

# The Clause

RECEIVED

MAY 03 1994

A QUARTERLY PUBLICATION OF THE *BOARDS OF CONTRACT APPEALS* BAR ASSOCIATION



## THE PRESIDENT'S COLUMN

Robert L. Schaefer

HUGHES MISSILE SYSTEMS



It is a real pleasure to provide these short messages with each edition of The Clause. Not only have our members been busy, as you can see from the other articles in The Clause, but our horizons are expanding. We should feel good about where we have been and where we are going. Once again in this issue of The Clause we ask the membership to take an active role in the future of the Association by voting on a proposed amendment to our Constitution. Please take a few moments to do so.

The Board of Governors meeting in March was an exciting affair. Not only did we deal with a number of substantive topics, but the discussion was animated and forward looking. The most important item of business was the proposed Constitutional amendment to create the "Associate" as a new type of membership.

The Board unanimously recommended creation of the Associate membership. Taking to heart the Association's desire to provide the greatest service to the most people, the Board decided to make this membership category even more inclusive than what I had proposed. If approved by the membership, we will welcome as members all those who are interested in improving the quality of practice before the BCAs. The proposed amendment and your ballot is included with this issue.

Expanding our membership base to include those who have a significant impact on the quality of practice before the BCAs is an important step that makes a lot of sense. Please vote on this important issue. It will take two-thirds of those casting ballots to pass this amendment and, if passed, will make it possible for the Associate members to join us at the annual meeting in October.

The Board approved October 25th as the date for the Association's 1994 annual meeting to be held in Washington, D.C. Dave Metzger

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## STERLING FEDERAL REVERSED

Laura Kennedy

SEYFARTH, SHAW, FAIRWEATHER &  
GERALDSON

Prior to May 1992, most successful protestors at the GSBCA recovered the following as their costs of "filing and pursuing the protest" under GSBCA Rule 35: (a) outside attorney's fees; (b) expert consultant fees; (c) corporate in-house legal costs; and (d) corporate in-house employee salaries for those who assisted in the protest effort. Generally speaking, all of these costs were recoverable as long as they met the usual standard of reasonableness.

This all changed by virtue of the GSBCA's unexpected decision in Sterling Federal Sys-

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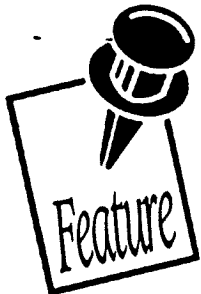
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is diligently working on the program and arrangements for the location. Mark your calendar.

Another matter that was addressed by the Board of Governors was whether we should sell the Association's membership list. The Board decided that we would not sell the list, but would share the list for noncommercial purposes when it is in the best interests of our members and the BCABA. For example, we may share the list with another bar association that wants to contact our members about an upcoming CLE opportunity or when we are co-sponsoring such an event.

Marcia Madsen, our immediate past president, has volunteered to chair the panel to be sponsored by the BCABA at the Federal Circuit Judicial Conference breakout session on June 16th. The panel will address the application of the new Federal Rules of Civil Procedure to the boards of contract appeals.

The Eighth Intensive Program on Trial



## PROPOSED CERTIFICATION CRITERIA

COL STEVEN PORTER  
PRESIDENT-ELECT

Certification is fast becoming the major topic of discussion at meetings of the Board of Governors and among many of our members. The certification issue has nothing to do with submitting claims to a contracting officer, but rather certification of attorney competence in the field of government contract law. Because of the many questions presented, it is appropriate to present some general information on the topic. You, the membership, are invited to join in the discussion, and help decide whether the BCA Bar Association will play a role in the certification of attorneys as specialists.

Presented below are some of the more common questions that have arisen, followed

Preparation and Advocacy in Federal Procurement was an overwhelming success. The program was oversubscribed, and thanks to the leadership of Bobby Moore, Craig Clarke and Bob Brams, the students had a challenging and informative educational experience. I also want to say thank you and recognize the support for the course that we received from thirty judges, representing eight boards of contract appeals and the U.S. Court of Federal Claims. The course also relied heavily on the donated time and resources of numerous lawyers, their assistants and firms. Thank you, one and all. I am confident that their time was well spent improving the quality of practice before the boards of contract appeals and the federal courts.

COL Steven Porter, President-elect, has been appointed to head the Nominating Committee for Association officers, and to fill vacancies on the Board of Directors to be elected at the annual meeting on October 25th. If you would like to volunteer or suggest a candidate, please contact COL Porter.



PROF. ANDRE LONG  
AIR FORCE INSTITUTE  
OF TECHNOLOGY

by the answers. The article concludes with the initial proposal.

### 1. What is certification, and what gives us the right to be certifying attorneys?

Certification of special skills has been with us for some time. Many state bar associations certify specialists in various fields, such as civil litigation, wills & probate, and family law. We have not found any that offer members certification in a specialty relating to government contracts. The authority of bar associations to certify specialties grew out of some of the modern changes to the canons of ethics, in much the same way advertising evolved. The umbrella organization for this change has been the American Bar Association (ABA).

The BCA Bar Association is not affiliated with the ABA, but could become a part of their certification program by developing a qualifying program, acting as the sponsor/monitor and paying the ABA to provide oversight. Because the payment to the ABA would be substantial, one of our first decisions would be to define the ABA participation. Even if we did not involve the ABA, their work in the area is definitive, and could provide us with the structure and background research that we would need to get started.

## 2. What would we be certifying?

The short answer is that we would be certifying attorney skill. We do need to decide what type of skill, i.e., general skill or specific skill. On the one hand, we could certify skill in government contract law. On the other hand, we could certify proficiency at handling matters before the BCAs. These are two very different types of certification, and the program by which we would accomplish the certification would be quite different. Many states have programs that focus on knowledge, such as certification in family law. Some state bars (and at least one specialty bar association) focus on skill at handling litigation. Certification of litigation skills involves, among other things, monitoring the conduct of litigation involving those attorneys requesting certification. As you might expect, that requires a great degree of cooperation between the certifying organization and the judges of the courts involved. All such programs I am familiar with depend heavily on comments by judges familiar with the conduct of those being considered for certification.

## 3. Will I need to be certified to appear before the BCAs?

No.

The certification proposal never envisioned the BCA Bar Association having any role in determining who could appear in any court or BCA. The BCA Bar Association certification program would be our way of publicly recognizing attorneys that possessed certain demonstrated skills. Our certification would be used by attorneys in the same way other types

of certifications are used today. A review of business cards, letterheads, and legal advertisements, including the telephone book, show many examples. More importantly, our certification would be viewed as peer recognition of demonstrated skill and capability.

## 4. Would we have to take a test?

Whether we are certifying attorney skills in the area of government contract law (general skill), or assessing performance before a BCA (special skill), almost assuredly we would need an examination. The examination will provide the opportunity to ask a wide range of pertinent questions to determine the skill of the individual seeking certification.

## 5. "I've been doing this for years! Surely, I don't need a test!"

Are we going to "grandfather" some of our more experienced members? My own research did not find one instance of reduced standards for the highly skilled. However, that is not to say that there is not a case to be made. Regardless how this issue is resolved, a strong case could be made for a single high standard, and a requirement that everyone must meet that standard. This standard would probably not be an impediment to experienced practitioners because those who are already highly skilled should have no difficulty in meeting high standards. Secondly, certification is not for everyone. We all do not need to be certified. But if we do decide to become certified, as a part of this or any other program, the work involved will teach us new things, and perhaps even make us better in all those things we have been doing for years.

## PROPOSED BCABA CERTIFICATION CRITERIA FOR GOVERNMENT CONTRACT PRACTITIONERS AS SPECIALISTS

Government contract law certification is a process by which the Boards of Contract Appeals Bar Association (BCABA) validates an individual lawyer's qualification and knowledge

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## THE CLAUSE CITED

BCA Bar Association members will be pleased to learn that, for the first time, their quarterly publication has been cited in a footnote of a BCA decision. See San Antonio Management Corp., d/b/a Advance Health Systems, ASBCA No. 40415, January, 1994.

for practice in government contract law, based on predetermined standards. Certification establishes that an individual has demonstrated an enhanced level of proficiency, expertise and standard of conduct which exceeds the minimum required for practice in the government contract law field.

BCABA is a private organization not affiliated with or sanctioned by any state or the Federal Government, and has no bearing on the right of an attorney to practice before the BCAs. BCABA certification is designed to promote continuing improvement and excellence in the practice of government contract law and the administration of justice in the BCAs.

### ELIGIBILITY REQUIREMENTS

The BCABA does not discriminate against lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability or age. Participation in the BCABA certification program does not require membership in any association or organization, including the BCABA. Candidates qualify for eligibility through a combination of formal or continuing education in government contract law, actual experience in government contract law, peer review and examination.

The requirements are as follows:

- a. Admittance to the practice of law and good standing before the highest court of a state, commonwealth, territory, possession, or the District of Columbia for the three years immediately preceding the date of application. Each applicant must submit a certificate from the clerk, presiding judge or other duly authorized official of the highest court of a state, commonwealth, territory, possession or District of Columbia, evidencing the fact that the applicant has been a member of the bar of such court for at least three years and is in good standing.
- b. Successful completion of at least 36 hours of instruction in government

contract or procurement law, or a master of laws (LL.M.) in government contract law, in the three-year period preceding the application for certification. This required number of hours may be met through any of the following means, including any combination of them:

- 1) Attending programs of continuing legal education or courses offered by the American Bar Association-accredited law schools in government contract law or administration, including attendance of programs by videotape;
  - 2) Teaching courses or seminars in government contract law or administration, provided that credit can be earned only once a year for courses taught more than once;
  - 3) Participating as a panelist, speaker or workshop leader at educational or professional conferences covering government contract law;
  - 4) Writing published books or articles concerning government contract law.
- Each applicant must present evidence showing that the programs, courses, seminars, conferences or publications used for credit contain sufficient intellectual and practical content relevant to government contract law to increase the applicant's knowledge and ability in government contract law. State-approved continuing legal education programs in government contract law will be deemed to have met this criterion.
- c. Worked in the area of government contract law at least twenty-five percent of a full-time position throughout the three-year period immediately preceding the application. This requirement may be met by any of the following means, including any combination of them:
    - 1) practiced as an attorney whose duties included furnishing legal counsel, drafting legal documents and pleadings, interpreting and/or giving advice in the

area of government contract law, or preparing, trying or presenting cases before any of the Boards of Contract Appeals of the Federal Government; or

2) Worked as a professor, teacher, research specialist, department head, director or dean of a college, university or other academic institution involved in the instruction of government contract law or administration; or

3) Sat as a judge on any of the Board of Contract Appeals of the Federal Government.

- d. Provide the names of at least five references who are not related to the applicant, at least three of whom are attorneys or judges who are knowledgeable in government contract law and are familiar with the applicant's competence in government contract law.

Each applicant will self-certify eligibility to the above requirements. However, the BCABA reserves the right to seek and consider references from persons of its own choosing. Each applicant is also subject to an audit of accuracy. Applicants selected for audit must be able to demonstrate to the satisfaction of the BCABA that all eligibility requirements have been met.

## EXAMINATION

With the exception of those individuals grandfathered into the program, all applicants must take an examination and score 70% of the total score possible. Certified attorneys who were grandfathered in without a written examination must take an examination upon re-certification.

The exam will be offered twice a year and requires a \$50 nonrefundable fee. The exam will be two hours in length and have between 60-100 multiple choice questions of equal value that will objectively measure an

applicant's basic knowledge of government contract law. The exam will cover fundamental aspects of substantive procurement law, including relevant statutes and regulations, types of contracts, contract award, modifications, terminations, changes, claims, equitable adjustments, remedies, professional responsibility and ethics. Procedural matters common to all BCAs will also be tested. Scores will be mailed to all applicants approximately six weeks after the examination date. Those who do not pass the exam may retake it until successful. Reapplication for the program is not required, but applicants must submit an exam and fee each time they retake the test.

## RECOGNITION OF BCABA CERTIFICATION AS A GOVERNMENT CONTRACT LAW SPECIALIST

Each attorney certified by the BCABA may hold himself out to the general public as a certified specialist in government contract law, providing that the jurisdiction in which the attorney is practicing recognizes the BCABA accreditation program and allows for such representation. Accreditation by the BCABA is not intended to, and shall not be interpreted to, preempt nor usurp the authority of states to regulate the practice of law, the certification of lawyers as specialists, or the approval of organizations which certify lawyers as specialists.

All certified attorneys who participate in the BCABA registry will be recognized as government contract practitioners who exceed the minimum standard of competency to practice before the BCAs. While the registry is not a referral and does not warrant an attorney's capability in handling specific issues, it will be a resource that identifies quality representation available to appellants.

## RE-CERTIFICATION

BCABA certification as a specialist in government contract law is conferred for a period of five years. A certification period begins with

## BCA JUDGES ASSOCIATION ANNUAL SEMINAR

On Tuesday, April 26th, the Boards of Contract Appeals Judges Association (BCAJA) will hold its Annual Seminar from 8:00 a.m. - 5:00 p.m. at the Radisson Plaza Hotel, 5000 Seminary Road, Alexandria, VA. The theme is Board Practice: Past, Present and Future. The panels will discuss the following topics: the effect of Federal Circuit decisions on Board practice; motions practice; how to succeed by trying really hard; civility; persuasion with integrity; and the future of federal procurement. Judge William J. Ruberry of the ASBCA, a judge for over 24 years, will give the luncheon address discussing Board practice from a historical perspective. A reception follows the seminar, and CLE approval is pending in Virginia and Ohio. The registration fee is \$120. To register and obtain more information, call Miki Shager at 202-720-6229.

the first day of the month in which the certification is granted, and ends five years later. Re-certification must be obtained and applications submitted during the last year of certification, and requires continued substantial involvement in government contract law, and 60 hours of relevant class instruction, in the five-year period preceding the application for re-certifica-

tion. Instruction may be obtained in the same manner as with an initial application.

If a certification has expired, an additional twelve hours of instruction is required for each full year after the date of expiration. Also, an additional fee of \$50 will be charged for delinquent re-certification.

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## BCA BAR ASSOCIATION OFFICERS

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## REVOCAION OF CERTIFICATION

BCABA certification as a specialist in government contract law may be revoked for any of the following reasons:

- a. Falsification of the certification or re-certification application.
- b. Failure to pay fees or annual dues.
- c. Misrepresentation of certification status.
- d. Cheating on the examination.
- e. Conviction of a felony.
- f. Debarment or suspension from the practice of law from any jurisdiction.

## REVIEW AND APPEALS PROCESS

An appeals mechanism is available for individuals seeking a review of a decision denying eligibility to sit for the exam or the revocation of certification. The review process is conducted by an impartial board appointed by the BCABA President. The decision of the Appeals Panel is final.

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## INTERVIEW WITH...

### Professor Ralph Nash

THE GEORGE WASHINGTON  
UNIVERSITY

**1. The Administration has undertaken a program of procurement reform. How does the current program compare with previous procurement reform initiatives you have seen?**

A. The current procurement reform program is the most extensive program since the 1940s when the Armed Services Procurement

Act and the Federal Property and Administrative Services Act were written. The Section 800 Panel, on which I served, reviewed the entire United States Code and recommended changes to many sections - including the socioeconomic provisions. The current bills that are pending in Congress consider these recommendations and adopt a few. Not even the Commission on Government Procurement went this far. There is also considerable discussion at the present time of abandoning cost-based contracting with the massive oversight that it entails.

I should hasten to add that discussion does not necessarily mean action. When I say that the current procurement reform program is extensive, I mean that it is discussing the broadest reforms that have been discussed in the last 45 years. Whether Congress will permit such reforms to take place remains to be seen. In addition, I am not convinced that the Administration will have the will to aggressively pursue the extensive procurement reforms that are possible without Congressional approval. If I had to make a prediction, I would guess that the actual reforms that are accomplished will be no greater than those that resulted from the Government Procurement Commission.

**2. If you could select one area to carry out procurement reform, what would you select?**

A. I would probably attack the most difficult area - the extensive oversight that has been imposed on the procurement process. In the 41 years that I have been working in this area, we have witnessed continual, creeping oversight. Each time there is a failed major contract, we adopt a new procedure to ensure that the cause of the failure will not be repeated. This means a new report, another audit or inspection, or the requirement for more data. The extensive federal and military specifications are also a part of this problem because they are used to ensure that no contractor can provide poor products or services. No one knows the cost of this system, but the most informed guess that it adds a minimum of 25 percent to the cost of government procure-

ment. And in some cases, the cost is far greater.

It is for this reason that I would attack this area. We must find a way to buy from efficient companies that have learned to survive in the heat of the commercial marketplace. By definition, that excludes companies that deal exclusively with the Government. The Government has mandated that they be inefficient. Whether these companies can become efficient if they are forced to compete with commercial companies is a good question, but I know of no other way to induce them to streamline their operations and cut out the extensive overhead that is imposed on them by the Government. Of course, all of this presumes that the Government will revise its policies and regulations to permit such streamlining.

**3. What are your views on the growing trend toward the use of alternate disputes resolution procedures in government contract disputes?**

A. My experience in this area has been very positive. I seem to spend more and more time each year serving as a neutral advisor, and over 90 percent of the cases I mediate result in settlements. Thus, I have concluded that ADR is a useful way to shorten the disputes process.

In my view, the main reason that ADR works is that it gets away from the trial process and uses much more direct ways to ascertain the facts of a case. I recommend the use of a roundtable discussion of the issues - one at a time - with the neutral retaining strict control of the discussion. This gets all of the views of the facts and the law on each issue on the table at the same time, and makes the entire proceeding more comprehensible to the parties. It also permits me to attempt to bring the parties together on each issue. I find that this is an excellent way to determine the facts that is far more efficient than the normal trial process.

In the long run, the best thing that could result from broader use of ADR procedures would be the adoption of simpler procedures by the boards of contract appeals. In my view,



one of the worst things that has happened to government procurement in the past forty years is the judicialization of the disputes process. The boards give us fully judicialized procedures without the rigor that is imposed by the normal district judge. This is the worst of all worlds.

**4. Do you believe there should be one board of contract appeals for all agencies?**

A. No, I think that would be very unwieldy. I would favor some consolidation of the smaller boards to arrive at four or five boards in the entire federal government. But I don't see any advantage to going any further than that. As I said a moment ago, it would be far more useful to find a way to get to simpler procedures. Incidentally, it appears that it is the bar that resists simplification of the procedures. At least it is my understanding that most attorneys reject such procedures when they are offered by the administrative judges.

**5. How would you rate the writing quality of BCA opinions?**

A. I have said for years that they are too long. I don't believe that extensive findings of fact are necessary, and I don't believe that there is a need to address every subsidiary issue. As far as the coherence of the opinions goes, I think the judges do a pretty good job. I don't find many opinions that I cannot understand and generally the judges give an explanation of their decision.

**6. Do you believe representatives from the academic community should participate in the selection process for BCA judges?**

A. Absolutely not. Academics have plenty to do with their teaching and writing. There is nothing I know of that would indicate they have any unique ability to select competent people.

**7. How adequate are the training programs available for government procurement attorneys?**

A. Well, I am biased on that question, but I believe that they are quite good. The Government Contracts Program that I established at George Washington University has a wide variety of courses that are taught by experts in the

field. Federal Publications also has a fine series of courses. Both organizations use practicing attorneys as their teachers and emphasize the legal aspects of the government procurement business. There are also a number of local programs in the field. In all, I believe the area is well covered.

**8. Are the courses within the Government of equal caliber?**

A. No, I don't know of any program within the Federal Government of the scope and magnitude of these two programs. The courses at the Army JAG School and the Air Force Institute of Technology are the most extensive that I am familiar with. However, as best I can tell, most government attorneys attend the outside courses when they want to become more expert on a particular subject within the area of government procurement law.

**9. The BCA Bar Association is presently considering certification of government contract practitioners as specialists. As a member of Board of Governors, what is your view on this?**

A. I am not a strong advocate of certification of specialties. I think it has the theoretical advantage of giving consumers some assurance that they are getting a quality product, but it seems to me it would be very difficult to administer. In addition, the consumers of legal services in this area are companies, most of which are fully capable of finding a competent attorney. I have a further problem in the fact that some of the best work I have seen in this field has been done by nonspecialists, such as attorneys that specialize in litigation. In all, the disadvantages of certification seem to me to outweigh the advantages.

**10. What trends do you discern in the government contracts field?**

A. The major trends that we have been riding in the past decade are criminalization and legalization. In the criminalization area, the Government has focussed a great deal of attention on finding fraud and it has found a significant amount of it. While this has had a beneficial effect on government procurement



by raising the standards of conduct, it has been extremely detrimental by casting a shadow over the entire field. Every practicing attorney can tell stories of oppressive use of the criminal process in circumstances where most people would have detected no fraud whatsoever. A few years ago, I heard a respected criminal lawyer say that, in his 25 years of practice, government procurement was the only area where he routinely advised innocent clients to plead guilty - because of the power of the Government in this area.

At the same time, the area has been extensively legalized - especially with regard to the protest practice. Federal procurement is quite unique in that losers are given more rights than winners, and we accept this as a normal part of the process. We seem to have carried due process to a high degree of perfection.

All of this has been a boon to attorneys but, in my view, it hasn't helped the companies or the procuring agencies. We would be far better off to return to the simpler day when the main work for attorneys in this field was resolving disputes between the Government and its contractors.

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

A. Thank you very much.

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## *DE NOVO AFFIRMED*

Clarence D. Long III

OFFICE OF THE GENERAL COUNSEL  
DEPARTMENT OF THE AIR FORCE

On January 26, 1994, the Court of Appeals for the Federal Circuit rendered its decision in Grumman Data Systems Corp. v. Sheila Widnall, Secretary of the Air Force and Contel Federal Systems, Inc., CAFC No. 93-1271, in which the right of the GSBICA in bid protests to hear evidence not considered by the agency was finally affirmed.

In January 1991, the Air Force (acting for the Joint Staff) issued an RFP for a computer

network to be known as Joint Staff Automation for the Nineties (JSAN). The solicitation stated that the contract would be awarded to the contractor who delivered the best overall value to the Government. The RFP also stated that an "integrated assessment" would be performed to determine the best overall value. The source selection authority (SSA) later decided that Contel provided the technically superior, although considerably more expensive, proposal. Grumman protested. In Grumman Data Systems Corp. v. Department of the Air Force, GSBICA No. 11635, 92-2 BCA ¶24,999, the Board sustained the protest on the grounds that the Air Force had failed to justify the price differential. The Air Force was ordered to reconsider its conclusion and make a new source selection decision. The Air Force complied, and its SSA attempted to close the price gap by quantifying the technically superior Contel proposal. In so doing, the SSA credited Contel for being superior to Grumman in some areas where both proposals were rated as weak, but where Contel failed the undisclosed standard by a lesser amount than Grumman. Grumman immediately protested again, and this time the Air Force hired outside experts to bolster its analysis. In general, these experts followed the same schemata that the SSA had followed. However, they used different numbers based on better source data, as well as productivity data from an expert retained by intervening Contel.



This time, the Board denied Grumman's protest, adopting much of the rationale of the experts (both respondent's and intervenor's), while rejecting the arguments advanced by protestor's experts. Grumman Data Systems Corp. v. Department of the Air Force, GSBICA No. 11939-P, 93-2 BCA ¶25,776. (Along the way, the Board also excluded two teams of experts, one for the Air Force and one for the protestor, and made some new law in the conflict of interest area

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

## BCA BAR ASSOCIATION BOARD OF GOVERNORS



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regarding experts. This issue lies outside the scope of this article, but those decisions should be read by anyone desiring to hire experts in a GSBCA bid protest case. See Grumman Data Systems Corp. v. Department of the Air Force and Contel Federal Systems, Inc., GSBCA No. 11939-P, 1993 BPD 35, and Grumman Data Systems Corp. v. Department of the Air Force and Contel Federal Systems, Inc., GSBCA No. 11939-P, 1993 BPD 233.) Grumman then appealed to the Federal Circuit, arguing, *inter alia*, that the Board had no right to receive this testimony, and that *de novo* evidence should not depart from the rationale used by the SSA.

In its appeal, the protestor-appellant argued that the *de novo* standard means that the Board can look at new evidence which attacks the source selection decision, but not at new evidence which supports the decision. In its brief, Grumman stated:

*De novo* review clearly means that the Board may receive and rely on evidence that goes beyond the information presented to and relied upon by the Source Selection Authority [SSA]. It means that the Board may, in appropriate cases, entertain expert testimony to critique the SSA's decision..., or to help explain why the decision and/or process is consistent with applicable law and regulations. Consideration of such testimony would be *de novo* review consistent with the overall limited role of the Board and with the mandate that the Board not perform the role of source selection authority. ... Grumman respectfully submits, however, that it cannot be permissible for the Board, under the rubric of *de novo* review, to overlook what would otherwise be a fatally flawed procurement decision, and to create its own justification for the decision by adopting new analyses created by litigation experts.

The Department of Justice and the Air Force responded:

Based upon the Davis precedent, as well as the numerous other decisions we have cited, the Court should sustain the GSBCA's rejection of Grumman's argument that it exceeded the proper scope of a *de novo* review. The Board pointedly and correctly characterized Grumman's argument: 'this gloss on *de novo* is simply wrong.' The Board held that, whether one looked to the general standard of *de novo* review enunciated in Doe v. United States, 821 F.2d 694, 697 (D.C. Circuit, 1987), or the *de novo* standard applied by the boards of contract appeals, the reviewing panel is to review 'everything anew'...

In its reply brief, Grumman argued that none of the eleven cases cited by the government dealt with the subject of *de novo* review in a bid protest case. It also argued that the role of the SSA was being assumed by the Board when it heard the "new evidence."

The Federal Circuit rejected protestor-appellant's arguments. It affirmed, without much discussion, the right of the Board to hear new evidence presented either *sua sponte* or by the parties. It affirmed the right of the Air Force to conduct an "integrated assessment" of the competing proposals, because that language was in the RFP and had not been challenged by the protestor. It also held that, in deciding the sufficiency of a source selection decision, the Board need not hold itself to strict accounting principles.

In its decision, the Court stated:

The board's use of its own best value analysis was permissible under the *de novo* standard of review. Grumman failed to raise alleged ambiguities apparent in the RFP prior to bidding and must accept the Air Force's interpre-

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tation of the disputed language since that interpretation was reasonable. Moreover, Grumman failed to demonstrate that it was prejudiced by the Air Force's alleged erroneous interpretation. Finally, *de minimis* errors in the Air Force's analysis of proposals are not a sufficient basis to support a successful bid protest.

This brings to an end a degree of uncertainty as to what could or could not be considered by the GSBCA in trying to decide the validity of a source selection decision, or perhaps even a final decision in a post award dispute.

In my opinion, this decision should be welcomed by government contracts attorneys on both sides of the aisle. Grumman creates a

level of comfort in Board decisions that would not otherwise exist, particularly in bid protests. The decision also affirms the concept of integrated assessment. This concept allows an agency in a "best value" procurement to compare proposals side-by-side. In this comparison, an agency may select discriminators that were not strictly derived from the evaluation criteria in the solicitation.

## PRACTICE & PROCEDURES COMMITTEE



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## DRAFT CODE OF PROFESSIONAL COURTESY

### PREAMBLE

Advocates for parties appearing before the Boards of Contract Appeals, including lawyers and authorized non-lawyer party representatives, should strive to make the system of justice work fairly and efficiently. In this regard, the following Code of Professional Courtesy is intended as a guideline for advocates in their dealings with opposing parties and their counsel, the Boards, and, in the case of lawyer advocates, their own clients.

This Code is not intended as a disciplinary code, nor is it to be construed as a legal standard of care in providing professional services. The Code shall not be used as an independent basis for litigation or for sanctions or penalties.

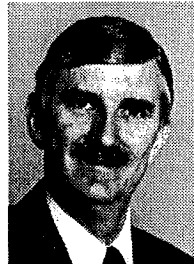
This Code of Professional Courtesy does not supersede in any way an advocate's obligations under any otherwise applicable code of conduct. Rather, it has an aspirational purpose and is intended to serve as a statement of prin-



## TREASURER'S REPORT

Jim Nagle

OLES, MORRISON & RINKER



### BCA BAR ASSOCIATION STATEMENT OF FINANCIAL CONDITION FOR THE QUARTER ENDING 31 MARCH 1994

Beginning Cash Balance, 1 Jan 1994		\$7,713.63
Fund Income:		
Membership dues	425.00	
Annual Meeting	4,845.00	
Total Fund Income		+ 5,270.00
Subtotal		12,983.63
Fund Disbursements:		
Newsletter (Winter)	1,017.55	
Annual Meeting	5,166.23	
Total Fund Disbursements		- 6,183.78
Ending Cash Balance, 31 Mar 1994		\$6,799.85

Our annual budget is approximately \$12,500. Of this, the four issues of The Clause cost \$1,000-\$2,000 each (almost half of which is for postage), and the Directory is almost \$3,000. The remaining funds are used to support the committees, stationery, and activities co-sponsored by the ABA (the annual meeting largely pays for itself).

principles and goals for professionalism among advocates.

#### OBLIGATIONS OF AN ADVOCATE

1. An advocate will endeavor to file or serve all pleadings, motions or other documents in a way that does not unfairly limit another party's opportunity to respond.
2. An Advocate will promptly return telephone calls and correspondence from the Board and from other Parties.
3. An advocate will consult with the other parties' advocates regarding scheduling matters in a good faith effort to avoid scheduling conflicts.
4. An advocate will engage in discovery only when actually needed to ascertain facts or information. Discovery will not be used for the purpose of harassment or to increase litigation expenses.
5. An advocate will respond to document requests reasonably and will not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. An advocate will not produce documents in a manner designed to hide or obscure the existence of particular documents.
6. An advocate will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
7. An advocate will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the Board.
8. An advocate will avoid making ill-considered accusations of unethical conduct toward an opponent.
9. An advocate will not engage in discourteous behavior.
10. An advocate will not needlessly embarrass another advocate and should avoid personal criticism of other advocates or parties.
11. An advocate will not seek sanctions against or disqualification of another advocate unless fully justified by the circumstances, and not for the mere purpose of obtaining tactical advantage.
12. An advocate will maintain a courteous tone in correspondence, pleadings and other communications.
13. An advocate will adhere to all express promises and to agreements with other parties, whether oral or in writing. An advocate will be honest in all dealings with the Board and others.
14. An advocate should confer early with the other parties to assess settlement possibilities. An advocate will not hold out the possibility of settlement as a means to gain any tactical advantage.

#### OBLIGATIONS OF THE BOARD

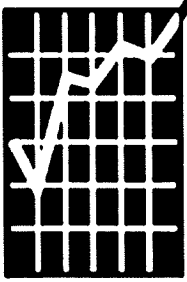
1. The Board will be courteous, respectful, and civil to advocates, parties, and witnesses. The Board will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to ensure that all litigation proceedings are conducted in a civil manner.
2. In scheduling hearings, meetings and conferences, the Board should be considerate of time schedules of advocates, parties and witnesses.
3. The Board should make all reasonable efforts to decide promptly all matters presented to it for decision.

### UPCOMING COMMITTEE MEETINGS

#### PRACTICE & PROCEDURES COMMITTEE

Last Tuesday  
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## THE ACCOUNTANT'S CORNER

Peter A. McDonald, CPA, Esq.

### KNOW YOUR MATH



Whether taking a case to trial or negotiating a settlement, it behooves the government contract litigator to know (and I mean KNOW) the appropriate measurement of damages.

Depending on the particular facts (type of contract, nature of the claim, positions of the parties, and so on), there are a variety of methodologies that apply to the measurement of damages. Except for the application of the Eichleay formula for unabsorbed overhead claims, there is no one way of measuring damages. Disparate methodologies have differing theoretical underpinnings, and this leads to an elementary appreciation of accounting theory. (Not only does such a subject exist, but accounting theory by itself is a half-day test on the three-day C.P.A. exam.)

There are many different ways of measuring the monetary value of an asset or a liability. There are present value determinations, acquisition costs, net realizable values, replacement costs, historical costs and others. Which 'yardstick' provides the "best" measure of value? This is never an easy question for a CPA to answer (whether he's under oath or not).

A simple lesson in the theoretical considerations of cost and value illustrates the point. Cost is said to refer to the present, while value is said to refer to the future. In other words, cost is what is sacrificed in a present transaction. Value, however, is what the expected future benefits will be. A familiar example is that the cost of an education is one amount, but its value is a considerably different figure.

Accounting is not simply the measurement of costs with mathematical precision, nor is it mere "bean counting." In any case in which he is called upon to express an opinion, the CPA will apply judgmental factors that will greatly influence the ultimate result.

It will be the rare case where a determination of value leads to only one dollar figure. Instead, a CPA will typically arrive at a range of values because of different theoretical rationales. Applying certain assumptions and judgmental factors may result in low dollar figures, while applying different assumptions and certain other judgmental factors provides high figures. The CPA normally presents his report in which all of this is carefully spelled out. Thereafter, the specific figure eventually arrived at in a case is determined by a BCA, court or the parties themselves.

Attorneys are not expected to be conversant with the abstract nuances of accounting theory. However, attorneys should learn the CPA's analysis enough to understand what rates, factors, assumptions and/or determinations went into the report. The attorney litigating a government contract case should know the math involved, and should avoid the discredited practice of knowing only the high and low figures. In short, know your math.

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CONTINUED FROM PAGE 1

tems, Inc., 92-3 BCA 125,118. In Sterling, the GSBCA broke with a long line of precedent and held that expert consultant fees and (non-legal) employee salaries could no longer be recovered by a successful protestor. In reaching this conclusion, the GSBCA relied upon a Supreme Court precedent that was wholly unrelated to protests or government contracts and a specific fee shifting statute that was cited therein.

Sterling was a blow to potential GSBCA protestors because the fees paid to expert consultants in successfully pursuing a protest can be substantial. Because of the complexity inherent in most computer-type protests, and because of protective orders that are put in

place, parties to a GSBGA protest generally hire expert consultants. In addition, in-house employee costs can be significant if those employees assist counsel with such tasks as organizing documents and answering interrogatories.

Sterling — as outlined above — is no longer the law. In an equally unexpected decision, the U.S. Court of Appeals for the Federal Circuit (CAFC) reversed the GSBGA. Sterling Federal Systems, Inc. v. NASA, CAFC No. 92-1552, January 28, 1994. This decision could be welcome news for potential protestors.

In essence, the CAFC ruled that the GSBGA erred as a matter of law in limiting the term "costs" to those taxable costs allowed by federal courts under fee shifting

statutes applicable to "normal litigation." By contrast, the fee shifting provisions of the Competition in Contracting Act (CICA), which apply specifically to protests, are broader and afford the GSBGA the "discretion" to decide whether costs such as "expert or employee costs" should be allowed. In making this determination, the GSBGA should "weigh the relevant factors" including "reasonableness and relevance" — which were the very tests that were applied before the first Sterling decision.

The CAFC remanded the case to the GSBGA, noting that such costs were routinely recoverable under the GSBGA's pre-Sterling decisional law. According to the CAFC, the GSBGA must now either award such costs (as it has done in the past) or "justify [the] change in practice."

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## GOVERNMENT CONTRACTOR TEAMING ARRANGEMENTS AND THE ANTITRUST LAWS - A BRIEF COMMENT ON U.S. v. ALLIANT TECHSYSTEMS AND AEROJET-GENERAL CORPORATION



Howard Adler, Jr. and David P. Metzger

DAVIS, GRAHAM & STUBBS

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### INTRODUCTION

On January 19, 1994, the Antitrust Division of the Department of Justice filed a civil antitrust suit against Alliant Techsystems, Inc. ("Alliant") and Aerojet-General Corporation ("Aerojet"), charging that their teaming arrangement on Combined Effects Munition ("CEM") systems, a type of air delivered cluster bomb, violated Section 1 of the Sherman Act (15 U.S.C. 1)<sup>1</sup>. Simultaneously, the Division and defendants entered into a settlement that will result in savings to the Government of \$12 million out of a total cost for the 1992 CEM procurement of \$133 million<sup>2</sup>. In addition, the

Decree prohibits the defendants from entering into any future teaming arrangement (where the effect is to eliminate or suppress competition on future CEM procurements) without the prior approval of the Justice Department or the court<sup>3</sup>. The Decree specifically allows "subcontracting between Alliant and Aerojet so long as the purpose or effect is not to eliminate or suppress ... competition."<sup>4</sup>

The case has created considerable confusion and concern among defense contractors. Both the Government and the companies characterize the challenged conduct very differ-

ently. The Justice Department asserted that Alliant and Aerojet violated the Sherman Act because they "divided up the market and caused a dramatic increase in price."<sup>5</sup> On the other hand, the companies stated that their agreement "wasn't anticompetitive and did not cost the government or the taxpayers a single penny," and that they settled solely to avoid "lengthy and costly litigation with the government."<sup>6</sup> While DOD and Justice jointly announced the settlement, there is reason to believe the Pentagon is not completely happy with Justice's aggressive stance<sup>7</sup>. Some defense contractors, however, are clearly upset. As a Federal Trade Commission antitrust enforcer quipped, for "some defense contractors, antitrust has taken the place of the former Soviet Union as the greatest threat to our national security."<sup>8</sup>

The antitrust action against Alliant and Aerojet does not break new legal ground. However, it sends a signal that some teaming arrangements will be challenged even though an agency of the Government has advance knowledge or the arrangement or even encourages it. That signal is a disturbing one in an era when defense spending is being reduced, and the Pentagon is witnessing consolidation in the defense industry. However, an understanding of the facts of Alliant-Aerojet and a close reading of the court imposed settlement (hereafter, CIS) should provide some assurance that there will not be an epidemic of unfounded antitrust prosecutions. In fact, if properly structured, most teaming arrangements will present little antitrust risk.

### THE UNDERLYING FACTS

Very briefly, Aerojet developed the CEM system for the Air Force and was awarded the first production contract in 1983. Thereafter, the Air Force adopted a second source procurement strategy under which Alliant became a second supplier. From 1985 on, the Air Force and later the U.S. Army Armament, Munitions & Chemical Command ("AMCCOM") solicited and

received competitive proposals from Alliant and Aerojet. Under a procurement policy designed to promote and preserve competition for cluster bomb production, the Air Force awarded higher quantities to the lower bidder and lesser quantities to the higher bidder.<sup>9</sup>

In the summer of 1992, the Air Force issued a solicitation to replenish CEM inventories depleted by Operation Desert Storm. Alliant and Aerojet entered into a written teaming agreement that divided production of CEM systems equally between the two companies, and designated Alliant as the prime contractor. Aerojet agreed not to submit a bid as a prime contractor. The arrangement was intended to apply to procurements for 1992 and beyond.<sup>10</sup> The CIS acknowledges that "Alliant and Aerojet disclosed their intention to enter into a teaming arrangement in advance to AMCCOM."<sup>11</sup> The CIS does not say, and it is not known, whether AMCCOM approved or objected upon being advised of the teaming arrangement. The CIS makes clear, however, that as a matter of law AMCCOM could not have created any antitrust immunity, even if it had approved the teaming arrangement. The parties'

disclosure did not create, and could not have created, antitrust immunity for the teaming arrangement. *Department of Defense personnel are not authorized, and it is not their role under the Federal Acquisition Regulations or applicable case law, to give antitrust clearance to teaming arrangements.*<sup>12</sup> [Emphasis added.]

The same point is emphasized later where the CIS explains the Decree's prohibition against future teaming without advance prior approval of the Justice Department:

The prior approval requirement in the proposed Final Judgment will emphasize to the defense community generally that the Federal Acquisition Regulations do not confer antitrust immunity. Subpart 9.602 of the Federal Acquisition Regulations states the general policy



that the Government recognizes the integrity and validity of teaming arrangements, if disclosed in advance; however, Subpart 9.604 explicitly provides that the general policy does not confer antitrust immunity on teaming arrangements. It is the responsibility of the Justice Department, and not other components of the Executive Branch, to make statements of federal enforcement intentions with regard to possible violations of Section 1 of the Sherman Act.<sup>13</sup>

The Justice Department's position is not a departure from prior law and enforcement practice. The FAR has long provided that teaming arrangements do not gain antitrust immunity even if disclosed in advance, and teaming arrangements may be challenged under the antitrust laws even if they have been encouraged by another agency of the Government.<sup>14</sup> This recent enforcement action, however, is a strong signal that in certain circumstances teaming arrangements can create significant antitrust liability.

## ANTITRUST ANALYSIS AND GUIDELINES

From an antitrust perspective, government contractor teaming arrangements are subject to both advantages and pitfalls. One risk is that contractors may be misled by military or civilian officials, who proceed with the procurement without being forthright about misgivings or even outright objections. As *Alliant-Aerojet* illustrates, any sense of security fostered by passive or even affirmative official encouragement of the teaming arrangement is illusory. A second negative aspect is that there is likely to be a written teaming agreement; thus, the parties will not be able to contest the existence of the "contract, combination or conspiracy" element of a Section 1 violation.

On the other hand, there are two significant advantages. To the extent that the teaming arrangement is disclosed to the Government, as it was in *Alliant-Aerojet*, there will be no risk of a criminal prosecution since criminal

sanctions are reserved for covert conspiratorial conduct.<sup>15</sup> Second, a government contractor teaming arrangement is a "joint venture" and, under well-settled principles, will be judged under the rule of reason rather than the *per se* rule. Where the *per se* rule applies, as it does to secret price-fixing or bid-rigging arrangements, the conduct is "conclusively presumed unreasonable 'without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use.'"<sup>16</sup> In contrast, under the rule of reason, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."<sup>17</sup> The inquiry is limited to whether the restraint "is one that promotes competition or one that suppresses competition."<sup>18</sup>

The Justice Department has said the following with respect to joint ventures:

A joint venture is essentially any collaborative effort among firms, short of a merger, with respect to R&D, production, distribution, and/or the marketing of products or services. Joint ventures may be created for a variety of good business reasons. For example, joint ventures may be created to take advantage of complementary skills or economies of scale in production, marketing, or R&D, or to spread risk ... Because joint ventures typically achieve integrative efficiencies, the Department judges the likely competitive effects of joint ventures under a rule of reason.<sup>19</sup>

Under the rule of reason, even if the venture's anticompetitive effects are substantial, the venture will often be upheld if there are countervailing efficiencies or other benefits.

Accordingly, Alliant and Aerojet would have had an opportunity to defend their conduct under the rule of reason. Without knowledge of all the facts, it is impossible to judge how a rule of reason analysis would have turned out. That fact that Alliant and Aerojet each had previously been able to submit independent bids, pursuant to the Air Force's dual source procurement strategy, would have

weighed against them. But circumstances can change, and the rule of reason affords broad latitude for presenting an array of business and economic factors in mitigation of the venture's alleged harm to competition, or demonstrating justifiable risk-sharing, production efficiencies of other benefits.

Forewarned by *Alliant-Aerojet*, government contractors contemplating a teaming arrangement should be guided by the following principles:

(1) A teaming arrangement or joint venture for development of costly and complex technology is unlikely to create antitrust exposure if post-development production and marketing are done on a competitive basis. As the Justice Department has stated,

Confining joint activity to the earlier phases of the innovative process rather than extending it to the application stage of production or marketing is a means of lessening any possible adverse effects on competition, and is usually necessary when the joint project is between significant competitors in an oligopoly market.<sup>20</sup>

(2) Team bidding will be accepted in circumstances where the defense authorities have determined that competitive bidding is not a feasible option. As the CIS states,

"[t]he Defense Department retains all the CEM acquisition options provided by the Federal Acquisition Regulation. *The prohibition of the Final Judgment on teaming relates only to those CEM acquisitions for which the procurement office has determined that it is appropriate to solicit competition.*"<sup>21</sup> [Emphasis supplied.]

Defense budget downsizing and defense industry consolidation increase the potential for single-source procurement, in which a team bid by the only two surviving contractors would not violate the antitrust laws. But the same factors make it all the more imperative to preserve competition where, as the Justice Department

found in *Alliant-Aerojet*, a dual source, competitive procurement remains feasible. In future similar situations, the government contractor team will want to obtain specific assurances from the Government that it does not consider competitive purchasing to be a feasible option.

(3) Team bidding may also be appropriate in relatively unconcentrated markets or where, in the absence of a teaming arrangement, neither partner would be able to bid. In these circumstances, the joint arrangement would not be substantially anticompetitive, either because there is a sufficient number of other bidders, or because the joint arrangement does not eliminate a source of independent competition.

There inevitably will be gray areas. For example, it may be unclear whether competitive procurement is feasible or whether, in the absence of the teaming arrangement, each of the team members would have had the capability or incentive to bid. The action against Alliant and Aerojet serves warning that in those circumstances, contractors should seek legal advice and, if appropriate, obtain a Business Review Letter ("BRL") from the Justice Department. As the CIS points out, that procedure "is available ... to provide statements of enforcement intention with regard to proposed business conduct."<sup>22</sup> It is not always desirable, however, to seek a BRL. The process is time consuming, requires disclosure of some information, and the Justice Department may be inclined to withhold a BRL in circumstances where, in fact, it would not challenge the parties' conduct.

## CONCLUSION

The action against Alliant and Aerojet reflects not so much a new or more aggressive attitude by the Justice Department as it does a change in the defense industry. The message sent by Justice is clear: defense contractors may not agree to divide up shrinking defense markets without active prior participation of the Defense and Justice Departments. Mere dis-

closure to or other interactions with DOD are not sufficient to provide a safe harbor. In fact, as in the *Alliant-Aerojet* case, DOD can award a contract based on the teaming agreement while simultaneously referring the matter to the Justice Department. Waiver and estoppel arguments (that DOD procurement and award activities precluded the Justice Department's right to bring an antitrust action) were not formally adjudicated in the *Alliant-Aerojet* case. However, the Department clearly attempted to dispel that conclusion with its publicity of the Decree.

DOD would do well to review its role in such cases. It is unseemly for federal agencies to provide conflicting signals to industry. A proper forum for such a review could be the Defense Science Board Task Force, recently formed by Undersecretary of Defense for Acquisition John Deutch on October 12, 1993<sup>23</sup>. While the announced purpose of the Task Force is to address the subject of mergers, teaming agreements and joint ventures should be included. Included in the review of this case should be a lessons learned recommendation about the need for early and vigorous coordination prior to finalizing procurements which raise such concerns.

## ENDNOTES

<sup>1</sup>. United States v. Alliant and Aerojet, Civ. No. 94-1026 (C.D. Ill. 1994) ("*Alliant-Aerojet*").

<sup>2</sup>. *Id.*, Competitive Impact Statement ("CIS"), IIIA, at 9-10. Section 5 of the Clayton Act requires the Department of Justice to submit a detailed Competitive Impact Statement along with every proposed Consent Judgment. The purpose is to enable the public to comment on the proposal and to facilitate the court's determination that it is in the public interest. 15 U.S.C. §16(e)-(f).

<sup>3</sup>. Final Judgment, §IV.

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

<sup>5</sup>. The Wall Street Journal, p. B8, January 10, 1994.

<sup>6</sup>. *Id.*

<sup>7</sup>. "Lock and Load: The Pentagon vs. The Trustbusters," by Catherine Yang, *Business Week*, p. 41, January 31, 1994.

<sup>8</sup>. *Id.*

<sup>9</sup>. CIS, II, pp. 4-5.

<sup>10</sup>. *Id.* at 6.

<sup>11</sup>. *Id.* at 7.

<sup>12</sup>. *Id.* at 7-8.

<sup>13</sup>. *Id.* at 11.

<sup>14</sup>. FAR Subpart 9.604. See Northrup Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1037 (9th Cir.), *cert. denied*, 464 U.S. 849 (1988).

<sup>15</sup>. Charles F. Rule, "Criminal Enforcement of the Antitrust Laws: Targeting Naked Cartel Restraints," 57 *Antitrust Law Journal* 257, 264 (1988).

<sup>16</sup>. ABA Antitrust Section, *Antitrust Law Developments* (3d Ed.), 1992, p. 33, quoting from Northern Pac. Ry. v. U.S., 365 U.S. 1, 5 (1958).

<sup>17</sup>. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

<sup>18</sup>. National Society for Professional Engineers v. United States, 435 U.S. 679, 691 (1978).

<sup>19</sup>. U.S. Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, 24 Trade Reg. Rep. (CCH), 3.4, p. 41 (November 10, 1988).

<sup>20</sup>. U.S. Department of Justice, Antitrust Division, *Antitrust Guide Concerning Research Joint Ventures*, p. 11 (November, 1980).

<sup>21</sup>. CIS at 11.

<sup>22</sup>. CIS at 11.

<sup>23</sup>. In creating the Task Force, Deutch announced that it would provide advice concerning (1) criteria for determining DOD's views on a given transaction; (2) data needed to make such determinations; (3) analytical capabilities required to do so and appropriate means for communicating with the enforcement agencies. See 60 *Federal Contracts Report* 396.

## ASBCA JUDGES RETIRE

Four judges from the Armed Services Board of Contract Appeals are expected to retire soon. Judge Joseph B. Axelman plans to retire on April 30th. One vice-chairman, Judge Willaim J. Ruberry, expects to retire by the end of May. The other vice-chairman, Judge V. John Riismandel, plans to retire before the end of the summer, as does Judge Joseph H. Reiter.



## THE FAR AND ADR: WAITING FOR GODOT OR LANGUISHING NO MORE?

Joseph M. McDade, Jr.

OFFICE OF THE GENERAL COUNSEL  
U.S. AIR FORCE

For almost three years, the Federal Government has encouraged the use of alternate dispute resolution (ADR) to the maximum extent practicable<sup>1</sup>. The Administrative Dispute Resolution Act of 1990 (ADRA or the Act<sup>2</sup>) set forth a promising but imperfect framework for the use of ADR techniques to resolve contract disputes. The ADRA called for implementing regulations to guide parties through the uncharted waters of using third party neutrals to resolve disputes. The first set of interim ADR regulations, however, mirrored apparently conflicting provisions of the ADRA and resulted in equally problematic coverage<sup>3</sup>. Still, the Government continued its active encouragement of ADR use<sup>4</sup>. Agencies such as the Defense Logistics Agency (DLA), General Services Administration (GSA) and the Air Force responded by embarking on programs to foster the use of ADR; such agencies in particular required improved coverage. Despite high level attention, almost two years expired before the second set of interim ADR regulations - including hoped-for clarifications - was published in the Federal Register<sup>5</sup>. Did we get what we were waiting for, or for us as for Sam Beckett's characters, does the languishing continue? I believe the FAR ends the need for much but not all, of our waiting.

The new interim rules reconcile and clarify ambiguities found in the ADRA. Unfortunately, they also incorporate by reference the ADRA's problematic confidentiality protections. Still, the new FAR coverage overall provides straightforward rules and procedures that will allow for successful, widespread use of ADR.

## KEY PROVISIONS

### AMENDMENTS TO THE CDA

The ADRA amended the Contract Disputes Act (CDA) to incorporate by reference the general provisions of the ADRA. These amendments, however, also created a problematic claim certification requirement. They appear to require certification whenever the parties use an "alternate means of dispute resolution" - a much broader term than "dispute resolution proceeding,"<sup>6</sup> the definition used by the ADRA to describe its new grant of authority. "Alternate means of dispute resolution" is defined under the ADRA to encompass virtually any method used by the parties, in lieu of litigation, to resolve a dispute - including unassisted settlement negotiations<sup>7</sup>. Read in isolation, this provision would severely limit agencies' authority to resolve disputes. In fact, this interpretation would result in the conclusion that every time a contractor attempted to negotiate a settlement, it must submit a certified claim. All claims, even those valued at less than \$50,000, would have to be certified if the parties resolved them short of litigation<sup>8</sup>.

At least one interpretation of the ADRA's amendments to the CDA avoid such a result. During passage of the technical amendments to the ADRA, Senator Grassley, a co-sponsor of the Act, took to the floor to clarify the confusion surrounding the ADRA's certification requirement<sup>9</sup>. The Senator argued that the ADRA amendments to the CDA created an ambiguity that could be reconciled only by reading the ADRA and its legislative history as a whole<sup>10</sup>. Relying on legislative history, Senator Grassley deduced that the ADRA's provisions have no effect on ADR procedures or authority in effect prior to the passage of the ADRA<sup>11</sup>. He noted that the ADRA authorizes the use of "dispute resolution proceedings" to supplement, rather than limit, existing authority<sup>12</sup>. This term, the Senator noted, has a narrow meaning and is intended to clarify the authority of agencies to use third party neutrals<sup>13</sup>. In short, the ADRA's

general authority to use neutrals serves merely to augment existing agency authority to employ unassisted negotiations to resolve disputes<sup>14</sup>. Further, only in those cases where the ADRA's new authority is exercised (arbitration proceedings) does the new certification requirement apply<sup>15</sup>. As discussed more fully below, the new FAR ADR coverage essentially adopts Senator Grassley's interpretation of the ADRA.

## CONFIDENTIALITY PROVISIONS

The ADRA's confidentiality provisions attempt to establish a nondisclosure rule for dispute resolution communications. With numerous exceptions, the ADRA provides for the nondisclosure of communications made during the ADR process. It also provides for the inadmissibility of such information in proceedings related to the dispute during which the communication was made<sup>16</sup>. These nondisclosure provisions, and their exceptions discussed *infra*, differ in application to government agencies and agency neutrals from their application to contractors and private sector neutrals. As applied to federal agencies, the exceptions to the ADRA's nondisclosure provisions swallow the rule. As applied to private sector parties, the exceptions all but swallow the rule. Only when applied to certain confidential discussions between a party and a private sector neutral do the ADRA's nondisclosure provisions in fact provide some protection, in addition to traditional mechanisms.

**Confidentiality provisions as applied to agency parties and neutrals**—The ADRA's nondisclosure provisions are irrelevant for purposes of determining whether a confidential or privileged document is releasable pursuant to a FOIA request. During debate of the ADRA, the concern was raised that agencies might seek to use the ADRA's nondisclosure provisions to shield documents from disclosure under exemption (b)(3) of the FOIA<sup>17</sup>. Had the ADRA been construed as an exemption (b)(3) statute, then its nondisclosure provisions would have authorized agencies to withhold certain records from a FOIA requester. Because the ADRA expressly provides that it is

not a (b)(3) statute, its nondisclosure provisions provide no protection from documents sought pursuant to the FOIA<sup>18</sup>. Agencies may nevertheless invoke applicable FOIA exemptions to avoid releasing privileged information<sup>19</sup>. Unlike government parties, private sector neutrals and parties generally are not subject to the FOIA, so the ADRA's nondisclosure provisions generally apply.

**Confidentiality provisions as applied to private sector parties**—As applied to contractors, the ADRA's nondisclosure protections have a number of exceptions, the most important of which are that: (1) ADRA does not prevent disclosure if the dispute resolution communication *was provided to or was available to* all parties to the dispute resolution proceeding<sup>20</sup>; (2) ADRA does not prevent disclosure if information is required by statute to be made public<sup>21</sup>; (3) ADRA does not prevent the discovery or admissibility of any evidence that is otherwise discoverable merely because the evidence was presented in the course of a dispute resolution proceeding<sup>22</sup>; and (4) even if the Act's confidentiality provisions apply, a court may still require disclosure if necessary to prevent a manifest injustice, establish a violation of law or prevent harm to the public health and safety<sup>23</sup>.

Of the foregoing, the most troubling exception is that which allows disclosure of information "if provided to or was available" to all parties to the dispute. In serious settlement discussions, parties frequently make statements or exchange documents that they would desire to exclude from future litigation. This provision, however, appears to subject to disclosure precisely this type of information exchange intended to remain confidential. Counsel should therefore proceed cautiously when exchanging information pursuant to settlement discussion.

**Confidentiality provisions as applied to private sector neutrals**—The ADRA's nondisclosure provisions appear to provide additional nondisclosure protection of dispute resolution communications made between a party (government or private sector) and a private sector neutral. First, because private sector individu-

als generally are not subject to the FOIA, the ADRA's nondisclosure provisions apply<sup>24</sup>. Second, the ADRA protects from disclosure "dispute resolution communications," which include any confidential oral or written communications prepared for purposes of a dispute resolution proceeding<sup>25</sup>. It must be emphasized, however, that only those dispute resolution communications "made in confidence" are protected from disclosure. Communications are "made in confidence" within the meaning of the ADRA if made with the express intent that they not be disclosed, or under circumstances that would create a reasonable expectation they would not be disclosed<sup>26</sup>.

In addition, the ADRA expressly authorizes the parties to agree to their own confidential procedures for protecting disclosures of confidential information by a neutral, and provides that such an agreement, if made before the dispute resolution proceeding commences, will govern the confidentiality of the dispute resolution proceeding<sup>27</sup>. Candid discussion with the neutral about the strengths and weaknesses of a party's case, as well as the interests behind stated positions, should thus be protected.

Based on the foregoing, parties should approach the ADRA's confidentiality provisions warily. Interestingly, a legislative amendment striking just two sentences from the ADRA's confidentiality provision would substantially correct the gaping holes in the protection of confidential settlement discussions. Congress should strike 5 U.S.C. §574(j), which renders the ADRA's confidentiality provision irrelevant to FOIA requests, and 5 U.S.C. §574(b)(7), which permits disclosure if the dispute resolution communication *was provided to or was available to* all parties to the dispute resolution proceeding. Unencumbered by these provisions, the ADRA's confidentiality provisions would provide useful additional protections to confidential dispute resolution communications.

### REVISED FAR COVERAGE

Almost two years after publication of the initial FAR ADR interim coverage, new revised interim coverage and request for comment was

set forth in the Federal Register<sup>28</sup>. The new interim rules seek to clarify the problematic certification requirements discussed earlier. In addition, the new coverage reconciles a number of other potential glitches related to claim certification. They do not (nor could they) rectify the ADRA's unfortunate confidentiality provisions.

### CERTIFICATION OF CLAIMS RESOLVED THROUGH ADR

The new FAR coverage adopts Senator Grassley's statutory interpretation noted above. Provisions regarding certification now state that:

Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act ... agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA<sup>29</sup>.

As a result of criticism of Senator Grassley's interpretation, the new FAR coverage represents a carefully crafted compromise. The provision avoids the apparently unintended consequences of the ADRA's amendments to the CDA by clarifying that the ADRA's provisions supplement, rather than replace, existing authority to use ADR. However, it also permits agencies to reject the Senator's interpretation by issuing supplemental agency regulations.

In addition, the new FAR coverage narrows the definition of "alternate means of dispute resolution" to include only "assisted" settlement negotiations - those involving a neutral third party<sup>30</sup>. This revision acknowledges that the ADRA's certification requirements do not apply to routine unassisted settlement negotiations<sup>31</sup>. The amended FAR coverage states that the claim certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim<sup>32</sup>.

### ADR PROCEDURAL RULES

The procedural requirements unique to ADR are simply stated. If the contracting of-

ficer decides to use ADR, the following must be present: (1) an issue in controversy, which is defined as a material disagreement between the government and the contractor related to a claim or which could result in a claim<sup>33</sup>; (2) a voluntary election by both parties to participate in the ADR process; (3) an agreement on alternate procedures and terms to be used in lieu of formal litigation; (4) participation in the process by representatives of both parties who have the authority to resolve the issue in controversy; and (5) certification by the contractor in accordance with FAR 33.207 when using ADR procedures to resolve all or part of a claim under the authority of the ADRA<sup>34</sup>.

The contracting officer may use ADR "at any time that the contracting officer has authority to resolve the issue in controversy<sup>35</sup>." ADR procedures also may be used to resolve all or a portion of a claim<sup>36</sup>. However, initiation of ADR subsequent to the issuance of a contracting officer's final decision (COFD) does not alter any of the time limitations or procedural requirements for filing an appeal of the COFD, nor does it constitute a reconsideration of the final decision<sup>37</sup>.

The FAR's revised ADR coverage protects ADR proceedings in a manner consistent with the ADRA's confidentiality provisions<sup>38</sup>. As discussed above, The ADRA's confidentiality provisions have no impact on the protection of information from a FOIA request. Agency counsel may still bring to bear the array of mechanisms to protect privileged information from disclosure<sup>39</sup>. The FAR coverage is useful, however, because it should direct counsels' attention to the new protections afforded confidential discussions between agency personnel and private sector neutrals.

Overall, the new FAR coverage is much improved. By clarifying the definition of "alternate means of dispute resolution" to include only "assisted" settlement negotiations, the FAR helps avoid unnecessary confusion about the scope of the ADRA. Equally important, the revised FAR coverage rectifies ambiguities found in the ADRA regarding certification of

claims. Perhaps most important, the new FAR policy has not diluted the policy of encouraging the use of ADR to "the maximum extent practicable."

## AGENCY PROGRAM INITIATIVES

The ADRA requires each federal agency to adopt an ADR policy and provide ADR training to agency personnel. In 1992, the DLA promulgated an ADR regulation providing that "[t]he decision not to use ADR, when unassisted negotiation has not been effective, should only be made after its use in resolving the issue in controversy has been fully evaluated and discussed with a higher level of supervision/command."<sup>40</sup> In other words, DLA has rendered ADR the preferred method of resolving all disputes. To implement this regulation, DLA developed extensive training materials and videos and is providing ADR training to much of its organization.

Also in 1992, GSA published a policy statement declaring, "We are firmly committed to using ADR in our administrative programs ... Employees need to become familiar with these techniques and use them as the agency's preferred way to resolve disputes." GSA, borrowing from the Army Corps of Engineers ADR training materials, developed an extensive ADR training program and has to date provided ADR training to approximately a thousand contracting officers and professionals.

In January 1993, the Secretary of the Air Force issued a memorandum urging Air Force personnel to use ADR procedures in appropriate cases and deeming ADR training essential<sup>41</sup>. Six months later, the Secretary followed up with a memorandum that specifically targets contract attorneys and professionals for ADR training in FY 1994<sup>42</sup>, thus initiating an extensive ADR training and awareness briefing program.

The Air Force also designated and fully funded four ADR pilot projects. Sacramento Air Logistics Center is experimenting with using ADR techniques to resolve all types of disputes at that installation. The U.S. Air Force Acad-

emy, in cooperation with the Air Force Space Command, is focusing on resolving contract and labor disputes using ADR. Kirtland Air Force Base established a Mediation Center to resolve labor and personnel disputes throughout the base. Finally, the Air Force Directorate of Contract Appeals (the "Trial Team") is screening all proposed COFDs valued at more than \$50,000 for potential resolution through the use of ADR. Because the Trial Team reviews several hundred such cases each year, its ADR screening effort may prove particularly effective in promoting the use of ADR.

In the past several years, the Air Force has successfully resolved seventeen contract disputes using ADR techniques. Almost all of these cases (fourteen) were resolved using ADR procedures at the ASBCA. The Air Force ADR Program, however, is now encouraging the use of ADR as early in a contract dispute as possible. The Sacramento Air Logistics Center pilot project was the first to initiate ADR before a dispute reached the ASBCA. During the last six months, they have successfully resolved two of the three cases in which ADR was attempted. They also used hybrid ADR techniques and estimated that doing so saved more than a hundred man hours.

But for the provisions of the ADRA that require agencies to take concrete steps to promote the use of ADR, the foregoing agency initiatives would not have received the high level attention and resources necessary for implementation. While these provisions are not codified in the United States Code nor found in the FAR's ADR coverage, they are arguably the most important found in the ADRA.

## CONCLUSION

Like most legislation, the ADRA - especially its confidentiality provisions and amendments to the CDA - is far from perfect. Luckily, the recent FAR amendments do much to rectify problems caused by the ADRA's amendments to the CDA. Unfortunately, only legislation can remedy the deficiencies found in the ADRA's

confidentiality provisions. Those who still hesitate to use ADR can no longer claim to do so because the procedures are too undefined or complicated. Several prominent procuring agencies and departments have stopped their waiting and begun active and successful employment of ADR techniques. Others should, too.

## ENDNOTES

1. See 56 Fed.Reg. 67,416 (1991).
2. P.L. 101-552, 104 Stat. 2736 (1990), codified in scattered sections of the United States Code as follows: 5 U.S.C. §§571-83 (general provisions, confidentiality, administrative arbitration); 5 U.S.C. §556(c) (ALJ authority); 9 U.S.C. §10 (arbitration, judicial review); 41 U.S.C. §§604-607 (contract disputes); 29 U.S.C. §173 (FMCS authority); 28 U.S.C. 2672 (tort claims); and 31 U.S.C. §3711(a)(2) (government claims). As originally enacted, the U.S. Code designations for the ADRA were incorrect. Technical amendments and code number designations were enacted in P.L. 102-352 (the ADRA Technical Amendments).
3. 56 F.R. 67,416 (1991)(hereafter, the original FAR interim rules).
4. Expanded use of ADR techniques by federal agencies was recently endorsed as a major recommendation of the National Performance Review. See *The National Performance Review*, at 199 (September, 1993). Just a few weeks ago, the DOD General Counsel, Jamie Gorelick, issued a memorandum urging the implementation of ADR techniques. See *DOD/OC Memorandum to all Military Departments and Agencies*, February 18, 1994.
5. 59 F.R. 11,368, 11,381-82 (1994)(hereafter, the new FAR interim rules).
6. 5 U.S.C. §571(6) (including "any process in which ... a neutral is appointed and specified parties participate").
7. *Id.* at §571(3) (including "any procedure used in lieu of adjudication ... including but not limited to ... settlement negotiations").



<sup>8</sup>. 41 U.S.C. §606(d) (setting forth that whenever an alternative means of dispute resolution is used, the contractor shall certify the claim). At the time this language was drafted, the CDA required such certifications only if the dollar amount claimed by the contractor was more than \$50,000. Such a change would therefore limit, rather than supplement, existing agency authority to settle claims through the use of dispute resolution communications.

<sup>9</sup>. See Cong.Rec. S11,781 (August 6, 1992)(floor statement made by Senator Charles Grassley during passage of H.R. 2549 to make technical corrections to the ADRA).

<sup>10</sup>. Id.

<sup>11</sup>. Id. at S11,781. The Tennessee Valley Authority, concerned that certain provisions of the Act would limit their existing ADR authority, sought a provision to avoid that result. As Senator Grassley noted, 5 U.S.C. §572(c) "make[s] clear that the intent of the Act is to promote ADR methods as a supplement to already existing agency dispute resolution procedures. The provisions of the Act are not meant to interfere with or limit any procedures or practices already in use."

<sup>12</sup>. Id.

<sup>13</sup>. Id.

<sup>14</sup>. Id.

<sup>15</sup>. Id.

<sup>16</sup>. 5 U.S.C. §§571(5), 571(7), 574(a)-(c).

<sup>17</sup>. Section (b)(3) provides that FOIA does not apply to matters that are specifically exempted from disclosure by statute.

<sup>18</sup>. 5 U.S.C. §574(j).

<sup>19</sup>. On October 4, 1993, the Attorney General issued a memorandum regarding the new FOIA policy:

It shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest

protected by that exemption. Where an item of information might technically or arguably fall within an exemption it ought not to be withheld from a FOIA requester unless it need be.

<sup>20</sup>. 5 U.S.C. §574(b)(7).

<sup>21</sup>. 5 U.S.C. §§574(a)(3), 574(b)(4).

<sup>22</sup>. 5 U.S.C. §574(f).

<sup>23</sup>. 5 U.S.C. §§574(a)(4), 574(b)(5).

<sup>24</sup>. 5 U.S.C. §574(a).

<sup>25</sup>. 5 U.S.C. §571(5).

<sup>26</sup>. 5 U.S.C. §571(7).

<sup>27</sup>. 5 U.S.C. §574(d). Parties cannot, however, transform all documents that existed prior to the dispute resolution proceeding into nondiscoverable documents merely by providing them to a neutral. 5 U.S.C. §574(f).

<sup>28</sup>. 59 F.R. 11,368, 11,380-82 (1994).

<sup>29</sup>. FAR 33.204

<sup>30</sup>. This clarification helps avoid potentially absurd results, such as requiring contractors to wait until disputes arise to the level of a formal claim before it could be resolved informally using ADR. Equally troubling, this requirement could rekindle the dispute about the ability of the government to resolve nonmonetary claims.

<sup>31</sup>. This framework is adopted in contract certification coverage found at FAR 33.207. The new provisions of FAR 33.207 state:

(a) Contractor shall provide the certification specified in 33.207(c) when submitting any claim:

(1) Exceeding \$50,000; or

(2) Regardless of the amount claimed when using -

(i) Arbitration conducted pursuant to 5 U.S.C. §575-580; or

(ii) Any other ADR technique that the agency elects to handle in accordance with the ADRA.

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<sup>32</sup>. FAR 33.207(b); see also FAR 52.233-1(d)(2)(ii).

<sup>33</sup>. FAR 33.201.

<sup>34</sup>. FAR 33.214.

<sup>35</sup>. FAR 33.214(b).

<sup>36</sup>. Id.

<sup>37</sup>. Id.

<sup>38</sup>. FAR 33.214(d).

<sup>39</sup>. Counsel are still free to invoke F.R.E. 408, seek contractual agreements to ensure settlement negotiations remain confidential, or seek a protective order from a board or court.

<sup>40</sup>. DLA Alternate Dispute Resolution Regulation No. 5145.1 (May 29, 1992).

<sup>41</sup>. Secretary of the Air Force Memorandum, January 12, 1993.

<sup>42</sup>. Secretary of the Air Force Memorandum, July 8, 1993.

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## THE ANNUAL PROGRAM AND MEETING

**David Metzger**

DAVIS, GRAHAM & STUBBS  
CHAIRMAN  
ANNUAL MEETING COMMITTEE

I first would like to say how pleased I am to serve as the Annual Program Committee Chair this year. I am very excited about the prospects for a practical, useful and educational annual meeting. The BCABA has had a great tradition of annual programs, which we will continue this year. The Board of Governors selected Tuesday, October 25th as the date for the annual meeting. We will once again hold the event at the Holiday Inn Crowne Plaza in Washington, D.C., because of its accessibility for most of the membership.

The theme of the Annual Program this year is improving lawyers' effectiveness before the boards. We will have an update on important board decisions, followed by three seminars presenting useful information for practitioners. We plan to have participation of both judges and members on all of the panels. We are currently exploring the possibility of a panel devoted to practical courtroom tips for improved advocacy, a panel devoted to improving motions practice and a third panel for pre-trial procedures. We are very interested in sug-

gestions from members this year, and encourage all our members to tell us their thoughts about the seminars before we finalize the topics. Please send your ideas either to me directly or to Pete McDonald at The Clause.

All members are urged to attend the business meeting portion of the annual meeting. As the Association grows, it is taking on increased responsibilities to the government contract community and the boards. We will discuss whether attorneys who practice before the boards should be certified in some way by the BCABA. This is a matter which the Board of Governors discussed at length at its last meeting and was a subject of discussion in the last issue of The Clause. President Schaefer has placed this on the Business Meeting agenda, ensuring that the meeting will be a substantive and meaningful session.

We also plan to present a luncheon speaker who can report on the status of acquisition reform, which is sure to be in the final stages (if not already enacted) by the time of the annual meeting.

So while you are thinking about it, place October 25th on your calendar and get your plane tickets (or Metro tickets) now. Let us hear from you about what you hope to see in the program this year, and we hope to see you there.



## EDITOR'S CORNER

Peter A. McDonald

{Standard disclaimer.}

[Above average disclaimer.]

### TERRORISTS ASSAULT CAD!!!

While not reported in the media, several opposing counsel disguised as terrorists recently attacked the Army's Contract Appeals Division (CAD). Dressed in power D.C. suits with culturally sophisticated accoutrements, each was armed with hardcover editions of Bartlett's Quotations, Roget's Thesaurus and Gregg's Reference Manual. The attack began with an intense bombardment of derisive insults and primitive gestures, followed by a withering fire of total put-downs and derogatory taunts. Some trial attorneys attempted to form a hasty defense, but their position was overrun by caustic gibes, scornful laughs and intimidating comebacks. After that, CAD formed into a sullen humiliated herd, sporadically shooting poorly aimed bursts of declaratory sentences.

That morning, the Deputy Chief Trial Attorney, Mr. Craig Clarke, was delivering a lecture to the office entitled "TQM at the Alamo: It Could Have Made a Difference." The high casualties were attributed to this, because the office attendees were something less than mentally alert when the attack began.

During the melee, the Navy's Office of General Counsel (OGC) was asked to provide support. The Army's request was denied, however, on the grounds that OGC found itself low on both action verbs and compound adjectives, which were needed for its own security (naval intelligence had recently reported seeing several satirists wandering near their offices). The Air Force stated that it would provide an airdrop resupply of gerunds and appositives, as soon as the Army repaid it the \$2.15 billion owed from last year's budget battle. The government attorneys at the Corps of Engi-

neers office stated that they would provide as much support to CAD as CAD would provide to them under like circumstances. In sum, CAD found itself fighting alone.



CAD's Chief Trial Attorney, COL Riggs Wilks, bemoaned the losses. "I don't have a full report yet, but it appears that we have been badly damaged," he said. "Several individuals had their delicate sensibilities badly bruised. A few suffered torn self-esteem. Three egos were scorched so badly that they were medically evacuated to the Army's Burn Trauma Unit at Ft. Sam Houston, Texas. Also, our only tender-hearted attorney has been completely devastated and our two magnetic personalities were both degaussed. I don't know how they are going to recover."

COL Wilks subsequently acknowledged that his office was not prepared for the attack. "We used to have some quick wits at CAD, and I can see now that we need to regain that capability. It will take some time and training, but we'll get there."

According to a knowledgeable source, all trial attorneys at CAD will soon be taking personality self-improvement courses by correspondence. Also, some trial attorneys will be sent to the Verbal Art of Self-Defense course, and experienced stand-up comics would be brought in as consultants to teach "Crowd Banter." Finally, trial attorneys would be encouraged to verbally joust at the office (that's right, at the office!) as a means of maintaining readiness.

We at the editorial staff of The Clause wish all afflicted CAD personnel a speedy recovery. (!!!)

As usual, there were the typical articles not accepted for publication: "Boy Raised By Wolves!", "SBA Issues COC to Bigfoot!!" and "Contracting Officer Denies Relying on Contractor Cost & Pricing Data!!!"

And remember people - Don't take all this government contract law stuff too seriously.

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## A BIG SUCCESS—THE 8TH INTENSIVE PROGRAM ON TRIAL ADVOCACY IN FEDERAL PROCUREMENT

The bi-annual ABA/BCABA Course was a highly successful event, and the BCA Bar Association wishes to thank the following individuals who gave freely of their time:

### ASBCA:

Judge Ruth Burg  
Judge John Grossbaum  
Judge Terrence Hartman  
Judge Martin Harty  
Judge David James  
Judge Carol Park-Conroy  
Judge Richard Shackleford  
Judge Jean Schepers

### GSBCA:

Judge Anthony S. Borwick  
Judge Stephen M. Daniels  
Judge Donald W. Devine  
Judge Allan H. Goodman  
Judge Catherine B. Hyatt  
Judge Robert W. Parker  
Judge Joseph A. Vergilio  
Judge Mary Ellen Coster Williams

### COEBCA:

Judge Harold Petrowitz  
Judge Stephen Reed

### AGBCA:

Judge Marilyn Eaton

### DOEBCA:

Judge Baryl S. Gilmore  
Judge Sherman P. Kimball

### INTERIOR BCA:

Judge Cheryl S. Rome

### POSTAL BCA:

Judge David I. Brochstein  
Judge James D. Finn, Jr.

### HUDBCA:

Judge Jean S. Cooper

### COURT OF FEDERAL CLAIMS:

Judge Eric G. Bruggink  
Judge Robert A. Hodges, Jr.  
Judge Lawrence S. Margolis  
Judge Christine Cook Nettesheim  
Judge Moody R. Tidwell

### COURSE ADMINISTRATION:

Robert S. Brams  
Gadsby & Hannah  
Robert M. Moore  
Morgan, Lewis & Bockius

### FACT WITNESSES:

Kathleen Barger  
Wickwire Gavin  
Sharon Chism  
Seyfarth, Shaw, Fairweather & Geraldson  
John Cook  
Smith, Pachter, McWhorter & D'Ambrosio  
Maureen Cummings-Spickler  
FAA  
Rob Edgecumbe  
Morgan, Lewis & Bockius  
Lorenzo Exposito  
Morgan, Lewis & Bockius  
Kathryn Good  
FAA  
Alastair Innes  
Morgan, Lewis & Bockius  
Andy Kerr  
Howrey & Simon  
George Kinsey  
FAA  
Eric Lipman  
Tom Muldoon  
Pettit & Martin  
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COE  
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Barrington Consulting Group  
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Barrington Consulting Group

Jill Teske

Morgan, Lewis & Bockius

John Thomas

Seyfarth, Shaw, Fairweather & Geraldson

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## APOLOGIA

A BCA Bar Association member did not get listed in the 1994 Directory. He is:

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Gardner & Kewley

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Please add the above information to page 17 of your Directory.

Pete McDonald has apologized in writing to Mr. Gardner for his error.

## NEW MEMBERS

The BCA Bar Association warmly welcomes:

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(F) 212-264-8171

# Application for Membership

Annual Membership Dues: \$25. [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: \_\_\_\_\_

## SECTION II (THIS SECTION FOR COMPLETION BY NEW MEMBERS 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 PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:**

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