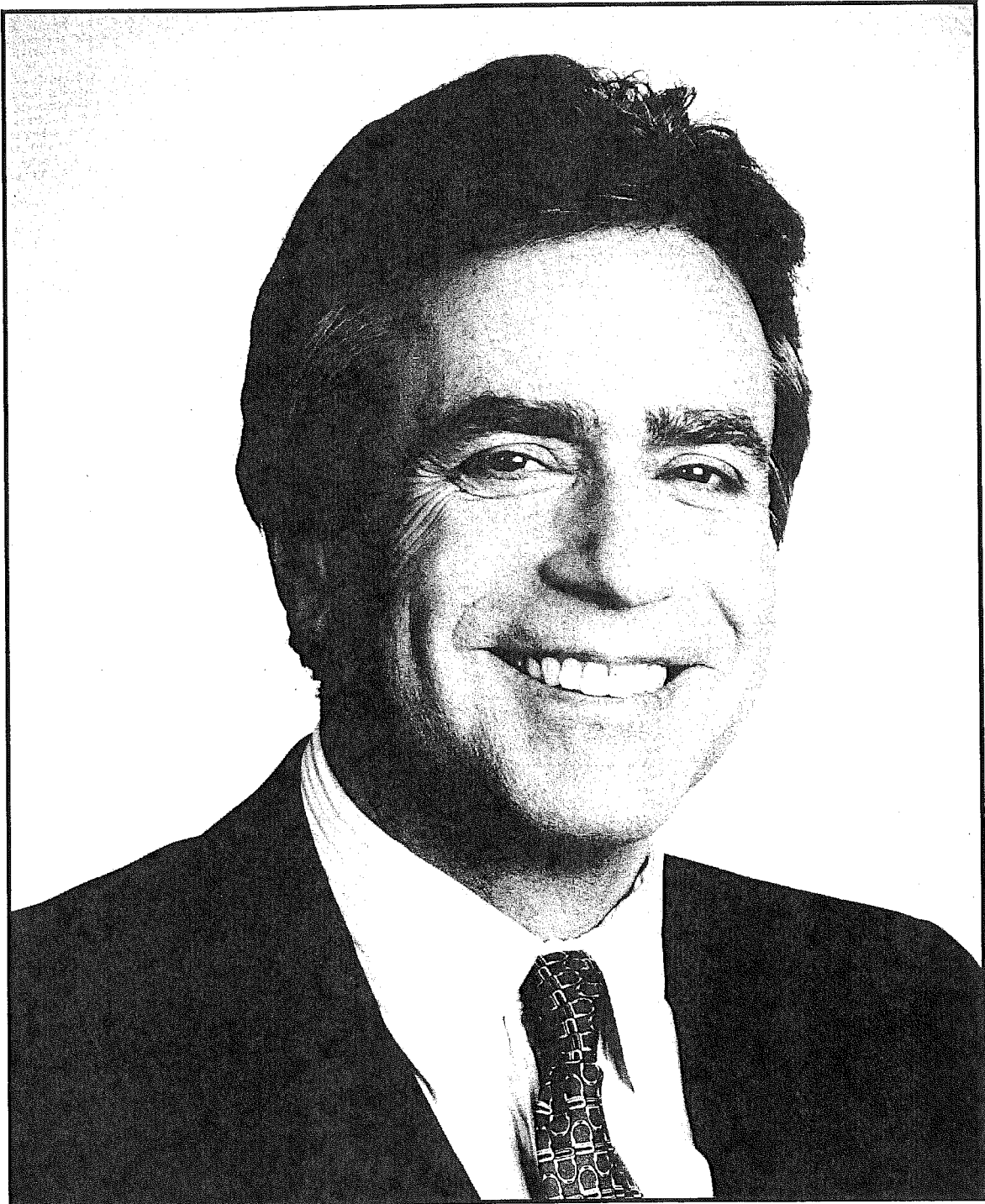


The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Spring Issue, April 1999, Vol. VV, Issue I



James A. Dobkin "1940 - 1999"

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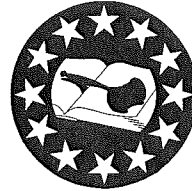
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PRESIDENT'S COLUMN

by David P. Metzger



Dave Metzger

We have dedicated this issue of *The Clause* to a good friend and colleague, **Jim Dobkin**, a member of the BCABA Board of governors and past Annual Program Chairman, who passed away unexpectedly this past January. We express our deep sympathies to his family. We would like to thank those members of our Board of Governors, and our officers, who contributed to the enclosed tribute to Jim. We would also like to thank Arnold & Porter, Jim's law firm, and a Gold Medal firm of the BCABA, for assisting us in paying tribute to this fine lawyer.

On a lighter note, we recently mailed the 1999 Directory to all members. The Directory reveals that we have approximately 400 paid members, about ninety judges and recorders as honorary members (some of whom have also paid) and approximately 500 members in all. We understand that the Directory is viewed as such a valuable item that rumor has it in some offices it has developed "legs." We have quite a few left over; if you would like another copy, let us know and we will mail you one. We also apologize to the few members whose entries had to be corrected; please notify the Secretary, **Jim McAleese, Jr.**, with any necessary changes in your mailing address or membership entry.

On February 18, 1999, we had our first in what is planned as a series of seminars sponsored by the Practice and Policy Committee. Our first such seminar was on "Discovery Before the Boards." We would like to thank our talented presenters for an excellent program: **Honorable R. Anthony McCann, Judge, Energy Board of Contract Appeals; Elaine A. Eder, Esquire, U.S. Coast Guard; and Ross W. Dembling, Esquire, Holland & Knight LLP;** and Co-Chair of the Practice and Policy Committee. We would especially like to thank the nearly 15 BCA judges who attended and contributed to the "interactive, participatory" format of the seminar. To encourage government and practitioner involvement, we will be dropping the cover charge for these seminars to \$6.00, to cover the cost of a modest lunch and beverages.

Planning for the next Annual Program is well underway. **Co-Chairs Honorable Reba Page (new Chair of the Engineers' Board) and Alan C. Brown, Esquire, partner, McKenna & Cuneo, LLP** (a BCABA Gold Medal firm), are planning a Program centering on avant garde issues. **Carl L. Vacketta, Esquire, partner, Piper & Marbury LLP** (a BCABA Gold Medal firm) will moderate a panel on litigation challenges that arise from the large amount of non-cost based contracts being awarded. **Alexander J. Brittin, Esquire, partner, McKenna & Cuneo, LLP** will moderate a panel on the expanding area of health care contract disputes. In the afternoon, a judges panel will discuss the role of the boards, practice and advocacy problem areas, and other important challenges for the boards. The Annual Program is scheduled for October 20, 1999 at the St. Regis Washington Hotel (formerly the Carlton) at 16th and K Streets, N.W. in Washington, D.C. Mark your calendars and we look forward to seeing you there.

With the membership at a fairly high level, and the BCABA solvent, we need to challenge ourselves with the question: "What is the mission of the BCABA?" I would like to focus on that question, and also invite comments on that question from our membership for publication in the next issue of *The Clause*.

By its charter, the BCABA has undertaken the protection, advancement and improvement of the Boards of Contract Appeals. As the excellent article by **Jim Nagle, a past BCABA president, of Oles, Morrison, Rinker & Baker LLP**, a BCABA Gold Medal firm, demonstrates, the boards are a natural evolution in the history of resolution of government contract disputes. The modern boards were given statutory recognition and status by the Contract Disputes Act of 1978; with the CDA, came a congressional recognition of the need for independence of the boards as well.

The independence of the boards continues as a vital BCABA interest. Encroachment on this independence can come from both overt and unseen sources. An overt assault on the independence (and very existence) of the Interior Board came last year from an aggressive official in the Department of Interior. I am proud of the fact that the BCABA, among other bar associations, reminded the Secretary of Interior of the obligation entrusted to him as Secretary to evaluate the Interior Board on the bases of workload and need, and not on the basis of bureaucratic or organizational considerations.

While a legitimate dialogue can and may recur on Capitol Hill in terms of the overall organization of the BCAs, the net result of any such reform, if it occurs at all, must be independent Boards of Contract Appeals, specialized and expert in government contracts with a commitment to informal, speedy, and just resolution of government contract disputes. We need to have interaction with the Committees on Capitol Hill that have jurisdiction over the BCAs, with an eye toward educating members and staffs on the critical role and function of the Boards. Reform in this area, if any, must be informed reform, rooted in the history and necessity for the boards. We are pursuing this education agenda through the monthly meetings of the Practice and Policy Committee.

This is not to say that the Boards cannot advance or improve themselves. While they constantly strive for a balance between sufficient process and informality, as the Nagle article states, many feel that the BCAs as a whole take too long to write and issue decisions that are sometimes unnecessarily lengthy, and could have been shorter, more pointed and more timely. These and other issues deserve attention. Later this year, I will attempt to convene a group of judges, government attorney-members and private practitioner-members to discuss these and other issues.

The role of the Boards of Contract Appeals is our central mission. Protecting, advancing, improving and challenging that mission is the responsibility of all of our members. **Jim Nagle's** excellent article sounds the initial tone for a comprehensive and year-long discussion of the role of the BCAs. As members, I would like all of you to consider submitting to *The Clause* next issue your views on this important topic. Your thoughts need not constitute a formal article. We will publish your views or insights, whatever they are, however long or short they may be, and wherever they take us.

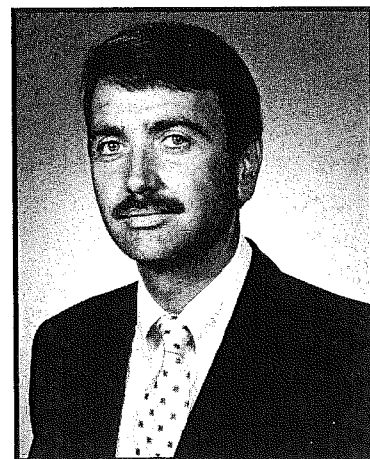
EDITOR'S COLUMN

by Andre Long

As mentioned in the President's column, this edition is dedicated to James A. "Jim" Dobkin, who passed away on January 13, 1999. Jim devoted many hours of service to this association and we will deeply miss his presence.

Thanks to the initiative of Dave Metzger, we have launched a new feature in this edition entitled "practice tips." Judge Allan Goodman from the GSBCA wrote this edition's tip and we thank him for his useful comments. We hope these tips will be a consistent

feature in every edition and will assist our many members in the practice of Government contract law at the Boards of Contract Appeals. To that end, we encourage the bar, especially the board judges and seasoned litigators, to contribute their ideas and opinions.



Andre Long

ADR WITH THE FEDERAL GOVERNMENT

By David P. Metzger
Christopher R. Yukins
Holland & Knight LLP

Alternative Dispute Resolution (ADR) offers an excellent means of streamlining and resolving disputes for both contractors and government officials. Contract administrators should be aware that the Contract Disputes Act (CDA), which governs most federal contract claims, specifically provides for the use of ADR to resolve government contract claims. Although the CDA provision is not ironclad - it allows either side to opt out of ADR, for example - even this limited provision gives contractors and the government an important tool to cut the time and expense of resolving claims.

A. The Different Kinds of ADR

Most methods of ADR may be tailored to meet the needs of the parties to the dispute. A general description of the most common ADR methods is presented below. For more details regarding these methods, see generally, Tom Arnold, *A Vocabulary of Alternative Resolution Procedures*, ALI-ABA Course of Study, December 12, 1996.

Mediation is a step beyond direct negotiation. Mediation includes any voluntary, nonadjudicatory dispute resolution process involving a neutral third party. Mediation is a rather informal process. A mediator typically takes a passive role by helping the parties evaluate and compare their respective situations so that they can move toward a settlement. One of the key distinguishing features between mediation and arbitration is that a mediator is allowed to have an *ex parte* (exclusive) contact with the parties that is prohibited in arbitration. Mediation involves the least risk of any dispute resolution technique for the parties involved. It is voluntary; therefore a party may withdraw at any time. Mediation is generally non-binding, although both parties can agree otherwise. It also is much less costly than arbitration, and typically the parties split the cost of the mediator. Finally, mediation encourages settlement at a much earlier stage than other dispute resolution techniques.

Facilitation is a type of mediation, in which the presentation of the case is very informal and often is made by the parties themselves with little participation by counsel. Although the parties may refer to a few key documents, evidence is not permitted. Discussions may be facilitated by neutral parties, but the parties to the dispute are to arrive at their own agreement, and may not look to the neutral to make a decision. Facilitation is very effective when both parties have an incentive to settle their dispute privately. The goal here is to reach an agreement between the parties, which necessarily involves compromise. As a result, facilitation often leads to less harsh results than may be found in arbitration.

Conciliation is a form of mediation similar to facilitation. Conciliation involves the use of a neutral party in the role of evaluator. The evaluator will hear all presentations made by both parties and then form a recommendation as to what the case is worth and how it should be settled. The evaluator sometimes might pressure the parties to settle according to his or her conclusion, although the recommendation is non-binding.

Factfinding is a process whereby a neutral party is appointed to perform the investigation into the critical facts of the dispute. Often, a neutral appointed as a factfinder will be an expert in the subject matter.

An **ombudsman** may also be utilized as a method of ADR. An ombudsman is a third-party neutral factfinder. The process is voluntary, private, and informal. The duty of the ombudsman is to make a non-binding recommendation to senior management of the disputing parties as to how to resolve the dispute.

A **minitrial** is a process whereby the presentation of the case is formal. The presentations often are made by counsel, with a neutral mediator assisting the process. A panel consisting of CEOs or equally senior officers of the disputing parties hears the presentations. The panel also may include neutrals who are experts in

the field. Witnesses may be called. Affidavits, depositions, and documentary evidence also may be used. The Federal Rules of Evidence generally do not apply to minitrials. At the conclusion of the presentations, the neutral experts (if any) make a non-binding ruling intended to provide guidance to the parties' decisionmakers, and the parties' senior decisionmakers attempt to reach a final settlement agreement.

Arbitration is the most formal of ADR methods, and may be binding or non-binding. It is a process whereby the parties agree to have a dispute resolved by appointing a person - an arbitrator (or arbitrators) - who will listen to the presentations of the case and the evidence, and then will render a decision. Arbitration can become extremely costly. Non-binding arbitration is a settlement technique intended to assist the parties to evaluate their case realistically; binding arbitration is adjudicative.

Non-binding arbitration is a relatively formal process involving presentation of the case to either a single arbitrator or a panel of arbitrators. The presentation is primarily made by counsel, although clients may occasionally participate. Affidavits, depositions, and documentary evidence are heavily relied upon; witness testimony is rare. The Federal Rules of Evidence generally are not followed. Private communication between the arbitrators and the parties is not permitted. Upon conclusion of the presentations, the arbitrators deliver a decision which will then be used by the parties to further their settlement negotiations.

Binding arbitration is, generally speaking, more costly than any other method of ADR. It also is the most divisive form of ADR because of the adversarial nature of the proceedings. Again, the process is formal and consists of presentations made by counsel to a single arbitrator (or a panel of arbitrators). Typically, the presentation is made by witnesses, with additional reliance on affidavits, depositions, and documentary evidence. The Federal Rules of Evidence are not followed. The arbitrators assume the role of a judge, asking questions and cross-examining witnesses. The decision or "award" of the arbitrators is binding and, therefore, is enforceable in court.

B. Arbitration Under the Contract Disputes Act

The key CDA provision endorsing ADR appears at section 6 of the CDA, 41 U.S.C. ? 605(d)-(e). The statute specifically provides that a contractor and a contracting officer may use, at their option, a wide array of alternative means of dispute resolution to resolve claims.

The claim must still be certified, even if ADR is used.

To embark on ADR, contractors and agencies may use any of the many means of ADR outlined in 5 U.S.C. ? 571. That statute endorses almost any conceivable method of ADR, including:

- facilitation,
- conciliation,
- mediation,
- factfinding,
- minitrials,
- arbitration, and
- ombudsmen.

The disputing parties may go beyond those traditional categories of ADR, and create a new method of ADR, so long as both sides agree to the special procedures. Combining these methods is also possible.

Although the statute allows either side to opt out of ADR, there are constraints on both sides' discretion. If a contractor rejects ADR, the contractor must explain in writing why ADR is being rejected. The statute allows contracting officers to reject ADR only under specific circumstances. If a contracting officer wants to opt out of ADR, the contracting officer must explain, in writing, why ADR is inappropriate, either under section 572(b) of title 5 or otherwise.

1. Reasons for the Government to Refuse ADR

As noted, ADR in the federal contracting process is governed by statute and the FAR. A contracting officer's decision to deny ADR must be based on the reasons outlined in section 572(b) of title 5, which says that ADR should not be used if the case:

- 1) would have important precedential value;
- 2) would have policy implications;
- 3) would undermine consistency in agency decisions;
- 4) could affect other parties;
- 5) requires a full public record; or,
- 6) requires continued jurisdiction by the agency, due to shifting circumstances.

These are not, however, all the reasons ADR may be denied. Both the governing statute and FAR 33.214 explicitly allow the contracting officer to reject ADR on

other grounds, if those grounds are specifically explained to the contractor.

The FAR's current Disputes clause also incorporates ADR. Under FAR 52.233-1, if the parties enter into ADR proceedings, the contractor must certify the underlying claim. Although normally a contractor need not certify a claim below \$100,000, under the current Disputes clause all claims submitted to ADR must be certified.

2. Procedures for ADR

If the parties enter into ADR, some of the procedures in that ADR proceeding will be governed by statute. See 5 U.S.C. §§ 573-83. An agency that seeks to use ADR may borrow an official from another agency as a "neutral," pursuant to a reimbursement agreement between the two agencies. The neutral—who also may be from outside the government—may agree to work without compensation. The neutral is expected to hold information from the proceedings confidential. Agency officials who would normally have the authority to settle a claim are specifically authorized to suggest arbitration (the most common form of structured ADR), and either side—the agency or the contractor—may bring a court action to enforce an agreement to arbitrate.

All parties are entitled to participate in the selection of an arbitrator. Once appointed, the arbitrator has full authority to control the proceedings, and limited authority to compel the appearance of witnesses and the production of evidence at the hearing. Each party is barred from having ex parte contacts with the arbitrator. The arbitrator must allow each party a fair opportunity to present its case at the hearing, and the arbitrator then generally must render a decision within 30 days after the hearing is closed. The arbitrator's decision (the award) should include at least a short statement of the reasoning behind the decision. Once 30 days have passed after the award, the arbitrator's award may be enforced in the U.S. courts.

Judicial review of an arbitrator's decision is very limited. Review of an agency's decision not to enter into a particular form of ADR is even more limited: that decision is, by the terms of the statute, "committed to the discretion of the agency."

3. FAR Provisions Governing ADR

Under Subpart 33.2, "Disputes and Appeals," agencies are encouraged to use ADR procedures to the maximum extent practicable to inexpensively and expeditiously resolve issues in controversy. FAR 33.204 and 33.214(a). Accordingly, where appropriate, Contracting Officers may use ADR, in whole or in part, to

resolve disputes under the authority of FAR 33.204 or the Administrative Dispute Resolution Act, Public Law 100-522. See also FAR 33.214(c).

ADR procedures are available where there is: (1) an issue in controversy; (2) voluntary agreement to participate in the ADR process by both parties; (3) joint agreement on alternative procedures and terms in lieu of formal litigation; and (4) party representation by an official authorized to resolve the controversy. FAR 33.214(a). However, ADR is not an appropriate means of dispute resolution where: (1) the case has precedential value; (2) the matter involves questions of policy; (3) consistent outcomes are of special importance; (4) non-parties may be affected by settlement; (5) a full public record is both unavailable and indispensable; and (6) agency jurisdiction is essential due to changed circumstances. FAR 33.214(b) and 5 U.S.C. § 572(b). Contracting Officers are also not authorized to use ADR procedures to resolve "a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine" and (2) "the settlement, compromise, payment or adjustment of any claim involving fraud." FAR 33.210. If one party rejects the other's ADR request, it must provide a written explanation either citing why ADR is inappropriate or enumerating specific reasons for rejecting the ADR proposal. FAR 33.214(b).

When used, ADR proceedings are generally considered confidential and are protected from voluntary disclosure under 5 U.S.C. § 574. FAR 33.214(e). Further, use of ADR procedures after a Contracting Officer's Final Decision ("COFD") does not alter the time limitations or procedural requirements for filing an appeal of the COFD and does not constitute a reconsideration of the COFD. FAR 33.214(c).

To ensure maximum flexibility to select appropriate ADR procedures as issues arise, solicitations may not require arbitration as a condition of award unless otherwise required by law. FAR 33.214(f)(1). Moreover, all arbitration agreements must be in writing and specify both the maximum award amount and other conditions limiting the range of possible outcomes. FAR 33.214(f)(2). Finally, the use of binding arbitration is governed by agency guidelines. FAR 33.214(g).

4. Finding Out More About ADR

For parties contemplating ADR with the government, there are a variety of resources available on the Internet. Probably the most comprehensive government-related ADR site is sponsored by the Air Force, at www.adr.af.mil. That site includes:

- Key statutes, executive orders, and regulations.
- Agency-specific directives and ADR programs.
- Links to state-level ADR programs.

The American Arbitration Association (AAA) offers useful model arbitration agreements and links at its Web site, <http://www.adr.org>. The AAA and the Federal Bar Association together hosted a comprehensive program on federal ADR in February 1998. The materials presented at that program included an informal review (www.erols.com/arbmed/article.htm) of the ADR procedures available at the General Services Board of Contract Appeals (GSBCA). (ADR procedures are available from all of the Boards of Contract Appeals.) There also is a vast collection of ADR-related legal materials available through the House of Representatives Web site, at <http://law.house.gov/314.htm>.

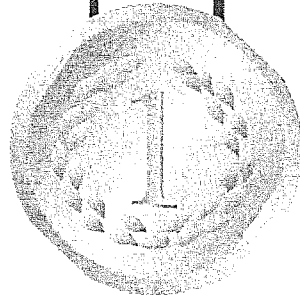
For those involved in ADR at the Department of Defense, a copy of DoD Directive 5145.5, Alternative Dispute Resolution, is available at <http://web7.whs.osd.mil/text/d51455p.txt>. That Directive explicitly encouraged all DoD components to develop and use ADR techniques for dispute resolution. Many components have done so, and their resources are also available on the Web.

The Navy, for example, has posted a good overview of ADR at <http://www.acq-ref.navy.mil/wcp/adr.html>. The Secretary of the Navy's Instruction on ADR, SECNAV Instruction 5800.13, is available at <http://www.ogc.secnav.hq.navy.mil/ogcwww/adr-secnav.html>, and background on the Navy's extensive efforts in ADR is available at <http://www.ogc.secnav.hq.navy.mil/Adr.html>.

The Defense Logistics Agency (DLA) has also gathered substantial resources devoted to ADR on its Web page, at <http://131.74.160.8/Offices/DOCCR/adr/adr.html>. In a pilot project, the DLA has developed detailed procedures for using ADR, which are posted on the Web site. See <http://131.74.160.8/Offices/DOC/adr/2.html>. The DLA materials make it very clear that ADR is encouraged within DLA, per direction from the DLA leadership. See <http://131.74.160.8/Offices/DOCCR/adrpol.html>.

For those contemplating ADR at the Armed Services Board of Contract Appeals (ASBCA), although the George Washington University Law School Internet site carries other resources related to the ASBCA, see <http://www.law.gwu.edu/burns/asbca/misc/quick.htm>, the site does not yet contain the ASBCA's Notice Regarding Alternative Methods of Dispute Resolution. That notice, which should be available directly from the ASBCA, spells out the typical types of ADR - from a settlement judge to a summary trial - that the ASBCA will support. The ASBCA can also provide sample agreements to use (1) a minitrial procedure; (2) a summary trial (with binding decision); or, (3) a settlement judge. These model agreements should make it faster, and easier, to embark on ADR before the ASBCA. The Energy Board of Contract appeals has recently issued a large publication on ADR, which is available directly from the Board.

In the federal marketplace, ADR is rapidly becoming an important means of streamlining disputes. The procedures for ADR have been set in place across many parts of the government, and many variations of ADR exist from which to choose. All methods of ADR offer the advantages of being less time-consuming, less costly, and more private. Widespread acceptance and use of ADR in the commercial marketplace suggest that contractors and government agencies should take greater advantage of ADR in government contracting.



HEAR YE! HEAR YE! HEAR YE!

For commitment to the Boards of Contract Appeals Bar Association and outstanding leadership in the field of government contracts, demonstrated by bringing their entire government contracts group membership into membership of the BCABA, we honor and salute the following organizations by bestowing on them the BCABA's:

GOLD MEDAL STATUS

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Crowell & Moring LLP

Department of Energy Board of Contract Appeals

Holland & Knight LLP

Kirkland & Ellis

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Piper & Marbury LLP

Smith, Pachter, McWhorter & D'Ambrosio, P.L.C.

Venable, Baetjer, Howard & Civiletti, LLP

Williams & Jensen, P.C.

MEMORIAL TO JAMES A. DOBKIN (1940 - 1999)

by
David P. Metzger¹
Susan Shallcross

On January 11, 1999, the government contracts bar lost one of its leading lights when James A. Dobkin passed away. Jim was a member of the Board of Governors and a past Annual Program Chairman of the BCABA.

After receiving his J.D degree from New York University, where he was Managing Editor of the *Law Review*, Jim received a Master of Laws degree from Georgetown University Law Center in 1968.

Jim Dobkin had a distinguished career in government contracts law. He started his career in the General Counsel's Office of U.S. Army Materiel Command and served four years there before moving on to the law firm of Arnold & Porter. He was an advisor to the President's Commission on Government Procurement in 1972 and 1973 and published widely on various aspects of the law relating to the transfer and licensing of patents and technology, government procurement, and international joint ventures, among other subjects. He was a co-author of *International Joint Ventures*, editor of and a contributor to *International Technology Joint Ventures in the Countries of the Pacific Rim* and *Joint Ventures with International Partners*, as well as a contributor to a number of other publications.

While at Arnold & Porter, where he practiced law for more than 30 years, Jim founded the firm's government contracts practice group. He played an instrumental role in the formative years of government contracts law and litigated several landmark cases, including the *Kentron Hawaii* and *Wheelabrator* decisions in the United States Court of Appeals for the District of Columbia. Those cases established the standards that federal courts continue to apply in *Scanwell* cases. Jim continued to litigate many significant bid protests and claims cases throughout his career. He was also a mentor to many aspiring government contract lawyers at his firm.

In the early 1970s, Jim Dobkin was an attorney adviser to the President's Commission on Government Procurement, whose findings would form the groundwork for the Contract Disputes Act of 1978. More recently, he was on the forefront of the Privatization@ debate and chaired the Privatization Ad Hoc Group of the U.S. Chamber of Commerce. He was on the Advisory Board of the *Federal Contracts Reporter*, as well as a member of the Board of Governors of the BCABA.

A surprising aspect of Jim's character to those who observed his brilliance in the legal arena was the fact that he was an acclaimed painter and sculptor, whose work was represented in collections throughout the United States, the Middle and Far East. Since 1981, Jim exhibited his work extensively in one-man shows and with other artists in various exhibitions and galleries along the Eastern Seaboard.

Tributes:

Jim Sandman, Managing Partner, Arnold & Porter

Jim headed Arnold & Porter's government contracts practice for many years. Among his many and lasting contributions to our firm was his assembly of a first-class government contracts practice group. In the many hardworking roles he occupied, he was the consummate team player, always looking out for the good of the firm as a whole. He brought out the best in others and was a mentor and role model for many young lawyers. He was also a generous, sensitive, and compassionate colleague. We were lucky to have had him with us.

David P. Metzger, BCABA President, Holland & Knight LLP

Jim embodied the spirit of those we most want involved in our bar association. Beyond the marvelous zeal with which he practiced law, and the value he gave to colleagues and clients alike, he gave back to the government contracts community a measure of his wisdom and spirit through his dedicated efforts on behalf of the BCABA. We treasured those contributions, and we will sorely miss him.

John S. Pachter, Smith, Pachter, McWhorter & D'Ambrosio, P.L.C.

I first met Jim Dobkin when we were on active duty in the Army Judge Advocate General's Corps in the late 1960s. Jim was at Army Materiel Command and I was at the Pentagon. After we entered private practice, our firms assigned us to work on different matters involving the New York Shipbuilding Co., which was then in liquidation, winding up its pending matters. The company executives were old hands with many years in shipbuilding. They were wonderful people, and great mentors. They spoke warmly to me of Jim, and when I would see him over the years, we would recall those early days with fondness. Jim had rare qualities. He was a thorough professional, and was a gentleman, always courteous and respectful. He will be missed.@

Flora Szilagyi, Associate, Arnold & Porter

I got to know Jim when I was a summer associate in 1996. He taught a superb class in negotiations to my summer class, took me (and others) out to lunch, and kindly sent me an article on a subject I was interested in and we discussed over lunch. After I joined the firm, too, he was always very supportive, kind, and approachable. . . He seemed to take a genuine interest in helping and mentoring associates, whether inside or outside his group.

Norman Diamond, Partner, Arnold & Porter

Jim was a close and treasured friend of many years standing. We frequently socialized with him and his lovely wife, Irma, when he first joined the firm. He then sported a dashing mustache. His handsome and courtly manners completely charmed my two daughters. In their minds, and speech, he was always "Omar." (After the then movie heartthrob, Sharif). He'll be sorely missed as long as Arnold & Porter exists! The firm couldn't have suffered a greater loss.

Richard O. Duvall, Holland & Knight LLP

It was a pleasure to serve on the Board of Governors with Jim. He was a supremely competent litigator and a great friend of the BCABA. The programs that Jim put on as a past Annual Program Chairman were very thoughtful and informative, as was his advice as a Governor. We will miss him.

Mark DeWitt, Associate, Arnold & Porter

After Jim's death, the outpouring of respect and love for Jim was overwhelming. After the announcement, members of the firm gathered together late in the evening and told stories of how they would remember Jim and how he affected the firm and the practice of law. He stood for the best that this firm has to offer. Jim may be gone, but his legacy to Arnold & Porter will be everlasting.

Steven Diamond, Partner, Arnold & Porter

As I got to know Jim, I was awed by his extraordinary breadth and talents. Jim was a truly gifted, creative and brilliant lawyer. His writing was elegant, and his advocacy was passionate. I witnessed on more than one occasion, a judge feeling compelled to compliment Jim and apologize to him if the judge was about to rule against him. When we wrote briefs together, I would sometimes put a note on top that said "Jim, this is ready for your illuminations." He relished the process of working a written piece until it was a work of art.

Peter A. McDonald, Partner, CPA, KPMG

Jim was always a strong supporter of the BCABA, and unselfishly responded to every request for assistance made of him. Within the BCABA, he was particularly concerned about activities to support the younger practitioners. He was a man of great integrity, and on a personal level was very amiable and down to earth. His friendship was highly valued by those who knew him, and his untimely death was a great loss to the government contract bar.

David P. Metzger is President of the BCABA; Susan Shallcross is the Manager of Practice Development for the law firm of Arnold & Porter. The BCABA is most grateful to Ms. Shallcross and Arnold & Porter for their assistance in this tribute.

THE BOARDS OF CONTRACT APPEALS A BRIEF HISTORY OF THEIR DEVELOPMENT

By James F. Nagle
Oles Morrison Rinker & Baker llp

Contract dispute resolution problems have plagued the nation since the Revolution. Robert Morris, the superintendent of finance during the Revolution, suffered complaints that the dispute resolution process for his contracts took too long. To alleviate that (under a contract to supply the army with food) he inserted a clause allowing him to appoint an inspector to settle all disputes. In September 1782, Ezekiel Cornell accepted this post of inspector of contracts.

By 1819, some sophistication was shown. In a contract that year with James Johnson for providing food to troops at various posts in the West, the contract contained a clause which required that any claim be referred to arbitration. In that case, the arbitrators awarded the contractor a portion of its claim but a House Committee investigating the contract and arbitration findings recommended that the award be set aside.

Most contracts did not contain such an arbitration clause. So in the first half of the 19th century, government contractors presented claims to the comptroller of the Department of Treasury who had the authority to decide all claims against the United State. Dissatisfied contractors sometimes then went to Congress, trying to obtain a private bill of relief.

Claims were submitted to Congress and hassled out through the political process in which contractors would try to bring to bear as much pressure as possible. For example, in 1859, a stagecoach contractor submitted directly to Congress, a claim for losses seeking an additional compensation of \$493,772.6. In 1860, a mail contractor presented a claim to Congress for losses incurred in carrying the mail from 1851 to 1860. Congress allowed the claim, and he received a treasury warrant for \$443,010.60.

The growing number of such contract claims and their disjointed resolution in this manner led to the establishment of the U.S. Court of Claims to hear matters arising from contracts. Despite this availability of a judicial forum, the executive branch continued to resolve disputes.

During the Civil War, many contractors brought their claims directly to President Lincoln, who functioned as his own contract appeals board. One classic example is Lincoln's role in handling the claim of Solomon Dingee and Company. Dingee contracted to furnish rifles to the Union Army. The Ordnance Department terminated the contract after the first delivery did not meet all contract specifications with respect to caliber, weight, material, and finish, although many of the guns were serviceable. Lincoln investigated the manner and instructed the Ordnance Department to accept all of those rifles meeting the contract specifications, reject those that were not serviceable, and purchase the remainder at a reasonable value. Lincoln also wrote a memorandum that interpreted the contract and resolved both entitlement and quantum. Dingee's case was not unusual, as the Union's rush to arm and equip the army caused major problems.

At the start of the Civil War, Major General John Fremont had engaged in such improper contracting that the government es-

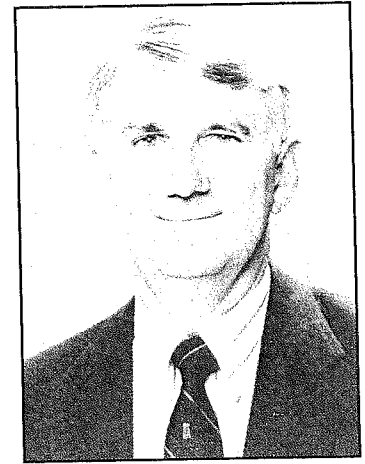
tablished a special commission to examine claims arising from Fremont's department. On October 25, 1861, the Secretary of War appointed a board of three commissioners to investigate proof presented by the claimants and make its recommendations to the Secretary. This administrative fiat created the forerunner of the same formalized boards of contract appeals that exist today.

One such case arising from Fremont's Department and the board reached the Supreme Court in 1868. In *United States v. Adams*, Adams, a contractor who sold boats to the Army, filed a claim for \$209,000. The board recognized only \$96,000, and Adams sought and received the remainder from the Court of Claims. The Supreme Court overruled the award to Adams of the remainder and recognized the authority of the head of an executive department to appoint a board for the purpose of adjudicating government contract claims. The Court held that this power was incidental to the Secretary of War's general authority to conduct agency affairs. The Supreme Court also found that the decisions of such boards could only bind contractors that elected to be so bound. Agency boards of contract appeals thus became recognized tribunals for the resolution of government contract disputes, but were used only sporadically until World War I.

In the 1890's, the Navy had appointed a board to evaluate claims regarding steel purchases, but it was not until March 1917 that the Secretary of Navy created a Navy Compensation Board for the resolution of disputes between the Navy and its contractors. This board was largely limited to considering whether costs were allowable under Navy cost reimbursement contracts.

On September 7, 1918, the War Department issued Supply Circular No. 88, which contained a standard form contract. Section 15 was a clause entitled, "Adjustment of Claims and Disputes," which provided for the Secretary to create a board designated by him to resolve "any claims, doubts or disputes which may arise under this contract."

except as otherwise specifically provided in this contract, any claims, doubts, or disputes which may rise under this contract, or as to its performance or nonperformance, and which are not disposed of by mutual agreement, may be determined upon petition of the contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary of War selects a board as his authorized representative to hear and determine any such claims, doubts, or disputes, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or such duly authorized representative or represen-



James F. Nagle

tatives shall be final and conclusive on all matters submitted for determination.

Two months later, the War Department created the Board of Contract Adjustment on November 16, 1918, by General Order No. 103, "to hear and determine all claims, doubts or disputes" arising from War Department contracts. The Board had not begun to function when the war ended on November 11, 1918. Consequently, once operational, it was inundated with contract termination claims. Two years later, it became the appeals section of the War Department Claims Board. It expired in 1922 when war claims were finally completed.

After the war, the Interdepartmental Board of Contacts and Adjustment, a board of the newly created Bureau of the Budget, had, as one of its major tasks, standardizing contracts, including clauses. In its 248th meeting, on August 13, 1926, it promulgated the standard disputes clause.

The approach of World War II formalized the process. War Department General Directive No. 72 of November 7, 1941, required the heads of all War Department activities to establish boards consisting of at least three members who "preferably" possessed legal training to: (1) investigate and determine facts in each case and afford the contractor the opportunity to present evidence in support of its contentions; (2) determine all essential facts and prepare an advisory estimate for the chief of engineers and the undersecretary of war; and (3) ensure complete and fair justice to the legitimate claims and contentions of contractors, subject to the limitation that neither the board nor any officer or official could surrender any asset of the United States without consideration. In addition to such contract settlement boards, the War Department also established the Board of Contract Appeals and Adjustments to advise the Secretary of War. On November 22, 1941, the Corps of Engineers established its Contract Settlement Board pursuant to the War Department directive.

To settle disputes that arose from the mass of hurriedly prepared and often changed contracts during World War II, the War Department Board of Contract Appeals, patterned after the World War I boards, was established on August 8, 1942. The Navy created a similar board in 1944. The War Department Board of Contract Appeals became the Army Board of Contract Appeals in 1947, then was replaced on May 1st, 1949 by the Armed Services Board of Contract Appeals which was created by joint directive of the Secretaries of the Army, Navy, and Air Force. Other agency boards soon followed. So a version of the modern system had emerged.

Immediately after the war, the importance of the boards of contract appeals was elevated by a most unlikely ally—the United States Supreme Court. Indeed the Supreme Court during this period exhibited more faith in the ability of the boards than did the Court of Claims and many government contracts practitioners. In 1946, in *United States v. Holpuch*, the Court held that contractors were required to exhaust their administrative remedies in the boards before a court could hear a case falling within the bounds of the disputes procedures. That made the boards a necessary stopping point in the contract dispute resolution process. Four years later, in *United States v. Moorman*, the Court sanctioned provisions in early disputes clauses which made such administrative decisions final and unreviewable as to questions of law. The next year it sanctioned such provisions which made the decisions unreviewable even as to questions of fact unless the court found fraud.

Congress reacted to these decisions in the so-called Wunderlich Act which limited the finality of board decisions and

made them fully reviewable as to all questions of law but nonreviewable as to questions of fact unless the decision was based on fraud or capricious or arbitrary, or so grossly erroneous as to necessarily imply bad faith or as not supported by substantial evidence.

After passage of the Act, the Executive Branch adopted a standard Disputes clause which remained in effect for over two decades. It stated a decision of the Contracting Officer would be final and conclusive, "unless, within 30 days of the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary."

Following such appeal the contractor was entitled to a hearing before the agency board of contract appeals. Relief obtainable from the board was limited to that provided by the contract itself and did not extend to claims for contract breach, reformation, or rescission. For such claims the contractor could pursue his Tucker Act remedies in the Court of Claims or in a Federal District Court. This limited jurisdiction resulted in a substantial amount of jurisdictional litigation and the possibility of fragmentation of remedies.

The Court of Claims had no specific statutory authority to review an appeals board decision. However, as a matter of course, such decisions were reviewed when a contractor filed Tucker Act claims seeking contractual relief which had been denied by a board decision.

Such a Disputes clause was at the heart of the next great Supreme Court decision impacting the boards. In its 1963 decision in *United States v. Carlo Bianchi & Co.*, the Supreme Court ended de novo review of contract appeals board decisions by the Court of Claims. The Court concluded that Congress intended that the boards hear all the evidence. Otherwise, "needless duplication" of evidence imposing a heavy burden of time and expense would occur. The Court found that an agency's decision may be supported by the "substantial evidence" contained in the administrative record, even though "it could be refuted by other evidence that was not presented to the decision-making body." Thus, the Court ruled that in contract disputes cases that initially arose before the boards of contract appeals, the Court of Claims in its appellate capacity was limited to review the administrative record and could not receive new evidence.

The *Bianchi* decision greatly increased the boards' significance in deciding government contract disputes. Before *Bianchi*, contractors' strategy sometimes entailed a pro forma appeal to the board, hoping for an acceptable result with a minimal investment of time, effort, and money. If unsuccessful, the contractor could then appeal the board's decision to the Court of Claims, where it made a full scale effort. *Bianchi* transformed the boards from "mere way stations" to essential trial forums. The increased weight given to their decisions impelled the boards to improve their procedures. So *Bianchi* accelerated the "judicialization" of the boards of contract appeals.

Critics doubted whether the boards were up to the task. Judge J. Warren Madden, author of the Court of Claims decision in *Bianchi*, publicly argued that the Supreme Court erred "in the conferring of legal status and effect upon the proceedings which should have only the status of haggling and negotiation between the parties." Others questioned whether the boards were sufficiently independent to reach impartial decisions.

[T]here is reason to believe that the independence of many boards of contract appeals may be unduly affected by their close relationship with the

office of general counsel in the various agencies. The high percentage of boards using part-time—as distinguished from ad hoc—membership raises the possibility that the adjudicative functions of these part-time members may be unduly encroached upon by their other agency duties. Lastly, the fact that most of the boards draw their membership from the government service—many of them from the agency itself—must inevitably color the viewpoints of these members to some extent.

The House of Representatives even considered but rejected a bill to overrule *Bianchi* legislatively:

The final Supreme Court decision involving the prestatutory disputes process was *S&E Contractors, Inc. v. United States*, where the Court held the government had no right of appeal from a board decision. The Court's logic was that since the board acted on behalf of the Secretary, the Secretary could not appeal his own decision.

The Commission on Government Procurement in 1972 conducted an exhaustive study of government procurement, including specifically the boards of contract appeals. The Commission found that while most of the boards were composed of full-time members, several were staffed by lawyers on assignment from the Office of General Counsel of the agency and one was composed of two full-time members plus a panel of outside consultants. Government employees serving on these boards had no tenure but were civil service employees or military officers under the control of the head of the agency. Caseloads per members varied substantially. The Commission criticized this inconsistency among the boards and recommended that more uniform standards be established and that board members be given more stature.

Moreover, the boards were in a bit of a quandary. The boards had approximately 2,000 cases on their dockets, over one-half of which were cases under \$10,000. However, the need for procedures which allowed fast and efficient resolution of disputes was counterbalanced by the holding of the Supreme Court in *Bianchi* that the sole hearing was to be held in the boards. Implementing this decision required not only that the parties be provided full procedural due process, but also that the boards make a record that was suitable for judicial review. So the boards had gradually adopted rules which paralleled the Federal Rules of Civil Procedure in giving full discovery rights and full rights during the hearing of the appeal—developments which led to the boards being criticized for being “over judicialized.”

As a result, the Report of the Commission on Government Procurement criticized the boards for failing to provide a “speedy, economical administrative remedy for the resolution of small claims.” The Commission recommended that legislation be passed to establish “a system of regional small claims boards to resolve disputes involving \$25,000 or less.”

In drafting the Contract Disputes Act of 1978, Congress scrutinized the organization and authority of the existing boards to determine what changes to make. Professor Harold C. Petrowitz, a leading expert on government contracts, served as a consultant to the Senate Select Committee on Small Business. Professor Petrowitz's report examined the history of the boards and analyzed their authority, composition, procedures, and workload. His recommendations profoundly affected the new statute.

When President Carter signed the Contract Disputes Act

into law on November 1, 1978, he said that the act was “landmark legislation:”

[I]t provides for the first time a uniform statutory base for the resolution of claims and disputes arising in connection with Federal contracts. The previous process was a mass of confusing and sometimes conflicting agency regulations, judicial decisions, decisions of agency boards of contract appeals, and statutes. This act will provide a much more logical and flexible means of resolving contract disputes. It should lead to savings for Federal agencies and their contractors.

The Contract Disputes Act of 1978 created the agency boards of contract appeals by statute rather than regulation and gave them the same powers as the Court of Claims in deciding contract claims, thus enlarging the boards' jurisdiction to reach claims for contract breach, reformation, and recession. In a major change, the Government was given the same rights of appeal upon approval of by the agency head and the Attorney General, thus, overruling the decision of the Supreme Court in *S & E Contractors vs. United States* and confirming the boards as independent decision makers.

AGENCY BOARDS

Section 8(a)(1), 41 U.S.C. § 607(a)(1), authorized the head of each executive agency to establish an agency board of contract appeals when, after consultation with the Administrator of Federal Procurement Policy, he “determines from a workload study that the volume of contract claims justifies the establishment of a full-time board of at least three members who shall have no other inconsistent duties.” The Senate report added

only those duties that are complementary to the hearing and deciding of appeals shall be added to the responsibilities of board members. The administrator of Federal procurement policy is responsible for identifying those duties which are consistent. Where the administrator finds that the execution of non-inconsistent duties is getting in the way of the primary duty of the boards - expeditious, less formal, less expensive resolution of government contract claims - the administrator shall eliminate those duties he identifies as non-beneficial.

OFPP conducted a complete analysis of the workloads of all appeals boards following the enactment of the Act and issued guidance on the statutory provisions. OFPP Policy Letter 79-2, June 26, 1979, paragraph 3(b), defined “related contract actions”:

Related contract actions are those actions other than contract appeals that arise under contracts or grants and require the performance of quasi-judicial functions. These include debarments and suspensions, patent hearings, grant disputes, and public law 85-804 hearings.

OFPP found that only six agencies had Disputes clause workloads sufficient to justify a board of three full-time members, but recognized the final determination on this issue was the responsibility of the head of each agency under the Act. Agency heads could assign “related contract actions” to their boards in order to enlarge the workload sufficiently to support three full-time members. After conducting that initial workload study, OFPP allocated 61 positions at the GS 16, GS 17, and GS 18 grades authorized

under Section 14(g) of the Contract Disputes Act.

OFPP spread the positions as follows: Department of Agriculture - 4, the Department of Defense - 33, Corps of Engineers - 5, Department of Transportation - 4, General Services Administration - 11, Veterans Administration - 4. In addition OFPP reserved seven positions at these grades for four agencies because the head of the agency had determined that its workload justified an appeals board: Department of Energy - 1, Department of Housing and Urban Development - 2, Department of the Interior - 2, National Aeronautics and Space Administration - 2. Only one agency board of contract appeals was eliminated as a result of 8(a)(1) - the Department of Commerce Board of Contract Appeals, whose functions were transferred to the Department of Interior Board of Contract Appeals.

Congress' call for a full-time board of at least three members with no inconsistent duties corrected a failure that infected some smaller boards whose members served part-time from the agency legal office that would advise the contracting officer on the merits of the contractor's claim and represent the agency before that part-time board in opposing that contractor's claim. So the statutory reform was a major step toward assuring the independence of the boards.

Section 8(c) provided that if "the volume of claims is not sufficient to justify an agency board under Section 8(a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency." If such an arrangement cannot be made, the agency head "shall submit the case to the administrator for placement with an agency board."

Section 8(a)(1) required that agency workload studies "be updated at least once every three years and submitted to the administrator" who, was to be directly involved in an advisory role in the process for justifying the setting up, and should the case be necessary, closing down of agency boards."

JUDGES

Under Section 8(b)(1) "the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to § 3105 of Title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years experience in public contract law." According to the Senate Report:

The principle purpose of having agency board members selected and appointed to serve in the same manner as hearing examiners appointed pursuant to Section 3105 of Title 5 is to ensure the independence of contract appeals board members as quasi-judicial officers. In other words, the method of appointment prescribed by Section 8(b)(1) is intended to guarantee that contract appeals board members, like hearing examiners (administrative law judges), be appointed strictly on the basis of merit, and that in conducting proceedings and deciding cases they would not be subject to direction or control by procuring agency management authorities.

Unfortunately, unlike agency inspectors general, agency boards do not have control of the appropriation request to Congress and thus depend on their parent agency to obtain adequate funding. Some

agencies such as the GSA administratively removed its board from the Administrator's office, creating it as an independent administrative entity responsible for its own budget, procurement, and staffing.

Administrative law judges are protected by 5 U.S.C. § 7521(a) "an action may be taken against an administrative law judge appointed under Section 3105 of this title by the agency in which the administrative is employed only for good cause established by the Merit Systems Protection Board on the record after opportunity for hearing before the board." This went a long way to establishing the independence of the boards and their immunity from direction and control by agency procurement officials.

PROCEDURES

Congress explained its goal in section 8(e): "an agency board shall provide to the fullest extent practicable, an informal, expeditious and inexpensive resolution of disputes. . ."

However, in Senate Report 85-1118, at page 12, Congress recognized the difficulty

The boards of contract appeals were originally intended to provide a swift, inexpensive method of resolving contract disputes. Their operations and procedures have, however, been changed over the years by the demand and requirement for due process. Because of the Supreme Court decisions and the Wunderlich Act, contractors and their counsel have become increasingly aware that a hearing before an agency board is often their only opportunity fully to develop and present their case. As a consequence, the parties pressed for adoption and implementation at the board level of all procedures associated with due process: full discovery, filing of responsive pleadings and briefs, and thorough adversary hearings with witness cross-examination. The dictates of justice in these disputes have emphasized thoroughness and due process at the expense of both speed and cost and the procedures of the boards have thus become increasingly formalized through demands by contractors and their counsel that further safeguards be afforded them.

But the present procedures neither provide full due process for the large, important claims, nor are a speedy, economical administrative remedy for resolution of small claims. By compromising these inherent contradictions in the agency board system, neither has been met adequately . . . just as inefficient operation of the contract disputes-resolving system can be obtained best with a flexible system that provides alternative forums for resolution of particular kinds of disputes.

Congress recognized this tension between efficiency and full procedural due process; but Senate Report 95-1118, 95th Cong., Second Sess. (1978), explained at 25:

Rules and regulations developed for the boards [should] be more informal and expeditious and less expensive than comparable proceedings in the courts. The contractor should feel that he is able to obtain his "day in court" at the agency

boards and at the same time have saved time and money through the agency board process. If this is not so, then contractors would elect to go directly to court and bypass the boards since there would be no advantage in choosing the agency board route for appeals. The process by which the agency board proceedings take place should be of sufficient positive value in time and monetary savings that contractors would elect to take their appeals to the agency board.

While Congress recognized the need for improvement in the procedure for resolving claims involving small dollar amounts, it rejected the recommendation of the Commission on Government Procurement to establish regional boards to handle those claims since it concluded that such an approach would involve needless duplication and dilution of disputes resolution resources. Instead, to encourage the efficiency of the boards, Congress authorized two less formal types of procedures, an accelerated procedure and an expedited procedure for small claims. To strengthen the ability of the boards to provide an effective forum, Congress also granted the boards subpoena power in 41 U.S.C. § 610, although this power should be substantially strengthened.

The Result - A Subjective Appraisal

The goal, therefore, of Congress was to establish a board system that was less formal, less expensive and more expeditious than the courts. Congress wanted the boards to remain as a "true alternative to a court proceeding." Indeed the Senate recognized that "complete consolidation of the boards, however, would only result in the creation of a completely judicialized and formalized new 'court' regardless of its title."

Congress' goals are mutually compatible. The speed of resolution is often only accomplished if the proceedings are handled relatively informally. The more detailed and formalized the proceedings become, the more they slow down and the more expansive they become.

Virtually all practitioners, I believe, would agree that two of those goals have been achieved. I don't know of any lawyer who would state that the boards are more formal or more expensive than the courts, but in fact would concede that they are substantially less formal. While litigating a multi-million dollar case is going to be expensive regardless of the forum, there is nothing in the boards' rules which would require them to be as expensive as similar court litigation.

The boards do many things extremely well and are both user friendly and litigation compatible. They have the ability to encompass multi-million dollar cases involving the most complex factual and legal issues; but they can also handle with equal aplomb a small claim involving one relatively simple dispute. Without a jury, they can be much more informal, both in procedures and the rules of evidence. The Rule 4 file wonderfully simplifies the admission of the avalanche of papers that seems to engulf every government contract case. The boards' worldwide jurisdiction and their willingness to go to where the witnesses are is an enormous help, as is their willingness to conduct conferences via telephone. Moreover, without legal technicalities and procedural hurdles, contractors can handle many matters pro se when they would otherwise be unable to process the appeal.

Without a jury and with a knowledgeable and experienced judiciary, the boards can provide an outstanding forum. Ask any lawyer how different it is to prepare a case for a board of contract appeals as opposed to preparing it for a jury or state or federal district court judge, who may not have the foggiest idea what the differing site conditions clause is all about or what a termination for convenience is.

One major problem with the boards however, is the length of time it takes for a non-small claims issue to be decided. The widespread use of ADR by the boards is both laudable and lamentable - because the boards themselves were meant to be such alternatives to full court litigation. Part of that painful delay is certainly not the boards' fault. By statute, they are required to adhere to the small claims process which can immediately bump small dollar value cases higher in priority than other matters. As if that were not enough, parties often take a long time for the discovery process simply to wade through the paper work and witnesses that are common in government contracts.

Two matters are within the control of the boards. First is the length of their decisions and the length of time it takes them to write such opinions. Board decisions contain lengthy factual findings, yet, it is surprising how often only a few of the findings of fact are cited in the relatively brief decision portion. Perhaps the judges are taking the view of *Bianchi* to heart and producing an abundantly clear record for the reviewing court as to what was considered and what was found by the board. I am not sure it is worth the trouble. In so doing the boards seem to be falling short of their initial goal to provide a quick, informal resolution. Board judges seem to fall prey to something that is well known among publishers. It is called "researchitis." Once authors have uncovered a fact in the course of their research, they feel duty bound to include it in their work and strike it only at the behest, rigidly enforced, of the editor, announcing that the article or the book must be cut by a third or a half. The board judges need such an editor.

Secondly, boards still adhere to the rule of decisions by collegial agreement. This seems to be an anachronism long past its usefulness. Despite their title of "board of contract appeals," they do not function truly as an appellate court. Their review is de novo and the decision of the contracting officer has no legal significance once a timely appeal has been made. I and most of my colleagues, either at the government or contractor side, have faith in the board judges' intelligence, knowledge, and experience. So why bother with this useless and time consuming effort of involving two or more other judges to read the briefs and the proposed decision?

Conclusion

The dispute resolution process mirrors the contracting system of which it is a part. Expecting this procurement system — in which contracts are measured in linear feet (once all the provisions, clauses, regulations, standards and specifications are included), claims often reach seven, eight or nine figures, and the goods and services being provided are mind bogglingly complex — to produce a "quick and dirty" dispute resolution process is both foolish and short-sighted.

The board process, as frustrating as it can be, is a product of the system and our lawyerly demands for the full rights and procedures such high stakes cases demand. The failure of the boards to fully achieve the goal of quick, informal, inexpensive dispute resolution should not disguise or undercut their enormous successes and contributions.

New Feature
Practice Tips Corner

by the Honorable Allan Goodman
Board Judge, GSBCA

As a Board Judge, I have greatly minimized the number of discovery disputes by advising counsel in the initial preliminary conference (after the answer is filed) that I am always available to resolve a discovery dispute on short notice. Even if they are in a deposition and a dispute arises during the deposition, they can call me and request a conference call. If I am in a hearing I will handle the conference call at the next recess. I request that they avail themselves of my accessibility before they file a motion to compel. What I have found is that the number of discovery disputes has decreased markedly. I can only assume that the possibility of immediate judicial intervention and the admonition not to begin filing discovery motions without talking to me is an added incentive to resolve discovery disputes with promptness and reason.

For additional about practice at the GSBCA board and articles regarding ADR, please visit my web site at <http://www.erols.com/arbmed/gsbca.htm>. The GSBCA's web site, which contains the Board's Rules and decisions is <http://www.gsbca.gsa.gov>

TREASURER'S REPORT

by Peter A. McDonald



Peter A. McDonald

**BCA Bar Association
Statement of Financial Condition
For the Period Ending March 15, 1999**

Beginning Balance		\$ 11,443.29
Fund Income:		
BCA Meeting materials	\$ 37.50	
Subtotal		\$11,480.97
Fund Disbursements:		
<i>The Clause</i> , winter issue	\$ 1,714.26	
Ending Cash Balance		<u>\$ 9,766.53</u>

Board Meeting Minutes

12/8/98 & 2/9/99

December 8, 1998

BCABA Meeting Board of Trustees Minutes at Holland & Knight

- A. Call to Order.
- B. Motion to accept the Secretary's Minutes from last meeting, Seconded, and Passed.
- C. Motion to accept the Treasurer's report (subject to audit), Seconded, and Passed.
- D. Bulk Mail Permit:
Large-size of Clauses expected of 20-40 pages per copy dictates BCABA to apply for permit.
- Pete McDonald and Dave Metzger are examining the "break even" number of prices per mailing to be cost-effective.
- E. Web Page for BCABA:
Approximated costs of \$170 to build website, with approximately \$20 per month fee to "host" site, (may grow to \$300 per month if there are a large number of hits to download BCA decisions (Approximately \$240 per year)).
Ty Hughes and Andre Long have been "spearheading" drive to develop a website, and Dave Metzger will follow up with judges determining their support for putting decisions, including single judge (discovery and other procedural) decisions on the web. It was not clear whether Judges are supportive, but net result should be fewer discovery disputes.
Hugh Long and the Board Members equally were highly supportive of commitment to have a website as an avenue for private bar of practicing attorneys to access information and volunteered his time, and that his wife, in building the website.
Dave Metzger suggested that BCABA Board proceed on approving \$410 in funds to put up a website and maintain it for one year.
Mr. Hughes and Andre Long will continue to monitor the website and one or more "Gold Medal Firms" will be approached to support keeping the website current.
So moved, seconded, and unanimously approved by BCABA Board.
- F. Rolling "Gold Medal" organization Memberships:
BCABA addressed the need to keep "Gold Medal" organization memberships open and pro rate membership fees.

James McAleese
Secretary

BCABA Meeting Minutes

Meeting held at Holland and Knight on February 9, 1999

- I. Dave Metzger, President, Called the meeting to order at 12:07 pm. The following were present: Metzger, Kienlen, Wixon-Bonfiglio, McAleese by telephone, & Alan Brown.
- II. Treasurer's Report (Given by Dave Metzger in Pete McDonald's absence)
- A. Gold Medal Firm - Seyfarth, Shaw, et al contributed 30 members;
 - B. Draft copy of directory presented with over 500 members;
 - C. Problem - Government pays for annual program but we have no idea who checks are for - how do we ensure we credit the appropriate person for membership?;
 - D. The summer of 1999 will be the next request for annual dues and the next issue of The Clause will have instructions on how the government should handle membership and meeting expenses.
 - E. WE ARE NOW FINANCIALLY SOLVENT!!!
 - F. Agenda for the Rest of the Year
 1. What does the BCABA stand for?;
 2. The next issue of The Clause will have one article from Jim Nagle on a broad history of the Boards, what they have gone through - transformation, and where they are going in the future. Chip Retson will be working on an article too and we should also have an article on ADR;

3. Everyone should consider "Perspectives on the Boards" Views and Perspectives from members;
- G. Motion to Adopt Treasurer's Report - Accepted.
- III. Secretary's Report - McAleese
- A. Reiterated the need for more information from government members;
 - B. Agreed that majority of Secretary's report covered in Treasurer's Report;
 - C. Motion to adopt Secretary's report - Accepted.
- IV Practice and Procedures Committee
- A. February 18, 1999 meeting to be held on depositions;
 - B. We want these to be regular events;
 - C. No judge will be charged.
- IV. President's Report
- A. Annual Program - The Carlton is where it will be again;
 - B. Alan Brown however is getting additional quotes form 2-3 hotels;
 - C. Topics for annual program include: Price Based Contracting, Health Care Costs. Judges Panel will be in the afternoon;
 - D. BCABA Web Site: Well underway;
 - 1. Will be ready in the early spring or summer;
 - 2. We will try to get decisions on the site;
 - E. Tribute to Jim Dobkin's will be in the next Clause - Please e-mail Dave Metzger any short attribution you may have so it can be published in The Clause as well;
 - F. Directory - Dave Metzger would appreciate your comments. Please fax Esther Townsend any changes immediately. It will be done in-house at Holland and Knight.
- V. Motion to Adjourn the meeting - Accepted at 1:34 pm.

James McAleese, Secretary

Board of Contract Appeals Judges Association Annual Seminar

On Wednesday, April 21, 1999, 8:00 a.m. - 5:00 p.m., the BCA Judges Association will hold its Annual Seminar at the Hilton Alexandria Mark Center Hotel, 5000 Seminary Road, Alexandria, VA. The theme is GOVERNMENT CONTRACT LITIGATION: FORUM, PROCESS, & MEDIATION. The panels will present WHICH FORUM TO CHOOSE, THE COURT OR THE BOARDS? FINDING THE RIGHT RECIPE FOR A PRACTICAL AND JUST RESOLUTION OF THE DISPUTE; THE CDA CLAIMS PROCESS - IS IT WORKING? WHAT NEEDS FIXING?; THE IMPACT OF RECENT COURT AND BOARD DECISIONS ON GOVERNMENT CONTRACT LAW; and USING MEDIATION TO RESOLVE THE HIGH-VALUE CONTRACT DISPUTE - A PROMPT PEACE IN AN OTHERWISE LONG WAR. Robert F. Bauer, special counsel to the U.S. Senate for the impeachment trial, will speak on AN UNHOLY ALLIANCE OF LAW AND POLITICS: THE IMPEACHMENT OF PRESIDENT CLINTON.

A reception follows the seminar. CLE approval is pending in Florida, Kentucky, Ohio, and Virginia.

The registration fee is \$125. For more information, call Miki Shager at (202) 720-6229 or e-mail at Mshager@usda.gov.

STATE AND FEDERAL EFFORTS TO ASSERT SOVEREIGN IMMUNITY AGAINST THE YEAR 2000 PROBLEM

by
Clarence D. Long¹, USAF, Pentagon

The year 2000 problem, most primitively defined as the inability of software/hardware systems to deal with the transition from 2 digit to 4 digit date systems, has been growing in American consciousness for three years. To a considerable extent it may be beyond the possibility of real repair in time to avert mishaps.

SUMMARY OF CURRENT FEDERAL LEGISLATION

Under the Federal Tort Claims Act (28 USC Sections 1346, 2671-2678, 2680), citizens may sue an agency of the federal government if they are injured as a result of the agency failing to render its computers Year 2000 compliant in time due to the negligence of the agencies' employees? Various exceptions are listed in the Tort Claims Act where the federal government may not be sued for tort liability, such as an exception for "discretionary functions."⁺

Under the Tucker Act (28 USC Sections 1346(a), 1491), citizens or companies may sue the federal government for breach of contract and other monetary claims not arising in tort due to the failure of one or more federal agencies to render their computer systems Year 2000 compliant. The Tucker Act empowers the Claims Court to hear suits against the federal government based on any contract with the government (express or implied) so long as the suits seek primarily money damages and do not involve tort claims. [Excerpt from [http://www.year2000.com/archive/Nflegal issues.html](http://www.year2000.com/archive/Nflegal%20issues.html)]

PROBLEMS WITH CURRENT LEGISLATION

If Air Force and other DoD and executive agency computers and embedded chips fail in the Year 2000, the Air Force and other executive agencies may be liable to others in certain circumstances.

Of course, under the Federal Tort Claims Act, the United States is liable as a private person would be for common law torts. The Air Force applies the same rule for negligence claims under the Military Claims Act. Negligence is not required under the Foreign Claims Act, nor in noncombat activity claims under the Military Claims Act.

For negligence claims, the claimant must show the existence of a duty, that the Air Force breached that duty, that the breach of the duty was the proximate cause of the harm, and that there are compensable damages. Prosser notes that negligence may be "defined as conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm": Of course, there is no black and white answer as to what constitutes an unreasonable risk of harm in different circumstances. Often, the more grave the consequences, the greater the duty to guard against possible harm.

Consequently, if the harm is foreseeable, the United States may be liable if it does not take action to prevent any injury. For example, suppose that the Year 2000 computer problems cause life sustaining equipment in a hospital to cease functioning. The consequences of an equipment failure at the hospital are grave, thus creating, perhaps, a greater duty to foresee and guard against just such an event. Indeed, hospitals are generally equipped with back-up generators. Would the Air Force be liable if death or injury were caused by the hospital equipment failure? If the equipment stopped functioning tomorrow, with no Year 2000 problems, and we would otherwise be liable because of the mere failure of the equipment to operate, then we would still be liable if the cause is Year 2000 problems.

The issue becomes more complex when a seller or purveyor of goods is involved. As an illustration, some pharmacies now fill prescriptions using computer technology. What is the responsibility of the manufacturer if the equipment fails? Once again, the possibility of harm is grave. Does the manufacturer of the equipment have a duty to notify the purchasers of such equipment that it may fail? This will depend upon state law, and whether the jurisprudence is one of *caveat emptor*, of a continuing duty, or of something in-between. At the same time, one could argue that given the publicity surrounding the Year 2000 problems, the Air Force is already on notice that such equipment might fail, and should exercise special caution when filling prescriptions in January 2000 (indeed, it is likely that there is a duty today to independently check the prescription in case the computer fails for any reason). State law and the purchase agreement for the equipment will also govern whether or not the United States could seek contribution, indemnity, or an apportionment of joint liability from the manufacturer of the equipment for any injuries caused by incorrect medication.

The failure of air traffic control equipment would also cause grave danger. Given current guidelines for payment of noncombat activities under the Military Claims Act, the Air Force would pay for any military aircraft crash arising out of the failure of Air Force air traffic control devices. As to possible harm to private or commercial aircraft because of the failure of Air Force air traffic control devices, we once again have to examine our duty to provide that service, and our contingency plans if the equipment fails for any reason.

The more difficult case is the one between grave and disregarded consequences. For example, suppose that a computer failure causes a release of hazardous waste. Certainly, under environmental statutes, the Air Force has an obligation for clean-up. But, may an individual who is injured by the release collect under the Federal Tort Claims Act for negligence in causing the release? If proper back-

up systems are in place because of the possibility of a computer failure-for any reason-then the United States should avoid any FTCA liability. Moreover, there is a discretionary function argument regarding the priority of fixing Year 2000 problems. In other words, the Air Force has an argument that resources were prioritized, and that command, control and communications systems were at the head of the list. If there was not enough time, money or manpower to address the possible release of a hazardous waste, then the United States should win any lawsuit on the exception under the FTCA for discretionary functions of the government. At the same time, if the Air Force recognizes a definite hazard for an unlawful release of hazardous waste exists, and fails to act (even if "acting" means shutting down the equipment), then the discretionary function defense will not be viable.

We should also note the possibility of an increase in claims under the Military Personnel and Civilian Employees' Claims Act. If the electricity in base housing is computer controlled, and it ceases to function, we could have a number of food spoilage claims. Or, if the heat goes out, there could be damage to property because of frozen pipes (since this will occur in January).

There is also the issue of pay. DFAS might have some liability under the statute which allows for payment of overdraft charges when DFAS does not properly transfer money to a financial institution.

Liability under the Tucker Act is less dramatic, but still very much a possibility in a Y2K scenario. Claims might be brought for failure to pay contractors for products delivered, work performed or, progress made; for failure to provide an on base environment in which work could be performed, for failure to deliver electricity from Government operated power plants;

In summary, executive agencies can be liable for Year 2000 computer problems. Liability will depend upon the particular factual scenario, local law and federal law. Whether or not the United States can recover in indemnity or contribution from the manufacturer of computer-controlled systems will also be factually dependent, as well as governed by federal and local law.

In the forthcoming year (1999), the insurance companies are alleged to be invoking the Year 2000 exceptions to the insurance clauses. *All states except Massachusetts and Maine* have allowed insurance companies to disavow coverage for Y2K problems. [Mealey's Year 2000 Report, October 13, 1998]

While working to solve any Year 2000 computer problems, if the Air Force and the other executive agencies desire to protect against liability, then the agencies should also develop contingency plans if equipment fails and there is a recognized danger.

STATE STATUTES

Beginning in the Spring of 1998, a movement to immunize government at various levels began across the nation. Six states have so far passed such legislation, and, most, if not all others have or are considering passing some sort of protective statute. The States that have, as of December 15, 1998, provided immunity for themselves against Year 2000 claims are Georgia, Florida, Virginia, Iowa, and Nevada, and New Jersey.

Typical language used is:

FLORIDA STATUTES 1998
***** THIS DOCUMENT IS CURRENT THROUGH THE 1998 LEGISLATIVE SESSION *****
TITLE XIX PUBLIC BUSINESS
CHAPTER 282 COMMUNICATIONS AND DATA PROCESSING
PART I INFORMATION RESOURCES MANAGEMENT
Fla. Stat. @ 282.4045 (1998)

282.4045 Immunity for state agencies and units of local government for year 2000 computer date calculation failures.

The State of Florida, its agencies, and any unit of local government shall be immune from damages consistent with s. 768.28. For purposes of this section, the state's agencies or instrumentalities shall be deemed to include any public or private university school of medicine that is part of a public or private university supported in whole or in part by state funds and that has an affiliation with a local government or state instrumentality under which the medical school's computer system or systems, or diagnostic or therapeutic equipment dependent upon date logic, are used to provide clinical patient care services to the public.

HISTORY: s. 4, ch. 98-331.

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***** THIS SECTION IS CURRENT THROUGH THE 1998 SUPPLEMENT *****
***** (1998 SESSION OF THE GENERAL ASSEMBLY) *****
TITLE 36. LOCAL GOVERNMENT
PROVISIONS APPLICABLE TO COUNTIES AND MUNICIPAL CORPORATIONS
CHAPTER 60. GENERAL PROVISIONS
O.C.G.A. @ 36-60-20 (1998)

@ 36-60-20. Political subdivisions have no liability for losses from any failure or malfunction of computer software

(a) As used in this code section, the term "political subdivision of the state" means any office, agency, department, commission, board, division, and institution of any county or municipality of the State of Georgia.

(b) A political subdivision of the state shall have no liability for losses from any failure or malfunction occurring before December 31, 2005, which is caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times, if the failure or malfunction causing the loss was unforeseeable or if the failure or malfunction causing the loss was foreseeable but the plan or design or both for identifying and preventing the failure or malfunction was prepared in substantial compliance with generally accepted computer and information system design standards in effect at the time of the preparation of the plan or design.

HISTORY: Code 1981, @ 36-60-20, enacted by Ga. L. 1998, p. 850, @ 1.

NOTES:

EFFECTIVE DATE. -This Code section became effective July 1, 1998.

CODE COMMISSION NOTES. -Pursuant to Code Section 28-9-5, in 1998, this Code Section enacted as Code Section 36-60-19 was renumbered as 36-60-20.

USER NOTE: For more generally applicable notes, see notes under the first section of this subpart, part, article, chapter or title.

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***** (1998 SPECIAL SESSION I) *****

TITLE 8.01. CIVIL REMEDIES AND PROCEDURE

CHAPTER 3. ACTIONS

ARTICLE 18.1. TORT CLAIMS AGAINST THE COMMONWEALTH OF VIRGINIA

Va. Code Ann. @ 8.01-195.3 (1998)

@8.01-195.3. Commonwealth, transportation district or locality liable for damages in certain cases.

Notwithstanding any provision hereof, the individual immunity of judges, the Attorney General, attorneys for the Commonwealth, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized. Any recovery based on the following claims are hereby excluded from the provisions of this article:

* * *

8. Any claim arising from the failure of a computer, software program, database, network, information system, firmware or any other device, whether operated by or on behalf of the Commonwealth of Virginia or one of its agencies, to interpret, produce, calculate, generate, or account for a date which is compatible with the "Year 2000" date change.

* * *

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***** (SIXTY-NINTH (1997) SESSION) *****

TITLE 3. REMEDIES; SPECIAL ACTIONS AND PROCEEDINGS

**CHAPTER 41. ACTIONS AND PROCEEDINGS IN PARTICULAR CASES CONCERNING
PERSONS LIABILITY OF AN ACTIONS AGAINST THIS STATE, ITS AGENCIES AND POLITICAL
SUBDIVISIONS**

Nev. Rev. Stat. Ann. @ 41.0321 (1997)

@ 41.0321. Conditions and limitations on actions: Incorrect date generated by computer or information system; limitation on liability; contracts must contain immunity provision. [Expires by limitation on December 30, 2005.]

1. No cause of action, including, without limitation, any civil action or action for declaratory or injunctive relief, may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions on the basis that a computer or other information system that is owned or operated by any of those persons produced, calculated or generated an incorrect date, regardless of the cause of the error.

2. Any contract entered into by or on behalf of and in the capacity of the State of Nevada, an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions must include a provision that provides immunity to those persons for any breach of contract that is caused by an incorrect date being produced, calculated or generated by a computer or other information system that is owned or operated by any of those persons, regardless of the cause of the error.

3. Any contract subject to the provisions of this section that is entered into on or after June 30, 1997, has the legal effect of including the immunity required by this section, and any provision of the contract which is in conflict with this section is void.

HISTORY: 1997, ch. 266, @ 1, p. 914.

NOTES:

EDITOR'S NOTE. -Acts 1997, ch. 266, @ 5 provides: "This act becomes effective upon passage and approval or on June 30, 1997, whichever occurs earlier and expires by limitation on December 30, 2005."

EFFECTIVE DATE. -This section became effective June 30, 1997.

USER NOTE: For more generally applicable notes, see notes under the first section of this chapter or title.

OTHER EFFORTS

In addition to the states named above, the following states introduced but failed to pass or sign immunity legislation during 1998: California, Georgia, Hawaii, Illinois, Indiana, Kansas, New Hampshire, Pennsylvania, South Carolina, and Washington. Some of these were full immunity statutes, others were partial immunity or "Cap" statutes.

POSSIBLE FEDERAL EFFORT

DoD is contemplating forwarding the following legislation to Congress for consideration in the next session. The legislation so far drafted is more precise than the state statutes passed so far, in that the draft defines the actual problem with some precision. Whether the statute will be forwarded or passed is for the future to decide:

SEC. ____ . EXEMPTION OF THE UNITED STATES FROM LIABILITY FOR CLAIMS ARISING FROM "Y2K" COMPUTER PROBLEMS

Section 1346 of title 28, United States Code, is amended by adding a new subsection (h) to read as follows:

"(h)(1) The district courts and the United States Court of Federal Claims shall not have jurisdiction over any civil action, either in tort or in contract, for any cause of action arising from the failure of any computer or software system to be "Year 2000 compliant" or from the failure of any computer or computer software to correctly interpret the date "9/9/99" or the numerical sequence "9999."

"(2) As used in this section, the terms-

"(A) "Year 2000 compliant" means the ability to accurately process data (including, but not limited to, calculating, comparing and sequencing) from, into and between the twentieth and twenty-first centuries, including leap year calculations. It also includes the ability to avoid decay or corruption of computer or software system operation over time that would adversely impact data processing or delivery, or any other dependent activity; and

"(B) "Computer" and "software system" include any related service or system owned, leased or operated by the United States."

Sectional Analysis

This section amends section 1346 of title 28, United States Code, by precluding the district courts and the United States Court of Federal Claims from having jurisdiction over the United States as a defendant in any civil cause of action arising from the "Year 2000" computer problem.

CONCLUSION

Here we have a phenomenon that was completely predictable and with enough time and money was fixable. But it won't be completely fixed by the year 2000. So what should have been no more than a minor mishap could mushroom into a major economic setback or even a social crisis. Governments are as much victims as individuals.

1. The opinion expressed within this article are those of the author and should not be construed as those of the USAF or DOD.

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: \$35.00 (\$30.00 for Government Employees) [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: - _____

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email address: _____

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

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

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

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

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

SECTION III

Date: _____ Signature: _____

FORWARD THIS APPLICATION WITH A CHECK PAYABLE TO THE BCA BAR ASSOCIATION TO THE SECRETARY AT THE FOLLOWING ADDRESS:

James McAleese, Jr.
McAleese & Associates
8201 Greensboro Dr.
McLean, VA 22102
