

# The Clause

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## THE ROAD TO IMPROVING GAO'S BID PROTEST RULES

David P. Metzger and Mark D. Colley<sup>1</sup>  
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A new protest file, post-debriefing suspension rights, agency discovery and the use of calendar days instead of working days are among the key features of the General Accounting Office's proposed revision to its bid protest regulations. While the proposed rule is generally well thought out, there is room for additional improvement and clarification in the final rule.

The rule implements the Federal Acquisition Streamlining Act of 1994<sup>2</sup>, and constitutes the first major revision of GAO's rules since April 1991. According to GAO, the rule "improve[s] the overall

efficiency and effectiveness of the bid protest process at GAO by streamlining the process, by reducing the costs of pursuing protests at GAO for all parties, and by permitting GAO to resolve protests as expeditiously as possible."<sup>3</sup> Despite the fact that the proposed rule adds certain new provisions required by FASA, it is shorter than GAO's existing bid protest regulations.<sup>4</sup>



### WARRANTY MAPS

Peter A. McDonald  
[Note: A condensed version of this article appeared in the *American Bar Association The Procurement Lawyer*, Vol. 30, No. 2, Winter, 1995.]

With contracting officers ever seeking to maximize the return on every program dollar during an era of budget retrenchment, warranty issues under government contracts may arise with increasing frequency. In recent years, some government agencies have certainly become more aggressive in reaping the benefits of their warranties.

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### SUMMARY OF THE PROPOSED RULE

The rule proposes several new provisions:

- A new protest file, similar to the "Rule 4" file required by the General Services Board of Contract Appeals ("GSBCA"), and consisting of pre-existing documents, must be produced within 20 calendar days by the agency, if requested by a party.
- Protective Orders were left largely unchanged, and GAO thus has missed several opportunities to streamline its procedures further in this regard.

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## PRESIDENT'S COLUMN

COL Steven Porter



The BCABA Officers and Board of Governors recently met to review the activities of the organization to see if we were still on track of meeting our goal: providing the membership with the best possible professional organization in terms of publications and activities.

We were happy to note that the decline in dues-paying members was apparently the result of forgetfulness. After the recent mailing, our numbers are back and growing.

Our publications continue to provide excellent value to members. Prof. Andre Long came to our meeting, all the way from Wright-Patterson AFB, and discussed his plans for *The Clause* next year. Andre intends to publish a Directory next year that will be much improved. He plans to include everyone's e-mail address in addition to their telephone and fax numbers. We are truly moving along the information highway, and e-mail will help keep us in touch. Also, Andre is considering the inclusion of member's photographs in the Directory for those that might be interested...for a slight additional charge.

Our Spring program with the Federal Circuit Bar Association is in high gear. You should have already received a copy of the brochure from

the Federal Circuit Bar Association that gives us credit for the morning ethics course, with an afternoon session to follow. Kudos to Judge Tunks for pulling all of this together. We hope that many of you can attend.

Jim McAleese has reported progress in developing a training program designed to help prevent disputes that grow into claims. He will be presenting to the BCABA Officers and Board of Governors a more complete review at the next meeting. Jim's next step is to find BCABA members that will act as faculty and assist in the training effort. Good work, Jim!

Our very active Practice and Procedures Committee needs a new Chair so that Carl Peckinpaugh can move to our Membership Committee. Any of you in the Washington, D.C. area who would be interested in chairing this Committee, please let either myself or Laura Kennedy know.

1995 will definitely be the year to meet and greet fellow members of the BCA Bar Association. We have agreed to jointly host a reception with the Federal Circuit Bar Association, as a part of their Tenth Annual Meeting and Continuing Legal Education Program on 25-26 May 1995. Also participating will be the Court of Federal Claims Bar Association. We expect to get a lot of visibility from this effort, and designed the pricing to attract new members. We are also co-hosting a reception honoring all of the BCA judges on 6 June 1995, together with the D.C. and Federal Bar Associations. Look for the flyers on these two events.

Of course, another great place to meet other BCABA members is our Annual Meeting. The Annual Meeting Committee, co-chaired by David Metzger and COL Riggs Wilks, is moving along with preparations for the Annual Meeting to be held at the Grand Hyatt Hotel (at Washington Center) on 15 November 1995. The nearest Metro stop is still Metro Center. Because of scheduling difficulties and the out-of-town meeting planned by the Court of Federal Claims Bar Association, we will be unable to link our Annual Meeting with their reception. We will try again next year to coordinate the two events to accommodate our out-of-town members. It is a bit early to forecast the program for the Annual Meeting, but Dave and Riggs are hard at work. The summer issue of *The Clause* should preview the meeting highlights.

The audit of last year's Annual Meeting shows a small profit and, after our recent membership drive, we have over \$8,000 in the bank (see Judge Rome's Treasurer's Report). Hats off to Cheryl Rome, who has really done a wonderful job.

And now for the last bit of news. I am on my way to Germany for a three-year tour with the U.S. Army Contracting Command, Europe. Laura Kennedy will take up the slack and begin exercising her presidential responsibilities a bit early. Laura will write the President's Column for the summer issue of *The Clause*, and will oversee the day-to-day running of the BCABA as we move toward the Annual Meeting. Congratulations, Laura! Just because I am moving to

Germany, don't count me out. I hope to keep up with what is going on, and I will have one of those e-mail addresses that will be listed in next year's Directory. But as I go, I could not be happier with the state of the BCABA.

Attend the BCABA-sponsored events, and meet your professional colleagues. I hope to see you soon.

## IN MEMORIAM:

COL Maurice J. O'Brien

COL Maurice O'Brien died at his home on December 30, 1994, after suffering a heart attack. He had been a career officer in the Army's JAG Corps since 1967, and at the time of his death was the Chief Counsel of the U.S. Army Information Systems Selection and Acquisition Agency.

COL O'Brien was known to many BCA Bar Association members through his long and distinguished career in procurement law. His contract law experience included assignments with the Office of the General Counsel, Office of The Judge Advocate General, Army Material Command, the Contract Appeals Division, and the Contract Law Division for U.S. Army Europe. He also served on the Defense Acquisition Regulatory (DAR) Council. Without question, he was a key figure in the formulation of acquisition policies and regulations now used in virtually all aspects of government contracts.

In addition to being highly respected for his accomplishments, COL O'Brien was well liked by the many who knew him. Among his colleagues, there were few of his stature.



## TREASURER'S REPORT

Cheryl Rome  
DEPARTMENT OF INTERIOR  
BOARD OF CONTRACT APPEALS



*BCA Bar Association  
Statement of Financial Condition  
For the Period Ending March 31, 1995*

<b>Beginning Balance</b>		<b>6,309.90</b>
<i>Fund Income:</i>		
Membership Dues <sup>1</sup>	5,275.00	
Annual Meeting <sup>2</sup>	7,980.00	
Reception <sup>3</sup>	290.00	
Refund <sup>4</sup>	605.62	
<b>Total Fund Income</b>		<b>+14,150.62</b>
<b>Subtotal</b>		<b>20,460.52</b>
<i>Fund Disbursements:</i>		
Newsletter (Winter)	1,429.82	
Annual Meeting	9,394.89	
Training <sup>5</sup>	131.15	
Stationery	398.47	
Account Adjustment <sup>6</sup>	350.40	
<b>Total Disbursements</b>		<b>-11,704.73</b>
<b>Ending Cash Balance, March 31, 1995</b>		<b>8,755.79</b>

## NOTES

- 1—The BCA Bar Association uses the same fiscal year as the Federal Government (October 1st–September 30th). Annual dues are payable NLT September 30th each year. A dues notice accompanies the summer issue of *The Clause*.
- 2—By policy, the BCABA annual meeting is paid for by the attendees themselves. After the Annual Meeting, the BCABA either receives the funds left over (if any), or assumes responsibility for any residual amounts unpaid. To date, the BCABA has received money after each Annual Meeting, which indicates how well managed these events have been under both Barbara Wixon and David Metzger.
- 3—This is the allocated cost of receptions jointly sponsored with several other bar associations.
- 4—The year-end audit revealed that the printer had been paid twice on the same invoice. The requested refund was promptly paid.
- 5—Once or twice a year, the BCABA will undertake joint responsibility for CLE training related to government contracts. These events have been co-sponsored with organizations such as the American Bar Association, the Federal Bar Association, the Court of Federal Claims Bar Association, and the CAFC Bar Association.
- 6—Each year for the last four years, Peter McDonald performed a desk audit of the BCABA books and records. Each year, he reported immaterial differences between the BCABA financial records and its bank account. However, no adjustments were ever made to the BCABA records. The differences for all years accumulated to the figure shown above. This was reported to the BCABA officers, who authorized the account adjustment.

## FASA AND TRAVEL COSTS: WRONG IDEA, WRONG TIME

Richard C. Loeb

*[Note: This article first appeared in the American Bar Association's The Procurement Lawyer, Vol. 30, No. 3, Spring, 1995. Reprinted by permission.]*

Tucked away in one little sentence of the recently enacted Federal Acquisition Streamlining Act (FASA), P.L. 103-355, is the kind of statutory provision that gives people working in the world of federal procurement a bad reputation. It is also a budget buster.

Section 2191 of FASA repeals section 24 of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. Sec. 420. That section placed a reasonableness limit on contractor reimbursements for lodging, meals and incidental expenses under cost reimbursement contracts; the same test was also used in pricing fixed-price contracts subject to the submission of cost and pricing data. Repeal of this reasonableness test is almost certain to create more, rather than fewer, administrative burdens; increase federal travel costs; and send the wrong message in an era of severe government cutbacks.

The restriction contained in section 24 of the OFPP Act emanated from Title II, section 201 of the Federal Civilian Employee and Contractor Travel Expense Act of 1985, P.L. 99-234, which was passed in the wake of excessive claims for travel reimbursement by some government contractors. Section 24 was implemented in FAR 31.205-46, which states that costs incurred by contractor personnel for travel be considered reasonable and allowable only to the extent that

they did not exceed the maximum per diem rates established pursuant to the Federal Travel Regulation (FTR) — the same rule that applies to federal employees on official government travel. That is, the reasonableness of contractor travel costs was tied to the FTR. In addition to providing an objective standard, a major side benefit of the law (as implemented in the FAR) was that it placed all contractors on an equal footing when it came to cost recognition for employee travel.

Contractors, however, have always chafed at this restriction and its repeal quickly became something of a cause celebre among industry associations. Contractor complaints focused on two central arguments: first, that FTR rates for lodging and meals are set artificially low because they represent discounted rates available to federal employees but not to contractors traveling under similar circumstances; and second, that the administrative costs of the law are greater than any savings achieved. In addition, contractors argued that the FTR itself is inflexible and unworkable. All of these arguments are palpably wrong.

The first argument — that the FTR rates represent discounts given to Federal employees — is factually inaccurate. FTR rates represent the midpoint rate of the Runzheimer International Travel Survey for domestic cities, without regard to discounts negotiated by the government. The Runzheimer survey identifies three types of accommodation: “deluxe,” “moderate,” and “economy.” The government uses the “moderate” rate

for cities surveyed in determining the applicable FTR rate. This rate may be higher or lower than that which would otherwise be chosen by contractors, but it represents a relatively objective determination of market rates for lodging and meals. Obviously, it is in the best interest of the government to negotiate contracts only with hotels that are within the Runzheimer “moderate” category; thus the apparent correlation between the Runzheimer rates and the government contract rates. Flat rates for meals and incidental expenses are also established based on the Runzheimer survey.

The second argument often cited by contractors — that FTR rates are burdensome to administer — is equally difficult to understand. Even if contractors were to use a reasonableness standard other than the FTR, they would still have to use some standard. It is hard to see how administration of one set of travel cost standards is likely to be less burdensome than administration of some other set of standards. Moreover, even for those contractors whose government business is a relatively small percentage of total business, it is not unreasonable to place a limitation on the recognition of travel expenses relating to lodging and meals. The travel cost principle applies only to cost reimbursement contracts and contracts subject to the submission of cost or pricing data, not to all contracts. And, as attorneys, I think most of us would respect client-imposed limitations relating to travel expenses, particularly when those

limits are based on objective criteria. This should be especially true when the client is using taxpayer funds.

In fact, the current reasonableness limitation is probably less administratively burdensome and more equitable than any alternative. For example, a current government notice of proposed rulemaking (59 Fed.Reg. 64542, December 14, 1994) would permit contractors to propose alternative per diem rates from those authorized by the FTR. I fail to see how this could possibly be less burdensome than the current FTR rule. First, each contractor desiring to use this procedure would have to prepare a proposal. Next, the proposal would be subject to an audit for reasonableness and cost experience. Finally, the contractor and the government would have to negotiate the proposed rates and conclude an agreement. This is less administratively costly? Also, how does one explain on public policy grounds why Contractor A has one per diem rate for a given city, while Contractor B has a different rate for the same city?

Contractors have also complained that FTR rates are inflexible and do not permit exceptions. Again, this is not the case. The FTR is quite flexible and permits use of lodging and per diem rates of as much as 150 percent of the normal rate in unusual circumstances — for instance, if accommodations at normal rates are not available or to meet the physical needs of the traveler.

As a practical matter what does all this mean? A review of travel costs for cost-based pricing arrangements

indicates that an increase of only 5 to 10 percent in lodging and meal rates for contractors will result in increased costs to the government of \$50 to \$100 million. Of course, given very tight federal budgets, this means we are likely to see fewer trips for the same amount of money, cutting into mission readiness and program accomplishment. However, there is an even more serious public policy issue here: in an era of large federal budget deficits, coupled with program curtailments and cancellations, how do we as members of the contracting community explain to taxpayers why government contractors should be able to negotiate travel recognition and reimbursement levels in excess of the rates used by the Government itself?

Understandably, contractors prefer fewer cost restrictions. In this case, however, removal of the current FAR reasonableness test tying travel reimbursement limits to the FTR rates is counterproductive. Rather than following the dubious lead of FASA and amending or repealing FAR31.205-46, we should leave that regulation in place on grounds that it represents a legitimate and appropriate exercise of the government's general procurement rulemaking authority. The alternative will be increased administrative burdens, potential damage to contractor credibility, and serious adverse impact on federal budgets and programs.

*Richard C. Loeb is executive secretary and counsel, Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB, Washington, D.C. The views expressed herein are solely those of the author and do not necessarily represent the views of any agency of the U.S. Government.*

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- Suspension of a procurement after debriefing is now possible, if the protester requested a debriefing within five days after receiving notice of contract award and files a protest no later than five days subsequent to the debriefing date offered by the agency.
- Agency discovery of relevant protester documents is authorized, with some modifications to GAO's document request and production procedures.
- Calendar days will replace the current "working day" definition of "day," resulting in new filing deadlines.
- Subcontract protests of awards that were made "by or for the government" will no longer be considered under CICA<sup>5</sup> and instead will be treated as non-statutory protests; GAO will not consider them unless the agency consents.

Each of these provisions has prompted reaction. Other provisions in the rule appear straightforward, such as simpler wording and confirmation of existing but previously unwritten practices. GAO did not address several aspects of its protest practice rules that could be improved further—most significantly, protective orders.

## THE NEW "PROTEST FILE"

The proposed rule provides that, upon request from a party to the protest, "the contracting agency

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shall prepare a protest file and provide a copy to GAO within 20 days after the agency's receipt of the request.<sup>6</sup> The file, in effect, must include all relevant documents that existed at the time the protest was filed.<sup>7</sup> Information exempt from disclosure under the Freedom of Information Act ("FOIA") may be withheld and provided under a protective order, if one is issued.<sup>8</sup>

The purpose of this provision, required by sections 1015 and 1065 of FASA, is to prevent delays by supplemental protests. These "rolling protests" have been a problem for agencies, awardees whose contracts have been suspended, and GAO. They are a direct result of the structure of the existing process. Typically, protests are filed on scant information. The subsequent Agency Report reveals the procurement record to protest counsel, who often file supplemental protest grounds based upon the new information. GAO usually incorporates the initial protest into the new grounds and moves the CICA deadline for decision forward to 90 working days from the date of the subsequent protest. This process can repeat itself, resulting in further delays.

GAO hopes that the protest file will minimize such delays by providing protesters with access to pre-existing documents earlier in the process. However, it will not eliminate such delays completely and in fact may not affect delays at all. Additionally, GAO's proposed protest file procedure raises a variety of other issues.

GAO's sole standard for issuance of the protest file is "upon request." In order to achieve the streamlining effects GAO seeks, the protester or counsel must request the protest file early. The rule contains no requirement to make such a request and no penalty for failing to do so.<sup>9</sup>

Recommendation: GAO should provide incentives to protesters to request the protest file in the protest. The proposed regulation should read: "upon request in the protest." The final regulation's list of items required in the protest should include a request, if one has been made, that the agency submit a protest file.

A simple penalty could and should be considered for failing to make such a request in the protest: The protester would be limited to the initial protest grounds and barred from filing supplemental or follow-on protests based upon pre-existing agency documents that would have been in a protest file. We understand and appreciate GAO's admirable reluctance to formalize its rules with excessive requirements and penalties. However, its timeliness rules already are strictly construed, and the problem of rolling protests, if worth addressing at all, should be dealt with in an effective manner.

Recommendation: Protesters who fail to request the protest file in the protest should be barred from filing additional protests after receipt of the Agency Report for that solicitation based upon preexisting documents that would have been in a protest file.

With a requirement to request the protest file early, GAO should consid-

er requiring production of the protest file in fewer than 20 days. Unlike the Contracting Officer's Statement and Memorandum of Law, which require analysis and drafting, production of the protest file involves a mechanical assembly of pre-existing documents. Agencies are likely to be much more organized about post-award files because of the new post-award debriefing provisions of FASA.<sup>10</sup> Agencies will have to provide much more extensive information in debriefings than currently is required. This includes ranking of all offerors, rationale for the decision, answers to reasonable questions of disappointed offerors, and other information not exempt under FOIA. Agencies will have to have files organized and ready to use in the debriefing process almost immediately subsequent to award. Consequently, agencies will have to prepare for post-award processes all the way through the procurement, and especially just prior to award. This post-award planning process can and should provide the basis for a shorter time frame for production of the pre-existing document file, which will lead to even earlier supplemental protests, if filed. Moreover, the FASA provision calling for preparation of a protest file in connection with GAO cases cited the "Rule 4 file" used at the General Services Board of Contract Appeals ("GSBCA"). At the GSBCA, the Rule 4 file must be submitted within ten working days of the protest filing.

Recommendation: GAO should shorten the time for production of the protest file from 20 to 14 calendar days from the date of notice of the protest.

GAO also missed an opportunity to use the protest file to help settle the pleadings. Currently, protests in negotiated and complex procurements are filed on bare information and full knowledge of the agency's actions does not occur until protester's counsel reviews the Agency Report, including the Contracting Officer's Statement, Memorandum of Law and the document file. At that point, based on review of the Agency Report, "rolling protests" may be filed, requiring further Agency Reports.

Closer analysis reveals that the protest file may hold the key to settling the pleadings. It is the document file that may lead to further protests, not the Contracting Officer's Statement or Memorandum of Law. The latter documents, if done properly, should summarize the pre-existing documents and not raise issues beyond them. Only rarely will new facts sufficient to raise new grounds for protest arise after production of the protest file. Thus, by providing the protest file within 14 days, and filing any additional protests within 14 days after that, the protester has put into play the "real protest" in comprehensive form by the 28th day.

The Agency then has seven days from that date to complete the Contracting Officer's Statement and Memorandum of Law, which now can be supplemented to enjoin the protest or protests in their most robust and fully articulated form. Comments on the Agency Report will be due 14 days later.

At that point, the protester has had every opportunity to state its grounds

for protest and no better statement of the protest or Comments could or should be forthcoming.

The only party that has not had its full say up to that time is the agency. The agency should be given the opportunity to reply, after which pleadings will be closed. Further pleadings should not be considered unless expressly authorized by GAO, upon request, with a brief proffer of why leave to file further pleadings should be granted. The justice is that protester's counsel gets one chance to file informed Comments on a comprehensive Agency Report and the agency is allowed one reply to this informed statement of all the protest grounds. Further pleadings are then cut off in the interest of efficiency and cost.

Recommendation: GAO should limit pleadings after the protester's Comments on the Agency Report to an agency reply. Further pleadings filed without leave should be returned.

## PROTECTIVE ORDERS

The protective order is vital to securing the time efficiencies GAO seeks. Protected evaluation documents many times raise additional protest grounds, but these documents presumably will not be made available without a protective order. Yet, GAO has not taken steps to speed up the protective order issuance process. Currently, a party must request a protective order within 20 days of the date the protest is filed.<sup>11</sup> The Proposed Rule eliminates the 20 day request requirement, placing no penalty for delays by protester's counsel in requesting the protective order in

the first place (although GAO may issue the order on its own).

Recommendation: GAO should allow and encourage protesters to request issuance of the protective order with the protest.

Additionally, valuable time is wasted in both the protective order issuance and access application processes. GAO's new rule should expedite both processes. Currently, GAO has standardized its protective orders and application forms for access to protected materials. It should now go further and incorporate either these forms, or their content, into the final rule. Under the new, expedited regime we propose, the "protective order" framework would be accomplished automatically by a standing order to rule without any further action by GAO or interested parties. The current application process for access to protected materials would be replaced by a simple certification by interested parties that they meet clearly articulated qualification criteria published in the regulation. This standing order and certification by reference process would eliminate a significant amount of paperwork. Only exceptional situations would be handled by resort to actual forms. While the protective order may seem to lend itself more to this expedited procedure than the more individualized application process, we believe nevertheless that GAO could implement a similar process for both.

Recommendation: GAO should consider incorporating its standardized protective order and related proce-

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dures into the regulation, and reduce the application process for access to protected materials to a certification.

With expedited protest file and protective order processes, the pleadings will settle faster and more efficiently. Protests will get to the merits faster and be more focused.

GAO also appears to have missed an opportunity to deal with other protective order related issues. For instance, the total restriction on copying is cumbersome and nearly unworkable in complex cases. It is not practical to allow additional resources—such as additional attorneys or consultants—under the protective order so that the strict timelines for Comments can be met, and then restrict copying of protected material even for individuals already under the protective order. Currently, counsel waste time negotiating such copying rights, for which GAO routinely grants leave. The protective order works if it is assumed that each individual granted access to protected material will, in fact, abide by the use and disclosure restrictions.

Recommendation: GAO should allow each individual placed under the protective order a copy of the protected material for use in the proceeding.

The proposed rule also provides no further guidance for in-house counsel applications to protective orders. Magnavox Electronic Systems Company<sup>12</sup> seems to imply that GAO will not consider favorably applications from single attorney in-house counsel offices. Yet, GAO continues to resist advancing any helpful “bright line” rules in this

area that would eliminate such requests if they have no probable chance of approval.

Recommendation: GAO should offer guidance on admission of in-house counsel to protective orders in the final rule. If single attorney in-house counsel offices have no probable chance of admission, it should so state.

Another protective order issue the proposed rule does not resolve is the current dilemma interested parties face with respect to preparation of redacted copies of protected pleadings. Protester and awardee counsel must currently prepare two different redacted versions of a protected pleading if they wish to both prevent disclosure of proprietary information to other offerors but at the same time disclose to a client how the client’s proprietary information was handled in the pleading. Since all such information is protected, a “universal” redacted version is usually prepared that deletes all reference to protected material, even one’s own proprietary information. The purpose is to signal to the other side that the material deleted, even one’s own, is protected. Subsequently, a second version is often prepared that retains the client’s own information, so that, with permission of all parties and GAO, the handling of that client’s own proprietary information can be revealed to the client.

That process is unnecessarily cumbersome. Counsel should be free to prepare redacted versions of pleadings for distribution to clients that redact only such information that is proprietary to another interested party or procurement sensitive. Preparation of such a document, leaving in a client’s

own information, would not constitute an admission that such information was not proprietary, nor waive the right to assert that it is. This would streamline the redaction process for outside counsel who must prepare the client’s additional redacted version, and for agency counsel and other interested party counsel who must approve them. Much time currently wasted on the redaction process would be saved.

Recommendation: GAO should provide in § 21.4 that “information is never protected from its source.”

## SUSPENDING PROCUREMENTS AFTER DEBRIEFINGS

Both FASA and the proposed rule attempt to cure a long-standing problem with regard to suspension of performance of a procurement. The current requirement to file within ten calendar days of the date of award in order to suspend normally results in a dilemma for the protester who feels aggrieved, but would like to receive a debriefing to obtain additional information in making the decision to protest. Currently, if the protester waits for the debriefing, and the debriefing does not occur within the ten day window, the right to suspend is lost. Triggering the protest without the debriefing may result in a suspension, but also in an unnecessary protest filed only because of the ten day deadline and not because the protester possessed adequate information regarding its grievance.

The proposed rule attempts to remedy this dilemma by adding to the current requirement to file with-



in ten calendar days the alternative of filing "within 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested, and when requested, is required..."<sup>13</sup> FASA requires this new alternative.<sup>14</sup>

The new provision raises two jurisdictional issues that GAO fails to address in its explanation of the proposed rule. First, in the event that the debriefing date is beyond GAO's own 14 calendar day jurisdictional filing deadlines set by § 21.2(a)(2), is the protest nevertheless timely? Common sense would seem to dictate that a protest filed within the five day period after the debriefing date would have to be timely because it has the power to suspend progress on the award. It seems inconsistent that such a protest could suspend the procurement and yet be dismissed as untimely because it exceeds the 14 day requirement.

There is some reason for doubt, however, about the timeliness of such a protest, and given GAO's past strict administration of its timeliness rules, GAO should resolve these doubts. The alternative suspension requirement occurs in § 21.6(c), the section relating to withholding of the award and suspension of contract performance, and not under § 21.2, the "Time for filing" section. GAO does not give any assurance such a post-debriefing protest would be timely in either the preface or the body of the proposed rule. In its current administration of the ten calendar day requirement for suspending contract award performance, GAO strictly construes the CICA requirement, even to the point of counting

days differently and more harshly for the time period to file for suspension of contract performance than for its jurisdictional filing period.<sup>15</sup>

More concern arises when one reviews the manner in which the GSBICA proposed to implement identical FASA language in its revised rules.<sup>16</sup> Those revised rules specifically state that such a protest is timely if filed within the five day period from the date of the offered, requested and required debriefing.<sup>17</sup> The fact that this alternative forum clarified this issue several months in advance of GAO's implementation of this same provision and GAO did not raise added concerns about GAO's intent.

It is possible that GAO may not consider it incongruous to strictly enforce its 14 day requirement. This would, however, stand the intent of the FASA provision on its head: instead of the ten calendar day suspension provision requiring protective protests in advance of the debriefing, the 14 day timeliness provision would now have the same effect. This would defeat the intent of the alternative post-debriefing protest opportunity and result in an absurdity.

Recommendation: GAO should confirm in the final rule that post-award or post-selection protests properly filed pursuant to § 21.6(c) within 5 days of the debriefing date will be considered timely even if filed after the 14 day requirement in § 21.2(a)(2).

An additional concern relates to GAO's current interpretation of the term "within 10 days of the date of contract award" and its intended interpretation of "within 5 days after the debriefing date..."<sup>18</sup> GAO's cur-

rent construction of the ten day deadline is to require that the protest be filed on a prior working day if the tenth calendar day for suspension falls on a Saturday, Sunday or federal holiday. The proposed rule defines "days" as calendar days,<sup>19</sup> and states a uniform method for counting days similar to that utilized by the federal courts.<sup>20</sup> The proposed rule enlarges all time periods to the subsequent working day when a time period otherwise ends on a Saturday, Sunday, or federal holiday. It specifically omits previous language that excluded the ten day deadline for suspension from the general rules for counting time. It would appear, therefore, that GAO now intends to subject the ten and five day suspension periods to the counting rules set forth in § 21.0(e). Thus, if the time period ends on a day GAO is not open for business, it will carry over to the next working day for these suspension timelines as well.<sup>21</sup> Because this proposed rule, when interpreted as a whole, changes GAO's rigorous past enforcement of language identical to that found in the proposed rule relating to these suspension timelines, GAO should assure the public of its intent to change the method of counting days in the suspension section.

Recommendation: GAO should clarify in the preface to the final rule that the method of counting days set forth in new § 21.0(e) applies to new § 21.6(c).

## AGENCY DISCOVERY

The proposed rule provides that the contracting agency may request that the protester produce relevant docu-

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ments that are not in the agency's possession. Proposed rule § 21.3(c).

Agencies have long considered it somewhat unfair that protesters are given discovery rights against the agencies, but agencies could not discover documents from the protester. While this provision purports to level the playing field, it raises, among other things, an issue of enforceability.<sup>22</sup>

FASA did not give GAO subpoena power over either documents or witnesses. Without subpoena power, GAO continues as an informal forum relying upon the good will of all interested and involved parties for its effectiveness. Currently, agencies can refuse to make witnesses available for hearings. They can claim schedule conflicts or other excuses to keep witnesses off the stand. Additionally, third party witnesses can refuse to attend hearings and protesters are not required to produce documents.

With this new provision in place, agencies for the first time can request documents of the protester. If the protester claims privilege, or that the documents have been lost, are not in the protester's control or do not exist, or simply refuses to produce requested documents, GAO will have difficulty enforcing the new provision.

The recalcitrant protester who refuses to turn over clearly identified and relevant documents should risk dismissal of the protest, adverse inferences or other sanctions. At what point and under what circumstances GAO should exercise such powers can be the subject of much debate.

The foreseeable circumstances in which such situations might arise, however, are fairly limited.

One troublesome area in which protester documents can be important relates to the "lack of meaningful discussions" protest ground. Most prudent offerors take careful notes during discussions and debriefings. These notes are coveted by agency protest counsel as a source of confirmation that the protester received notice of certain issues. These notes are probably covered by the new provision.

An easy solution to the problem of what was said at debriefings and during discussions would be for agencies to tape record such sessions, and give a copy of the tape to the offeror. In that way, the notes taken would not be needed, and because both sides have a copy of the same tape, discovery of meeting notes would be unnecessary. We think that is a much more effective and streamlined manner of dealing with this problem than wrangling over discovery of meeting notes.

A second area in which protester documents may be helpful is the mistaken bid situation. In those cases, the protester must submit the documents that clearly demonstrate the intended bid anyway, and GAO will not consider the protest unless those documents accompany the protest.<sup>23</sup> The discovery right to protester documents carries little significance in that case and any other where the protester bears a heavy burden to document its allegations.

Prejudice arguments may raise a need for review of protester documents. In general, however, few other

protester documents exist that are pertinent to a protest. Unlike civil litigation, the issue in a protest is usually the reasonableness of the agency's evaluation and selection decision. By law, offerors are prohibited from participating in those evaluations, deliberations and decisions. Rough drafts of proposals, bid sheets, and other preliminary documents are irrelevant unless they were submitted as part of the record and were evaluated. Therefore, except for meaningful discussions, mistaken bid cases and prejudice issues, protester documents are not particularly helpful in protests. While giving the agencies an increased sense of fairness, we think this provision is not likely to alter significantly the extent to which protester documents figure in GAO protests.

## SUBCONTRACT PROTESTS

The proposed rule eliminates GAO's current consideration of subcontractor protests of prime contractor actions that are "by or for the Government."<sup>24</sup> In so doing, GAO follows the decision of the Court of Appeals for the Federal Circuit in *U.S. West Communications*,<sup>25</sup> in which the Court interpreted statutory language regarding GSBICA's jurisdiction, which is identical to that applying to GAO, as barring consideration of subcontract protests before the GSBICA. The court in dicta indicated that the GAO likewise lacked statutory jurisdiction over subcontractor protests.

GAO announced in the proposed rule that it would consider subcontractor protests that are "by or for the government" only if the agency

involved "has agreed in writing to have its protests decided by GAO."<sup>26</sup> Presumably, this means a prior written consent by an agency to have such protests considered. Few agencies are likely to sign up for this right for their subcontractors.<sup>27</sup> Even if agencies do grant the right, the proposed rule provides that subcontractor protesters would have no rights to 1) the new protest file; 2) protest costs if successful; and 3) the right to suspend contract award.

A question arguably left open by GAO's elimination of "by or for" jurisdiction is whether GAO will nevertheless agree to review subcontractor protests when the contractor is acting as a true "purchasing agent" in the limited sense articulated by the federal courts.<sup>28</sup> The history of the "by and for" provision, however, suggests that GAO will not hear subcontractor protests even in that context. When the "by or for" standard was adopted in the existing rules, GAO eliminated many circumstances in which it had previously considered protests of contracts other than those "by a federal agency," including cases where a prime contractor "is acting as the Government's purchasing agent," declaring that such subcontractor protests were beyond the reach of CICA.<sup>29</sup> Eliminating protests of subcontracts "by or for" the government appears to leave disappointed subcontract bidders on federal projects (including subcontractors at GOCO or M&O facilities) with no bid protest recourse.<sup>30</sup> While GAO may have no leeway on this point, given CICA's jurisdictional confines, this may be an area for congressional consideration if it is determined that fed-

eral agencies are evading CICA and the protest process by shifting requirements to subcontractors.

## OTHER ISSUES

GAO should establish a bright line test for award of protest costs where corrective action is taken by the agency. GAO has never awarded protest costs when corrective action was taken prior to issuance of the Agency Report. In fact, it has even determined that corrective action taken after a hearing and just prior to the filing of post-hearing Comments did not constitute an undue delay to justify costs.<sup>31</sup> Given that it is highly unlikely that GAO will ever award protest costs when corrective action is taken prior to issuance of the Agency Report, GAO should announce that "bright line" in its rule and save all concerned the time and expense of pursuing and resolving hopeless claims.

The express option is likely to continue to languish under the new rule. The proposed rule states that decisions will be issued within 125 days.<sup>32</sup> It further states that GAO will resort to the express option, to the extent practicable, to resolve timely supplemental or "rolling" protests.<sup>33</sup> However, under the new rule, supplemental protests are likely to be filed early, especially if the protest file is issued within 14 days. If the supplemental protest comes 34 days after the initial protest (20 days for the protest file plus 14 calendar days), or 49 days after the initial protest (35 days for the Agency Report plus 14 days for new grounds), the express option probably would not be needed. The

express option would have a more significant role if the rolling protest were filed later in the process, to allow addition of only 65 additional days for a decision and not 125 days. However, because most supplemental protests will arise early from the protest file, such late developing supplemental protests for which the express option would be useful will be rare. To the extent that GAO retains its ambition to resolve supplemental protests within 125 days, Congress should insure that it has adequate manpower support to accomplish the task.

The proposed rule permits requests for dismissal, but apparently only by the agency.<sup>34</sup> This would seem to be unfair to the awardee, particularly because of the many political and resource constraints on agencies. The right to point out defects in protests so that frivolous and jurisdictionally barred protests are dismissed is a service to interested parties and to GAO and should be a right reserved to all interested parties.

## CONCLUSION

GAO's proposed rule is a good start. It continues the steady progress in the rule begun by GAO in 1988, significantly advanced in 1991, and significantly improved once again by this proposed rule. At the same time, GAO would do well to consider the recommendations described above as a means of improving its proposed rule further before final issuance. The bid protest regulations are simple, easy to follow, and continue GAO's efforts to

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## ANNUAL MEETING HIGHLIGHTS

[Note: If the BCABA had an editor who was worthy of the title, this would have appeared in the last issue. - Pete McDonald]

Fraud, alternative dispute resolution and civility in discovery were topics of the day at the BCABA Annual Meeting on October 25th. Chief Judge Glenn L. Archer, Jr., of the United States Court of Appeals for the Federal Circuit keynoted the luncheon speech, offering practitioners present valuable insights into the inner workings of the CAFC.

This year's program set a number of firsts. It was the first time that the BCABA held a joint reception with the Court of Federal Claims Bar Association the night before. Also, it was the first time fraud was a seminar topic, the first time a poll was taken of BCA judges for a seminar (the ADR panel), and the first time ethics CLE credits were sought for a seminar (the civility in discovery). While the State Bar of Virginia declined ethics credits for the seminar, it did

grant 5.0 CLE credits for the program.

Anchoring the ADR discussion was a unique, first-of-its-kind survey of the boards of contract appeals judges on their experience with ADR and their receptiveness to it (they are very receptive). The fraud panel examined the essential role of the boards of contract appeals in fraud cases, including an interesting discussion of proposed language in the Federal Acquisition Streamlining Act (FASA) establishing penalties for claiming unallowable costs, and a provision providing for advisory opinions to district courts by the boards of contract appeals (since enacted). The civility in discovery panel presented an entertaining series of interactive vignettes in which actual case facts were presented to demonstrate ethical and civil boundaries of conduct indepositions and discovery.

Pete McDonald started off the Annual Meeting with a brief sum-

mary of recent developments at the boards of contract appeals.

The three panels culminated the hard work of three talented lawyers and seminar moderators. They assembled a cast of expert panel members who, judging from the long and loud rounds of applause for each of their respective panels, deserve the thanks and appreciation of the BCA Bar Association for their efforts:

- Lynda Troutman O'Sullivan led the panel on "Alternative Dispute Resolution—Is It Working?"
- David A. Churchill chaired the panel on "Cross Currents in Contract and Fraud Litigation: The Essential Role of the Boards of Contract Appeals."
- John S. Pachter presented a panel discussion of "Discovery and Civility—Can They Co-Exist?"

Three board judges helped lead these panels in practice-oriented discussions and tips on these subjects.

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keep its process from becoming overly formal and judicialized.

#### ENDNOTES

- 1 David P. Metzger and Mark D. Colley are members in the Washington, D.C. office of Davis, Graham & Stubbs, L.L.C.
- 2 Pub. L. No. 103-355 ("FASA").
- 3 "General Accounting Office; Administrative Practice and Procedures, Bid Protest Regulations, Government Contracts," proposed rule, 60 Fed. Reg. 5871 (January 31, 1995) (the "proposed rule"). Comments must be submitted on or before April 3, 1995.
- 4 4 C.F.R. § 21.
- 5 Competition in Contracting Act of 1984, 31 U.S.C. § 3551(1)("[...]protest[...] means a written objection by an interested party to a solicitation by [a] Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract.")
- 6 Proposed rule, § 21.3(c).
- 7 Specifically, the file must include "an index and a copy of all relevant documents including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications or portions relevant to the protest; the abstract of bids or offers or relevant portions; and any other relevant documents." Proposed rule, § 21.3(c).
- 8 Proposed rule, § 21.3(d).
- 9 The proposed rule is not entirely clear regarding where the request should be directed: GAO or the agency. GAO should clarify that the request should be made to GAO in the protest. See recommendation below.
- 10 Pub. L. No. 103-355, §§ 1014 and 1064.
- 11 4 C.F.R. § 21.3(d)(1).
- 12 B-258037.2, December 8, 1994, 94-2 CPD ¶ 227.
- 13 Proposed rule § 21.6(c).
- 14 Pub. L. No. 103-355, § 1402. The ten calendar day requirement remains. However, the new method of counting days apparently applies to this requirement for the first time. Under the new rule, if the tenth day after contract award falls on a Saturday, Sunday or federal holiday, the period runs to the next day GAO is open for business.
- 15 SINTECH, B-245470, Dec. 27, 1991, 91-2 CPD ¶ 587 (protest received within ten calendar days of the date of award but notice to agency within one working day is not within the ten calendar days, the automatic extension is not triggered).
- 16 See FASA § 1433(a); Rule of Procedure of the GSBICA, 59 Fed. Reg. 61,861 (December 2, 1994), at 61861-64.
- 17 Id. at 61863 ("Such a request is timely if the underlying protest is filed on the later of (i) the tenth day after the date of contract award; or (ii) the fifth day after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.") (emphasis added).
- 18 Proposed rule § 21.6(c); Pub. L. No. 103-355 § 1402.
- 19 Proposed rule § 21.0(e).

The three judges were Judge Martin Harty, ASBCA, on the ADR panel, Judge Robert J. Robertory, DOTBCA, on the fraud panel, and Judge Martha DeGraff, GSBCA, on the discovery and civility seminar.

Chief Judge Archer discussed the heavy reading load on CAFC judges, the need to be "brief" in briefs, the mysteries of case assignments at the Court and, of particular interest to practitioners, insights into how various oral advocacy techniques are received by the Court's judges.

On the ADR panel, Professor Ralph Nash recalled that the Contract Disputes Act of 1978 was supposed to be alternative dispute resolution and wondered aloud what had happened. Lester Edelman (COE Chief Counsel) analyzed both the success of ADR at COE and obstacles that retard ADR's use. Judge Harty presented his unique survey of the board judge's views on ADR, noting that between 1987 through FY 1994, there were

approximately 216 ADR requests in 350 appeals, of which were 90-95% were successful.

Dennis L. Phillips (DOJ Civil Division) discussed the government's wielding of the "big club"—its fraud enforcement powers. In counterpoint, Jim Carlsen (Assistant General Counsel, Westinghouse Electric Corporation) described the costs and problems of parallel proceedings for firms defending themselves against the "big club." Judge Robertory presented a tour de force of case law by the boards involving fraud.

Richard White (District Trial Attorney for the COE Baltimore District) and Barbara Pollack (Senior Staff Counsel, Hughes Aircraft Company) participated with Judge DeGraff and moderator John Pachter in a series of vignettes that demonstrated how to deal with objections to unwanted persons at depositions (get agreements beforehand), objections to videotaping (tough to win), instructions to the

witness not to answer (call the judge if it gets out of hand), and how to deal with obstreperous counsel (videotaping can help).

The Annual Meeting also dealt with the certification of attorneys practicing before the boards and admission of associate members and election of new members. Further progress on the attorney certification issue was referred to the board of directors. At the conclusion of the meeting, the membership elected Laura Kennedy president-elect, James F. Nagle secretary, and Judge Cheryl S. Rome treasurer. Newly elected to the Board of Directors for three-year terms were Roger N. Boyd of Crowell & Moring, James McAleese, Jr., of McAleese & Associates, and Judge E. Barclay Van Doren, Chairman of the Department of Energy Board of Contract Appeals. The meeting concluded with thanks to all of the former BCA Bar Association officers and directors for their past service.

20 "In computing a period of time for the purpose of this part, the day from which the period begins to run is not counted. When the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday or Federal holiday. Similarly, when the General Accounting Office (GAO), or another Federal agency where a filing is due is closed for all or part of the last day, the period extends to the next day on which the agency is open." Proposed rule § 21.0(e). See Fed.R.Civ.P. 6(a).

21 We use the term "working day," even though GAO does not, because it is shorter than GAO's "a day that is not a Saturday, Sunday or federal holiday." That definition is also not complete because it does not take into account those days GAO may not be open for business for other reasons, such as snow days. We prefer the term working days.

22 The proposed rule is silent on issues of timing and procedure, such as when and how discovery from the protester is to be requested, when and how objections will be made and resolved, and when requested documents must be produced and to whom. While GAO's attempts to keep the forum from "over-judicialization" by keeping its rules to a minimum, lack of guidance can contribute to more, not less, discovery wran-

gling. Gone also is the sanction on agencies for failing to produce documents (adverse inferences, and so forth). There is no reason for this deletion. The mild sanction was a reminder to agencies to "play it straight" on discovery and should be left in. Such sanctions should also apply to protesters.

23 William G. Tadlock Construction, B-251946, May 13, 1993, 93-1 CPD ¶ 382 at 4.

24 See University of Michigan; Industrial Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643; 4 C.F.R. § 21.10.

25 *U.S. West Communications Services, Inc. v. United States*, 940 F.2d 622 (Fed. Cir. 1991).

26 Proposed rule § 21.13(a).

27 In fact, on March 2, 1995, the Department of Energy ("DOE") proposed to eliminate subcontractor protests ("the Department proposes to delete DEAR 970.7107 which provides guidelines for the consideration of subcontractor level protests. This is consistent with the General Accounting Office proposed rule published at 60 FR 5871, January 31, 1995.") 60 Fed. Reg. 11646 (March 2, 1995).

28 See *United States v. New Mexico*, 455 U.S. 740, 743 (1982); *United States v. Johnson Controls*, 713 F.2d 1541, 1551 (Fed. Cir. 1983).

29 See GAO-Bid Protest Regulations, Final Rule, 49 Fed. Reg. 49418 (December 20, 1984); Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166.

30 While the federal courts might theoretically be available, most federal contracts do not meet the stringent tests establishing a "purchasing agent" relationship between the government and contractor, which would make the subcontracts subject to traditional Scanwell protest jurisdiction.

31 ManTech Field Engineering Corp.-Reconsideration, B-246152.5, Dec. 17, 1992, 92-2 CPD ¶ 422. See Colley, M. and G. Cadieux, "GAO Protest Costs: New Rule on Reimbursement," Contract Management, 39-43 (July 1993).

32 Proposed rule, § 21.9(a).

33 Id. at § 21.9(c).

34 Proposed rule, § 21.3(b).

Warranties are covered by FAR Subpart 46.7, which is a subcategory of the chapter on Quality Assurance. Most of the FAR warranty clauses are so straightforwardly laid out that a map could literally be drawn.

## GENESIS

Warranties are commonplace in today's commerce and comparatively few products are sold without one. Buyers (including contracting officers) take warranties for granted, unmindful of how they are created.

A manufacturer not offering a warranty is at a competitive disadvantage against manufacturers of similar products that do. This is because consumers perceive warranted products to be of superior quality or just a better buy.

Responsible manufacturers subject the prototype of any new product to a series of rigorous tests. These tests are conducted to determine the point at which a product will fail when subjected to various stresses (compression, tension, torque, durability, and so on). In some cases, the tests are conducted over a range of temperature and/or pressure gradients, and may take months or even years (computer simulations are greatly reducing costs in this area). Eventually, a body of performance data is gathered and analyzed by engineers. Based on the results of the testing, a design flaw or systemic production defect may be discovered, in which case correction action is taken (part redesigned, stronger materials used, production

*Peter A. McDonald is an attorney-C.P.A. in the Government Contracts Group in the National Office of Coopers & Lybrand.*

method altered, whatever). Depending on the product, there may be many prototypes fabricated and tested before the final model is ready for full scale production. The goal, of course, is to improve the quality of the end product.

Test engineering provides the technical data upon which a product's failure modes and failure rates may be reliably established.

A failure mode is the part of a product that breaks first and what conditions or circumstances cause that to occur. A failure rate is how many products fail per hundred or per thousand, regardless of mode. In this manner, a manufacturer learns a products performance extremes, as well as the number that are likely to fail, how soon after purchase they will fail (ninety days, a year), and the part or mechanism most likely to break.

The testing results are compared to the technical parameters of "normal use" (a term discussed in greater detail below). For example, data from temperature testing may show that a product fails to properly operate at 450° Fahrenheit, only because a particular plastic part begins to soften and lose its strength. However, the highest temperature during "normal use" might only be 225°F. Accordingly, the failure of this plastic part due to temperature is not the likely mode of failure in normal use. Suppose other tests establish that the first part to break in the temperature range of normal use is a certain mechanical switch, which fails sometime between a thousand and fifteen hundred operations. The first mode of

failure during normal use, then, would be this switch. If the product is expected to be used once daily, then product failures should not occur until more than three years after purchase. Under these circumstances, the manufacturer would incur little financial risk in offering a one-year warranty.

Now to discuss "normal use." A manufacturer intends for its product to be used under certain specific conditions and in a particular way. The product is then designed to operate within these boundaries. For example, a kitchen appliance such as a stove or can opener would have different design parameters than their industrial counterparts. These conditions (weight, dimensions, capacity, and so on) create the perimeter of "normal use," at least as far as the manufacturer is concerned. With respect to warranties, manufacturers limit their liability by extending coverage only to failures occurring during normal use. Purchasers of a product, however, sometimes utilize it in unintended ways, i.e., beyond its design criteria. (In the government contracts arena, this can occur when a commercial product fails when used in a military environment.) Some warranty lawsuits result from conflicting attitudes regarding the scope of a product's normal use. The point here is only that the meaning of "normal use" varies depending on one's perspective. To a manufacturer, normal use means how a product was designed to be used (narrow scope), but to a consumer it may mean how a product was actually used (broad scope).

If during testing the failure rate is too high, the item(s) determined to

be the "weak link" may be redesigned, reinforced, fabricated with more durable material, or all three. The manufacturer's goal is to get the failure rate low enough to be able to offer a warranty, knowing that only an acceptably insignificant number of products will be returned for repair or replacement. Because the costs for any such repairs or replacements can be accurately determined, a product's failure rate relates directly to its anticipated warranty expenses. In short, warranty costs are derived by accountants based on work done by test engineers, outside laboratories, or both<sup>2</sup>.

Critics disparage failure rates (and hence, warranty costs) as mere estimates. However, the more practically minded note that such estimates are grounded on a body of technical data obtained from objective tests, from which accurate projections can be reliably made with a reasonably high degree of mathematical precision.

The above narrative is a simplistic overview of how warranty costs for a new product are derived. It is also necessary, however, to understand how this information is used.

Some sales of a product will assumedly occur even without a warranty. Therefore, the true cost-benefit analysis of a warranty is the comparison of warranty costs against the amount of anticipated additional sales. Higher warranty costs require greater profits from additional sales, which generally means greater sales volume (or larger unit margins). In short, warranties exist where a traditional cost-benefit analysis shows that they are worthwhile, i.e., where the anticipated profits from

increased sales exceed the projected warranty costs.

This leads to how warranties are accounted for.

### GAAP

Under generally accepted accounting principles (GAAP), warranties are categorized as a contingent liability, similar to gift certificates or coupons. The accounting rule regarding the treatment of warranties was promulgated by the Financial Accounting Standards Board (FASB) in 1975<sup>3</sup>. That rule provides for contingent liabilities, such as warranties, to be classified according to two criteria: likelihood and amount. Regarding the likelihood, probability levels are categorized as either remote, reasonably possible, or probable. Determination of the appropriate amount depends on whether circumstances enable the amount of the liability to be reasonably estimated.

If a contingent liability is probable and its quantum can be reasonably estimated, then a loss reserve must be established (i.e., accrued). In addition, any additional losses attributable to the same cause must be disclosed in a note to the financial statements<sup>4</sup>.

There are two kinds of warranties: full refund and pro rata refund. For either, a manufacturer's accountant can use the data supplied by the engineers to compute, within a fairly narrow range, the expected costs of a product's warranty. In fact, some of the mathematical formulas and cost models in this area are exceptionally well thought out, according to accuracy to cost projections that few non-accountants are aware of<sup>5</sup>. As

but one illustrative example, the formula for calculating the expected rebate (E) over the life of a pro rata warranty is

$$E[r(t)] = \frac{C [1 - (1 - e^{-\sigma t^2})]}{(\sigma t^2)}$$

where  $r(t)$  is the rebate paid at time  $t$ ,  $C$  is the price of the product,  $\sigma$  is the product's failure rate, and  $t^2$  is the warranty period squared<sup>6</sup>. (Of course, the presence of the function "e" in this equation assumes that the product's failure distribution is logarithmic.)

Because the likelihood of losses due to warranties are probable and their costs can be reasonably estimated, typical journal entries to record a reserve for warranty liability would appear as follows:

	<u>Debit</u>	<u>Credit</u>
Warranty expense	\$x	
Warranty liability		\$x

The amount of the warranty liability is based on estimated sales. While these are the entries when the accounts are created, the entries shown below are used as warranty costs are actually incurred:

	<u>Debit</u>	<u>Credit</u>
Warranty liability	\$y	
Cash		\$y

While the production department generates the information accountants need to create warranty accounts, sales department records are used to periodically review those accounts. To ensure that the accrual remains within reasonable bounds, the warranty liability account is compared to records of returned items. Adjustments to this account, which are normally immaterial, are made as experience dictates.

Warranty costs may either be charged as a direct cost of a govern-

ment contract, or allocated as an indirect cost of several contracts through the use of a reserve. Where the reserve method is used, the actual warranty costs should be reviewed from time to time to ensure that they are not disproportionately small to the size of the reserve. If they are, an appropriate adjustment should be made to avoid excessive cost allocations (government auditors may check this<sup>7</sup>).

We can now turn to how warranty costs are treated under government contracts.

### FAR

The cost principles in FAR Part 31 distinguish allowable costs from unallowable costs. Warranty costs are allowable under FAR 31.205-39, which provides:

Service and warranty costs include those arising from fulfillment of any contractual obligation of a contractor to provide services such as installation, training, correcting defects in the products, replacing defective parts, and making refunds in the case of inadequate performance. When not inconsistent with the terms of the contract, such service and warranty costs are allowable. However, care should be exercised to avoid duplication of the allowance as an element of both estimated product cost and risk.

Warranties are encountered primarily in fixed-price supply, services and construction contracts<sup>8</sup>. Because they are so routinely required in

solicitations, it is frequently overlooked that their use is optional<sup>9</sup>, except for mandatory warranties applicable to most DOD weapon systems acquisitions<sup>10</sup>. (To digress, two GAO reports have severely criticized the Department of Defense for its ineffective implementation of weapon system warranties<sup>11</sup>.)

The warranty clause itself is set forth in full text in a solicitation because there are blank spaces for the contracting officer to fill. In IFBs, contractors factor in their anticipated warranty costs as part of their bid. In RFPs, however, warranty costs may be negotiated between the parties. Obviously, the terms of a warranty are not part of the technical specifications of a contract. Specifications define what the contractor must produce for acceptance to occur, while a warranty accords explicit rights to the buyer after acceptance<sup>12</sup>.

A warranty comes into existence only after acceptance has occurred<sup>13</sup>. This is the critical event. Delivery can occur at any time, but inspection must always precede acceptance. Consider the following three sequences of contract developments:

<b>A</b>	<b>B</b>	<b>C</b>
delivery	inspection	inspection
inspection	acceptance	delivery
acceptance	delivery	acceptance

All three are valid. The point here is only that regardless of when delivery occurs, under the FAR acceptance cannot occur prior to inspection<sup>14</sup>. Acceptance is also crucial because ownership of the items transfers at that time, as does the risk of loss<sup>15</sup>, and warranty rights are incident to ownership. This is why

accountants base the amount of the warranty liability account on sales, not production.

Not only do the rights and responsibilities delineated in warranty clauses arise from the moment of acceptance, but the "warranty clock" begins also. All warranties have finite lives and, as time goes in government contracts, theirs are comparatively brief. In commercial contracts, the duration of a manufacturer's warranty (known as the warranty term) varies greatly depending on the product - ninety days, six months, a year or even longer. When buying commercial items, this product information is known to contracting officers.

There is a substantial difference between how the warranty term operates in government contracts from the commercial sector. Many products bought by federal agencies go to a warehouse or depot before being distributed to the ultimate user. At such a warehouse or depot, the items are inspected, accepted and put into the government's inventory. The government consumer may not receive the product until weeks or months later. Because a warranty begins to run from the moment of acceptance, however, the warranty term has diminished (or even expired) by the time the product is received and used by the government consumer. The commercial consumer, on the other hand, normally receives a product directly from a retailer or distributor, so the time when the product is accepted and received is the same. For this reason, consumers in the commercial arena use a product for its full



warranty term, while government consumers may not<sup>16</sup>.

The FAR contains the following warranty clauses:

Clause	Contract Type	Alternates
52.246-17	Supply-noncomplex items	5
52.246-18	Supply, R&D-complex items	4
52.246-19	Supply, service, R&D	3
52.246-20	Services	0
52.246-21	Construction <sup>17</sup>	1

With five basic clauses and thirteen alternate clauses, the FAR has a total of eighteen different warranty clauses<sup>18</sup>. Their terms and conditions vary the application and duration of a warranty. For example, all but one of the clauses leave a blank space for the contracting officer to specify the length of the warranty period. (The sole exception is the warranty of construction clause, which establishes a fixed period of one year.) It is customary for contracting officers to use a product's commercial warranty and insert its duration in the blank space of the applicable warranty clause. In this manner, the government generally adopts the same warranty period manufacturers offer their commercial customers. Nevertheless, contracting officers can (and sometimes do) seek a warranty period longer than is offered commercially.

Only a few agencies have supplemented the FAR in this area<sup>19</sup>. An unusual (indeed, unique) provision was promulgated by the Environmental Protection Agency, which provides that a warranty may not be required of a contractor unless the project officer concurs<sup>20</sup>.

Regarding how to distinguish between "noncomplex items" (FAR 52.246-17) and "complex items"

(FAR 52.246-18), FAR 46.202-b provides the following definitions:

(1) Complex items have quality characteristics, not wholly visible in the end item, for which contractual conformance must be established progressively through precise measurements, tests, and controls applied during purchasing, manufacturing, performance, assembly, and functional operation either as an individual item or in conjunction with other items.

(2) Noncomplex items have quality characteristics for which simple measurement and test of the end item are sufficient to determine conformance to contract requirements.

According to these definitions, then, if an inspection is done only on the end items, they are noncomplex, while complex items have inspections during their manufacture or assembly. Supplemental agency regulations do not further refine this distinction between complex and noncomplex items.

The different warranty clauses set forth similar provisions and have similar alternates<sup>21</sup>. However, they provide distinct procedures for contracting officers to follow. This can be readily seen in flowcharts (or maps) of the four basic warranty clauses (see Maps 1 through 4): supply (noncomplex items), supply (complex items), services, and construction.

#### WARRANTY MAPS

Acceptance is the act that activates a warranty, so all the maps begin at this point.

**Acceptance** is defined as the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract<sup>22</sup>.

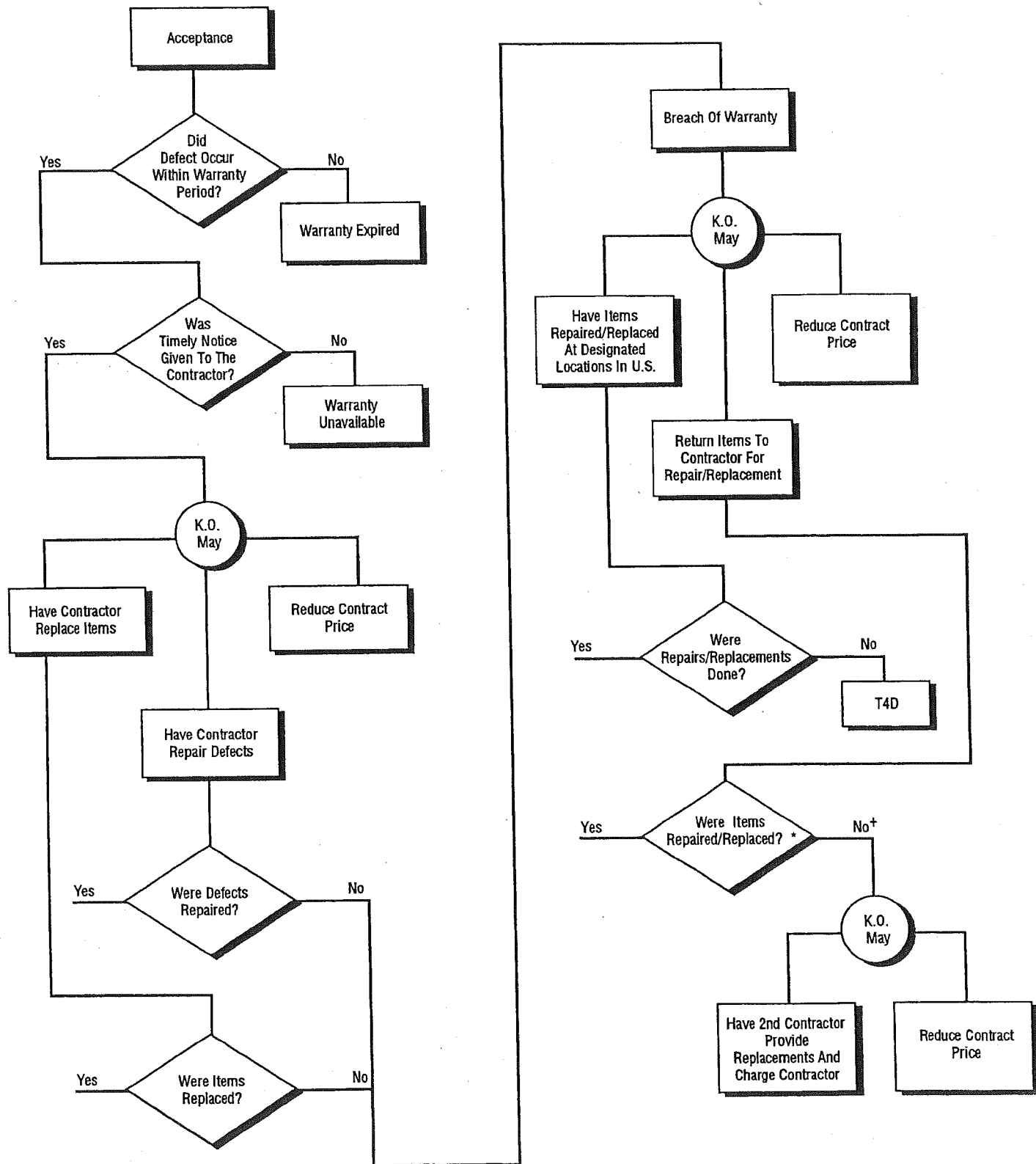
Again, once there is an acceptance, the warranty period begins to run. Only one of two results can then occur: expiration of the warranty or discovery of a defect. The former operates through the passage of time, while the latter is an event. Should a warranty expire, it means only that the legal remedies under the warranty clause are unavailable to the contracting officer. Nevertheless, the contracting officer has recourse to other legal rights, such as a claim of latent defects, gross mistakes or even fraud, all of which survive acceptance<sup>23</sup>. The significance to the contractor of such government claims is that, unlike a warranty, the cost of corrective work is not recoverable. Latent defects do not involve any warranty clauses, however, and thus are outside the scope of this article<sup>24</sup>.

Once a defect is discovered, a second period of time begins to run, and this is known as the notice period<sup>25</sup>. This is the time within which the government must notify the contractor of the defect, and that it is exercising its rights under the contract's warranty clause.

Just as the warranty period is expressed in terms of fixed duration, so is the notice period. How long the notice period is in a particular contract is determined by the gov-

# "Noncomplex" Supplies

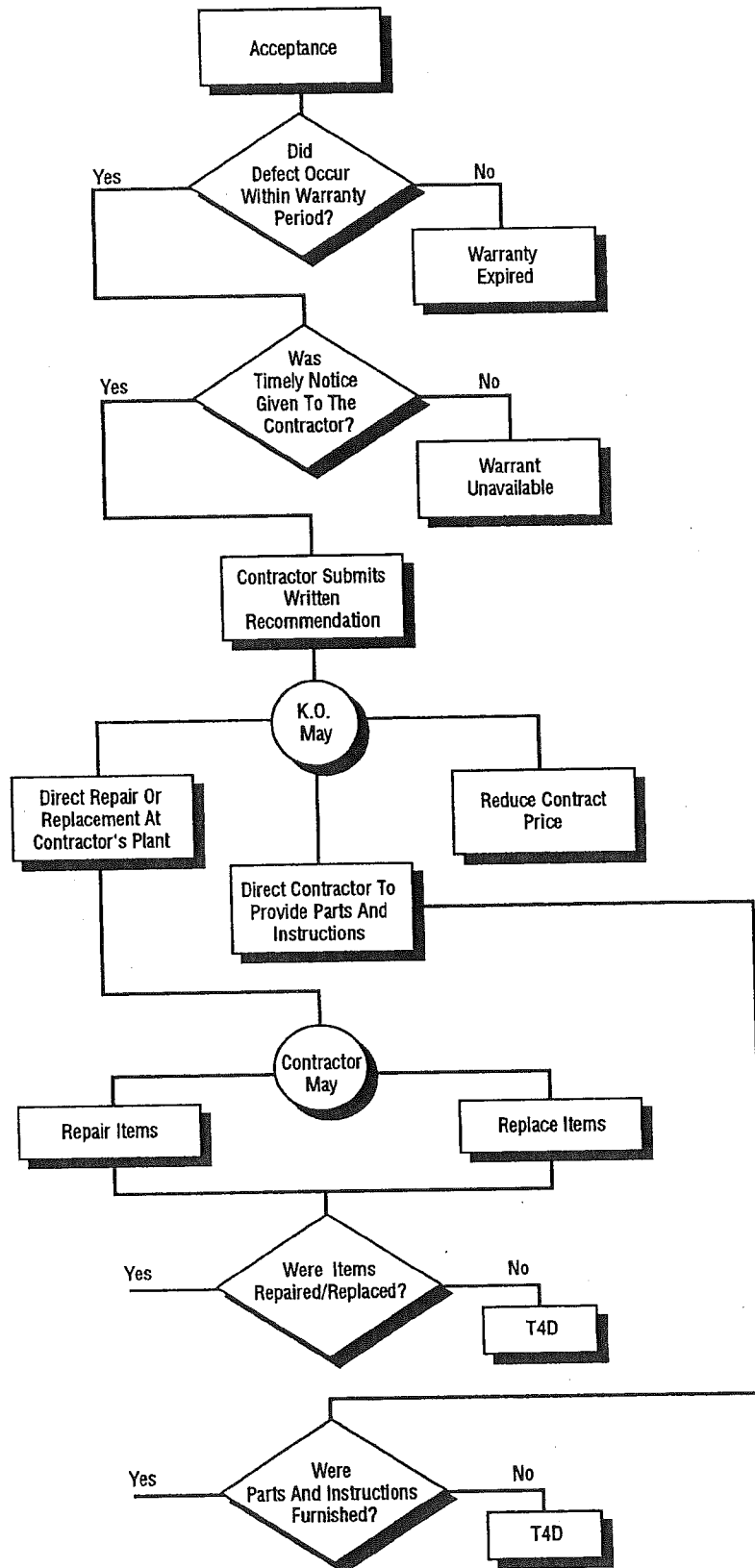
(FAR 52.246-17)



\* Work must be done within a specified period  
 + Cure notice may be required. See Far 52.246-17 (c) (4) (i) (B).

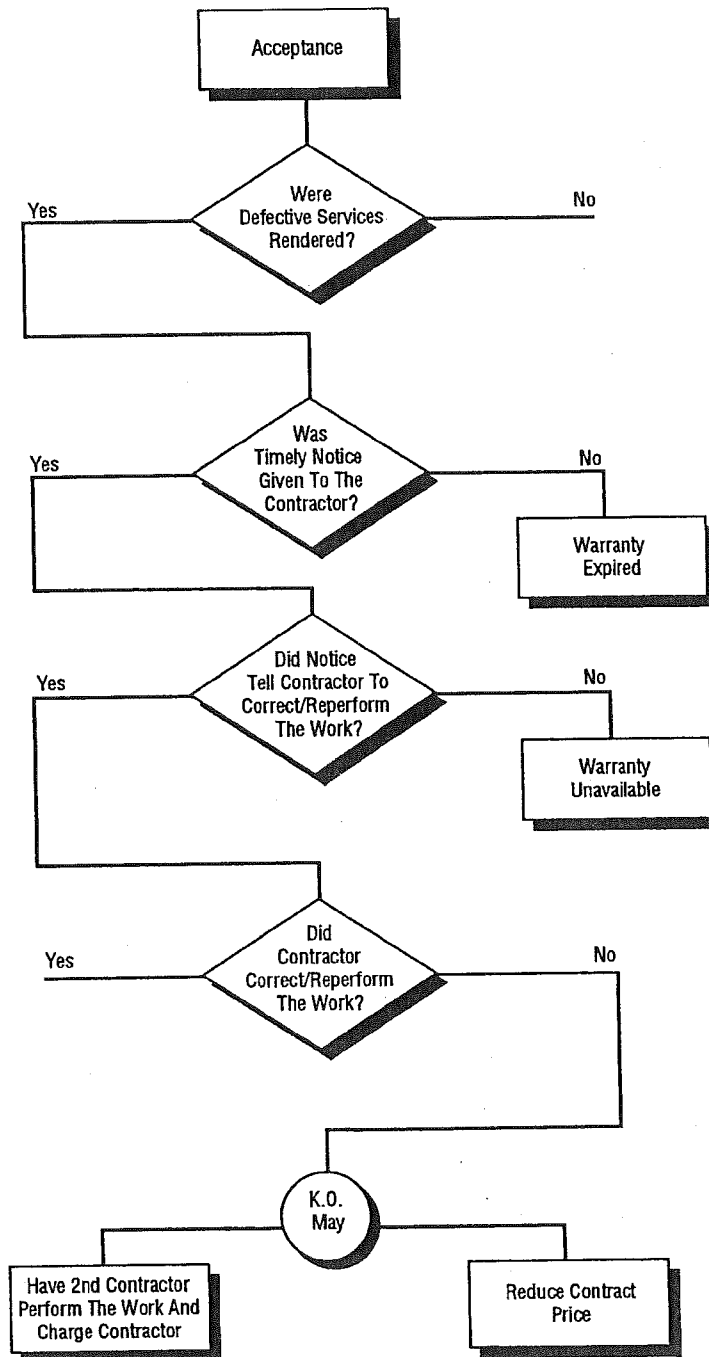
# "Complex" Supplies

(FAR 52.246-18)



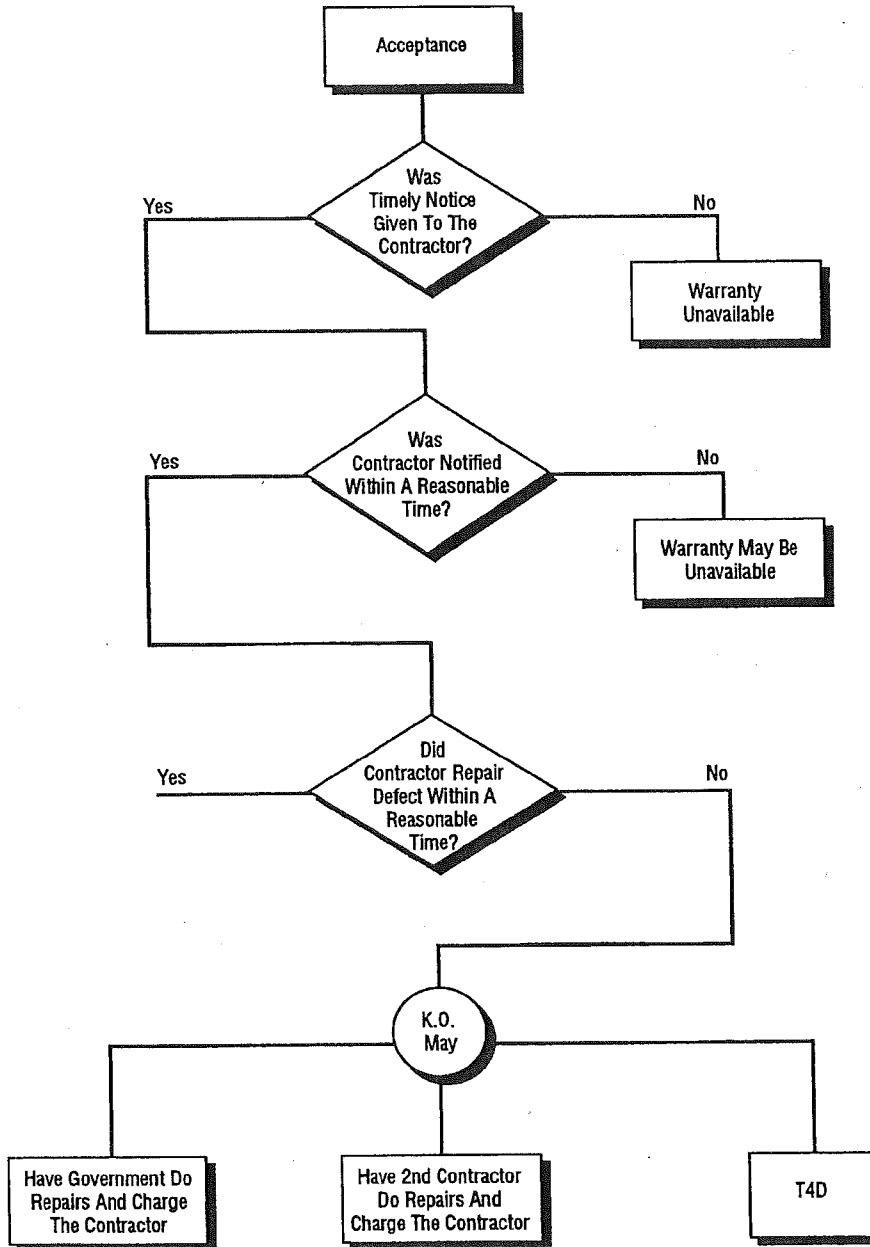
# Service

(FAR 52.246-20)



# Construction

(FAR 52.246-21)



ernment. (The warranty clause in the solicitation has blank spaces. These are filled in by the contracting officer before the solicitation is released.) The warranty of construction clause is an exception to the requirement for the length of the notice period to be specified. It merely requires the notice period to be "a reasonable time<sup>26</sup>."

The remedies available under a warranty are strictly limited to those specified in the warranty clause in the contract. In other words, once a warranty notice is provided to the contractor, the contracting officer must at some point make an election of remedies: (1) lower the contract price through an equitable adjustment; (2) have the item repaired; or (3) have the item replaced<sup>27</sup>.

For the first choice, the FAR is silent on how the determination of an equitable adjustment for nonconforming goods or services should be made. Guidance for the second and third choices is found in the warranty clauses themselves.

Whether defective items are repaired or replaced, the allowability of a contractor's warranty costs under a negotiated contract are not affected<sup>28</sup>. However, the amount of reimbursement for warranty costs is fixed at contract award. Hence, contractors are cost conscious in this area to avoid exceeding this sum.

When contractors are required to meet their warranty obligations, almost invariably the cheaper solution is to replace a defective item. Essentially, this is the merely cost of increasing the contract quantity by one. Repairing a defective item is ordinarily the more expensive alter-

native, due to labor and travel costs (repairs at point of delivery) or labor and shipping costs (repairs at point of manufacture).

As for the basic warranty clauses themselves, the maps (or flowcharts) are self-explanatory and only a few brief comments are necessary. In contracts for noncomplex supplies (FAR 52.246-17), the contracting officer determines whether defective items will be repaired or replaced (see Map 1). Also, if the contracting officer elects to return defective items to the contractor for repair or replacement, a period of time must be specified within which that must be accomplished. Should the contractor not complete the warranty work within the allowed time, the contracting officer may then either reduce the contract price or have a second contractor provide replacements and charge the original contractor's account. However, a cure notice may be required before the contracting officer may do either<sup>29</sup>. Interestingly enough, the warranty clause specifies the remedies available to the contracting officer at this juncture, and a termination for default (for failing to complete the warranty work within the allotted time) is not one of them.

For supplies of a complex nature (FAR 52.246-18), the contractor submits its written recommendations before the contracting officer chooses a remedy (Map 2). Should the contracting officer direct that the defective items be either repaired or replaced, the contractor then decides which course of action to pursue. Obviously, contractors having this warranty clause in their contracts are accorded more

decision making authority in the warranty work process.

The warranty of services clause requires the contracting officer to provide timely notice of defective work, and state whether reperformance will be required<sup>30</sup> (Map 3). Here also, the warranty clause specifies the limited remedies available to the contracting officer should the contractor fail to reperform as directed: the contract price may be reduced, or another contractor may be employed at the original contractor's expense to do the corrective work. Again, termination for default (for failing to reperform) is not an available remedy.

The rarely seen warranty for supplies/R&D clause (FAR 52.246-19) is unique among warranty clauses in one respect. It alone requires a contractor to perform warranty work before the supplies or services have even been accepted<sup>31</sup>. This requirement is nonsensical, as are other aspects of this clause. For example, it is difficult to imagine how the government can reject goods or services without an inspection (whether by sampling or otherwise)<sup>32</sup>. Further, acceptance cannot occur until the goods or services have been tendered. Without an acceptance, warranty rights simply do not come into existence. Stated differently, a buyer does not enjoy a warranty for goods not even tendered. Again, warranty rights are incident to ownership. In this and other subparagraphs, this warranty clause is both inartfully worded and illogical<sup>33</sup>. Fortunately, it is infrequently used and there are no known cases construing its terms. It would take considerable space

(more than this author cares to spend) to dwell on the many other shortcomings of this lengthy, irrational and obscure clause. Accordingly, it will not be considered further (sorry - no map).

As mentioned earlier, the warranty of construction clause (FAR 52.246-21) has a fixed warranty period of one year from the date of possession (Map 4). In addition, the contractor is charged only with the responsibility of correcting noted defects. Under this clause, the contracting officer cannot direct how that result is accomplished. Hence, the contracting officer has no election of remedies unless the contractor fails to repair the defect within a reasonable time.

While the language of all but one of the FAR warranty clauses is plain enough to make maps, there have been disputes.

## CASES

In this area, there is comparatively little reported litigation.

When the government alleges a product failure under a warranty clause, it bears the burden of proof in showing that the cause of the defect is attributable to the contractor. To meet this burden, the testimony of technical experts is invariably required. (In fact, the expert's opinion is frequently the case.) Sometimes, the government meets its burden of proof<sup>34</sup>, but mostly it doesn't<sup>35</sup>.

In litigation over warranties, contractors are not left to merely poking holes in the government's case. There are defenses that can be asserted in these actions. For example, misuse or mishandling of a product

voids a warranty (i.e., the fault for the failure lies with the user). In this area, there may be a fine line between "normal" and "abnormal" use, particularly where a product will be used by the government in a manner inconsistent with its commercial applications. Is a manufacturer's warranty, intended for commercial customers, void where government agency customers use a product in a manner unique to the government? Stated another way, do government users automatically void a commercial warranty when they use a product for its governmental purpose? The law has not yet answered this question.

Contractors can also assert that failure of their product was caused by improper maintenance or improper installation (where the contractor does not bear such responsibilities). In these cases, the contractor enjoys the advantage of not having the burden of proof. To the contrary, it is necessary for the government to prove that proper installation and/or maintenance occurred. This can be done through documentation such as equipment logs, maintenance schedules, checklists, and testimony of workers familiar with the equipment, whether they are government employees or third party contractors. In such cases, the longer the warranted item has been in use, the more difficult it will be for the government to meet this burden. This is because, with exceptions for products such as elevators and airplanes, maintenance personnel are not known to be scrupulous in their recordkeeping.

As explained above, when the government gives notice of defects dur-

ing the warranty period, the contractor has the obligation to either perform repairs or replace the items. If it fails to do so, the government may revoke its acceptance for those items and recover any payments made<sup>36</sup>. However, this does not mean that the government unilaterally makes the repairs or replacement decision. The contractor elects the remedy, and the government can only demand replacement where repairs cannot economically be made. Should the contractor be directed to replace an item under circumstances where the defect could have been more economically repaired, the government may be liable for the additional costs of replacement<sup>37</sup>.

Warranty work under a construction contract operates under the same rules as other types of contracts, i.e., the government can charge the cost of repairs if the contractor fails to perform the corrective work<sup>38</sup>.

## CONCLUSION

It is impossible to say how worthwhile product warranties are in government contracts because data is neither collected on their use nor analyzed<sup>39</sup>. To its credit, the Defense Logistics Agency (DLA) requires the retention of records pertaining to warranty actions for two years. The purpose of the data is to "determine the usefulness of the warranty clause versus the cost of administering the warranty actions." This regulation notwithstanding, no formal comparative analyses have ever been performed. Even worse, DLA components either do not gather data or incorrectly classify rejection of non-conforming goods as warranty

actions<sup>40</sup>. In short, the regulation DLA promulgated is not followed and what data it has gathered is inaccurate.

The exercise of rights under a warranty clause is a contract-specific event. Because the government does not collect and report warranty information, how agencies are faring under their contracts cannot be ascertained, nor can it be learned how agencies are doing in general, or what trends may have arisen. All of this notwithstanding, it is arguable whether such warranty data is even worth gathering.

As long as warranties remain contract-specific, those seeking to navigate a course through this province of the FAR may want to follow the appropriate warranty map.

## ENDNOTES

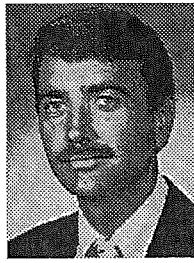
- 1 Some manufacturers seal a product or its subassemblies and attach a label, which provides that the warranty is void if the seal is broken.
- 2 In product liability lawsuits, these engineers are invariably the expert witnesses.
- 3 FASB Statement No. 5, "Accounting for Contingencies."
- 4 FASB Interpretation No. 14, "Reasonable Estimation of the Amount of a Loss" (1976).
- 5 Two of the many excellent articles in this area are "Approximating Expected Warranty Costs," by E.W. Frees and S.H. Nam, *Management Science*, Vol. 34, pp. 1441-1449, 1988, and "Determination of Time Period for Full Refund in a Warranty," by A. Mitra and J.G. Patankar, *Journal of Cost Analysis*, Spring, 1991.
- 6 *Id.*
- 7 DCAA Contract Audit Manual (DCAM) 7-1600, "Warranty and/or Correction of Defect Costs."
- 8 There are exceptions. In cost reimbursement contracts, the clauses at FAR 52.246-3 (Inspection of Supplies), FAR 52.246-5 (Inspection of Services) and FAR 52.246-8 (Inspection of Research and Development) all provide for replacement of nonconforming items or reperformance of services at no additional cost to the government. In addition, DFAR 252.246-7001 (Warranty of Data) applies to cost reimbursement defense contracts.
- 9 FAR Subpart 52.300.
- 10 10 U.S.C. Sec. 2403 and DFAR 246.770-2.
- 11 GAO Report No. NSIAD-87-122, "DOD Warranties: Improvements Needed in Implementation of Warranty Legislation," July 1987, and GAO Report No. NSIAD 89-57, "DOD Warranties: Effective Administration Systems Are Needed to Implement Warranties," September 1989. In June 1986 (i.e., prior to the cited GAO reports), the Defense Systems Management College prepared a "Warranty Handbook" for DOD program managers, which was described in the latter GAO report as "good, definitive guidance." See also "Weapon System Warranties: Unleashing the Genius in American Industry?" by David Medsger, 127 *Mil.L.Rev.* 63 (1990). The rules for waiving this warranty requirement are found at DFAR 246.770-8. For a good laugh, read DFAR 246.770-6(c) regarding warranties for Foreign Military Sales (FMS) acquisitions, the author of which apparently saw a distinction between "expressly requests" and "specifically requests."
- 12 *BMY*, ASBCA No. 36926, 91-1 BCA P23,565. In this case, the Government seriously argued that the warranty was part of the specifications (?).
- 13 FAR 46.702(b)(2).
- 14 FAR 46.501.
- 15 FAR 46.505.
- 16 Increasing use of customer service data in the commercial sector is enabling some companies to negotiate more effective warranties, thus widening the gap between the commercial and government markets in this area. See "The Gold Mine of Data in Customer Service," by John Verity, *Business Week*, p. 113, March 21, 1994.
- 17 H.R. 3236 will amend Title 23 U.S.C. to authorize states to include warranty provisions in federally-funded highway construction contracts. See *Federal Contracts Report*, Vol. 60, No. 15, p. 407, October 18, 1993.
- 18 Implied warranties lie beyond the scope of this article. Readers interested in this subject should see "Implied Warranties Under Government Contracts," by William Spriggs, *Public Contract Law Journal*, Vol. 4, No. 1, p. 80 (April 1971).
- 19 See NASA Subpart 18-46.7, DOT Part 1246, DLAR 46.7, and EPAAR Subpart 1546.
- 20 EPAAR 1546.7.
- 21 Both the "noncomplex" (-17) and "complex" (-18) clauses have alternates that apply to the acquisition of commercial items, another alternate for transportation at government expense, a third alternate for fixed-price incentive contracts, and a fourth for government reimbursement for disassembly and/or reassembly of large items. Only FAR 52.246-17, however, has a fifth alternate clause that applies to warranty work performed by a sole source.
- 22 FAR 46.101.
- 23 While acceptance is required for a warranty, in latent defects cases acceptance is considered to be revoked. See "Contractor Liability for Design Defects Under the Inspection Clause: Latent Design Defects - A Sleeping Giant?" by Mark S. Jaeger, *Public Contract Law Journal*, Vol. 21, No. 3 (Spring 1992). See also *M.A. Mortenson Co. v. United States*, FedCl, No. 90-390C, August 13, 1993.
- 24 Latent defects claims arise from one of the many FAR Inspection clauses, not the FAR Warranty clauses.
- 25 FAR 46.706(b)(4).
- 26 FAR 52.246-21(f).
- 27 FAR 46.706(b)(2).
- 28 FAR 31.205-39.
- 29 See FAR 52.246-17(c)(4)(i)(B).
- 30 FAR 52.246-20 (b).
- 31 FAR 52.246-19(b)(2).
- 32 Under most DOD major systems contracts, the government can reject without inspection items made from an unapproved manufacturing process.
- 33 As another example, subparagraph c(1)(i) provides that the government's warranty rights "shall not be affected in any way by any terms or conditions of this contract concerning the conclusiveness of inspection and acceptance." In other words, this clause seeks to confer warranty rights, whether or not inspection and acceptance have been accomplished (!). FAR 52.246-19 is certainly a candidate for the worst clause in all of FAR-dom, and its many deficiencies are worth a separate article.
- 34 *Meredith Construction Co., Inc.*, ASBCA Nos. 40481 and 41125, 91-1 BCA P23,643.
- 35 *R.B. Hazard, Inc.*, ASBCA No. 41061, 91-2 BCA P23,709; *Quality Diesel Engines, Inc.*, GSBCA No. 10805-COM, 91-2 BCA P23,933; *G&E Mechanical Corp.*, IBCA No. 2374, 91-1 BCA P23,355; *A.S. McCaughan Co., Inc.*, PSBCA No. 2750, 90-3 BCA P23,229; *Walsky Construction Co.*, ASBCA No. 36940, 90-2 BCA P22,934; *Alonso & Carus Iron Works, Inc.*, ASBCA Nos. 38312, 40334, 90-3 BCA P 23,148.
- 36 Also, according to the contractor an opportunity to cure defects within a reasonable time is not a waiver of contract specifications. *Pickett Enterprises, Inc.*, GSBCA Nos. 9472 et. seq., 92-1 BCA P24,668.
- 37 *Hoboken Shipyards, Inc.*, DOT BCA Nos. 1920, 1921, 1926, 90-2 BCA P22,752; *Mir-Con, Inc.*, ASBCA No. 39377, 90-2 BCA P22,707.
- 38 *C.M. Eusebio Construction*, ASBCA No. 37245, 92-2 BCA P24,979. For a pre-FAR discussion of the law in this area, see "The Owner's Warranty of the Plans and Specifications for a Construction Project," by James E. Harrington, Robert B. Thum, and John B. Clark, *Public Contract Law Journal*, Vol. 14, No. 2, p. 240 (February 1984).
- 39 The sole exception is the Defense Logistics Agency (DLA), which requires the retention of records pertaining to warranty actions for two years (DLAR 46.790). The purpose of the data is to "determine the usefulness of the warranty clause versus the cost of administering the warranty actions." This regulation notwithstanding, no formal comparative analyses have ever been performed. Even worse, the DLA components that do gather data incorrectly classify rejection of nonconforming goods as warranty actions.
- 40 Responses to the author's FOIA requests received from the Defense Personnel Support Center, the Defense General Supply Center, and the Defense Electronic Supply Center. The other DLA components did not collect warranty data.



## INTERVIEW WITH:

Prof. Andre Long  
AIR FORCE INSTITUTE OF  
TECHNOLOGY

[Note: Prof. Long accepted the invitation to be the new editor when Pete McDonald's three-year term expires in September.]



### 1. What are some of your goals as the new editor?

I hope to challenge, inform and educate. For me, an association's publication is the "face" of the organization. Who are its leaders and members? What is the association's goals and directions? What developments have occurred that will affect or interest its members? Many members do not live inside the D.C. Beltway, and do not have the opportunity to attend committee meetings and other gatherings. Times are changing quickly in our profession, and a good publication can share expertise, exchange ideas and add knowledge for the entire membership, regardless of where they live. *The Clause* is the BCABA's forum, and I would like to make it as interesting and add as many new dimensions as possible.

One goal is to upgrade the physical quality of the publication. Ideally, I would like to go to a printed, glossy bond, magazine format with a color photograph cover. However, with only a few hundred members and annual dues of \$25, there are obvious limitations as to what we can achieve. Another goal is to bring practical, in-depth analyzes of today's issues. Finally, I would like to keep a

good mix and balance with the articles. The BCABA has a healthy representation

of government, industry and private practice attorneys. I intend to continually offer diverse and interesting cross sections of opinions and ideas.

### 2. What do you believe are some of the emerging topics of interest to readers of *The Clause*?

I believe that one area of great interest is in proposed regulatory revisions, e.g., FASA II. There are some major proposals being considered that will have a significant impact in several areas of practice, such as bid protests.

### 3. What difficulties do you anticipate encountering as the editor?

Getting members to contribute articles. There is so much expertise out there. The challenge is getting it into printed form so that informed, knowledgeable opinions can be shared with the entire professional community.

### 4. What trends do you see emerging in the government contract arena?

We have all heard the complaint that federal agencies need better and cheaper ways to resolve disputes. Whether it is bid protests or contract disputes, the painstaking search for truth and justice with no expense spared is no longer a priority. The new emphasis will be on expediency, efficiency and cost.

The expanded use of Alternative Dispute Resolution techniques will be an important step toward that goal.

### 5. The editor is neither a BCA Bar Association officer nor member of the Board of Governors. To what extent do you expect that to be a problem for you?

I will enjoy the role of editor and consider it a privilege to be the editor of *The Clause*. Because I serve at the pleasure of management, I will always try to be reasonable and responsive to their interests, as well as the interests of the BCABA in general. However, I am a free spirited thinker, and have never hesitated to share my own ideas and opinions with anyone who listens. That is why I teach: my students have no choice but to listen.

### 6. In your opinion, how worthwhile are the BCABA publications as a benefit of membership?

I know several individuals who belong to an association only because of the publications they receive through membership. While the BCABA has a lot more to offer than just *The Clause*, I hope that our quarterly issues and the Directory will continue to be one more reason for joining.

### 7. What advice would you give to prospective authors?

When I worked in industry, I thought I never had any time

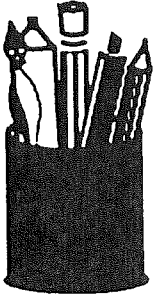
CONTINUED ON PAGE 27

## EDITOR'S COLUMN

Peter A. McDonald

~~[Standard Disclaimer]~~

[Above Average Disclaimer]



I am sometimes asked what being the editor involves. The answer is that most of my time is spent editing items considered for publication. This reply usually leaves the person I am talking to puzzled because of the circular reasoning ("What do you do as the editor?"—"I edit."). To provide a more elaborative answer, I thought it would be a good idea to put an example of my work in the Editor's Column. Below is a recent example.

Few authors are able to write their article in one sitting. Instead, an article starts out as a stream of the author's consciousness. Successive drafts are revised over many days, weeks or months to reach the final version. For example, here's what a recent original draft of mine looked like:

Dear Member:

You are such a cheapskate. I can't believe you didn't pay your annual dues on time. The dues (all of twenty-five bucks) are payable no later

than September 30th each year. Because you didn't pay your dues, we had to go to the additional expense of sending you a separate mailing of "Annual Dues — Final Notice." You didn't respond to that either, pal. At a meeting of our Board of Governors (the "mature, responsible adult-types"), the question arose about what to do about people too cheap to pay their dues (you know, people like YOU). I recommended the homes of deadbeats be visited by urban drug lords (as a CPA, I can tell you—those guys *know* how to collect.) As usual, I was the only one at the meeting with a creative solution. Well, over my objections the namby-pamby Board of Governors decided to put out a yet another reminder with the winter issue of *The Clause*. I was so mad I couldn't see straight for a week. So here it is: How about forking over your precious, five-months overdue twenty-five bucks!!!

Now THAT'S a stream of consciousness. Of course, it would never make it to print, but the elements of a "ruff" draft are there: originality of idea, expressiveness of concept, the raw nature of the author's true feelings, and so on. Not surprisingly, this draft underwent a large number of revised versions. It took me weeks

of tortuous editing before the BCABA officers finally approved the text for this flyer:

### ATTENTION!

Our records indicate that you did not respond to last summer's annual dues notice, which were payable NLT September 30, 1994. In October, an "Annual Dues—Final Notice" was also sent to you, but we received no reply.

This is your last issue, and you will not appear in the 1995 BCA Bar Directory, unless your FY1995 dues are paid by February 28th.

To pay your dues, please forward a check in the amount of \$25 to:

Judge Cheryl Rome  
Dept. of the Interior  
Board of Contract Appeals  
4015 Wilson Blvd., Ste. 1026  
Arlington, VA 22203

Your cooperation is appreciated. If you have recently paid your dues, please contact Judge Rome to ensure that your check has been received.

She can be reached at 703-235-3813.

See the difference?! Now *that's* what an editor does!!!

As some of you know, my three-year term as editor expires this summer, and Prof. Andre Long of the Air Force Institute of Technology has been chosen to succeed me. Andre will undoubtedly be a superb editor, as you will all soon see.

Of course, there were the usual articles not accepted for publication: "Interior BCA Moves to Upscale Offices!", "No Ambiguities Found in FASA!!", and "IG Terminates Investigation—After Only *Three* Years!!!"

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

CONTINUED FROM PAGE 25

for writing. However, when I finally started to write, it was much easier and less time consuming than I originally thought it would be. I developed my articles around cases and subjects drawn from my work experiences. My recommendation to prospective authors is to draw upon your own experiences and expertise in the development of an article that is practical, in-depth and useful to other practitioners.

**8. What is the government contract program at AFIT like?**

AFIT is a wonderful institution which traces its roots to the early days of powered flight. Over half a million DOD personnel have attended AFIT programs. In the Law Department, where I am an Assistant Professor of Government Contract Law, we teach both continuing education courses in the School of Systems and Logistics, and the graduate courses in the School of Logistics and Acquisition Management. Our courses vary from government contract law and administrative law to negotiations and alternative dispute resolution. We also have an opportunity to consult, do research and write. In general, it is a great job and always stimulating.

**9. We appreciate you making yourself available for this interview and wish you every success as the new editor.**

Thank you very much. I am looking forward to it.

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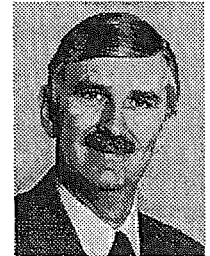
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ARLINGTON, VA 22203



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# Application for Membership

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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.]

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## 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 applying for associate membership.

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 BCABAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:**

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