

BCA BAR ASSOCIATION

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EDITOR'S COMMENT

by Jim Nagle

It is amazing how fast these newsletter deadlines come around. It seems like only yesterday we were sending out the last issue and now the time has come again for us to get ready to publish this issue. It seems like such a short time until you realize that a war has been fought and decisively won between those two publication dates.

Those of us who are involved in government contracts, even solely as litigators, can be button-bustingly proud of the government contracts process. For years, critics have condemned everyone involved in government contracts as lazy, stupid and venal, spending incredible lengths of time and incredible piles of money to buy inefficient weapons and other products. Such critics do not understand how the various statutes and regulations required such a painstakingly slow and often inefficient process in the interest of fairness and a variety of socio-economic goals. Nor do they understand that cost overruns can result from a variety of reasons, not the least of which is a cascade of change orders designed to make sure that the product keeps pace with an exploding technology so that it is not obsolete the day it rolls off the production line. Finally, the critics have not accepted that perhaps the opinion of the service members who are prepared to use this equipment in battle should be entitled to somewhat more weight as to its efficiency than some critics who, only a few years after acquiring their art history degree, pronounce authoritatively on what is or is not a good weapons system. Even days before the ground war began, I was arguing vehemently with some people who, unburdened by any knowledge, were arguing that the M1A1 and the Apache would be useless in the desert because of all the breakdowns they would suffer.

Hopefully, such critics will take a break now and at least acknowledge that they were possibly wrong on some of their claims. Some people are already arguing that this was a battle of World War III weapons versus World War I weapons. Hogwash!. Hussein has not been spending all that petro-money in the last decade to buy antiquated weapons. He has bought the best weapons available to him, especially Soviet made technology, which now lies burnt and bombed out on the Arabian peninsula. As a parenthetical, you may have noticed various news stories that have reported how concerned the Soviet military has become over the effectiveness of their arms versus American equipment.

As litigators before the Boards of Contract Appeals, it is easy for us to lose sight of the fact that we are integral parts of the procurement process. Even our clients, the corporations or the contracting officers, don't like to admit that. But we are. We keep the system honest, we make sure the claims are paid, that arbitrary government decisions do not stand, and that inefficient or crooked contractors cannot keep bellying up to the government table. We all share in the system's success.

In this issue, Judge Guy H. McMichael, III, the Chairman of the Veteran's Appeals Board of Contract Appeals gives us his views on resolving appeals more quickly. He provides some insights as to what the particular problems are in having a speedy resolution in disputes, and some suggested ways to hasten the process.

Peter MacDonald has contributed another Accountant's Corner in explaining that there are various types of CPAs. Understanding the distinctions will be extremely helpful in choosing or cross-examining such an expert. We have an article from Hugh Long and Tim Rollins on GSCBA protests. This article is written from the perspective of government counsel. We would

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be delighted if we received a private or corporate practitioner's viewpoint. And we have an article on dispositive motions by David Anthony.

At the back of the issue there is a form for the Visiting Judge Open Forum that our president, Ron Kienlen, has proposed. The page itself is self-explanatory, so I refer you to it for what I think will be an extremely valuable insight into Board practices and procedures, especially for those of you outside the Washington, D.C. area.

Finally, there is an application for membership in this issue. Please circulate this issue of the newsletter, and previous ones, throughout your firm, organization, or office, and encourage people to join. We have much to offer and our benefits can increase exponentially as our membership lists grow.

As always, I solicit your comments, suggestions, and any articles or matters of interest you wish to share with our other readers. Please send them to me at: Oles, Morrison & Rinker, 3300 Columbia Center, 701 Fifth Avenue, Seattle, Washington 98104-7007.

THE JUDGES CORNER

RESOLVING APPEALS MORE QUICKLY

GUY H. McMICHAEL III
Chairman, Veterans Affairs
Board of Contract Appeals

There seems to be general agreement that appeals often take too long to be resolved. Agreement soon dissolves, however, when it comes to assigning responsibility or proposing a solution to the problem. To simplify the discussion let's admit at the onset that there are few innocent parties and no single magical solution. Rather we are all guilty to a degree and a variety of approaches may be used to reduce appeal time.

As for delay in general, it is a given that most judges and attorneys can argue persuasively that they have less available time than the demands made on them. In any event, procrastination has always been the chronic disease of the legal profession. Less pressing things are put off for more pressing matters.

Administrative Judges could, it is admitted, address the matter head on by making all cases filed before them a "high priority" matter and establishing more rapid and inflexible deadlines. But this runs the risk of making no case high priority and ignores the reality that appeals are not fungible but rather have different time and processing requirements. Moreover, many find this a Draconian remedy. Some claimants attach greater urgency to appeals than others. Other appellants lack the ability to commit significant resources to an appeal in a shortened time period. And some appeals like recipes simply need simmering time before they are ready for resolution—particularly where settlement is being contemplated.

While it's not suggested that judges abdicate their pri-

mary responsibility to manage case dockets in an efficient manner, some indication of the priority assigned to an appeal by the litigating parties is often helpful. As a practical matter the urgency assigned to an appeal will more often than not be influenced by the urgency communicated by the party seeking relief.

With these general observations in mind, let's consider some ways in which the priorities can be indicated and appeal time reduced. Perhaps the most efficacious way to accomplish this would be for a routine early scheduling conference to set the time parameters of the case. A party which comes to that conference with a good idea of what is important to its case and what additional evidence is needed to persuade the board is in a good position to suggest a realistic timetable. It has also been observed that a fact-specific, detailed complaint which focuses the Government attorney's attention—and that of the Board—on what is really at issue can facilitate reduced processing time. Also helpful in this connection is a complete and properly assembled Government Rule 4 file together with a prompt and thorough supplementation of the file by the appellant as directed by the rule. Even where early scheduling conferences are not a regular Board practice, most judges would be amenable to an early setting of milestones where a party seeks such a conference.

ADR is more talked about than utilized. Where actually used it has resolved appeals in a timely manner and won the praise of those involved. Most boards now routinely notify the parties of the availability of ADR in their docketing notices. We just need more customers and less distrust of the procedure—particularly on the part of some Government attorneys.

Discovery traditionally consumes a significant portion of the appeal process time. Much of this could be reduced if the parties concentrated on what was really important and adhered to the spirit of the BCA discovery process which is intended to be voluntary and informal in nature. Ever expanding interrogatories of doubtful utility and an uncooperative attitude invariably produce a similar response from the other party. Perhaps the answer is to establish numerical limitations on the discovery process, but is this really the most desirable way to solve the problem?

A related problem, for which the administrative judiciary bears a significant responsibility, is the failure to obtain stipulations on many matters which are not really an issue or which are tangential to the real controversy in the appeal. This can often prolong a hearing with added expenses for all parties concerned. Greater utilization of prehearing submissions may be called for.

Boards may also have sent mixed signals to litigating parties about the utility of motions. Frequently motions are regarded by some Administrative Judges as a distraction which consumes precious time and more often than not fails to expedite appeal disposition. On the other hand many appeals do seem ripe for summary judgment motion or Rule 11 submission. To succeed, however, greater care needs to be taken by the moving party to establish what the material facts are, utilizing information, admis-

sions and affidavits obtained during the appeal process. For their part, Administrative Judges need to be more mindful of the standards for summary judgment set forth in *Celotex Corp. v. United States*, 477 U.S. 317 (1976). Finally, let's examine the time from hearing to decision which is another major contributor to extended processing time. Here the Boards shoulder the principal responsibility. Greater effort needs to be made by judges to write the decision while the disputed events are still fresh in their minds. Facts determined at the hearing, their connection to other facts and ultimate conclusions can fade quickly from a mind interrupted for any period of time with other matters. Returning to a case "cold" and trying to remember why you concluded this or that is neither pleasant nor an efficient way to reach a decision.

To facilitate this process perhaps principal briefs should be required prior to the hearing with a limited period for supplemental posthearing briefs. Perhaps also, there should be greater attention given to the scheduling of other appeals so that reserved time for decision is available shortly following the hearing. Shorter, more summary opinions have also been urged in general, but to date no affected party has asked for it in his appeal. Until the parties request summary decisions in their appeals, it is unlikely that the Board's will depart from detailed fact finding.

ANNUAL BCA JUDGES' SEMINAR

On May 23, 1991, the BCA Judges' Association will conduct its annual seminar at the Radisson Plaza Hotel, 5000 Seminary Road, Alexandria, Virginia. The title of the seminar is "Litigating Government Contract Claims in the 90's" and will certainly be a worthwhile, indeed invaluable, presentation that will interest all our members. Registration will begin at 8:00 A.M., followed by welcoming remarks by the Honorable Sherman P. Kimball of the Engineer Board, the current president of the BCAJA. The presentation will consist of four panel discussions, the first two panels in the morning will discuss Managing the Termination For Convenience Case, and then a demonstration on the Examination of an Expert Cost Witness. The luncheon speaker is the Honorable Helen W. Nies, the chief judge of the United States Court of Appeals for the Federal Circuit, who will discuss "What is Precedent?". In the afternoon, the two panels will discuss Defective

Pricing and then Other Perspectives. The lecturers are a virtual Who's Who of BCA practice, including this association's immediate past president, Marshall Doke. Following these presentations, there will be a reception for the attendees. The registration fee for this seminar is \$110.00. For additional information, contact Judge Elizabeth A. Tunks, at the ASBCA, Skyline 6, 5109 Leesburg Pike, Falls Church, Virginia 22041-3208. Judge Tunks' telephone number is 703/7558516. For anyone involved in BCA practice, this is a "can't miss" event.

KEEPING OUR MEMBERSHIP ROLLS CURRENT

Please remember to notify our membership chairman, Sandy Faulkner of Rives & Peterson, 1700 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203-2607, as soon as your address is changed. Also, please circulate the newsletter throughout your office and remind any personnel who may have been members of the old Armed Services Contract Trial Lawyers Association (which merged into the BCA Bar Association) that they became members of the BCA Bar Association and are entitled to receive one year's membership. So they also should contact Sandy as soon as possible. We really are making a sincere and concerted effort to update our membership rolls, but we need your help.

THE PRESIDENT'S CORNER

Ron Kienlen

There appears to be a slight increase in the number of bench decisions being requested and issued. This has resulted in prompt results for both of the parties. There has been no indication that the single judge decision represented any difference in outcome from that to be expected of a three or five judge decision.

There has also been a minor increase in the number of situations in which judges have become more active in working with the parties in settlement negotiations. I'm in the process of cajoling some of the participants into sharing their experiences with you. With all the time they have saved in not having to write lengthy briefs and long opinions, they should have a lot of extra time to write about their experiences. We'll see.

This year the Federal Circuit Judicial Conference is set for May 9th. There will be a separate afternoon break-out session for the Boards of Contract Appeals. We are supporting the Boards in putting together this session, thanks to the leadership of John Chierichella, who chairs our Programs & Education Committee. The topic will concern the different contract forums. Of interest will be the litigator's and client's current reasons for making a choice, and how the cases are perceived on appeal.

If you haven't expressed your interest in participating in informal forums with a visiting judge and your colleagues, take advantage of the form at the back of this newsletter. Also, if you haven't, please send your dues into our treasurer. Just \$25 for those who forgot or who transferred in from the Armed Services Contract Trial Lawyers Trial Association.

The February 27, 1991 opinion in *United States v. Grumman Aerospace Corporation*, CAFC No. 90-1217 (precedential opinion issued February 27, 1991) (a unanimous three judge panel, with four circuit judges dissenting from the Court's refusal to consider the case en banc), stated that Congress had delegated authority to the office of Federal Procurement Policy, under Section 8 of the CDA (41 U.S.C. 607(h)), "to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority)."

Aside from its impact on the issue of certification, this decision may suggest that OFPP has significant regulatory authority governing the establishment, functions (including jurisdiction), and procedures of all the Boards. If that is the case, it may well be that any suggestion our association develops with respect to changing Board procedures should be directed to OFPP, rather than the individual agency boards.

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GUIDELINES TO PROCESSING GSBCA PROTESTS

Lieutenant Colonel Clarence D. Long, III
Chief, GSBCA Bid Protest Team, CA
and
Timothy Rollins, Esquire
Williams and McCarthy
Rockford, Illinois

Having a protest filed with the General Services Administration Board of Contract Appeals (GSBCA) against an installation procurement can be something of a shock to the contracting officer and installation contract attorney who have never had the pleasure of experiencing such a protest. Yet, because of the compressed nature of proceedings before the GSBCA, there is no time for installation personnel to familiarize themselves with GSBCA procedures.

This article is intended to give a general overview of practice before the GSBCA, with particular emphasis on the role of the contracting officer, so that installation personnel may familiarize themselves with these procedures before actually receiving such a protest. The authors hope that contract attorneys will pass this article on to the contracting officers they advise.

I. DIFFERENCES BETWEEN THE GSBCA AND THE GAO.

Most contracting officers and contract attorneys have at least some familiarity with GAO protests, and it might, therefore, be useful to briefly compare the two forums and highlight the differences. This is particularly true because there are significant procedural and substantive differences between GAO protests and those filed with the GSBCA, and it is dangerous for any contracting officer or contract attorney to regard a GSBCA protest in the same light as a GAO protest.

A. Procedural Differences

The major procedural differences between GAO protests and GSBCA protests are the time limits involved, the protester's access to agency information, and the differences in the level of formality and adversarial nature of the two proceedings.

Unlike GAO protests, in which a decision is required to be issued within ninety (90) working days¹, in GSBCA protests decisions are required to be issued within half that time—or forty-five (45) working days from the date the protest is filed.² Yet, conversely, there are many more demands on the agency within that shorter period. This difference alone—a process which requires more actions within a shorter period of time—is the most significant reason why an agency cannot approach a GSBCA protest in the same fashion that it approaches a GAO protest.

The second significant procedural difference is the protester's access to agency information. Unlike GAO protests, in which the agency still has a great deal of control over what information the protester will have access to,³ the GSBCA grants protesters almost full discovery

rights similar to those available in federal court.⁴ Using these rights, a protester may: pose written questions relevant to its protest which the agency is required to answer; request documents which the agency is required to produce; and question agency personnel under oath. The Board also issues protective orders, so that a protester's outside counsel may view proprietary and/or competitive-sensitive information.⁵

In addition to these discovery rights, the agency is required to put together and serve on the protester a "protest file," containing all documents relevant to the protest.⁶ In sum, in GSBCA protests a diligent protester will be provided with all information relevant to its protest grounds, and probably a good deal of information not directly related to its protest grounds.

The third major difference between the two types of protests is the formality of GSBCA proceedings. The GAO group that entertains bid protests was initially conceived of as a very informal, inexpensive review process for disappointed bidders and offerors. It still retains much of that character, although it has recently moved to provide increasingly formalized alternative procedures.

The GSBCA, on the other hand, has always offered comprehensive adversarial proceedings for its bid protests, culminating in a hearing on the merits before an administrative judge at which witnesses testify under oath and are cross-examined by opposing parties.⁷

B. Substantive Differences

Besides the procedural differences, the GSBCA employs a different, less deferential standard of review than the GAO. The GAO will essentially deny a protest if it finds that the agency acted "reasonably."⁸ It will not, or so it says, substitute its judgment for that of the agency officials. The GSBCA, on the other hand, employs what is known as a *de novo* standard of review.⁹ What this means is that, in most cases, the GSBCA grants no deference to the contracting officer's decision and instead unabashedly substitutes its own judgment for that of the contracting officer. This difference in review standards has led directly to the GSBCA's use of legal standards different from those used by the GAO.

C. Differences in Protest Outcomes

It is hard to accurately compare the impact of these procedural and substantive differences between the two forums. Statistics show that over half of all protests tried on the merits by the GSBCA are sustained and that, if settlements and dismissals are included, approximately half of all protests filed at the GSBCA result in some relief being given to the protester.¹⁰ In other words, if a GSBCA protest is filed against your installation the odds are that you will either lose the protest or have to settle with the protester. The statistics for GAO protests are much more favorable to the agencies.¹¹

Protests before the GSBCA are, therefore, no casual matter. The results of an improperly handled protest can be devastating to all concerned in terms of time added to the procurement cycle, added costs, stress, and additional resources.

- 3 Bid Protest Regulation, 4 C.F.R. 21 (1990). The GAO is still in the process of expanding protestors' rights to agency information. It is currently considering issuing protective orders to allow protestors' representatives to see proprietary and/or competitive sensitive information.
- 4 GSBCE R.P. 15.
- 5 GSBCE R.P. 15(f)(1).
- 6 GSBCE R.P. 4.
- 7 GSBCE R.P. 21.
- 8 *M. Steintal & Co v. Seamans*, 455 F.2d 1289, 1301(D.C. Cir. 1971).
- 9 *Storage Technology Corp.*, GSBCE No. 9793-P, 1989 BPD 1.
- 10 Feidelman, *Bidding and Negotiation/GSBCE and the Courts*, 1990 Government Contracts Year In Review Conference Briefs (1990).
- 11 BNA FED CONTRACT RPT, Index Summary, Vol 49, Rpt Nos.1-26, p. 1-1274, Jan 4 - Jun 27, 1988.
- 12 GSBCE R.P. 5.
- 13 GSBCE R.P. 5(a)(1)(iii).
- 14 GSBCE R.P. 5.
- 15 GSBCE R.P. 1(e).
- 16 GSBCE R.P. 5(d).
- 17 GSBCE R.P. 1(b)(4).
- 18 GSBCE R.P. 9.
- 19 GSBCE R.P. 19(a)(2). If the tenth calendar day falls on a weekend or federal holiday, the Board has held that a protest filed the next working day may still request suspension. The Board has also ruled that if the protest itself is filed within the necessary time limit, the request for suspension can be made at a later date. The Army has actually had situations where the protester itself does not request a suspension but at the pre-hearing conference the hearing judge will, on his own, ask the protester if he wants a suspension.
- 20 GSBCE R.P. 19(d).
- 21 GSBCE R.P. 19(a)(3). The Board looks with disfavor on contested suspensions, and sometimes punishes agencies which contest suspension by giving only one or two days to prepare for the suspension hearing. In one recent protest, the hearing judge ordered that the suspension hearing be held two days after the pre-hearing conference, despite the fact that all of the Army's witnesses had to fly in from Arizona.
- 22 GSBCE R.P. 21(c). Attorneys familiar with GSBCE practice sometimes speak of the "general officer rule." There is a perception that, in deciding whether unusual or compelling circumstances exist, the GSBCE is unimpressed with any testimony given by someone lower than a general officer, a high level SES, or the Assistant Secretary of an agency. The theory is that if an agency cannot get someone important to testify, the requirement cannot be all that important.
- 23 *Computervision Corp.*, GSBCE No. 8601-P, 86-3 BCA(CCH)P10,1855 (1986).
- 24 *VION Corp.*, GSBCE No. 10218-P-R, 1990 BPD [30.
- 25 GSBCE R.P. 5(b)(3); *VION Corp.*, GSBCE No. 10218-P-R, 1989 BPD 274.
- 26 P.L. 98-369 2713,98, Stat. 1182-84 [codified at 40U.S.C. 759(a)(1982).
- 27 40 U.S.C.}759(a) (1982).
- 28 Rollins, *A Contract Lawyer's Guide to the Requirements for Meaningful Discussions in Negotiated Procurements*, 122 MIL. L. REV. 221 (1988).
- 29 *National Bio Systems*, GSBCE No. 1 0332-P, 1989 BPD 354.
- 30 For example, suppose a protester alleges that the awardee cannot meet a particular mandatory requirement, yet, if the requirement were given the interpretation advocated by the protester, the protester would not meet it, either.
- 31 *VION Corp. v. United States*, C.A. F.C. No. 90-1190, Slip Op. 25 June 1990.
- 32 GSBCE R.P. 15.
- 33 See Standard Protective Order issued by the Board in GSA proceedings.
- 34 GSBCE R.P. 4(a)(9).
- 35 GSBCE R.P. 25(b).
- 36 GSBCE R.P. 32(c).
- 37 GSBCE R.P. 35(a).
- 38 GSBCE R.P. 11(a).
- 39 Federal Acquisition Regulation, 48 C.F.R. 15.402.

TYPICAL DEADLINES FOR A GSCBA PROTEST

<u>EVENT</u>	<u>TIME</u>	<u>RESPONSIBILITY</u>
Notification to all interested parties of protest (usually that means all offerors)	1 day after receiving copy of protest	Contracting Officer (probably best to do by telefax)
Prehearing Conference	Usually 2 working days after protest is filed	Trial Attorney
Notification to GSCBA that all interested parties notified	5 working days after protest is filed	Contracting Office
Protest (Rule 4) File	10 working days after protest filed	Contracting Officer (but the trial attorney will want to see it first. Therefore, the K.O. normally has only about 7 working days
Suspension hearing (If the agency decides to contest)	Not later than 10 Calendar days after protest filing	Trial attorney (but normally the KO and senior requiring activity officer will have to be there)
Written discovery requests	As set by the Board, but normally one week after protest filing	Trial attorneys, but KO/COR will normally be requested to provide substantial input to the agency's requests to the protestor
Response to written discovery	10 working days after receiving from protestor	Trial attorneys and contracting officer. This can be an unusually complex effort, with many people, nights and weekends involved.
Dispositive Motions due	As set by the Board. Normally 20 calendar days or so after protest filed	Trial attorneys
Depositions	As set by the Board. Probably 25-28 days (calendar) after protest filed. No more than 1 week will be allowed to depose as many as 10-12 witnesses	Trial attorneys, but KO, COR and technical evaluator may have to be deposed.
Prehearing Brief	As set by the Board. Probably 35 calendar days after protest filed	Trial attorneys
Hearing	As set by the Board. No later than 25 working days (40 calendar days) after protest filing	Trial attorneys, All witnesses, KO.
Post-Hearing Brief	5 days after hearing	Trial attorneys

have the burden of negating the other party's, position.

The Celotex decision is of great importance to contractors in any case, but particularly cases involving cost disallowances and more particularly in defective pricing cases. Currently, it is the frequent practice of Contracting Officers to issue Final Decisions by rote, adopting without analysis DCAA cost disallowances or findings of defective pricing. Such DCAA positions are frequently based on insufficient factual evidence, misunderstanding of the facts, or a lack of understanding of the law. Instead of carrying the burden in a motion for summary judgment of negating all of the DCAA misconceptions, under Celotex the appellant contractor can move for summary judgment with a simple motion and thereby thrust upon the Government for the first time the necessity of supporting its position or to have its case, summarily rejected.

From the contractors' viewpoint, the judicious use of summary judgment should be an important part of its effort for timely and efficient disposition of appeals.

THE ACCOUNTANT'S CORNER

TYPES OF CPA'S: The Good, the Bad and the Ugly by Peter A. McDonald C.P.A., Esq.

CPA's have their own fields of specialization, and being aware of what these fields are enhances the likelihood of finding an accountant suitable to the assignment.

One area of specialization is Personal Financial Planning (PFP). CPA's in this field concentrate on the preservation and enhancement of individual wealth. This encompasses state and federal taxes, investments, insurance coverages, estate planning and so on. The clients of these accountants are usually individuals and trusts. The College for Financial Planning in Denver offers an extensive and rigorous course of instruction and examinations, the successful completion of which leads to the CFP (Certified Financial Planner) designation.

For accountants specializing in corporate accounting and finance, the National Association of Accountants maintains the Certified Management Accountant (CMA) program. These individuals either work for or are controllers, treasurers, vice presidents of finance, or similarly titled positions in corporations. Their focus is the determination and control of costs, as well as using actual and estimated costs to help management identify its best course of action.

Some CPA firms specialize in taxes and largely restrict their practices to issues of tax management and the preparation and filing of tax returns. Other CPA firms concentrate on performing audits, sometimes only in par-

ticular industries. Because both fields are founded on a detailed knowledge of a client's management and internal operations (which indicates the high trust), these firms tend to have long term relationships with a stable clientele.

Of interest to members of the BCA Bar Association, some CPA firms now offer litigation services support, which entails the quantification or analysis of various kinds of claims. Moreover, the national accounting firms have divisions that provide government contract services, to include litigation support (a growing field). If the size of the claim justifies hiring a CPA, this can be a very worthwhile expense.

Another area of specialization is known as Management Advisory Services (MAS). MAS specialists, who are popularly referred to as consultants, have experience in particular industries or knowledge in certain accounting and related fields that enable them to render advice on complex business problems. Their clients are usually corporations and large partnerships.

Of course, the general practice of accounting involves the preparation of financial statements, bookkeeping services, business planning, tax advice, and associated matters. While almost any CPA firm could theoretically provide the specialized services described above, ethical considerations (specifically, Article 201 of the AICPA Code of Ethics) prohibit CPAs from accepting assignments beyond their abilities. Accordingly, CPAs rarely accept an undertaking outside of their field of expertise.

Unlike the American Bar Association, the American Institute of Certified Public Accountants (AICPA) mandates minimum annual Continuing Professional Education (CPE) hours for its members. This requirement can be met by taking AICPA or state sponsored courses. In this manner, the AICPA promotes the uniform quality of accounting services for both specialists and general practitioners.

Knowing the kind of CPA you want helps you find an accountant better suited to your requirements.

THE FEDERAL PUBLICATIONS BRIEFING PAPER OF DECEMBER, 1990

Lawyers who practice before the Boards of Contract Appeals must of necessity know something about the U.S. Court of Appeals for the Federal Circuit. The Federal Publications Briefing Paper of December, 1990 is a guide to the Court of Appeals for the Federal Circuit by Michael J. Shea and Michael J. Schaengold. It is an excellent, concise, and practical guideline to practice before the Court and highlights the special rules regarding contract litigation.

distinguish your case from your opponent's while at the same time preparing the judge and opposing counsel that you will be using a visual approach to your case.

Settlement Conferences

Let the opposition know you are *ready for trial*. This is a good way to psychologically influence them into settling rather than risk losing to your well organized presentation in trial. This is a good way to show the other side weaknesses in their claim areas while assuring them of your strengths.

Mediations / Arbitrations

Graphics at this point can be utilized as effectively as those at a settlement conference. Make them just good enough to make all the points, but not as fancy as your final trial graphics will be. This avoids unnecessary expense if you are able to settle before trial.

Trial

Visuals can be used at virtually any stage in the trial process. In an opening statement, it may help in explaining a key point to the judge. He or she will already be familiar with your presentation format. (It can also be too much of a distraction at this point, make sure to keep your goals in mind when deciding what to use.) In a closing argument, it can enhance and reinforce what you have already gone over by reminding the judge of your case. Using the demonstrative evidence in cross-examination can give your case immense credibility if you force the opposition's experts to use *your* graphics to make a point.

TYPES OF DEMONSTRATIVE EVIDENCE

There are types of visuals that are extremely complex, and require a professional consultant to provide them, such as models, courtroom demonstrations, scientific experiments, etc., but there is also a large number of visuals that can be made relatively inexpensively, by your own staff, or by hiring a graphics or consulting firm.

Charts and Graphs

Line Charts

These are excellent for showing relationships over time or as connected sequences. They can track changes over time or showing trends in certain elements. Data that lends itself easily to line charting: Certified Payroll, manhours statistics, crew size over time, weather temperatures over the course of a project, etc.

Bar & Column Charts

These are very easily understood by viewers, and by far the most popular form of visual. Bar and column charts show elements in comparison to each other or to time frames. Common data used in bar and column charts is gross revenue data, equipment or purchasing costs, total actual amounts (like manhours

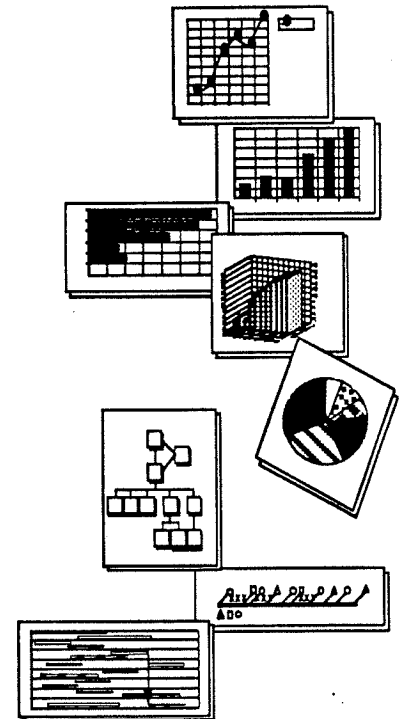
vs. estimated total amounts. *These are very effective for comparisons.*

Pie Charts

These are excellent for showing relationships between elements, as part of a whole. They can be very dramatic, but also confusing if the improper data is used. Be careful that the whole makes sense as the sum total of the parts for these charts.

Flow / Organizational Charts

These pictorially show how a series of procedures, events, decisions, operations, chains of command, or units can relate to each other. There are a number of sources for this data in these charts, including project management hierarchy (this helps with names as well as hierarchy. It is very effective for all the team members for use in case planning. Especially when reading correspondence files. It allows you to properly place authors in the overall scheme).



Timelines / Schedules

This type of visual can be a simple timeline or a complex schedule of events as they relate to one another. They will clearly show how a project progressed, or how it was planned in comparison with actual progression. These can be an extremely effective way to make a complex construction CPM less technical for your audience. Data for these can be found in certified payrolls, journals, daily reports, progress reports, correspondence (for milestone dates such as delays, stop work orders, etc.), and time sheets.

Diagrams

Maps that show relative size, distance, location or regional borders. Technical Illustrations show relationships between elements. Overlays can be useful to show changes between elements. Sketches can be a much simpler for, commonly drawn by experts during testimony. May times however, these can be difficult to reproduce at the time of trial for all parties.

Photographs can also be useful in illustrating a point or emphasizing testimony. Be careful, because these can be costly to reproduce for all the parties, and large sized for trial use are difficult and costly to obtain.

TAKING DEMONSTRATIVE EVIDENCE TO TRIAL

Be prepared for opposition's objections to your exhibits. They will most likely be: prejudice, cumulativeness and lack of substantial similarity.

How should you object to their demonstrative evidence? Prejudice, cumulativeness and lack of substantial similarity!

Admissibility of demonstrative evidence is solely within the discretion of the judge.

GETTING YOUR EVIDENCE ADMITTED - FOUNDATION REQUIREMENTS

In order to establish the proper foundation the following criteria should be satisfied in addition to the requirements of state and/or federal rules of evidence.

1. Exhibit prepared according to scale
2. Exhibit prepared and/or verified by witness as reliable and as a correct representation of the area, the information or the original underlying data in issue.
3. Exhibit of such a nature so as not to mislead, cause confusion and unduly influence
5. Exhibit, where appropriate, is identical with original except as to size

6. Witness qualified and available to testify as to accuracy, foundation, means of preparation, etc. of proposed exhibit.

7. The nature of the testimony to be presented by either the factual or expert witness is such that reference to a demonstrative exhibit is necessary and desirable to an understanding of the testimony.

ADDITIONAL CONSIDERATIONS

Size: Bigger really is better. The larger your exhibit, the more effective and easily seen the presentation is. Be sure to tailor the exhibit to the size of the room you will be presenting to. Always have handout sized copies of the large exhibit available for individual

use by the jury, judge or for inclusion in the trial record. Having a smaller copy can also come in handy as an attachment to a post-trial or appellate brief.

Budget: Make a list of your exhibits according to priority. As the cost increases, if you need to cut back, you can do it from the bottom of this list. This ensures that your most important exhibits still get made.

Redundancy: Stop when your point is clearly made. Repeat performances can lose the attention of your audience.

Use your visuals wisely - highlight salient points, increase the jury's comprehension of your data, illustrate the unknown or hard to imagine points, and add dramatic effect to your presentations. Above all, don't forget to

EXPRESS YOUR POINT, GRAPHICALLY.

VISITING JUDGE OPEN FORUM

I understand that from time to time BCA judges may travel to my part of the country for purposes of hearing a particular case. This usually means that the visiting judge will have a few hours available sometime during the trip. A number of judges have expressed a willingness to discuss procedural and advocacy issues.

It is expected that the forums would have a flexible agenda. A few topics may be highlighted, but any permissible topic would be well received. The opportunity for hearing what the judge thinks, and telling it to the judge, should open a line of communication that offers professional insights to those on both sides of the bench.

There will be an opportunity for a forum each time a judge visits the area. It is expected that there will be a large number of different judges over time; and, that the identity of the participants will vary greatly, depending upon the schedules of our members. It is anticipated that the members actually participating in any forum will be small enough, about half a dozen or so, to encourage the give and take of open communication.

_____ I am interested in participating in visiting judge open forums that are held in my metropolitan area.

_____ In addition, I would be willing to arrange facilities, usually at my law firm, government office, or corporate counsel's office

NAME: _____

ADDRESS: _____

TELEPHONE () _____

FAX () _____

Mail to:
James A. Hughes, Jr., Esq.
Vice Chair, Programs & Education Com.
c/o 4402 Jensen Place
Fairfax, VA 22032

BOARDS OF CONTRACTS APPEALS BAR ASSOCIATION

APPLICATION FOR MEMBERSHIP

(Annual Dues: \$25.00)

NAME: _____

FIRM / ORGANIZATION: _____

DEPT / SUITE / APT: _____

STREET ADDRESS: _____

CITY / STATE / ZIP: _____

This address is my: Home Business

Date of Birth _____
(month) (day) (year)

Gender: Male Female

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

District of Columbia State of _____

Employment Firm Corp. Govt. Judge Other

Law Firm Size: Solo 2-5 6-9 10-19 20-99 100+

I would be interested in serving on the committee listed below (please indicate three committees in order of preference)

- | | |
|---|--|
| <input type="checkbox"/> Membership | <input type="checkbox"/> Practice & Procedures |
| <input type="checkbox"/> Annual Meeting | <input type="checkbox"/> Legislation & Regulations |
| <input type="checkbox"/> Programs & Education | <input type="checkbox"/> Publications |

(Date)

(Signature)

Forward this application (with check payable to the BCA Bar Association) to the treasurer of the association at the following address:

Robert L. Schaefer, Esq.
Assistant Group Counsel
Hughes Missile System Group
Bldg. 261, MS N18
8433 Fallbrook Avenue
Canoga Park, CA 91304-0445

BCA BAR ASSOCIATION
c/o
**Oles, Morrison
& Rinker, Lawyers**

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701 Fifth Avenue
Seattle, Washington
98104-7007**

Bulk Rate
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