The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

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DEPARTMENTS

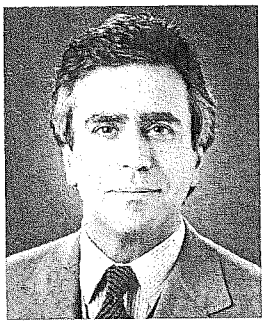
In Memory of the Honorable Timothy J. Gieszko who passed away in February after a long illness. He served as an HUD Judge from 1988 until his death and was the 1993-1994 President of the BCA Judges Association. He was well liked and respected and will be dearly missed.

President's Column

Laura K. Kennedy
Partner, Seyfarth, Shaw, Fairweather & Geraldson

Laura K. Kennedy

The BCA Bar Association is currently involved in several exciting programs and events. First, we have formed a new committee, the Practice Committee, chaired by Roger Boyd of Crowell & Moring. This Committee meets the third Thursday of every month and has already defined a number of projects to pursue this year. The Committee is developing a Practice Manual for Alternate Dispute Resolution (ADR) procedures at the boards of contract appeals. This Manual will provide sample agreements, procedures and documents for use by ADR practitioners. It will also include a checklist or set of considerations for those involved in ADR and a list of individuals, such as retired BCA judges, who could serve as potential mediators. In addition, the Committee is considering compiling the unwritten rules generally followed by the boards of contract appeals and distributing these rules to the boards to ascertain whether there is a consensus on them. As a longer term project, the Committee is also exploring ways in which it can better educate Congress and the public on the unique role of the boards of contract appeals. The first step in this process would be to collect data regarding the types of cases and disposition of those cases at the various BCAs, noting the particular attributes of each board.



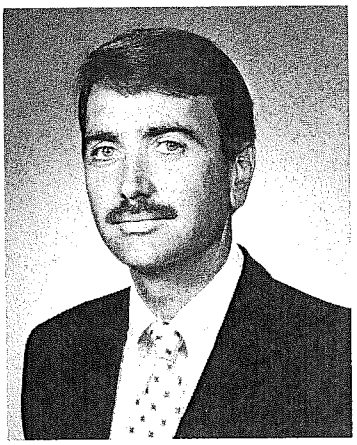
Jim Dobkin

The Association is also busy planning the Annual Program which will be held on October 23, 1996. Jim Dobkin serves as Program Chair this year and will feature panels on trial techniques by Dick Duvall of Holland and Knight and construction litigation issues moderated by Bruce Mudlow, General Counsel of Clark Construction Group, and including ASBCA Judge Alexander Younger; Phillipa Anderson, Deputy General Counsel of the Department of Veteran Affairs; and Joe West, partner at Arnold and Porter. Jim Dobkin is also developing a third panel which will focus on the impact of the new procurement reform legislation, FASA and FARA on BCA activity. This promises to be a lively and thought-provoking program.

The Association also looks forward to several joint programs and events in the coming months. On May 15, 1996, the BCA Bar Association joins the Federal Bar Association and the D.C. Bar Association in sponsoring the BCA Judges Reception at 5:30 p.m. at the Carleton Hotel. On May 23, 1996, the Association will present a two-hour breakout session at the Federal Circuit Judicial conference. This events, among others, will bring an active and productive spring and summer.

Editor's Column

Professor Andre Long, CPCM
Air Force Institute of Technology



Andre Long

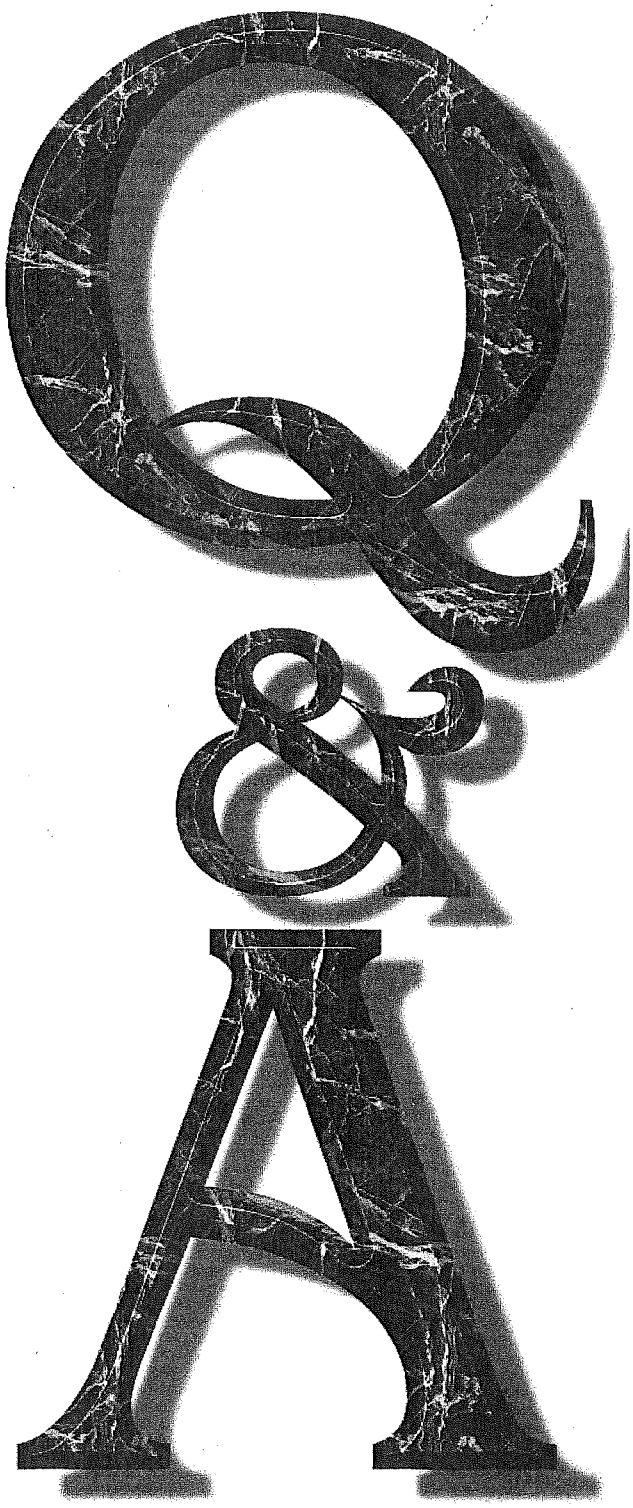
With the passage of the FY 1996 Defense Authorization Act, P.L. No. 104-106, two important acquisition provisions were enacted: the Federal Acquisition Reform Act of 1996 and The Information Technology Management Reform Act of 1996. This will bring many significant changes to federal procurement, including the government wide elimination of the GSA's authority over computer procurements and the GSBCA's authority to hear bid protests related to the procurement of Information Technology (IT).

Dr. Steven Kelman, Administrator, Office of federal Procurement Policy (OFPP), has had a major role in influencing this and other procurement reform legislation. His ground-breaking and controversial ideas have stirred up much debate and his influence has continued to grow with the OFPP's expanded mission of overall direction of Government-wide procurement policies, regulations, procedures and forms. While Dr. Kelman is particularly interested in reducing unnecessary litigation, formal legal actions have been on a decline as exemplified by the cases filed in the three major forums. In the Court of Federal Claims, FY 1994 had 1,101 cases filed and FY 1995 had 858. The ASBCA had 1,533 in FY 1994 and 1,323 in FY 1995. The GAO had 2,625 in FY 1994 and 2,334 in FY 1995.

This issue of the **CLAUSE** features an interview with Dr. Kelman. It is my hope that our association, whose purpose in part is to support and improve the administration of justice in the Boards of Contracts Appeals, can play a greater role in assisting the OFPP in its quest to promote economy, efficiency, and effectiveness. Dr. Kelman welcomes comments and suggestions from our members. His Fax number is (202) 395-3242. We have much expertise to share, so let's keep the dialogue open.

An Interview with Dr. Steve Kelman

by Andre Long



Question: As the Office of Federal Procurement Policy (OFPP) Administrator, you are playing a key role in reinventing the procurement Process. One area of great concern to our members is your keen interest in reforming the award protest system. The reality is that many Americans do not trust the Federal Government. Decisions regarding contract awards by Government Procuring Agencies affect not only company profits but also jobs and sometimes entire communities. What would you consider to be some "ideal" changes to the present protesting process and how will this increase confidence in our Government?

Answer: I'll divide my answer to the question into two parts. One is attitude and cultural change and the other as institutional and legal change, in support of the attitude and cultural change.

I think the basic paradigm shift that I would like to see in the procurement system is one that is closer to a commercial model of close and trusting relationships between the buyers and customers. The reason for that is there is much evidence from the commercial world that those kinds of relationships contribute toward achieving the objectives the buyer seeks in a buyer/seller relationship in terms of getting good quality, performance, and prices from the seller. Litigation is inconsistent with a model of close trust and partnership between supplier(s) and customer(s). In the commercial world, when a problem or dispute between a supplier and customer reaches a point of litigation, which it does much less commonly than in the government, typically that is a preclude to breaking the relationship off. A relationship between a buyer and seller in the commercial world typically does not survive litigation because of the negative effect of litigation on confidence in the partnership.

By contrast, in the Federal Government, we have come to accept over the years the idea that it is an acceptable part of a business relationship for a supplier, almost on a routine basis, to sue their customer. I think that is very damaging to the value of creating a productive supplier/customer relationship, and I think there needs to be a shift in this atti-

tude and general culture. In this case a lot of the shifts we are trying to seek in the procurement culture involves changes on the supplier's end. They need to change their attitude regarding the acceptability of litigation and how quickly they resort to litigation.

We have also supported some institutional and legal changes to reduce litigation. We have supported elimination of GSBCA's bid protests jurisdiction, because the GSBCA's procedural structure and standard of review have encouraged litigation by making it too easy for protestors to: (a) win; (b) disrupt procurements; and (c) hold the government agency hostage to the threat of a very resource intensive/expensive litigation. We have supported the elimination of those features of the GSBCA which have encouraged wasteful litigation. Similarly, we favor eliminating Scanwell jurisdiction for bid protests because it allows forum shopping and home court advantage, which makes it too easy for a protestor to win. A protestor can take the company's case to a local District Court and have an easier time winning than they would in front of a different kind of forum. The Scanwell jurisdiction thus encourages litigation. Institutionally, the President's recent Executive Order, has sought the use of genuine Agency internal protest resolution mechanisms that would make it a more viable procedure compared to other protest forums and thus encourage the resolution of protests in a more streamlined and less adversarial kind of way.

Question: Do you see Alternative Dispute Resolution (ADR) methods playing a bigger role in contract disputes and protests?

Answer: Yes, we would very much like to see it play a bigger role in both disputes and protests. Absolutely!

Question: How about ADR's mandatory use before a judicial alternative is available?

Answer: I don't think we are ready to go that far at the present time. We want to see how some of the changes which have been introduced play out. I would not reject that idea outright, but I would not want to support it at this moment. I would want to have more input and public comment before moving that far.

Question: What other examples do you see of "litigation abuse" in the procurement system, not only in protests but in all other areas.

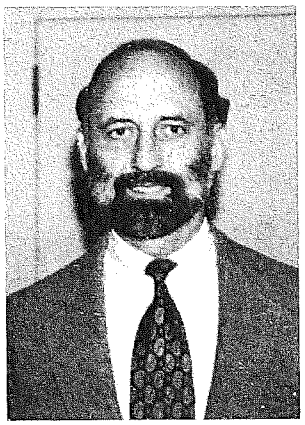
Answer: In addition to what I have mentioned earlier, the data complied by the GAO suggests that for large IT procurements, somewhere in the area of 40% were being protested to the GSBCA. This is an outstanding example of litigation abuse. It is such a large proportion of major procurements that litigation becomes a way of life. I also think some of the recent decisions of the GSBCA, such as the B3H case which was recently overturned, set up an almost impossibly high standard for the Government to meet in a best value procurement to avoid having its decisions overturned. Had that standard been required, it would have put a straight jacket on the procurement process.

Question: Are you satisfied with the FAR rewrite to date, and what strategy do you have for future changes?

Answer: As you know there is undergoing a rewrite of FAR part 15, which is a very important undertaking and is getting a fair amount of my personal attention. I have a meeting with a staffer of mine on the rewrite team every week, and we hope to have that done this calendar year. We also have some important regulatory activity in the wake of the 1996 authorization bill, particularly in the area of commercial product buys, and a rewrite of FAR Part 37 that has been proposed by OFPP regarding performance based service contracting. Beyond that, I want to play it one step at a time in developing our priorities regarding the FAR rewrite.

MEDIATION BEFORE THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS

Steven L. Reed



Roman J. Zadwadzki

WORK IN PROGRESS

MEDIATION BEFORE THE CORPS OF ENGINEERS
BOARD OF CONTRACT APPEALS

BY

Steven L. Reed, Administrative Judge
Member, Corps of Engineers Board of Contract Appeals

Ronald E. Gilbertson, Kilcullen, Wilson and Kilcullen
Washington, D.C.
(No Photo)

Roman J. Zadwadzki
U.S. Army Corps of Engineers, Los Angeles District

Alternate or Alternative Dispute Resolution (ADR) is successfully being used to resolve controversies arising under Federal contracts, controversies which otherwise would have been addressed following formal litigation. ADR has been successful; the result has been savings of cost and time for all concerned.

For contract disputes, parties initially tended to conduct minitrials. Similarity with the format of traditional hearings likely made participants, especially counsel, more comfortable. Parties benefitted from expedited resolution and by retaining control over the process. As disputants become more familiar with ADR, they feel free to fashion ADR processes that best suit the individual needs of the parties, the nature of the dispute, and the selected facilitator or neutral.

What follows is a summary of one recent ADR experience before the Corps of Engineers Board of Contract Appeals (ENG BCA). What makes this case interesting from the ADR proponent's perspective is the unusual form of process agreed upon and the flexibility displayed by the participants as the ADR process unfolded.

The first of three appeals in this case was filed at the Board in 1988. A three-day mediation session (its ultimate evolutionary form) produced an agreement which effectively resolved disputes between the original contractor, the surety, and the surety's completion contractor, and the Corps of Engineers.

Why Not Litigation?

Going to the mat usually involves a hard landing, often for both wrestlers. Thus it is with full-blown litigation. "Winners" and "losers" may both be battered and bruised by the process. The function of the Boards is to resolve disputes. Fully mature litigation is the long way home for the parties. The trial, briefing, and decision working time for such resolution is at the root cause of so-called "backlogs" at the Boards of Contract Appeals. Also, the end result of formal litigation places the ultimate decision in the hands of a third-party, the Board, to dictate the result. The parties sacrifice all control over the outcome.

ADR and dispute avoidance techniques may eliminate the bruises in some cases. Time and cost for resolution can be lessened. Hard landings ought to be cushioned wherever practicable. Depending upon the ADR mechanism selected, ADR can also afford the parties greater control over, and participation in, the ultimate outcome.

The ENG BCA is committed to efficient, inexpensive, and expeditious dispute resolution and dispute avoidance where appropriate. Call it active (maybe even aggressive) docket management and flexible dispute resolution if you like. The "labels" and process definitions are much less important than getting down to the pragmatic business of avoiding or ending litigation.

Why not litigation in this case? The simple answer is that

after several years it had not worked. Mediation worked.

The Project

The project was an "experimental" sand pumping system to accommodate natural littoral dynamics on the coast of California, assist in keeping a channel navigable, and replenish beach sand. The project involved coastal marine construction. Mechanical and construction features of the project were not conceptually radical. Sand pumping is not new. However, the scale and scope of the project were beyond the magnitude of previous projects. Additionally, harsh environmental conditions, such as severe wave action, poor underwater visibility, and fluctuating harbor bottom conditions, created construction risks not present in some other projects.

The design was obtained by the Government and advertised for fixed-price construction bids. The contract was awarded in 1985. The original contract price was over $5.4 million. The sand pumping plant and facilities included, among other things, diesel engines, pumps, computer monitoring and control systems, a jack-up barge pumping platform, pipelines above and below water, jet pumps, fueling lines, a pump booster, a crane, and sand discharge lines. Completion of construction during a specified performance period of one year was to be followed by operation of the facility for another year.

The Disputes

The original contractor was an experienced marine construction contractor. Early in the work, it alleged delays and design defects which it said hampered progress and caused additional costs. Claimed problems included incorrect pipe connections and inadequate supports, extra excavation for pipelines on the channel bottom (the ocean floor) on account of excessive shoaling and adverse sea conditions, improper pipe fittings and gaskets, pipe coupling failures, Government dredging, defectively designed valves, improperly sited pipeline, and more.

The Government dredged the channel to remove shoaling, directed repositioning of certain pipeline, and unilaterally allowed some price increases. During 1987, the Corps issued two "cure notices" which asserted that the contractor had failed to make adequate progress toward completion. The contractor made additional claims of changes, differing site conditions, and delays concerning the pipeline system. By late 1987, the contractor had laid out the entire pipeline portion of the project but continued to experience substantial problems with failed pipe connections and the resultant inability to satisfy contractually required pressure tests. By February 1988, the original and modified contract completion dates were overrun by 19 and 9 months, respectively. The Corps considered the project 94% complete and had paid almost 97% of the contract price.

The "heart" of the project was a large, barge-mounted engine and pump assembly to be procured, installed, and extensively tested by the contractor. That proved difficult. After several unsuccessful attempts to run and test the engine and pump assembly, a third cure notice was issued in March 1988. In April 1988, the contractor's right to proceed with the contract work was terminated for default.

The surety, reviewed the project's status, agreed to complete the contract work, and subcontracted with another experienced marine construction contractor for that purpose. More claims were filed by the surety/completing contractor. Many were similar to the original contractor's demands, e.g., piping, valve, and fitting problems, barge hoist system modification, crane modifications, repair of damage to the cross-channel pipeline, and more.

The total of all contractor and surety claims was over $7.5 million. The Corps had allowed about $1.6 million in contract modifications issued to the original contractor and payments to the surety/completing contractor. The majority of these modifications were unilaterally issued by the Corps. The amount at issue in the appeals before the Board was just under $6 million, exclusive of interest, if any, due under the Federal Contract Disputes Act. The termination for default of the original contractor also had not been resolved.

Attempted Formal Resolution

Pleadings were filed and discovery commenced under the Board's Rules. The initial appeal related solely to the termination for default of the original contractor. This appeal was later joined by a small direct cost claim which had been partially denied by the Contracting Officer. In 1991, the parties jointly petitioned the Board for a suspension of the processing of the appeals by the Board to allow for the presentation of additional monetary claims to the contracting officer and to allow the parties to engage in unassisted negotiation. The appeals were dismissed without prejudice for that purpose. Either party was empowered to seek reactivation of the appeals within three years if negotiations were unsuccessful.

Following the dismissal without prejudice, a final "global" claim was prepared and presented to the Corps' contracting officer. Prior to presenting the claims, the completing surety had consulted a scheduling expert, as well as experts in marine construction.

Two years, 364 days after the appeal was dismissed without prejudice, the Appellant asked that the initial appeals be returned to the Board's active docket. At the same time, the "global" claim was appealed. Given the fact that the appeals had been pending for a very long time, without resolution by the parties, the presiding Board Administrative Judge immediately set a hearing on the merits within a few months and told counsel that the hearing dates were firm. This allowed for a tight schedule to complete pleadings and discovery and to prepare for trial.

The Appellant began to suggest ADR as the vehicle for expeditious resolution of the appeals. When it became clear that both parties would seriously explore the possibility of ADR, the Board's Chairman committed Board resources by assigning a Board judge as facilitator and agreeing to allow the use of the Board's hearing room and other conference facilities. The facilitator was not a member of the panel of three judges assigned to decide the appeals and would have no substantive conversations with the panel about the appeals. The facilitator's initial role was to assist counsel in the development of an ADR process agreement.

ADR As-planned

The facilitator required two things: (1) that the parties commit to a written ADR agreement and (2) that each party assure participation by a person empowered to resolve finally all disputes under the appeals (the principals). The facilitator reserved the right to review the proposed role of the facilitator in the ADR process.

An agreement was quickly and easily reached during two relatively brief telephone conferences among the facilitator and counsel. The agreement generally provided as follows.

Five days prior to the "settlement conferences," each party was allowed to submit a "brief" to the facilitator, now called the

"settlement judge." The "brief" would be exchanged with the other party. A strict page limit was imposed on the text of the "brief," which was not to exceed ten pages, although no limitation was placed upon the number of attachments. The parties were free to use their discretion as to the format of their "brief."

The settlement conference was set for 3 days (with a fourth day allowed by the settlement judge, if necessary). The principals were to attend the entire conference.

Day 1 - Each party was allocated a half day to make its best summary presentation of the facts, analyses, claims, and defenses to the other party and to the settlement judge. "Witnesses" could be called and "exhibits" presented, but no rules of evidence were applicable, hearsay was specifically allowed, witnesses/speakers would not be sworn, and there would be no transcript. During the presentations, the settlement judge was allowed to ask questions of anyone attending the conference.

Day 2, Morning - A general "round table" discussion of any and all issues would be conducted among all attendees with the settlement judge acting as a participant and mediator. Any attendee could have direct discussion with any other attendee.

Day 2, Afternoon - The settlement judge was to meet with each party independently, then with both parties together, to offer suggestions and recommendations.

Day 3, Morning - The parties would meet to attempt settlement without the settlement judge being present.

Day 3, Afternoon - If the parties had not settled, both would meet with the settlement judge for a non-binding decision in the nature of arbitration.

ADR As-executed

As-planned, the parties exchanged and filed their "briefs" prior to the first meeting of the parties. These "briefs" and the "exhibits" that accompanied them would provide a framework for the discussion which were to follow. In advance of the meeting, both parties exchanged a list of attendees and "witnesses."

On Day 1, following introductions, proceedings occurred substantially as-planned. Both parties were represented by principals with full settlement authority: the surety/contractor by a corporate officer; and the Corps by the contracting officer. Attorneys for both sides participated throughout the proceedings. Also in attendance were one "fact witness" and one scheduling expert for each side. All attendees, including the settlement judge, worked at one large table.

Appellant began with a summary presentation of its case, utilizing a "fact witness" to describe the project and provide basic orientation to the problems encountered by the defaulted contractor and the completing contractor. This was followed by a presentation by Appellant's scheduling expert. The Corps followed with a responsive presentation, also using a "fact witness" and scheduling expert. Both parties used the technique of questioning of "witnesses" by their respective counsel. The proceeding, however, was much more informal than a hearing.

Some discussion, such as was planned for the Day 2 round table, was conducted during Day 1 because the settlement judge asked questions and followed-up with requests for responses from the other side. Direct exchanges between opposing witnesses/speakers was allowed and encouraged. Presentations, questions, and discussions throughout the day ranged widely, covering orientation to the site and lay-out of the project work, project work chronology, technical issues, scheduling analyses by outside consultants, status of work when the original contractor was terminated, and much more.

At the conclusion of Day 1, each party was asked by the settlement judge to prepare a brief clarification of certain points to be presented at the start of Day 2 and to determine for itself whether the Day 1 presentations translated into a change in its position on settlement in terms of damages. The settlement judge asked each principal what he or she expected from the conference. In effect, both committed to a good faith attempt at resolution.

At the start of Day 2, the surety/contractor presented a two-page outline of significant settlement issues. The outline, plus follow-up presentations on project scheduling, tended to focus the round table. However, the round table addressed a large number of issues, most of which had been covered by the summary presentations on Day 1.

At mid-day on Day 2, the ADR proceedings departed from the planned format. The afternoon of Day 2 was planned for settlement judge meetings with each party independently, then with both parties together, to offer suggestions and recommendations. Instead, the round table continued in the afternoon. The parties then asked for a settlement judge evaluation in open session. Following the settlement judge evaluation summary in open session, each party met separately with the settlement judge. During the separate sessions, the settlement judge elaborated on the evaluation and implications for damages calculations as well as termination for default of the original contractor. Each party was asked by the settlement judge to be prepared to make its best opening offer at the at the start of Day 3.

The parties had determined by coin toss which would meet with the settlement judge first on Day 3. Day 3 was taken up with separate conferences during which each party would present its offer and discuss its basis with the settlement judge, followed by formulation of an accompanying message for the settlement judge to take to the other side. The opening offers were significantly apart, but demonstrated that the principals were serious about reaching a mutually agreeable dollar amount. Separate meetings by the parties with the settlement judge continued throughout the day, as the parties made settlement proposals and counter-proposals. Throughout these negotiations, the settlement judge acted as a neutral broker, conveying the point of view of one side to the other. Acting as a go-between, the settlement judge was in a position to temper the emotions that might flare on both sides and to keep the settlement process moving by providing his own insight.

When it appeared to the settlement judge that an agreement was likely, a generic settlement agreement was drafted. When the parties did in fact agree upon a settlement figure, a joint drafting session was convened to complete the agreement.

Overall Critique

Both principals reported satisfaction. Several of the "witnesses" and consultants found the mediation remarkably efficient. Counsel were relieved that settlement was achieved. Having a settlement judge with experience in resolution of Federal construction contract disputes, considerable previous exposure to engineering and construction technology and terminology, and a good familiarity with Corps of Engineers project management and business processes was very helpful and kept the mediation moving apace.

There is no doubt that much time and money were saved compared with the investment which would have been required for full preparation, hearing, and briefing by the parties and counsel. The Board saved time which would have been required for hearing

preparation, the hearing, and decision writing, not to mention time and effort possibly resolving preliminary issues related to discovery and other pre-hearing matters.

Last but not least, settlement judge time and Board conference facilities cost the parties nothing directly. The bottom line is that the Board is prepared to foster informal, inexpensive, and expeditious dispute resolution whenever and wherever appropriate.

The Contractor's Perspective

The Benefits of ADR

Resolution of disputes through an ADR procedure is attractive to the contractor for several reasons including:

(1) Risk Management;

(2) Cost Savings;

(3) Speed of Resolution; and

(4) Flexibility.

(1) Risk Management. No matter how strongly a contractor may feel about the correctness of its position, there is a risk in formal litigation that the judge, or Board, will not agree. There is a risk, therefore, of losing everything. That is the risk that a party takes by placing the final decision regarding the outcome in the hands of a third-party. ADR provides a procedure through which the contractor can participate in reaching the final decision. The cost of being able to have some control over the outcome is the initial recognition by the contractor that the outcome will be a compromise and not everything will be recovered. A further risk management benefit of ADR is that the downside risk is extremely limited. Normally, the ADR will not be binding and the only real risk is that the process may reveal a weakness in the contractor's case that may not have been recognized otherwise.

(2) Cost Savings. ADR also offers a contractor a cost effective procedure. Because the time allotted to an ADR procedure normally will be far shorter than a formal hearing, costs for preparing and presenting witnesses are greatly reduced. This has the added benefit of allowing witnesses to carry on with their other duties for the company. Additionally, full trials are stressful for attorneys and witnesses alike. The ADR proceeding can provide a mechanism for lessening not only the monetary cost, but also the emotional cost of dispute resolution by offering a more informal procedure.

(3) Speed of Resolution. Resolution of a dispute through an ADR procedure offers the benefit of a quick resolution. Not only does a formal trial often require prolonged preparation and sometimes weeks or months of presentation, but there can be a long delay between the completion of trial and the decision. Further, if the decision is limited to entitlement issues, and excludes quantum, a prolonged period of quantum negotiations may follow a successful entitlement decision. ADR, if successful, can eliminate years from the process.

(4) Flexibility. Another benefit of ADR is its flexibility. Rather than having the "rules of the game" imposed, as in the case with a formal hearing, ADR offers the parties the opportunity to define the "rules" for themselves with input from the neutral facilitator. ADR also gives the parties the flexibility, to change the rules during the course of the ADR.

Our ADR Experience Before The ENG BCA

In formulating the planned "rules" for ADR in this case, an effort was made to combine the benefits of a minitrial, including, briefing; round table discussion; negotiation/mediation; and finally, arbitration. The idea was to provide a variety of techniques, with the hope that one of them would provide the key to successful dispute resolution.

We felt that the briefing, with a strict ten-page limitation, would force the parties to distill their positions and to focus on the major areas of their case. We considered the brief an opportunity to explain our position to the settlement judge and, hopefully, to persuade him of the strength of our case. We paid careful attention to the preparation of the brief. We elected to draft it in a narrative style, rather than outline form, in order to make it both readable and understandable. It was written much like a short pre-trial brief. We then selected a small number of "exhibits" to attach to the brief which we felt would convey our position without overburdening the proceeding. That brief, and its exhibits, in turn, provided the framework for our presentation to follow.

The minitrial technique of presenting a limited number of witnesses to present the fact "testimony" and expert opinion "testimony" provided a familiar format with which counsel felt comfortable. We believed it would provide the most effective method for further defining and explaining the issues, not only for the other party, but for the settlement judge, as well. Again, careful preparation went into the minitrial presentation. We met with and prepared our "witness" and our expert much as we would do before a trial.

The round table discussion we hoped would provide a method for sharing points of view in a relatively, unrestricted manner. When we were preparing the plan for the round table discussion phase, no limitations were placed on those who could participate or on the scope of the discussion. It was felt that the settlement judge could act as the moderator to maintain order, so that all points of view could be heard.

In the negotiation/mediation stage, the original plan called for some initial face-to-face meetings without the settlement judge. We felt that this would give the parties a chance to air any concerns that they, for whatever reason, might not feel comfortable expressing in front of the judge. Then, if settlement was not reached, the parties could meet with the settlement judge for him to make a final effort to mediate a settlement.

Finally, under the original concept, if all else had failed, the settlement judge would issue an "arbitration decision." We hoped that a non-binding "decision" by the judge, as an arbitrator, might push the parties to an agreement.

The ADR proceedings which actually took place in this case were a testament to the flexibility of ADR. The proceeding began within the context of the briefing and "minitrial" presentations as originally planned. The parties and the settlement judge were comfortable moving into the round table discussions at an early stage and this phase was entered into ahead of "schedule." This discussion process allowed for the airing of differing viewpoints on all of the major issues in contention. The settlement judge played an important role in this round table discussion process by probing issues and by controlling the procedure. The "briefs," with their "exhibits," proved to be an important resource throughout the round table discussions.

The negotiation phase of the ADR differed significantly from the original planned process, again reflecting the flexibility of

the procedure. Rather than engaging in face-to-face negotiations without the settlement judge being present, the parties agreed that the settlement judge was playing an important role. Face-to-face negotiations were abandoned altogether. It was agreed that the settlement judge would meet with the parties separately and would act as a go-between.

It was at this point that the settlement judge played his most crucial role. The judge acted as a neutral broker of offers, and counteroffers, conveying messages between the parties. After each session with us, the judge was careful to recap exactly the offer and message which he would convey to the other party, so that there could be no misunderstanding. The judge also acted as an effective mediator, making suggestions as to how to best phrase any message and encouraging the parties toward the ultimate goal of settlement. Throughout the process he offered his experience and insight.

There is no doubt that, without the settlement judge's "shuttle-diplomacy" and mediation, the parties would not have reached a final settlement. By establishing his understanding of the issues and building a sense of trust on both sides of the table, the settlement judge assisted the parties in reaching a compromise. While counsel can play an important role in helping their clients to appreciate the benefits of compromise, the settlement judge is in a unique position as a respected objective neutral party.

This certainly was an ADR success story. The procedure reduced a relatively complex and technical case, which would have taken weeks to try in a formal proceeding, to a satisfactory resolution in three days. The monetary cost of the proceeding was a fraction of what a full hearing would have cost. The witnesses who we would have called to testify at the hearing each expressed relief that they would be spared the experience.

Conclusion

The desired destination in every ADR proceeding is the resolution of the dispute without a formal trial. Our experience in this case perhaps provides one road map which others might follow to lead them to their destination. But the beauty of the procedure is the flexibility to alter the route in each case, or even to alter the route during the journey. The path chosen is not nearly as important as reaching the destination.

The Government's Perspective

All of the benefits which ADR bestows on the contractor may also be claimed by the Government. In the past, contractors sometimes complained about the litigation advantage held by the Government, with its "unlimited resources." Now, in many cases, the Government's resources are more limited than the contractor's. ADR, in appropriate cases, may be helpful in overcoming "downsizing" limitations.

There are two other specific benefits of ADR which the Government may find especially attractive. First, technical issues may be addressed, better understood, and sometimes resolved, when the experts have an opportunity to present their opinions and then proceed with an informal dialogue.

During the usual litigation process, the experts for each side do not communicate directly. Their opinions are exchanged by means of interrogatories, documents, and depositions. During the hearing, the experts often see each other for the first time. Their communication at the hearing continues to be limited to the sequential exchange of testimony elicited more or less effectively by attorneys who often have only a superficial knowledge of the subject.

In contrast, during an ADR process, the expert for one side may be permitted to discuss the issues directly with the expert for the other side. Such discussions may result in a better understanding of the issues. Some issues may be resolved, and each side can better evaluate its position.

A second benefit of an ADR, if it involves a Board Administrative Judge, is that the parties present their "best case" to an individual who often has been involved in similar technical and legal issues as an attorney and/or as a judge. Most other "neutrals" will not have such an extensive technical and legal background. In a properly structured ADR process agreement, the parties may request that the judge, after the presentations and discussion, give each side an opinion as to the strengths and weaknesses of each case. The judge may also give an opinion as to a likely outcome if the ADR process had been a trial, including a general opinion as to the amount of the award, if any. This opinion will be a very good indication of the probable outcome if the matter goes to trial, and it can provide Government representatives with a strong dose of "reality." They may come to realize that settlement of the case, heretofore considered one that could "never" be settled, is in the best interests of the Government.

BOARD OF CONTRACT APPEALS JUDGES ASSOCIATION ANNUAL SEMINAR

On Tuesday, April 30, 1996, 8:00 - 5:00 P.M., the BCA Judges Association will hold its Annual Seminar at the Radisson Plaza Hotel, 5000 Seminary Road, Alexandria, VA. The theme is GOVERNMENT CONTRACT LITIGATION ISSUES IN THE SPOTLIGHT. The panels will present "IF I COULD CHANGE THE RULES, I WOULD..."; "ETHICS: BENCH V. BAR - CROSSING THE LINE"; "EAJA: THE LAST BASTION OF THE JURY VERDICT"; and "FRAUD!? WHERE!?". The Honorable Thomas M. Davis, III, U.S. House of Representatives (Virginia) will give the luncheon address discussing topics of current interest to the Federal procurement community. A reception follows the seminar. CLE approval is pending in Florida, Kentucky, Ohio, and Virginia. The registration fee is $125. To register or obtain more information, call Miki Shager at (202) 720-6229.

STRATEGIC APPLICATION OF THE NEW DFARS RULE ON RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE TO MAJOR DEFENSE ACQUISITION PROGRAMS

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I. MISSION STATEMENT

The purpose of this article is to craft a well-defined strategy to exploit intellectual property assets and capture award of lucrative Department of Defense ("DoD") contracts under the new Defense Federal Acquisition Regulation Supplement ("DFARS") Final Rule on rights in technical data and computer software.[1] Specifically, this article sets forth strategies aimed at securing awards for (1) Full-Rate Production ("FRP") contracts for major weapon systems; (2) related Service-Life Extension Programs ("SLEPs"); (3) maintenance, operations, and logistics support contracts; and (4) derivative Foreign Military Sales ("FMS") and direct military sales to foreign governments. In other words, the goal of this article is to maximize developmental/production contractors' ability to capture follow-on production programs via vigilant protection of critical, core competency "trade secrets" in development contracts.[2] It is these intangible assets that are so critical to award of major weapon system FRP contracts, and upon which contractors consequently build their respective core competencies.

Consequently, contractors that have historically developed "core competencies" must scrupulously focus on retaining trade secret assets in the form of technical data and computer software from RDT&E contracts to sustain their respective competitive advantages.[3] Such advantage will increase the probability of award in subsequent FRP contracts where the primary drivers are budget and schedule, rather than premium technical capability. Accordingly, it is critical that, during the development phase, contractors jealously guard their technical data and computer software rights for subsequent capture of FRP awards. It is equally important to protect such rights in order to maximize profit on derivative procurements, SLEPs, logistical tails, FMS, and direct military sales to foreign governments.

II. HISTORICAL SYNOPSIS

In October 1984, Congress mandated that DoD issue procurement regulations governing technical data and computer software, to accommodate and balance the interests of both the federal government and its contractors.[4] Culminating a decade of attempted compliance with that congressional mandate, DoD at last promulgated the Final Rule on "Rights in Technical Data and Computer Software," on June 28, 1995.[5]

The most significant reforms to the DFARS were largely derived from the efforts of the Government-Industry Technical Data Advisory Panel that Congress established in Section 807 of the National Defense Authorization Act for Fiscal Year 1992.[6] Representatives from three primary groups — government, developers/Original Equipment Manufacturers ("OEM") and non-developers/spare-parts manufacturers — comprised the Committee. The reforms that the Section 807 Panel ultimately recommended were intended to:

> (1) eliminate the "required for the performance" criterion from the definition of "developed exclusively at government expense", where the government formerly obtained unlimited rights in virtually all technical data and software generated during performance of a federal contract, regardless of agency need for such data or the true source of funding;
>
> (2) provide for the "segregation" of items, components, and processes to the "lowest practicable" sub-item, sub-component, and sub-process, to protect those sub-parts developed "exclusively at private expense" from those surrendered to the government with greater rights;
>
> (3) apply a "source-of-funding" test to that lowest-segregable-level of such constituent pieces to determine the category of rights accorded to the government; and
>
> (4) establish an evolved-standard license of Government Purpose Rights ("GPR"), where mixed funding is not subject to being segregated at the lowest sub-component or sub-item.

When DoD circulated its then-proposed rule in early 1994, it acknowledged the congressional mandate to "balance . . . the interests of data developers and data users, i.e., encourage creativity, encourage firms to offer DoD new technology, and fa-

cilitate dual-use development."[7] When it issued the Final Rule in June of 1995, DoD expressly adopted the paradoxical shift that its rights were limited to "specific, non-exclusive license rights," and that "[a]ll rights not granted the [g]overnment [were] retained by the contractor."[8]

Given the relative scarcity of foreseeable major weapon programs, such newly implemented developers' rights must be zealously asserted to ensure that historical core competencies are properly protected in the initial R&D, T&E, and prototype phases of the acquisition process. This should facilitate award of subsequent FRP contracts, maintenance/logistical support, SLEP programs, and derivative procurements in federal, commercial, and international markets.

III. TECHNICAL DATA

A. Commercial Items, Components, and Processes are Presumed to Have Been "Developed Exclusively at Private Expense"; Consequently, Related Technical Data is Tendered With "Limited Rights" to the Government.

One of the developers' chief concerns has been protecting technical data rights in "commercial items, components, and processes," to avoid a windfall grant of rights to the government. This occurred where such commercial items, components, and processes were merely tangential to performance of a federal contract or subcontract. There has been a historical, deep-rooted perception by developers that the government would always claim unlimited rights in technical data relating to commercial items, components and processes, even in non-developmental items ("NDI") or commercial off-the-shelf ("COTS") items, and that such valuable, intangible assets inevitably would be disclosed to competitors.

The revised DFARS "Technical Data — Commercial Items" Clause partially alleviates this concern by establishing a presumption that "commercial items" are developed at private expense, such that technical data pertaining to such commercial items, components, and processes only grants the government limited rights to a specific contract.[9] Specifically, the new regulations preclude contracting officers from challenging a contractor's assertion that an item, component, or process is "commercial," unless the government can actually produce credible evidence that it "contributed to the development of the item."[10] This presumption of "commerciality" is of value to developers because technical data concerning such commercial items, components, and processes is presumed to have been "developed exclusively at private expense."[11] Consequently, the regulations confer on the government only limited rights in commercially derived technical data, except under to specifically enumerated circumstances. Moreover, contracting officers cannot deny an asserted restriction, absent such circumstances, even if the contractor fails to respond to a challenge notice.[12] Hence, the presumption of commerciality reduces administrative costs and risk of loss of related technical data for both prime contractors and subcontractors.

Another significant DFARS revision prohibits contracting officers from releasing, disclosing, or allowing use of, commercial technical data to third parties as Government Furnished Information ("GFI"), without the contractor's written permission, except under enumerated conditions. This protection is available to contractors via the mandatory incorporation of a provision similar to the DFARS 227.7103-7 "Non-Disclosure Agreement" clause limiting the use of the technical data disclosed by the government to third parties for unrelated contracts.[13]

The new rule's fundamental premise for commercial technical data is that the government acquires only the rights customarily granted commercial purchasers, albeit with three notable exceptions. First, there is the traditional grant of unlimited rights in "form, fit, and function" ("FFF") data.[14] FFF means only technical data that describes the required overall physical, functional, and performance characteristics of the procured item to the extent necessary to permit identification of physical and functional interchange.[15] Second, the government acquires unlimited rights in data relating to commercial items if the contract expressly includes a requirement for operations, maintenance, installation and training.[16] The third and final exception grants the government unlimited rights in technical data describing that portion of modifications to a commercial item or process that is required to meet the government's specifications.[17]

B. Treatment of Technical Data Pertaining to "Noncommercial Items, Components, and Processes" has been Clarified to Offer Greater Developer Protection Through Several Discrete Mechanisms.

The main effort of the reform process occurred in the area of refining treatment of technical data regarding noncommercial items, components, and processes. Specifically, in acquiring noncommercial items, DoD voluntarily stated that it would acquire only those technical data rights necessary to meet the respective agency needs.[18]

Under the new regulations, there are three standard categories of license rights that contractors can grant DoD: "Limited Rights"; "Government Purpose Rights"; and "Unlimited Rights."[19] The primary bases for determining allocation of these rights are the "source of funds" used for development, and whether such noncommercial items, components, or processes are expressly specified as an element of performance.[20] Consequently, determining the source-of-funding is the most important step in the allocation of technical data rights in noncommercial items, components, and processes.

The perceived inequity in defining the "source of funds" under the previous DFARS was a significant motivation for developer arguments to reform the regulations. Specifically, the government generally received unlimited rights in technical data — even in wholly funded contractor R&D — developed during performance, because of the expansive definition of "developed exclusively at government expense." Now, however, contractors have the opportunity to focus on the source of funding to protect propri-

etary technical data rights in noncommercial items, components, and processes.

1. *Elimination of the "Required for Performance" Criterion Grants the Government Unlimited Rights only in technical data of which development was "specified as an element of performance" or was exclusively funded at "direct-cost" to the government.*

As a general proposition under the revised regulations, the government now only acquires "unlimited rights" in technical data pertaining to noncommercial items, components, and processes (1) "developed exclusively at government expense"; or (2) expressly specified as an element of performance in the contract. The former regulations promulgated in 1988 defined "developed exclusively with government funds" to encompass any and all development "required for the performance of a Government contract or subcontract," regardless of whether it was specified as an element of performance.[21] Simply stated, use of the term "required for performance" under the old rule was so broad that virtually all technical data developed during performance was captured by the all-encompassing definition of "developed exclusively at government expense." With technical data rights allocated to parties according to the source of funding, it was no surprise that the government acquired unlimited rights in all data since it was "developed exclusively at government expense" by definition. This included technical data, derived from IR&D and B&P that were allocated as indirect costs to prior and current contracts. Such broad definition of "developed exclusively at government expense" even captured wholly funded contractor R&D, if development occurred in performance of a contract. Thus, the government acquired unlimited rights to any technical solution not fully developed prior to performance.

Developers on the Section 807 Panel understandably argued that this provision granted the government unlimited rights even in items that were truly "developed exclusively at private expense," where the items had not been expressly identified in the contract as elements of performance, and where the development was not funded at direct cost to the government. Developers asserted that the government's interpretation of such an overly broad definition was inconsistent with the principle that it should obtain unlimited rights only in technical data pertaining to items, components, or processes that had been truly "developed exclusively at government expense." The government responded that eliminating the "required for performance" language would encourage developers to selectively target items, components, and processes that had commercial or reprocurement value and to "cherry pick" such critical components. For example, the government argued that developers would "cherry pick" components, and preclude them from competition for spare parts, maintenance, and logistical support by funding them at private expense.

While the respective positions were debated extensively before the Section 807 Panel, the Chair ultimately determined that selective identification, or "cherry picking," by developers would not be permitted under the Cost Accounting Standards (CAS) and FAR Part 31 requirements. Therefore, the Chair proposed that the "required for the performance" language be eliminated from the definition of "developed exclusively at government expense." While the government fought hard to preserve the "required for performance" language, it later conceded the issue to promote the flow of technology refreshment from industry to defense agencies. In response to public comments on the proposed regulations, DoD stated that it favored the change, reasoning that

> [t]he criterion ["required for the performance"] should be eliminated to protect private expense development, [and to] encourage developers of new technologies or products, many of whom are small businesses, to offer their products to the Government, [to] encourage dual use development, and [to] balance the interests of data users and data developers.[22]

Ultimately, the DAR Council agreed, and deleted the "required for performance" standard. The government now only receives unlimited rights in that technical data specifically enumerated as an express element of performance in the contract, or where development of such technical data was indeed exclusively funded at direct cost to the government.

2. *The revised DFARS clarifies that technical data developed during performance at indirect cost is now considered "developed exclusively at private expense" and is therefore furnished to be government with limited rights.*

Technical data developed at indirect cost to the government is now clarified as data "developed exclusively at private expense."[23] Consequently, such technical data would be furnished to the government only with "limited rights," unless its development is expressly specified as an element of performance.[24]

The Section 807 Panel Chair responded to the developers' proposal by soliciting the Defense Contract Audit Agency (DCAA) to study the issue. The DCAA concluded that developers would not be able to selectively identify a particular design effort and indirectly charge that effort, i.e., grant the government only "limited rights," if such costs were identifiable to a specific contract. The DCAA also concluded that developers would not be able to alter existing accounting systems to abuse the proposed indirect cost rules to "cherry pick" specific sub-items, subcomponents, and sub-processes, and still remain compliant with the mandatory requirements of FAR 31.202, which govern the allocation of direct costs. However, the DCAA forecasted that "any extension of the current provisions regarding 'developed [exclusively] at private expense' would require increased Government verification efforts."[25] As a result, the DCAA projected a rise in the number of disputes and an increase in the potential for "improper cost charging," because the developers' proposal would greatly increase the importance of the direct/indirect cost classification.[26]

The Section 807 Panel ultimately relied on the DCAA's findings as to consistency of indirect cost allocations, to recommend that technical data developed under indirect cost pools, e.g., IR&D and B&P, be considered "developed exclusively at private expense."[27] Thus, the Section 807 Panel proposed to grant the

government only limited rights in technical data cannibalized from IR&D and B&P, as well as that derived from wholly funded contractor R&D.

Not surprisingly, the non-developers disagreed strongly with the DCAA report and the Section 807 Panel majority. Indeed, in a minority report, the non-developers labeled the indirect cost decision "The Creative Accounting Giveaway." In response to such public comments, DoD defended the indirect cost decision, and expanded the definition of "developed at private expense" to include all indirect costs.[28] Additionally, DoD made clear that the allocation of indirect costs such as officers' salaries, guard services, employee benefits, and other indirect costs allocated to specific contracts would not trigger a windfall grant of unlimited data rights to the government.[29]

Under the new regulations, then developers can restrict the government to only limited rights to technical data in items, components, and processes developed at indirect cost, e.g., IR&D and B&P, in addition to that wholly funded at contractor expense.

3. *Contractors are now authorized to "segregate" items, components, and processes to the "lowest practicable level" to assert limited rights to technical data in those constituent segments "developed exclusively at private expense."*

It is critical that contractors segregate items, components, and processes to the lowest practicable technical and engineering level to assert limited rights to technical data in those sub-items, sub-components, and sub-processes that were "developed exclusively at private expense." The doctrine of "segregability" is derived from the understanding that items, components, and processes are comprised of many constituent segments that can be segregated by the source of funding to (1) confine government unlimited rights to those constituent segments developed "exclusively at government expense"; (2) grant only GPR to the government where constituent segments were developed with "mixed funding"; and, most critically, to (3) grant only limited rights to the government where such constituent segments were "developed exclusively at private expense."[30]

Developers were concerned because the government has long argued for unlimited rights in the contractual "end-item," which included many proprietary, constituent sub-items, sub-components, and sub-processes developed exclusively at private expense. For example, the government historically asserted that, since it paid for some portion of the development of an engine, it should receive unlimited rights to the entire engine, even though the engine's complex valves had been previously developed exclusively at private expense.[31] The government refused to recognize that an engine is a complex system of individual components integrated together. Consequently, the developers argued that the government would continue to determine the allocation of rights at the highest practicable level or end-item, despite the elimination of the "required for performance" statutory language from the revised definition of "developed exclusively at government expense." This would have effectively eliminated any opportunity to protect data rights in constituent segments truly developed at private expense in aircraft, tanks, spacecraft, missiles, etc.

The Section 807 Panel responded to the developers' concerns. The revised regulations now specifically provide that "private expense determinations shall be made at the lowest practicable level."[32] For the first time, contractors are now expressly authorized to restrict the government to limited rights "in segregable sub-item[s], sub-component[s] or portion of a process[es]" developed exclusively at private expense.[33]

4. *Definition of "developed" remains unchanged to require "existence and workability" for contractors to effectively assert limited rights in data developed under IR&D, B&P, or wholly funded contractor development prior to performance.*

The developers failed to effectuate any significant change in the definition of "developed." The definition of "developed" is important because technical data pertaining to items, components, and processes "developed" prior to performance is presumed to have been funded "exclusively at private expense," and thus presumptively allows the government only limited rights.[34] As before, a noncommercial item, component, or process will be deemed to have been "developed" only if it "exists and is workable."[35] Under the existence-and-workability test, as it relates to the development of major weapons systems and subsystems, the government often seeks to acquire unlimited rights in pre-existing data if the first prototype is not successfully field-tested before performance. The government often seeks to obtain unlimited rights even if the contractor had functionally developed the item or process without a prototype, prior to the award of the government contract. Developers on the Section 807 Panel argued that the "existence-and-workability" test was outdated because of modern design practices. They contented that the industry now conducts most of its design and testing via computer simulation. Additionally, industry leaders supported the proposal on the grounds that computer-aided design ("CAD") and testing had substantially reduced the need to manufacture testing prototypes. Accordingly, if the need for trial-and-error testing of hardware had been eliminated or reduced, R&D and T&E costs likely would also have decreased.

One hypothetical example of the potentially disastrous consequences to developers under the continuing existence-and-workability test is demonstrated by the Boeing 777 program, which was widely acclaimed as designed entirely via CAD with "virtual prototyping." If Boeing had elected to propose the 777 for a government procurement (as a cargo plane, for example) prior to successful flight tests of the first aircraft, the government would have probably acquired unlimited rights in all of Boeing's technical data. The government would have acquired such rights because the three-dimensional CAD design was not "developed" prior to contract execution, and rigorous testing of the 777's major components may have been insufficient to demonstrate a "high probability of performance." Simply stated, the 777 as an end-item did not "exist" and was therefore not "workable" under the unchanged defini-

tion of "developed." This result may dissuade developers from offering their most advanced or innovative products to the government until such items have been clearly and unequivocally developed through full field testing, or where the technical data has been protected by government acknowledgment that the items, components, or processes were "developed" prior to contract award for designation as limited rights data. The failure of the Section 807 Panel to revise the definition of "developed" was a major setback for developers because it effectively requires contractors to accelerate testing of items, components, and processes to demonstrate "existence" and "workability" as a prerequisite for assertion of limited rights in technical data.[36]

5. *"Government Purpose Rights" is the default right where items, components, and processes cannot be further segregated to fully separate government expense development from that technical data developed exclusively at private expense.*

The revised regulations clarify the government's duty to negotiate rights to the lowest segregable level of item. Historically, "Government Purpose License Rights" ("GPLR") were the default mixed-funding rights, and their use was significantly restricted.[37] Because of the broad "capture" of prior clauses — such as government claims to any data "required for performance" even with indirect funding, and the inability to segregate protected components of major weapons systems — the government almost always received at least GPLR for competitive procurement of FRP contracts. Developers argued that the inability to negotiate a license right specifically crafted for mixed-funding situations was causing "unnecessary, unrestricted disclosure of protectable material." As such, there was a genuine lack of incentive for contractors to propose wholly funded R&D for development contracts.

The government and developers in the Section 807 Panel eventually agreed on a compromise to create a better articulated GPR standard. Now, the government receives the rights to reprocurement, while the developers retain the rights to the data's commercial use.[38] As discussed above, contractors can now segregate data rights developed exclusively at private expense to the lowest practicable level. Consequently, the new provision makes GPR more manageable because it no longer categorically captures IR&D or wholly funded contractor R&D.[39] DFARS 252.227-7013 provides for a nominal five-year period of GPR, while specifically allowing for the negotiation of a lesser or greater time period.[40] The commencement of this time frame occurs at the execution of a contract, subcontract, or similar contractual instrument.[41] Contractors must realize that the government receives unlimited rights in such data upon expiration of such period.[42]

Contractors must also be forewarned that the revised regulations defining "government purpose" for application of GPR by the government explicitly include FMS programs. Specifically, the regulations define "government purpose" for which GPR data may be used by the government to include "any activity in which the United States Government is a party, including cooperative agreements with international or multinational organizations, or sales or transfers by the United States Government to foreign governments or international organizations." [43]

6. *Contractors must be vigilant in pre-award identification of "identical or substantially similar" data delivered under any previous federal contract or subcontract to avoid potential triggering of civil and criminal repercussions.*

Although it was not given the prominence of other changes, one provision that could have particularly grave consequences to developers is the new requirement to identify all technical data documents that are "identical or substantially similar" to technical data (and computer software) previously delivered to the government. Specifically, DFARS 227.7103-6(d) directs contracting officers to include a solicitation clause that requires offerors to:

1) identify
2) all documents or other media incorporating technical data or computer software
3) to be delivered to the government with less than unlimited rights
4) that are identical or substantially similar to
5) documents or other media
6) that the offeror has produced for, delivered to, or is obligated to deliver to, the government
7) under any federal contract or subcontract.[44]

In short, a developer must identify all technical data previously produced for, delivered, or to be delivered, to the government under any federal contract or subcontract in its initial proposal. This is, to say the least, an incredibly onerous and costly reporting requirement, even for sophisticated developers.

Even more ominous is the fact that the requirement has the potential of exposing offerors to civil and criminal liability under the Civil False Claims Act,[45] the Criminal False Claims Act,[46] the False Statements Act,[47] and the Truth in Negotiations Act.[48] That is, if an offeror fails to identify all technical data required to be delivered under all past and current prime contracts and subcontracts for all federal agencies, it may well be accused of making false claims, false statements, and of defective pricing, i.e., arguably "double dipping" for data in which the government already possessed at least GPR rights. Such construction is supported by the mandatory requirement that the contracting officer establish a separate line item for each data deliverable and to price each deliverable separately.[49] The reporting requirement is not constrained to previous technical data delivered, or required to be delivered, with less than unlimited rights to the government. Rather, the pre-award disclosure duty expressly includes literally all "identical" or "substantially similar documents" ever produced in performance of a federal contract or subcontract. Given that few, if any, developers can meticulously satisfy the disclosure duty of the "previously delivered" clause, it is imperative that they adopt — and enforce — suitable prophylactic measures without delay.[50]

7. *Contractors must carefully safeguard intellectual property rights delivered under any federal contract or subcontract to ensure maximization of intellectual property revenue streams and complete protection of technical data and computer software rights.*

Under the new rule, the government cannot disclose to competitors technical data or software in which it has less than unlimited rights, unless the recipient executes a Non-disclosure agreement ("NDA") prior to receipt of the protected data or software.[51] Thus, it is important for contractors whose intellectual property is misused by a third-party recipient, or otherwise improperly disclosed by the government, to know their rights and remedies. As explained below, the remedies depend on the party that committed the improper disclosure, and the nature of the intellectual property rights, i.e., whether the disclosed information was patented, copyrighted, or protected as trade secrets under the guise of limited rights in data or restricted rights in software.

Beginning with the parties, the non-disclosure agreement grants a contractor standing as a "third-party beneficiary" to bring a direct action against recipient contractors that misuse or misappropriate technical data or computer software in violation of proper restrictive legends. The agreement also provides that recipient contractors will indemnify and hold harmless the government, its agents, and employees from "every claim or liability" relating to the misuse or unauthorized disclosure.[52] At the same time, however, the new regulations purportedly require contractors providing limited rights data to release the government from liability for improper disclosure of properly marked technical data or computer software, whether the release was committed by the government or a recipient contractor.[53]

Turning to the nature of the intellectual property rights, a patentee may not generally obtain an injunction against unauthorized use of a patent by the government.[54] Instead, it may sue the government for monetary damages in the Court of Federal Claims,[55] or it may bring an administrative claim.[56] The same exclusive remedies against the government also apply in the case of copyrights.[57] Under 28 U.S.C. § 1498, a patent or copyright owner has a right of action against the government for infringement of patents or copyrights. However, the statute also operates to "relieve the [recipient] entirely from liability of every kind for the infringement of patents in manufacturing anything for the government."[58] In other words, while section 1498 grants the patentee or copyright owner the right to seek compensation from the government, it also removes the intellectual property owner's right to bring an infringement action against a government contractor.[59]

Contractors whose technical data rights, other than those derived from patents or copyrights, have been misappropriated, are unaffected by section 1498. Instead, they may be able to obtain relief under the Trade Secrets Act,[60] which makes it a crime for a government official to disclose "trade secrets, processes, [and] operations" without authorization. Although the trade secret owner does not have a private right of action to enforce a criminal statute, it may obtain an injunction for a violation of the Trade Secrets Act under the Administrative Procedure Act.[61]

IV. COMPUTER SOFTWARE AND SOFTWARE DOCUMENTATION

The new rule creates an entirely new DFARS subpart and enabling contract clause to provide separate guidance for computer software and software documentation. Presented below is an analysis of substantive changes from the previous rule.

A. The Government's Rights in "Commercial Computer Software" and Related Documentation Are Now Expressly Limited to Those Customarily Provided to the Public.

The new regulations concerning "commercial computer software" and related software documentation are expressly intended to mirror the commercial marketplace.[62] Although the new regulations governing commercial software and related software documentation are fundamentally similar to those concerning technical data pertaining to commercial items, there are some key differences.[63]

First, the new regulations prohibit DoD from compelling developers to furnish algorithms and source codes related to "commercial computer software"[64] and software documentation not customarily provided to the public. The primary exception is for "information documenting specific modifications made at government expense or documentation to meet the requirements of a Government solicitation."[65] The regulations also seek to protect offerors from being compelled by the government to relinquish restricted rights in commercial software or related software documentation.[66]

Second, although the new regulations require use of a specific clause in the case of "technical data" pertaining to commercial items, components, and processes,[67] they expressly decline to prescribe a particular clause for "commercial computer software" or related software documentation. Instead, they provide that DoD's rights will be limited to those customarily provided to the public in license agreements.[68]

B. The New Regulations Concerning "Noncommercial Computer Software" Presume that "Noncommercial Computer Software" is Furnished with Restricted Rights Unless "Developed Exclusively at Government Expense."

The new regulations require that contracting officers ensure, "whenever practicable," that DoD acquire "noncommercial computer software" and software documentation as separately priced contract deliverables. Although the government may acquire unlimited rights in noncommercial computer software "developed exclusively at government expense," such software is considered furnished with restricted rights where expressly specified as an element of performance but developed "exclusively at private expense."[69]

1. *The revised definitions of "noncommercial computer software" and "noncommercial computer software documentation" enforce protections granted developers.*

The new rule revises the definition of "noncommercial computer software" to clarify that contractors are not required to furnish critical source codes and algorithms as part of the related software documentation manuals, which are by definition provided with unlimited rights. Under the old rule, "computer software" was defined simply as "computer programs and computer data bases,"[70] and portions of such data bases were generally provide as GFE. Broad use of the term "data bases" arguably encompassed the most closely held elements of software, e.g., source codes and algorithms.[71] In contrast, the new rule clarifies the definition of noncommercial "computer software" by expressly including source codes and algorithms.[72] Conversely, the new regulations limit the definition of "computer software documentation" to encompass only "owner's manuals, user's manuals, installation instruction, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software."[73]

This is a significant departure from the former regulations, which included computer listings, object and source codes, and printouts in its definition. Noncommercial source codes and algorithms are now included under the protectable "computer software" definition in order to increase protection, since the government is automatically vested with unlimited rights in noncommercial computer software documentation.[74]

2. *Definitions of "developed" for noncommercial computer software is a lower standard than that for noncommercial technical data.*

The broadening of the definition of "developed"[75] is important because it eases the developer's ability to demonstrate the "existence and workability" of noncommercial software prior to performance. Demonstrating that such noncommercial computer software was "developed" prior to performance pre-empts government assertions of GPR or unlimited rights.[76] Specifically, the new clause defines "developed" noncommercial computer software as software that has been "tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose."[77] This definition differs from that of "developed" technical data in that the latter — "a high probability that it will operate as intended" — is a higher standard than the one for software. Given that the new regulations effectively establish a presumption limiting the government to restricted rights for delivered computer software, developers should review their preliminary technical approach and ensure that they document testing to demonstrate that specific modules, routines, and sub-routines can "reasonably be expected to perform their intended purpose" prior to performance.

The clause also separately defines "developed computer software documentation" that is required to be delivered under a contract, as documentation that "has been written, in any medium, in sufficient detail to comply with requirements under that contract."[78] This is relevant because the definition of "documentation" has been clarified to expressly exclude critical source codes, algorithms, etc., because all noncommercial computer software documentation is delivered with unlimited rights to the government.[79] Consequently, contractors must conserve such rights by documenting the reasonable expectation of intended performance prior to the incorporation of noncommercial software from IR&D and B&P inventories into proposed technical solutions.

3. *Segregability for software modules and subroutines is authorized to the lowest practicable level to segregate rights based on source of funding.*

Another important feature of the new rule is that it expressly favors determining the source of funding at the "lowest practicable level" for noncommercial computer software.[80] The effect of this provision is that it authorizes segregation of those software "modules" and "subroutines"[81] "developed exclusively at private expense" for assertion of restricted rights. This is critical, given that noncommercial computer software in major weapons systems often consists of more than one million lines of tailored source code per system. The segregability provision effectively allows developers generous flexibility to resurrect software modules and subroutines from IR&D and B&P inventories, or to wholly fund such modules and subroutines as private R&D to retain their competitive advantage in competition of the subsequent FRP contract.

4. *Noncommercial computer software cannot be acquired with unlimitedrights merely by designation as an element of performance or as a contract deliverable.*

As always, contractors must be vigilant in identifying computer software scheduled to be delivered with less than unlimited rights in their proposals.[82] Although the new rule contains several exceptions that effectively give DoD unlimited rights in specified categories of technical data, it authorizes DoD to obtain unlimited rights in noncommercial computer software, but only if the software (1) was developed exclusively at government expense; (2) was obtained with unlimited rights under another government contract; (3) was the subject of specifically negotiated license rights; (4) was otherwise publicly available; (5) was disclosed without restrictive legend; or (6) was derived from expired GPR or former GPLR licenses that expired.[83] There is no such distinction between treatment of noncommercial technical data and noncommercial software documentation. In fact, the new rule expressly asserts unlimited rights in noncommercial computer software documentation, even where the software itself is delivered with restricted rights.[84] This significance creates a strong presumption that developers can retain rights in the most valuable elements of software developed at their own expense — even where the government specifies the supply of the software as an element of contract performance. Additionally, it is critical for contractors to remain alert since the DFARS is clear that GPR

shall accrue where noncommercial computer software is developed with mixed funding.[85]

5. *Noncommercial computer software delivered with restricted rights is prohibited from reverse engineering, disassembly, or decompilation by both the government and third-party contractors.*

Under the heading of noncommercial computer software delivered with "restricted rights," the new rule treats technical data and computer software differently in several respects. The first, and most obvious, is identification. The government can obtain "limited" rights in noncommercial technical data, but obtains "restricted" rights in noncommercial computer software. The second, more substantive, difference is that the revised regulations confine the government to using one computer program with one computer at one time.[86] Third, the critical substantive difference, in contrast to technical data, is that although DoD is authorized to modify software or even disclose modified software to third parties, it cannot permit third parties to decompile, disassemble, or reverse engineer protected software.[87]

6. *"Double dipping" of software to which the government already possesses GPR or unlimited rights may trigger criminal and civil repercussions.*

The noncommercial computer software clause includes a special prohibition on charging for computer software or software documentation license rights when the government has acquired "by any means" the same or greater rights in the software or documentation.[88] Consequently, not only must wary contractors comply with the duty to list all noncommercial computer software intended for delivery to the government with less than unlimited rights,[89] but charging for software triggers the certification requirements of disclosing all computer software "identical or substantially similar" to the "produced for," "delivered," or "obligated to be delivered," under any federal contract or subcontract.[90] This provision has particular import for two reasons: (1) it effectively becomes a fuse for False Claims Act, False Statements Act, and Truth in Negotiations Act civil and criminal allegations if violated; and (2) its scope is so broad that it encompasses not only all of a contractor's divisions and subsidiaries, but also its subcontractors at any tier as to any contract or subcontract with any federal agency. Consequently, although contractors are required to use the same "flow-down" clause in their subcontracts, they should strongly consider imposing a separate, flow-down certification requirement on subcontractors to insulate themselves from certifications by subcontractors that may be misconstrued by the government as material misrepresentations or false certifications/statements.

7. *Developers are authorized to retain restricted rights to derivative portions of GPR or unlimited rights software subsequently developed exclusively at private expense.*

Another difference between the regulations governing technical data and noncommercial computer software is the treatment of derivative modifications. Although there are no express provisions for technical data, the software rule expressly allows the government to retain its rights in the unchanged portions of any noncommercial software delivered under a contract that the contractor uses to prepare, or includes in, derivative software or software documentation.[91] This implies that the contractor relinquishes only restricted rights in the derivative modules and sub-routines, so long as such were developed exclusively at private expense.

V. CONCLUSION AND COMMENDATIONS

After ten years of uncertainty, DoD has issued the Final Rule concerning rights in technical data and computer software. Corporate Legal and Contracts Departments must familiarize themselves with the changes in order to take advantage of the nascent opportunities the new rule has created. For example, they should continue concentrating resources on their core competencies while identifying suitable, complementary contractors for exclusive teaming arrangements to capture FRP contracts. This would be enhanced by (1) exploiting existing IR&D/B&P and wholly funded contractor R&D technology, and demonstrating its usefulness to DoD; (2) aggressively protecting both data and software rights from the outset within their respective core competency; (3) minimizing the risk of diminishing the value of the proprietary data by painstakingly enforcing Cost Accounting Standards; and (4) targeting of "development" and "systems concept formulation" studies in negotiating advance IR&D agreements.

Although large-scale developers are the most obvious beneficiaries of the new regulations, spare-parts manufacturers, and small businesses should not assume that they are excluded. For instance, they should explore teaming with developers that are exploiting these opportunities to complement their respective core competencies. At the same time, they should focus on increasing their share of suitable procurements, such as SLEPs. By continuing to target FRP contracts and educating historical customers as to new mission needs and appropriate technical solutions, contractors can attentively protect valuable "trade secret" rights without loss of customer goodwill.

Endnotes

1. The new DFARS Final Rule is set forth in Rights in Technical Data and Computer Software, 60 Fed. Reg. 33,464 (1995) (to be codified at 48 C.F.R. (DFARS) Subparts 227.4, 252.2). The new rule became applicable to all solicitations issued on or after September 29, 1995. Unless specified otherwise, the Final Rule will be the source for all DFARS citations herein. The Final Rule specifically defines the term "technical data" as "recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information." DFARS 252.227-7013(a)(14) (June 1995). The term "computer software" is defined as "computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulas and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation." DFARS 252.227-7014(a)(4) (June 1995).

2. Such amorphous terms as "technical data" and "software" are comprehensively defined so as to include critical engineering design, systems engineering, manufacturing designs, processes engineering, development testing and evaluation, operational testing, and software codes and enabling algorithms. The term "trade secrets" is used in this article to stress the value of such intangible assets for exploitation in the federal, commercial, and international marketplace. Rest assured that, although the term "trade secrets" is intentionally misused to emphasize the value of such technical data and software assets, from developmental contracts to capture award of subsequent, lucrative FRP contracts, the terms "technical data" and "computer software" have been employed only in accordance with their accepted usage.

3. Examples of core competencies include rotary-wing or fixed-wing aircraft; theater or tactical missiles; surveillance, encryption, and signal interception; spacecraft and launch vehicles; and armor.

4. See FY 1985 Defense Authorization Act, Pub. L. No. 98-525, § 1216(a), 98 Stat. 2595 (1984) (also entitled the Defense Procurement Reform Act of 1984) (codified as amended at 10 U.S.C. § 2320 (1994)). For a detailed survey of prior DoD data rights policy, see Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18,415 at 92,383-405.

5. 60 Fed. Reg. 33,464.

6. See Pub. L. No. 102-190, § 807, 105 Stat. 1421 (1991). Hence the name "Section 807 Panel."

7. Rights in Technical Data, 59 Fed. Reg. 31,584, 31,584 (proposed June 20, 1994).

8. 60 Fed. Reg. 33,464, 33,470.

9. See DFARS 252.227-7015; 227.7102. Congress mandated the changes in the Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, § 8106, 108 Stat. 3243, 3393-94 (amending 10 U.S.C. § 2320(b)(1) (1986)).

10. DFARS 227.7102. The new rule further requires that any effort to rebut the presumption that commercial items were developed exclusively at private expense be resolved in accordance with the procedures set forth in DFARS 227.7103-13, and the respective "Validation of Restrictive Markings on Technical Data" clause set forth at DFARS 252.227-7037. It is of value to note that this clause holds the government liable for payment of fees and costs if the challenge was not made in good faith. See DFARS 252.227-7037(h)(2).

11. DFARS 252.227-7037(h)(2). See also DFARS 227.7102, .7102-1(a); DFARS 252.227-7015.

12. DFARS 227.7102; 252.227-7037.

13. DFARS 227.7103-7.

14. DFARS 227.7102-1(a)(1).

15. DFARS 252.227-7013(a)(13).

16. DFARS 227.7102-1(a)(2). This exception applies only "when such data are not customarily provided to commercial users or the data provided to commercial users are not sufficient for military purposes; . . ."

17. DFARS 227.7102(a)(3). This exception presumes that such modifications are either expressly designated as an element of performance or are funded at direct cost to the government.

18. DFARS 227.7103-1(a).

19. DFARS 227.7103-5; see also DFARS 252.227-7013(b). The former regulations provided for both unlimited and limited rights, but had different mixed-funding requirements for "Government Purpose License Rights." See DFARS 227.402-72 (1988).

20. DFARS 227.7103-4(a). Under the old regulations, the government would automatically receive unlimited rights to all technical data developed during performance as "required for performance." See DFARS 227.402-72 (1988).

21. DFARS 227.401(11) (1988).

22. 60 Fed. Reg. at 33,466.

23. DFARS 252.227-7013(a)(7).

24. DFARS 252.227-7013(b)(3)(B).

25. Memorandum from Michael J. Thibault, Assistant Director, Policy and Plans, DCAA to Director, Defense Procurement (August 13, 1993) [hereinafter DCAA memorandum].

26. Id.

27. Retention of "limited rights" in indirect costs such as IR&D and B&P are in addition to the undisputed ability of contractors to assert limited rights in data for items, components, and processes developed with wholly funded contractor R&D. DFARS 252.227-7013(a)(7).

28. Rights in Technical Data, supra note 1, at 33,464. DoD reiterated the position that "manufacturing and production engineering costs that can be identified with a particular cost objective are direct costs and cannot be allocated to an indirect cost account." Id. DoD noted, however, that FAR 31.202 allows an exception for direct costs of a minor dollar amount, but the exception "must be consistently applied to all final cost objectives and produce substantially the same result as treating the cost as a direct cost." Id.

29. Id.

30. Use of the phrase "private expense" has been defined previously as (1) indirect-costed data that has not been specified as an element of performance in a specific contract; or (2) data developed under wholly funded R&D from a contractor's profit pools at true private expense. See DFARS 252.227-7013 (1988).

31. Assume that the contract expressly required delivery of the "end-item" engine without a substantial break down of its components, and that direct costs of development were allocated to the contract for all components, except the valves. Assume also that the valves were cannibalized from IR&D inventory and wholly funded contractor R&D to complete development testing during contract performance.

32. DFARS 252.227-7013(a)(7)(i).

33. DFARS 227.7103-4(b).

34. See DFARS 252.227-7013(a)(6), -7013(a)(7); DFARS 227.7103-4, .7103-5.

35. DFARS 252.227-7013(a)(6) (defining "developed"). The definition was drawn almost entirely from Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18,415. Specifically 252.227-7013(a)(6) defines "developed" as

> an item, component, or process [that] exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art [or technical discipline] that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process and the [then existing] state of the art. To be considered "developed" the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market [i.e., commercial embodiment], nor must the item, component, or process be actually reduced to practice within the meaning of title 35 of the United States Code.

Id. For comparison purposes, "reduction to practice" under 35 U.S.C. requires an actual performance of the function for which the invention is intended, and character of operation sufficient to indicate its utility in the environment in which it is contemplated to be useful. See Kirschke v. Lamar, 426 F.2d 870 (W.D. Mo. 1969). Specifically, such delineation is of value because the DFARS only requires a "high probability" of workability and has no express requirement of a strict environment test.

36. It is critical that Contracts and Legal be ever-vigilant for government changes and communications as well as subcontractor communications. See DFARS 227.7103-3(c); 252.227-7013(e)(3) (authorizing post-award assertion of rights in protected technical data only under evidence of "new information" or "inadvertent error.") Note that such period of correction is limited to six months and that such data must not already have been released into the public domain. See DFARS 227.7103-10(c)(2). Obviously, there is no remedy for recapturing technical data rights after disclosure into the public domain.

37. DFARS 227.402-72(a)(2), (b)(2)(1988).

38. See DFARS 227.7103-5(b); see also 252.227-7013(a)(11), (12).

39. Id.

40. DFARS 227.7103-5(b)(2); 252.227-7013(b)(4). The duration of the GPR period can be renegotiated at any time prior to delivery of the technical data, without additional consideration by either party, and periods of longer than five years are designated as permissible where there would otherwise be insufficient time to adapt a commercial application. Id.

41. DFARS 227.7103-5(b)(3). When the specified time period expires, the government is automatically vested with unlimited rights in the data. Id.

42. DFARS 227.7103-5.

43. DFARS 252.227-7013(11); see also Israeli Aircraft Indus., Ltd., B-258229, 94-2 CPD ¶ 262 (concluding that FMS of mine plows for armored vehicles fell within the scope of "Government Purpose" for GPLR).

44. See DFARS 252.227-7028.

45. 31 U.S.C. § 3729 (1994).

46. 18 U.S.C. § 287 (1994).

47. 18 U.S.C. § 1001 (1994).

48. 10 U.S.C. § 2306a (1994).

49. DFARS 227.7103-2(c).

50. Examples of such measures would be to conduct a technical data and computer software audit, and to institute a protocol for keeping the data/software inventory current.

51. DFARS 227.7103-7.

52. DFARS 227.7103-7; 252.227-7025.

53. DFARS 252.227-7013(b)(6), -7014(b)(6).

54. 28 U.S.C. § 1498(a) (1994); Robishaw Eng'g, Inc. v. United States, 891 F. Supp. 1134 (E.D. Va. 1995).

55. 28 U.S.C. § 1498(a).

56. DFARS 227.70.

57. 28 U.S.C. § 1498(b); DFARS 227.70.

58. Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 343 (1928).

59. See Robishaw, 891 F. Supp. 1134. In Richmond Screw, the U.S. Supreme Court explained that section 1498 "is more than a waiver of immunity and effects an assumption of liability by the government." 275 U.S. at 344.

60. 18 U.S.C. § 1905 (1994).

61. 5 U.S.C. § 706 (1994). See Dowty Decoto, Inc. v. Department of the Navy, 883 F.2d 774 (9th Cir. 1989) (affirming an injunction prohibiting the Navy from disclosing a subcontractor's technical data that had been developed at private expense).

62. Rights in Technical Data, supra note 1, 60 Fed. Reg. at 33,471.

63. Compare DFARS 227.7202 (provisions governing commercial computer software and related software documentation) with DFARS 227.7102 (provisions governing technical data pertaining to commercial items, components, and processes). The comparison is relevant because the discussion on computer software in this article has been "piggybacked" on the technical data discussions, since each subpart implemented the same fundamental concepts.

64. "Commercial computer software" is defined as software that has been "developed or regularly used" for nongovernmental purposes, and:

> (i) Has been sold, leased, or licensed to the public;
>
> (ii) Has been offered for sale, lease or license to the public;
>
> (iii) Has not been offered, sold, leased, or licensed to the public, but will be available for commercial sale, lease, or license in time to satisfy the deliveryrequirements of this contract; or
>
> (iv) Satisfies [one of the above] and would require only minor modification to meet the requirements of this contract.

DFARS 252.227-7014(a)(1).

65. DFARS 227.7202-1(c)(1).

66. DFARS 227.7202-1(c)(2). It is worthwhile noting that, although the new regulations protect developers' rights in commercial computer software and related commercial software documentation equally, they protect rights in noncommercial software and documentation differently. Compare DFARS 227.7202-1 (providing equal protection for commercial computer software and software documentation in accordance with license customarily provided to public) with DFARS 252.227-7014(b)(1)(i) (granting unlimited rights in noncommercial computer software only for software "developed exclusively at government expense") and DFARS 252.227-7014(b)(1)(ii) (granting unlimited rights in noncom-

mercial software documentation required to be delivered under the contract even where such documentation was "developed exclusively at private expense"). The reasons for the disparate treatment are (1) that most commercial software and documentation already are protected by copyright; and (2) that developers succeeded in preserving the most protection for the most valuable intellectual property — source codes, and algorithms of noncommercial computer software — such that granting of unlimited rights in documentation, i.e., operating manuals, would not compromise the software, since "documentation" is expressly defined to exclude critical source codes and algorithms. DFARS 252.227-7014(a)(4), (5).

67. DFARS 227.7102-3 (mandating incorporation of the clause at 252.227-7015).

68. DFARS 227.7202-1(a), .7202-4.

69. DFARS 252.227-7014(b)(1).

70. DFARS 252.227-7013(a)(5) (1988).

71. DFARS 252.227-7013(a)(3-4) (1988).

72. DFARS 252.227-7014(a)(4).

73. DFARS 252.227-7014(a)(5).

74. DFARS 252.227-7014(a)(4).

75. DFARS 252.227-7014(a)(6).

76. DFARS 252.227-7014(b)(1), (2).

77. DFARS 252.227-7014(a)(6)(ii).

78. DFARS 252.227-7014(a)(6)(iii).

79. DFARS 227.7203-4(a)(2).

80. DFARS 252.227-7014(a)(7)(i).

81. The new rule does not define "module" or "sub-routine." For an industry recognized and accepted definition of the above terms, see Microsoft Press, Computer Dictionary (2d ed. 1994).

82. See DFARS 227.7203-3(a) and 252.227-7017 (listing requirements).

83. Compare DFARS 252.227-7014(b)(1) (covering computer software) with DFARS 252.227-7013(b)(1) (covering technical data).

84. DFARS 252.227-7014(b)(1)(ii).

85. See DFARS 227.7203-6(a)(1); 252.227-7014(b)(2).

86. See DFARS 252.227-7014(a)(14)(i). This clause is consistent with commercial practice.

87. DFARS 252.227-7014(a)(14)(v)(c).

88. DFARS 252.227-7014(j).

89. DFARS 227.7203-3(a); 252.227-7014, -7017 (forfeiting such rights absent pre-award notice or extenuating circumstances of inadvertent omission or new information).

90. DFARS 252.227-7028 (emphasis added).

91. DFARS 252.227-7014(c).

TREASURER'S REPORT

David P. Metzger
Holland & Knight

David P. Metzger

March 4, 1996

BCA Bar Association
Statement of Financial Condition
For the Period Ending February 29, 1996

Beginning Balance		$ 9,740.02
Fund Income:		
Dues	$ 1,650.00	
Annual Meeting	4,908.20	
Total Fund Income		+ 6,558.20
Subtotal	$ 16,298.22	
Fund Disbursement:		
Newsletter (Winter)	2,454.36	
Postage	56.99	
Mailing Lists	20.09	
Annual Meeting (Hotel)	6,965.83	
Membership Directories	2,437.00	
Total Fund Disbursements		- 11,934.27
Ending Cash Balance		**$ 4,363.95**

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

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

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: _____

City/State/Zip: _____

Work phone: _____ Fax: _____

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 $25.00 PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:

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