel would be wise to request ADR, so that the client can quickly receive an objective assessment from a Board neutral.

VII. Preparing for ADR and the Confidentiality of Information If the parties are amenable to ADR, they may want to engage in limited discovery before the ADR takes place. The current rule encourages the use of modified standard procedures in order to prepare for ADR:

Selective use of standard procedures. Parties considering the use of ADR are encouraged to adapt for their purposes any provisions in Part I of the Board's rules which they believe will be useful. This includes but is not limited to provisions concerning record submittals, pretrial discovery procedures, and hearings.

The appeal file furnished by the Government and supplemented by the contractor may serve as sufficient document discovery for the purpose of ADR. The parties may agree to voluntary document production on issues relevant to the ADR. I strongly recommend that individuals with ultimate settlement authority participate or at least be present at the ADR. If they cannot be present, they should be available by telephone to discuss settlement possibilities. I reiterate this before every ADR session, because I will not have an ADR proceeding stymied because the individuals involved lack settlement authority.

The information submitted for use in the ADR proceeding is confidential. The current rule provides as follows:

Retention and confidentiality of materials. The Board will review materials submitted by a party for an ADR proceeding, but will not retain such materials after the proceeding is concluded or otherwise terminated. Material created by a party for the purpose of an ADR proceeding is to be used solely for that proceeding unless the parties agree otherwise. Parties may request a protective order in an ADR proceeding in the manner provided in Rule 112(h).

VIII. ADR Procedures and Examples [Back to Table of Contents]

The current rule emphasizes that the determination of the technique or techniques to be used is made on a case-by-case basis:

ADR is not defined by any single procedure or set of procedures. The Board will consider the use of any technique proposed by the parties which is deemed to be fair, reasonable, and in the best interest of the parties, the Board, and the resolution of contract disputes.

The current rule describes the various ADR procedures which may be used. I have used some, but not all of the procedures described in the rule, and other procedures which are not described. The remainder of this paper contains a discussion of my

experience using ADR at the Board. I have found that the ADR procedures the parties elect most frequently are the non-binding methods — neutral case evaluation and mediation. I also use judicial intervention when I believe it will be effective. The parties' summary relief motions are sometimes used as a basis for ADR. These processes, with examples, are described below.

A. Neutral Case Evaluation

Neutral case evaluation is defined as follows:

The parties agree to present to the Board Neutral information on which the Board Neutral bases a non-binding, oral, advisory opinion. The manner in which the information is presented will vary from case to case depending upon the agreement of the parties. Presentations generally fall between two extremes, ranging from an informal proffer of evidence together with limited argument from the parties to a more formal presentation of oral and documentary evidence and argument from counsel, such as through a mini-trial.

Note that the rule indicates that the presentation may consist of "information." This term is used because the presentation may consist solely of counsel's argument, describing what the evidence would be, rather than presentation of evidence. Also, by choice of the parties, the case may not have proceeded in discovery to the point where the parties can present admissible evidence. If this is the case, there is an understanding that the advisory opinion is based on the assumption that the evidence will be what the parties allege it will be.

Before the ADR session begins, I request that the parties exchange and submit to me a position paper summarizing the issues. In neutral case evaluation, I prefer to convene the parties in a conference room rather than the formal setting of a hearing room. A conference room setting tends to put participants at ease, allows everyone to converse with each other, and stimulates discussion. Counsel and their clients are present, together with any witnesses. The parties have the option of excluding witnesses, but they generally do not do so. There is no record of the proceedings.

The parties are free to present their positions in any way they feel is most effective. A typical presentation consists of opening statements of counsel, during which they summarize the position of their clients. Fact witnesses testify, either by response to direct examination by counsel or in narrative fashion. I do not place the witnesses under oath. Witnesses may be cross-examined by opposing counsel. I also allow witnesses to ask questions of each other. Thus, the contracting officer may ask questions of the contractor's personnel and vice versa. Often this interchange between witnesses is a discussion, rather than an exchange of questions and answers. Sometimes the "discussion" becomes argumentative and emotional. At times I may wish to have a discussion with only the attorneys present.

Depending on the nature of the issues involved, I may render an advisory opinion at the conclusion of the presentation, or schedule a time in the near future to reconvene so that I may render the opinion. If I am the panel chairman, I inform the parties that I may, if I believe it necessary, consult with the other two judges on the panel of the case. While the opinion is non-binding, the parties look favorably on the fact that they have received an opinion endorsed by the three panel members.

Neutral Case Evaluation of an Appeal

The following is a general description of an actual appeal which was resolved by ADR. I was the panel chairman in a dispute resulting from the contracting officer's denial of a multiple line-item claim arising from the renovation of a federal office building. Appellant filed the appeal pro se and subsequently retained counsel. During an initial conference with counsel and the parties, shortly after the answer was filed, I discussed the option of proceeding with ADR. The appellant, who had limited resources, was very much in favor of ADR, and the Government consented. In order to retain my position as panel chairman, the parties agreed that I would not act as mediator, and therefore would not have ex parte contact with the parties. Rather, I would serve as a neutral case evaluator and render a non-binding advisory decision as to each claim item.

After limited discovery, the ADR session commenced with counsel and witnesses present. Each claim item was discussed separately, with counsel presenting argument and witnesses testifying in narrative fashion, without much prompting from the attorneys. At times, the witnesses asked each other questions, and I had questions for the witnesses. After the presentation for each claim item, I recessed briefly to consider the information presented, then returned to the conference room to give an oral, non-binding advisory opinion. I did not consult with the other panel members. After I gave my advisory opinion, I left the conference room to allow the parties to engage in settlement discussions. The parties either settled the item or reserved it for further discussion. When an item was settled, the parties did not inform me as to the settlement amount.

The ADR proceeded in this fashion for a day and a half. When all but four claim items had been presented, the parties informed me that there was no need to review the remaining items and they had agreed to a settlement of the entire appeal. I did not become aware of the settlement sum until a motion to dismiss the appeal was filed with a settlement agreement attached.

Neutral Case Evaluation of a Protest

The following is a general description of a protest resolved by ADR. Several days after the filing of a protest, I received a joint request for ADR from counsel for protester, the Government, and the awardee. The request was made on a Friday afternoon, and the ADR was scheduled for the following Tuesday. That same afternoon, another offeror intervened in the protest and was informed of the ADR. That intervenor also participated in the ADR.

The parties requested that I, as the panel chairman, render a non-binding advisory opinion on one count of the protest complaint. Counsel for the parties presented oral argument, and each party also offered a presentation from an expert witness. The expert witnesses were allowed to ask each other questions. The entire presentation was concluded in three hours. That afternoon I consulted with the other panel members and drafted the opinion. The ADR was reconvened the next afternoon and I read the non-binding, advisory opinion to the parties. Although the opinion was in written form for my convenience, it was delivered orally and not given to the parties in writing. Several days after the ADR, the Government terminated the contract for convenience and the protest was dismissed thereafter.

B. Mediation

Board Rule 204 defines mediation as follows:

Mediation. The Board Neutral, as mediator, aids the parties in settling their case. The mediator engages in ex parte discussions with the parties and facilitates the transmission of settlement offers. Although not authorized to render a decision in the dispute, the mediator may discuss with the parties, on a confidential basis, the strengths and weaknesses of their positions. No judge who has participated in discussions about the mediation will participate in a Board decision of the case if the ADR is unsuccessful.

The distinguishing feature of mediation is that the mediator is allowed to have *ex parte* contact with the parties. During these ex parte meetings, the parties may reveal confidential information which they believe might be helpful for the mediator to know, but which they do not wish to reveal to the other party. The mediator is not authorized to render a decision in the dispute. Rather, the mediator may discuss with the parties the strengths and weaknesses of their positions, and facilitate the transmission of settlement offers. The mediator should not be the same individual who would render a decision if the mediation fails and proceeds to litigation. Also, by prior agreement, the mediator will not discuss the mediation with the individual who will render a decision if the mediation fails to result in a settlement.

As in neutral case evaluation, I request a position paper from the parties before the mediation begins. The mediation session convenes in a conference room, rather than a hearing room. The general procedure for mediation consists of an opening statement by the parties with all counsel and clients present. The parties may also bring individuals who have personal knowledge of the facts, who can present a summary of their knowledge to the mediator. The mediator then meets ex parte with counsel and their clients, and discusses the strengths and weaknesses of their case. These ex parte meetings are called "caucuses." I usually will conduct the caucuses in my office, while the other party and counsel remain in the conference room. After several caucuses during which the facts of the case are analyzed, and the parties have had an opportunity to discuss with me any confidential information they wish, I request that the parties begin exchanging settlement offers. Usually the parties will prefer that I transmit the settlement offers and relay to them whatever reaction, and counteroffer, the opposing party has to the offer. Once a settlement is reached, the parties reconvene in the conference room to confirm that a settlement has occurred.

There are two approaches to mediation - *facilitative* and *evaluative*. In facilitative mediation, the mediator's function is to aid the parties in settling the matter, but the mediator does not offer an opinion as to which party will most likely prevail or the value of a settlement value. Facilitative mediation proceeds with the assumption that since the mediator is not the person who will ultimately issue a decision if the mediation is not successful, the mediator's non-binding opinion might serve to harden the parties' positions and be counter-productive to a settlement. In evaluative mediation, the mediator's function is to render an opinion. The two approaches may be combined. In facilitative-evaluative mediation, the mediator's efforts are focused upon first achieving a settlement without rendering an opinion. Sometimes the parties arrive at their own solution through the facilitative efforts of the mediator, without the mediator rendering an opinion. If the parties cannot achieve settlement, the mediator will then render an opinion, which will then be used as the basis for further settlement discussion. [An excellent discussion of this concept is found in "Mediation Advocacy" by John W. Cooley, cited previously.]

It has been my experience that the parties request evaluative mediation. Counsel and the parties will usually ask my opinion of the case, based upon the information that I have heard, as the mediation session progresses. Even though I am not the person who will ultimately decide the case if the mediation is not successful, counsel and the parties have told me emphatically that my opinion as mediator has predictive value, because in I am also a judge. If I am able to give an opinion, I will. This often enhances settlement discussions and results in a settlement. I have never seen a party, after receiving a negative opinion during a mediation, terminate the mediation and proceed to litigation, hoping to receive a more favorable opinion. I have had instances in which the parties have reached a settlement before I render an opinion, even though they contemplated evaluative mediation. In these cases, the parties discussions and mutual cooperation have yielded a settlement based upon their own evaluations of information received during the mediation process.

Mediation of an Appeal

An appeal arose from a contract to perform testing services. I was not on the panel, but was appointed as the Board Neutral. The mediation commenced with counsel for both parties giving brief opening statements. Thereafter, I met with the parties ex parte in a caucus. The initial hurdle was that there was a disagreement between the parties as to the quality of the contractor's performance. I then met with counsel for the parties without their clients present and suggested we convene everyone together again to air the differences as to the contractor's performance. This joint session to discuss the contractor's performance proved to be cathartic for both sides, and clarified various factual issues.

After the factual issues were aired, I had another caucus with the Government during which the Government representatives conceded entitlement but raised many issues as to quantum. The remainder of the mediation focused on resolving quantum. Caucuses were held with both parties, and the parties agreed to a settlement at the end of the first day.

C. Mini-trial

Board Rule 204 mentions the term "mini-trial" in the context of neutral case evaluation. However, the term "mini-trial" is often used to describe a procedure in which a neutral sits on a panel with representatives of the parties who have authority to settle the dispute. Once the panel hears the evidence and/or information presented, the neutral aids the other panel members in reaching a settlement, usually through facilitative and/or evaluative mediation. This procedure can be used with a panel consisting of a Board neutral and representatives from the contractor and the Government.

I recently had the occasion to serve as Board Neutral and employ this procedure. The dispute presented in the mini-trial arose from a contract awarded in 1985 for the design, development and maintenance of a worldwide logistics information system for the Air Force equipment. The purpose of the ADR proceeding was to attempt to resolve three consolidated appeals previously docketed at the Armed Services Board of Contract Appeals, together with other disputes arising from contract performance. Pursuant to Rule 204, the parties agreed to request ADR services from the GSBCA.

Prior to the mini-trial, I requested that the parties file briefs and supporting documentation. The parties made presentations to a panel consisting of the Board Neutral and representatives of the parties. Prior to the mini-trial, the Board Neutral and party representatives spent considerable time reviewing the parties submissions. After two and a half days of presentation to the panel, I, as the Board Neutral, facilitated negotiations between the party representatives. During the course of these negotiations, I offered non-binding evaluation of the parties' positions, and met *ex parte* with the party representatives. Thus, the procedure was conducted as both a neutral case evaluation and mediation. After several days of negotiations, the mini-trial concluded. The parties settled the disputes raised in the three consolidated appeals at the ASBCA, as well as other matters arising from the contract which had not been the subject of those appeals.

D. Binding Decision

Board Rule 204 provides for the issuance of a "binding decision" in much the same manner as non-binding neutral case evaluation:

Binding decision. One or more Board judges render a decision which, by prior agreement of the parties, is to be binding and non-appealable. As in the non-binding evaluation of a case by a Board Neutral, the manner in which information is presented for a binding decision may vary depending on the circumstances of the particular case.

I am currently serving as Board Neutral in a bid protest arising from a construction procurement in which the parties have elected to proceed in an accelerated proceeding in which documentation will be submitted, followed by summary arguments and testimony, after which the Neutral will render a binding, non-appealable decision. The parties have elected a very fluid procedure, in that they will not decide as to the nature of the summary arguments and testimony, or whether they will actually offer witness testimony, until after the submissions of documentation are exchanged.

E. Judicial Intervention

Judicial intervention is not mentioned in the current rule, but it can occur at any time in the process, and can take many forms. Judicial intervention can be merely the asking of a question, the answer to which is necessary to complete the record. While the purpose of my judicial intervention is not to force a party to meet its burden of proof, sometimes the response to my inquiry makes clear that the party cannot meet its burden of proof. Thus, if it appears to me that a party is evading an important issue, whatever the stage of the proceedings, I believe it is my prerogative to at least make an inquiry.

Asking a Question

For example, I had a protest in which a party had failed to file a responsive answer to an interrogatory. During a telephone conference, I requested the responding party to file a responsive answer to the interrogatory. The party then filed a brief stating that they would "prefer" not taking a position on the issue raised by the interrogatory. I then issued a written request, directing the party to file a responsive answer. At that point, the party did respond. The substance of the response was very unfavorable to the responding party, and this led to a resolution of the protest. I suppose that instead of issuing a written request for clarification, I could have issued an order precluding further evidence on the subject, drawn negative inferences, and perhaps the case would have proceeded to a hearing on the merits. On the other hand, I felt that the party was capable of giving a responsive answer to the interrogatory, so why wait?

Independent Review of Data

Another form of judicial intervention is independent review of data and a discussion with the parties before rendering a decision on the merits.

I was the panel chairman for an appeal that the parties elected to submit for a decision on the written record. The claim alleged nonpayment of rent under a lease for computer equipment. Several years after the lease was completed, the contractor became convinced that it had not been paid approximately \$200,000 under the lease agreement. The contractor's records had been destroyed, and it therefore did not have its own payment data. It made a Freedom of Information Act request for the Government's records, which consisted of invoices and payment vouchers. The contractor then attempted to prove that the Government's records did not support payment in the amount of the claim.

The parties filed briefs which contained argument and referred to documents in the appeal file. The contractor's brief took

a "broad brush" approach, which included mathematical computations which allegedly proved nonpayment of amounts in excess of \$200,000. The Government's brief argued that even if nonpayment had occurred, the contractor had waived or was otherwise estopped from asserting its claim.

I contacted counsel and suggested that there were various questions raised by the parties' submissions which would make it difficult for me to render a decision based solely on the arguments presented by the parties. The parties consented to an ADR session to explain their positions and to respond to my concerns. My main concern was that neither party had adequately matched the invoices and payment vouchers which were in the record with the list of payments which allegedly should have been made. They were making general arguments as to entitlement without doing the necessary arithmetic to ascertain whether there was any entitlement.

At the conclusion of the first day of the ADR session, it was clear to me that the parties had not adequately focused on the payment information in the record. I suggested that the ADR reconvene in several days, after I had a chance to review the payment vouchers. The next day, I constructed a spreadsheet in which I tracked every invoice and payment voucher against the payments which were allegedly missing. If I ultimately had to issue a decision on the merits, I would have reviewed this information in this fashion, in order to satisfy myself as to the evidence of payments made to the contractor. The result of my review of the evidence was that the Government had not produced payment vouchers for approximately \$9,000 of alleged payments — a far cry from the claim amount in excess of \$200,000. At most, the claim was worth \$9,000. But even the fact that the Government did not have documentation to support the payment did not mean that payment had not been made.

When the parties reconvened in the ADR, I simply showed them my spreadsheet. I told the contractor that my conclusion was that there was no documentation for \$9,000 of alleged payments, which did not mean that the contractor had proved that it was entitled to that amount. The parties settled the appeal shortly thereafter.

F. Motions for Summary Relief As a Basis for ADR

Motions for summary relief may provide an opportunity to initiate ADR. Parties spend considerable effort drafting such motions, and the motions serve to summarize in detail the parties' positions based upon the record of the case at that stage. Even if a motion is not granted, it may serve as the basis for ADR. If a party has filed a motion for summary relief which is not granted, I may suggest that the parties meet with me to talk about the issues raised in the motion. The parties are usually amenable to this suggestion, as this discussion affords an opportunity to hear what I have to say at this stage of the proceedings, and also salvages to a certain extent the effort expended in compiling the motions for summary relief.

I recently was the panel chairman for an appeal in which the parties filed cross-motions for summary relief. Both motions raised matters which required expert testimony, but neither offered expert testimony in support. Even so, the motions contained detailed information which provided an opportunity to assess the strengths and weaknesses of the parties' positions. During a telephone conversation with counsel, I advised them that neither would prevail on summary relief, and that I would issue a decision denying the motions in the near future. I also informed them that their presentation of information had led me to assess their positions and I would be glad to give them an indication of their strengths and weaknesses if they both agreed that this would be helpful. Both were amenable, and I gave them my assessment of the case. Based on my assessment, the parties settled the appeal.

G. Arbitration

Arbitration is the process by which parties agree to have a dispute resolved by appointing a person known as the arbitrator to listen to the evidence and then render a decision as to which party will prevail. In binding arbitration, the parties agree to abide by the decision of the arbitrator. In non-binding arbitration, the parties do not agree to be bound by the arbitrator's decision. They use the arbitration process to obtain an advisory opinion, as in neutral case evaluation described above. In non-binding arbitration, the parties may nevertheless abide by an arbitrator's decision, if they have confidence in the arbitrator's decision and a desire to end the dispute without resorting to what probably would be lengthy and costly litigation.

For cases over which the Board has jurisdiction, I do not view binding arbitration as a useful option. Binding arbitration involves the presentation of evidence before a finder of fact, and it is not a settlement technique. Having served as a private arbitrator, my experience with the process is that it is procedurally similar to litigation, and its processes are not necessarily faster or less costly than proceeding at the Board. Non-binding arbitration is a settlement technique, as neither party is bound by the result. For cases over which the Board has jurisdiction, I believe that neutral case evaluation is a less formal, faster, and less costly alternative than non-binding arbitration.

For contract and procurement disputes over which the Board does not have jurisdiction, but for which the parties request the Board to provide ADR services, binding arbitration may be used effectively in lieu of traditional procedures.

IX. An Example of a Combination of ADR Techniques

We have seen that ADR techniques may be used in combination. The following example illustrates how the parties who are committed to avoiding extensive litigation may fashion their own ADR procedures to their best advantage.

A dispute arose on a construction project in which the contractor alleged various government delays. In order to resolve its delay claim and relieve itself from liquidated damages, the contractor requested a contracting officer's final decision during performance of the project. The contracting officer did not render a decision, and the contractor appealed to the Board. The contractor's counsel, in his notice of appeal, requested an immediate conference with the Board. As panel chairman, I held the conference several days after the appeal was filed. Counsel requested suspension of proceedings to attempt to settle the dispute. The contracting officer shortly thereafter rendered a decision denying the claim.

After several weeks, counsel again requested a conference and advised me that a settlement had not been agreed, but that they believed that an ADR proceeding would resolve the major issue in the appeal. The relationship between the parties had deteriorated as the result of prior problems arising from the procurement, and the parties did not wish the appeal to remain unresolved while contract performance continued. The parties agreed to neutral case evaluation combined with mediation. Counsel presented argument, and a principal from the contractor and the contracting officer also attended. While we had initially planned for only ninety minutes of presentation, a three hour discussion ensued after the counsel presentations. In effect, the parties engaged in detailed, but limited, discovery as we sat at the conference table. After listening to the discussions, I rendered a non-binding opinion, and mediation commenced. By the end of the day, the parties had resolved the major issue in the appeal. The parties also agreed to return to the Board for ADR to resolve any future disputes as they arose, before they developed into claims and requests for contracting officer final decisions.

This commitment to cooperation rather than litigation, initiated by counsel in the early stages of an appeal, was successful in resolving a complex issue during an ongoing project. The ADR proceeding was used very effectively to present positions, perform limited discovery, and initiate and conclude settlement negotiations. Both the evaluative and facilitative assistance of a Board neutral were used.

X. ADR of Disputes Other Than Docketed Appeals

As mentioned previously, the current rule makes the Board available to provide ADR services to agencies whose Contract Disputes Act disputes would not ordinarily be resolved at this Board, and in instances where a contracting officer's final decision has not been issued or is not contemplated.

A. Non-Binding Arbitration and Mediation

I served as a Board Neutral in one Contract Disputes Act dispute which would have been litigated at another Board of Contract Appeals, except that the parties jointly requested that this Board provide ADR services. Originally, the parties agreed that the procedure to be used would be non-binding arbitration. After presentation of position papers and a session during which documentation and testimony would be offered, the Board Neutral as arbitrator would issue a written opinion which would serve as the basis for settlement negotiations.

During a preliminary conference with counsel the day before the ADR session was to be held, I reviewed procedures for the ADR session. The parties agreed that it might be useful during the ADR session if I met ex parte with counsel and/or with counsel and their clients in an effort to have the session result in a settlement. Thus, the nature of the proceeding changed from non-binding arbitration to mediation.

The ADR session commenced with counsel offering opening statements. Counsel set forth the parties' positions as to entitlement and quantum, and factual statements were made by individuals from both parties. Thereafter, I held ex parte discussions with counsel, and with counsel and their clients, concerning the parties' positions as to the various issues of entitlement and quantum. As the ADR session proceeded, the parties indicated a willingness to attempt to resolve the dispute by settlement discussions, and requested that I transmit the settlement offers and counteroffers. At the end of the day, after exchanging several offers and counteroffers, the parties agreed to a settlement of the dispute. A closing session was held with all in attendance, in which the settlement amount was confirmed.

B. Mediation of A Government Claim Prior to Issuance of CO Final Decision I have also served as a Board Neutral with regard to a Government claim against a contractor which had not been the subject of a contracting officer's final decision. The parties agreed to submit the claim to ADR. The proceedings were conducted as a mediation, similar to the one described above.

C. Mini-trial of Appeals Docketed at Another Board of Contract Appeals Previously in this paper, I discussed a mini-trial which resolved disputes in three consolidated appeals which were docketed at another Board. The parties sought ADR services from this Board, and the disputes involved in the previously docketed appeals as well as other disputes arising from the performance of the same contract were resolved in a mini-trial procedure at this Board.

D. Binding Decision in a Protest Docketed at the Court of Federal Claims I also previously discussed bid protest in which the parties have elected a binding decision. That protest was originally filed at the United States Court of Federal Claims Court. The parties agreed to attempt to resolve the protest by requesting ADR services from this Board.

XI. Standing Neutrals on Specified Projects

In December, 1996, GSA signed a development agreement with Boston Properties, Inc., establishing the GSBCA as a standing neutral to provide alternative dispute resolution services throughout the construction of a \$330 million facility at the National Institutes of Health (NIH) main campus in Bethesda, Maryland. The facility is expected to take seven years to complete, and is currently in the planning and design stage.

Three Board judges have been designated to serve as a team of project neutrals. GSA's news release concerning this project states:

Whenever the contracting parties are unable to settle disputes arising on the project, these judges will mediate the disputes or conduct mini-trials and make recommendations for reaching accommodations without expensive and lengthy litigation. These recommendations will be made quickly and will not be binding on either party. If a dispute goes on to litigation, the other six members of the Board will be available to serve as judges.

XII. Allowability of Expenses Incurred in ADR

The issue of allowability of expenses of ADR is usually raised in the settlement process. The parties strive for an all-

inclusive settlement sum. Recovery of interest in appeals brought under the Contract Disputes Act is generally included in settlement offers proposed by the contractor. If the contractor is eligible to receive an award pursuant to the Equal Access to Justice Act, the parties may submit the issue of whether respondent's position is "substantially justified," and receive a non-binding advisory opinion as to this issue.

XIII. What ADR is Not

ADR is not a process in which a claimant receives something for nothing. Sometimes a participant receives no recovery in the process. This may occur if the case lacks merit, or if the party fails to convince the Board Neutral or the opposing party that it has any chance of meeting its burden of proof. A party should not expect a reward for merely participating in the ADR process. In the private sector, many believe there is a tendency in arbitration for the arbitrator to "split the baby." My experience as a private arbitrator is that this does not occur. When I serve as an arbitrator, I do not reward a claimant half of its claim for just "spending the time." In fact, I have never been tempted to do so. The same holds true for ADR at the Board. The value of submitting claims to ADR which lack merit or are unsupported is that the resolution comes quickly and at less cost. It is not my experience that meritless or unsupported claims fare better in ADR.

XIV. Conclusion

The Board cannot unilaterally initiate ADR proceedings. All parties must agree to participate before such proceedings can be held. My experience is that ADR proceedings are successful in most cases. As this paper illustrates, I have used neutral case evaluation, mediation, mini-trials, binding decisions, judicial intervention, arbitration and settlement discussions based upon motions for summary relief as successful ADR techniques at the Board. My experience is that these procedures save time and resources, and resolve cases to the satisfaction of the parties.

JUDGE'S CORNER

by: the Honorable Cheryl Scott Rome
Administrative Judge, IBCA



THE INTERIOR BOARD OF CONTRACT APPEALS — STILL ALIVE AND KICKING

The picture on the cover of this issue of "The Clause" shows me in better days, not long ago. Now I wish to present an accurate picture of the Interior Board of Contract Appeals. The IBCA adjudicates Contract Disputes Act and other contract, and some grant, disputes for Interior, the U.S. Environmental Protection Agency, the Indian Health Service of the Department of Health and Human Services, the Office of Personnel Management, the Peace Corps and ACTION. Articles have appeared in "The Government Contractor" recently, noting that the IBCA has been targeted for elimination. Were the IBCA to be abolished, the waste would be palpable. As demonstrated below, a cost/benefit analysis mandates retaining the IBCA.

The reason offered publicly to attempt to justify the unwarranted abolition of the IBCA is that it has a "dwindling" caseload. The facts demonstrate otherwise. Ironically, prior to recent events, one of the Board's primary concerns was how to handle our healthy caseload more expeditiously, so as to reduce the backlog of appeals awaiting written decisions. Now, the interruptions to our work and burdens imposed by the threatened course of action have interfered with, but have not overcome, our determination to decide cases expeditiously and always with the same high quality for which the IBCA has been renowned over the many years we have served DOI, other federal agencies and the private contracting community.

No matter how our appeals are counted, a 1996 audit of the DOI's office of Hearing and Appeals, of which the IBCA is a part, by DOI's Office of the Inspector General, initiated by OHA's current Director, did not criticize the IBCA or challenge its caseload. The Director's own attorney auditors concluded in their 1994 audit report, which the Director endorsed, that the IBCA has a healthy workload. An independent DOI "Blue Ribbon

Committee" reached the same conclusion in its July 1996 report, endorsed by former Secretary Manual Lujan, Jr.

OHA recently erroneously reported to Senator Kennedy's office and to DOI management that the IBCA had only 26 to 30 cases. On August 20, 1997, "The Government Contractor" reported our incoming appeals by appellant and by number of claims through August 11, 1997. It did not report our pending caseload, which can vary from week to week, but as of August 22, 1997, was about 91, counted by appellant, and about 243, counted by separate claims filed. Indeed, far from "dwindling," a statistical study shows that, on a per judge basis, our incoming appeals have increased significantly in 1997 and are projected to total at least 71 by year's end, thus substantially increasing our pending caseload.

Further, the principal component of the IBCA's budget is salary, which has been set by Congress, and is somewhat over \$350,000 for the Chairman and two members. We have no Vice-Chair. The Director eliminated that position. I do not know the budget component for benefits and overhead, but our very modest office space is part of OHA's overall space. At the same time, we are charged with resolving contract disputes totaling millions of dollars. I have one case alone in which the Government is seeking to recover over \$39.5 million from a contractor. Any reasonable cost/benefit analysis shows that the IBCA provides a big bang for the taxpayers' buck. Moreover, the work we do must be paid for by Interior in any event. No other Department or agency will accept our caseload without requiring that the work, and the judges necessary to perform it, be funded by DOI.

Any decision to abolish would contravene the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1993). That Act and its regulations, which took years of negotiations by Interior, HHS, and the Native American community to develop and were only finalized in June, 1996, require that contract disputes under the Act be heard specifically by the IBCA.

Additionally, the President's April 29, 1994 Executive Memorandum, 59 Fed. Reg. No. 85, and Secretary Babbitt's Departmental Order No. 3175, as amended through December 1, 1995, both require prior consultation with Native American Tribal Governments before any action to abolish the IBCA is taken. After this requirement was pointed out to the Director, he then stated that consultation with Congress and the Tribal Governments would occur. However, that statement was made in a written notice confirming the intent to abolish the IBCA. Any predetermined result would make consultation meaningless.

The proposed abolition of the IBCA in the manner contemplated, which does not include the transfer of any judges with the work, has been perceived as an impingement upon judicial independence and as potentially violating the CDA. As stated in a May 12, 1997 letter from the Board of Contract Appeals Judges Association to Honorable Steven J. Kelman, Administrator of the Office of Federal Procurement Policy:

[BCAJA] has, among its purposes and consistent with the mandate of the [CDA], an interest in the proper establishment and maintenance of independent and impartial Boards of Contract Appeals within the Federal Executive branch. BCAJA is equally concerned with the independent status of the Administrative Judges who are members of such Boards, a status conferred by the CDA at 41 U.S.C. § 607. As indicated in both the House and Senate Reports, the Boards of Contract Appeals were created to function with the independence of trial courts in conducting proceedings and deciding cases, not subject to direction or control by procuring agency management authorities. S. Rep. No. 95-1118, 95th Cong., 2d Sess. 24, reprinted in 1978 U.S. Code Cong. & Admin. News, 5235, 5258; H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. 22 (1978). The impartiality and independence of the Boards and Board members are the very foundation of integrity upon which an effective disputes resolution system must be based.

* * * * *

If consideration is being given to transfer of the IBCA's function to another agency Board without also transferring the IBCA judges, then the independence of all BCA judges is compromised. See 41 U.S.C. [sec.]

607(b)(1). All Boards and Board judges would not then be independent.

BCAJA followed with a letter to Interior Secretary Babbitt, dated August 15, 1997, concluding:

Any decision to dissolve the Interior Board and to transfer its pending contract appeals should be made for sound procurement related reasons only, as set forth in the CDA. If the ultimate decision of DOI is to dissolve the Interior Board and transfer its contract appeals workload, we assume that the transfer of resources and Judges will accompany the workload transfer consistent with the Interior Board's contract appeals pending caseload in order to preserve the integrity and independence of the contract disputes resolution process mandated by the CDA.

The DOI has had its own Board of Contract Appeals for many years. The Interior Board's tradition and expertise in resolving the DOI's contract appeal disputes should not be cast aside without considerable review of all of the facts surrounding the recommendation for dissolution. The Boards of Contract Appeals, including the Interior Board, issue decisions which can affect the expenditure of substantial sums of appropriated funds. Such decisions also create legal precedent affecting the administration of contracts and allowance of contract costs. The need for and the value of quality decisions should be considered in any cost-benefit analyses of a Board's operations.

I cannot conclude my remarks any better.

TREASURER'S REPORT

by Barbara E. Wixon
Williams & Jensen

August 28, 1997

BCA Bar Association Statement of Financial Condition For the Period Ending August 28, 1997

Beginning Balance	\$ 2,561.34	
Fund Income:		
Dues	\$ <u>200.00</u>	
Subtotal		\$ <u>2,761.34</u>
Fund Disbursements:		
D.C. Bar ('97 BCA Judge's Reception)	750.00	
A&B Litho (Directories)	<u>1,032.31</u>	
Total Fund Disbursements		<u>(1,782.31)</u>
Ending Cash Balance		\$ <u>979.03</u>

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: \$25.00 [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: - _____

City/State/Zip: _____

Work Phone: _____ **Fax:** _____

email address: _____

SECTION II (THIS SECTION FOR COMPLETION BY NEW MEMBERS ONLY.)

I am applying for associate membership (for non-attorneys only)

I am admitted to the practice of law and am in good standing before the highest court of the:

District of Columbia: _____ **State (s) of:** _____

Employment: Firm _____ Corp _____ Govt _____ Judge _____ Other _____

SECTION III

Date: _____ **Signature:** _____

FORWARD THIS APPLICATION WITH A CHECK FOR \$25.00 PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:

**Barbara Wixon
Williams & Jensen
1155 21st Street, NW
Washington, DC 20036**
