

The Clause

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A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION



THE PRESIDENT'S COLUMN

Marcia Madsen

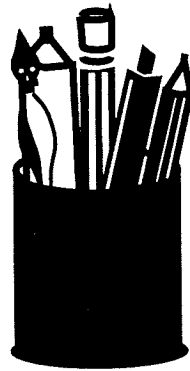
MORGAN, LEWIS &
BOCKIUS

During a recent conversation with a Chief Judge of one of the Boards he asked, "Is there a role for the Boards of Contract Appeals Bar Association today?" That question may be reflective of a deeper concern that goes to the role of the Boards of Contract Appeals. This year we have seen significant developments concerning the Boards. The NASA Board has been folded into the

Armed Services Board and the DOE Board has been merged into the DOE Office of Hearings and Appeals. At the same time these activities are taking place, the Pentagon is advocating yet more procurement reform and some of the civilian agencies are undergoing detailed oversight by Congressional Committees critical of their procurement practices. Moreover, a frequent agency response to the filing of an appeal is the initiation of a fraud investigation.

What is the role of the Boards in all of this? The debate on procurement reform has largely passed by the disputes process. The DOE Board, at least, was barely consulted on the merger. Buying agencies and the Justice Department take the view that a criminal investigation should cut off proceedings at a

CONTINUED ON PAGE 2



EDITOR'S CORNER

Peter A. McDonald

DELOITTE & TOUCHE

[Standard disclaimer.]

[Above average disclaimer.]

A few weeks ago, we met to plan the BCA Bar annual meeting. To liven the annual meeting up a bit, I suggested that awards be presented to individuals in certain categories. Initially, it seemed that my idea was favorably received. When I was asked what categories I had in mind, I drew up the following list:

- Worst dressed witness;
- Sleepiest judge (there'd be competition for this one);
- Most obnoxious opposing counsel (this one's pretty much mine);
- Highest per page copier cost in an EAJA application;
- Slowest decision (there'd be competition here, too);
- Fanciest exhibit;
- Most comfortable courtroom furniture;
- Most litigious (hey, we've got to give the Navy something);
- Most frivolous motion (these are my favorite);
- Highest per hour fee by a prevailing party;
- Most hostile witness;



CONTINUED ON PAGE 11

INSIDE

The Judge's Corner	2
Newest Members	6
Treasurer's Report	8
The Mediation Alternative	10
Termination for Convenience Bibliography	13
Contractor Claims: The Procedural Morass Continues	15
Interview with... COL James Babin	22
Accountant's Corner	25
Win-Win or Just Win?	27
EPA Final Guidelines for Contractor Indemnification	29
Consolidations Affect NASA and DOE Boards	34

Board. As practitioners before the Boards, we need to focus on the quality and nature of the disputes process. We should be asking ourselves whether it is important to our clients (government and private) to have access to an administrative forum for dispute resolution. We also need to examine our expectations for such a forum and determine whether the expectations are realistic.

Clients who file an appeal (or a protest at the GSBICA) may have an unrealistic expectation of justice and are frustrated with the disputes process. Many of them expect the Boards to function as a federal court, imposing the same type of discipline and holding to the same standards. It is difficult to explain wit-

nesses who do not show up for depositions, dispositive motions that take two years to decide, hearings where disjointed and cumulative testimony takes days and uses up resources, briefs that are not timely filed and other abuses of the system. All of these are issues that counsel practicing before the Boards could and should address if we expect our clients to willingly bring cases to the Boards.

I believe there is a need and a continuing role for the BCA Bar Association. However, the Association is only as viable as the participation of its members. The BCA Bar Association is the only organization of practitioners focused solely on the Boards. We have the unique ability to recommend changes, draft or comment on legislation, and take affirmative steps to improve the quality of practice and



JUDGE'S CORNER

NEW DIRECTIONS FOR THE GENERAL SERVICES BOARD OF CONTRACT APPEALS

Stephen M. Daniels

CHAIRMAN, GSBICA

[EDITOR'S NOTE: THIS ARTICLE FIRST APPEARED IN THE AMERICAN BAR ASSOCIATION PUBLIC CONTRACT NEWSLETTER, VOL. 28, NO. 3, SPRING, 1993. REPRINTED WITH PERMISSION.]

[THE VIEWS EXPRESSED BY JUDGE DANIELS ARE HIS ALONE AND DO NOT REPRESENT THE OFFICAL POSITION OF THE GSBICA, THE GENERAL SERVICES ADMINISTRATION, OR THE U.S. GOVERNMENT.]

To anyone who has survived, or even heard rumors about, the past year at the General Services Board of Contract Appeals

(GSBICA), the end of 1992—coming hard on the appointment of a new Board chairman—might bring to mind words spoken by Gerald R. Ford upon his becoming President: "My fellow Americans, our long national nightmare is over."

In January 1992, the Senate Committee on Governmental Affairs began an intensive management review of the Board's operations. In May, the Board's chairman announced his resignation, effective in September, to pursue opportunities in the private sector. Between May and the end of December, when I was appointed as the new chairman, the Board was without permanent leadership. The Senate Committee issued its report in November, documenting manipulative case assignments, the stifling of any opportunity for Board members to resolve internal disagreements about

justice at the Boards. The BCA Bar Association can take steps that are not possible or feasible for the judges. We can get involved in issues such as Board consolidation or changes to the jurisdiction or authority of the Boards, and attempted derailing of the disputes process by criminal investigations.

The BCA Bar Association has taken some steps this year to assist the Boards, but all of these efforts need more member support. I encourage every member to participate in the work of the Association's committees. There is more than enough work to do. For example, the BCA Bar Association will be co-sponsoring the Government Contracts Trial Advocacy Course with the ABA Section of Public Contract Law. The BCA Bar Association Committee on Practice and Procedure is preparing a practice

manual for the Boards and needs materials and suggestions. We are also attempting to develop a register of attorneys who may be willing to assist pro se appellants. There are a wealth of opportunities for those with the willingness to participate.

A strong and effective disputes process is good for the procurement system. Government buyers and contractors alike need to recognize that the disputes process imposes a necessary discipline on the system and effectively enforces the procurement laws and regulations. The BCA Bar Association definitely has a role in making sure that the process is effective.

decisions, wasteful spending, and the absence of any real management controls. The impression of a Board in disarray gained considerable currency.

Notwithstanding these difficulties, however, the individual members of the Board continued to perform their work—hearing and deciding cases—with energy, speed, and (we trust) skill. The Public Contract Newsletter published statistics that show that the GSBCA issues more than twice as many opinions, per judge, as the second most productive board of contract appeals. 27 Pub.Cont.Newsl., at 5 (No. 4, Summer 1992). The GAO continued to acknowledge that the Board's protest procedures work so well that they should be adopted (at least in part) by that competing forum. The Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Laws (the Section 800 Committee) also applauded the Board's protest procedures and practices. The same Senate Committee report that was highly critical of our management practices was greatly complimentary of the work of the judges.

Overall, then, the Board is in remarkably good shape. The members have been able to

surmount the obstacles placed in their way by poor management, and to ensure that the institution performs its fundamental mission well. If they can do so well under conditions of hardship, they should be able to do even better if the administrative duties are handled competently. The task before the Board now is to build on the excellence we have developed by constructing a management system that will support rather than impede the fundamental work of the institution.

In embarking on this task, we have to keep in mind a couple of essential principles. The first is that the Board is a judicial-type tribunal. Our location in the executive branch of government is a historical accident that may necessitate following various prescribed agency forms and procedures. That location is irrelevant to internal organization or functioning, however. The second principle is that in creating the boards, Congress vested all authority in the boards themselves; while chairmen and vice-chairmen may be designated by agency heads, they are given no specific powers. (The GSBCA chairman is the only board chairman who has any specific statutory authority, and that power is very limited: in a protest, he or

she may determine that due to the unique circumstances of the case, a period of time greater than forty-five working days is necessary for decision.)

From these principles, we are drawing some relatively obvious lessons about how the Board should be administered. When the Board performs its judicial mission, it should function

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as much like a court as possible—with collegial, rather than dictatorial, leadership. Decisions on matters of policy, such as rules of procedure and case assignments, should be made by majority vote of the judges. Decisions on matters of law should also be made by majority vote; if most of the members want to reverse the ruling of a panel, through full Board consideration of a case, they should be permitted to do so. Further, the rights of a minority of the judges should be respected; if a few members wish to dissent from the Board's determination not to order full Board consideration, they should be allowed to do so.

We have already taken some steps in this direction: by unanimous vote, the Board has issued proposed rules revisions for public comment; we have adopted an internal rule providing for assignment of cases by rotation and assignment of panelists at random; and I have given the judges my word that I will not exercise any judicial power vested in the chairman by the GSA Administrator's Charter unless directed to do so by a majority of the Board.

The lessons to be drawn from fundamental principles include directions relating to administrative actions, also. All such endeavors that involve the Board should advance the decisionmaking function. These actions should be under the supervision and general direction of the chairman, but they must be for the greater good of the entire Board, and not simply the chairman. As chairman, I am responsible for administrative matters, but I am not exclusively an administrator. The chairman is primarily a judge, and I'm concerned that if I don't hear my fair share of cases, I will quickly lose touch with what the Board really does. All the members of the Board, as well as its highly professional support staff, need to be consulted, and their views considered, in the formulation of administrative policy and procedures.

Our strategy for establishing a rational, constructive management system is simple. Current policies and procedures are being written down by the support staff—something that

was never done before—and will be analyzed and modified wherever appropriate. Committees headed by judges and including staff are hard at work on other administrative matters—trying to figure out how our computer system, library, and physical facilities can be made to serve us better. The committees discuss their proposals with Board members and staff generally and make final recommendations; and the chairman and vice-chairman review these recommendations and make decisions. This is also totally new to us; in the past, management was secretive, and we as members of the Board never knew what was going on.

We have already enlisted GSA consultants to advise us in this process. We plan to meet with representatives of other boards of contract appeals, and with court administrators, to learn how they operate. We take seriously the investigative work done by the Senate Governmental Affairs Committee, which is serving as an initial blueprint of areas of inquiry, and we expect to have a management improvement plan in place by June 30, as the Committee requested.

All of this is very important to us internally. I hope I'm not exaggerating by telling you that since last Christmas, the Board has become a much more open and happy place to work. I'm expecting to see the Board hear and decide cases faster as a result. And, this is important to litigants and their attorneys; it should give you confidence that we will soon be devoting our full attention to conscientiously hearing and resolving the cases you bring to us.

Making a single board of contract appeals run smoothly, fairly, and efficiently is obviously a commendable goal. Now that we are well on our way toward it, we must also begin to think about more global issues that will affect this Board and its headline jurisdiction, the protest process, in the years to come. These issues are of great importance to you as practitioners of public contract law also. If you haven't begun to think about them already, you ought to do it soon. I have in mind three particular issues: the organizational placement of the

Board and how it affects our function; protest jurisdiction with regard to goods and services being acquired by federal agencies; and the desirability of unifying protest venues, which the Section 800 Committee raised. What I have to say about these subjects are my personal views, not necessarily the views of the Board or any other members.

BCA BAR ASSOCIATION COMMITTEES

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There is a fundamental problem with the GSBCA and all other boards of contract appeals, and that is organizational location. We are just about the only people in the executive branch who have the authority to tell the people who appointed us that they are dead wrong and need to spend a lot of money to make things right. Compounding this problem, the people who are above us on the organizational chart have to spend some of the money they think Congress appropriated for their programs just to keep us going.

Naturally, this doesn't sit too well with the agency heads. And if they really want to, they can do something about it. When private companies have cases before us, they are limited in that they can bring to bear in that litigation only evidence and argument. The government, on the other hand—the party being sued—has many more tools at its disposal. The head of the agency in which the board is placed can start taking bites out of the board's budget. He can take away support personnel or space, or otherwise make working conditions intolerable. Simply because these powers exist—even if they are never used—the agency head can ex-

ercise a subtle influence over the outcome of cases.

If you doubt that the agency head will ever use these powers, I urge you to take a look at the Charter that the General Services Administrator promulgated for the GSBCA last spring. I have no doubt that the Charter was motivated by a sincere concern to establish a formal structure for relating the Board to the rest of the GSA. And I think the purpose was commendable. But this Charter, whether deliberate or not, has a few rough edges that infringe on the independence of the Board. The Administrator has asserted authority over some of the Board's statutory prerogatives, like issuing its own rules, and has delegated some of that authority to the chairman, whom he can replace every two years, perhaps simply if the chairman is not sufficiently compliant. I will be explaining to the new Administrator why these rough edges need to be smoothed off, and I welcome the Section's assistance in this regard.

There are two other principal ways in which the government can use the boards' position in the executive branch to prejudice the

NEWEST MEMBERS

The BCA Bar Association warmly welcomes the following new members:

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course of litigation against private companies. First, boards don't have the power to hold a party in contempt for violations of their orders; we would have to rely on the goodwill of the Attorney General to bring an enforcement action in a United States district court. Similarly, each board may issue subpoenas, but it has no power to enforce them, other than by making application to a district court through the Attorney General. If the Attorney General doesn't favor the board's order or subpoena, he can, through delay or outright refusal to act, ensure that enforcement never occurs. This could obviously be a significant problem if the object of our order or subpoena is the government itself.

The government does not benefit in all ways from the boards being located in the executive branch, however. When a private party makes a pleading without first making reasonable inquiry as to its grounding in fact and law, that action is monetarily sanctionable in federal court. Most boards have said that such action is not sanctionable before them. The GSBCA has held that it may impose monetary sanctions for groundless pleadings only if those pleadings are made in bad faith; some com-

mentators have questioned the validity of even that ruling, though, in light of a decision of the Court of Appeals for the Federal Circuit (see *ViON Corp. v. United States*, 906 F.2d 1564 (Fed.Cir. 1990)). Thus, our being executive rather than judicial officers may subject the government to the burden of defending totally baseless lawsuits.

Our being in the executive branch may create a related problem regarding protests in which private parties intervene on the side of the government. These intervenors might be unable to secure monetary sanctions against protestors because as agency officials, we cannot grant a judgment in favor of one private party against another.

Might these problems be eliminated—and the fairness of the process much better guaranteed—if the boards were removed from the executive branch and placed where they functionally belong, in the judiciary? Congress did this before, when it converted the Board of Tax Appeals, which was a part of the Treasury Department, into the United States Tax Court. Might you and we both benefit if this pattern were followed again?

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Now what about the scope of protest jurisdiction? Firms in the computer and telecommunications industry are unique in that they can bring their protests to a board of contract appeals. They come to the GSBCA with the knowledge that their cases will be decided quickly, by trained adjudicators who are experienced in government contract law. Even more important, they come to us knowing that the discovery process will give them (or, frequently, their lawyers under protective order) the opportunity to find out what really happened in the procurement, so that they can present the case to us on the basis of a com-

plete record that includes the live testimony of the people who were involved in the matter. The computer industry firms also know that they will prevail if they can convince us, by a preponderance of the evidence, that they are correct.

When these firms come before the Board, they won't have to be satisfied with apprentice adjudicators, or a limited record put together solely by the agency, or an almost insuperable burden of proof, as they would before other forums. And I think the results show the benefits of the process. Computer procurements may not be perfect, but having seen on a daily basis disputes on contracts for other goods and services, I am convinced that on the whole, the agencies are doing far better in buying computers and computer services than they are in buying other items. Generally, the contracting and program officials do better at following their procedures, and they are more thoughtful in evaluating proposals and making decisions. The procurements are much more open and fair than they were before the Competition in Contracting Act of 1984 put the Board into the protest business.

Protests can be expensive—no doubt about it. But the money is well spent. Protests focus the review of procurement actions on the particular actions that knowledgeable people with a vested interest think have been handled wrong. The expense of bringing the suit dictates that a protest not be filed unless the complainant is pretty sure there is a good case, and that the case will be pursued efficiently. The expense also dictates that an agency not defend a suit unless it is convinced that it has a good chance to win. The process forces hard choices quickly, and settlement where appropriate. The system is far more efficient than trying to fix procurement problems by rewriting regulations, or by having auditors wander around contracting shops looking for what's wrong.

At this point, the procurements are better even when protests aren't filed; the mere possibility that the process will be fully and inde-



TREASURER'S REPORT

Laura Kennedy

SEYFARTH,
SHAW, FAIRWEATHER & GERALDSON



BOARDS OF CONTRACT APPEALS BAR ASSOCIATION STATEMENT OF FINANCIAL CONDITION FOR THE FISCAL QUARTER ENDING 30 JUNE 1993

Beginning Cash Balance, 31 March 1993		\$11,287.70
Fund Income		
Membership dues (new members)	400.00	
Annual Meeting (late payments)	935.00	
Total Fund Income		+ 1,335.00
Fund Disbursements		
Newsletter (Spring)	2,572.35	
Correcting Entry ¹	2,832.02	
Total Fund Disbursements		- 5,404.37
Ending Cash Balance, 30 June 1993		\$7,218.33

¹COST OF 1993 BCA DIRECTORY; RECONCILIATION OF BCA LEDGER WITH BANK STATEMENT.

The IRS has determined that we are a non-profit association. Accordingly, we have applied to the Postal Service for a non-profit association mailing permit. We expect to receive this permit before the annual meeting in October.

ANNUAL DUES ARE DUE NLT SEPTEMBER 30th!!! To remit your dues, copy the back cover of "The Clause" on a copier, fill out the copy and mail it to me with a check for \$25, payable to the "BCA Bar Association." Individuals not paying their annual dues will not appear in the 1994 BCA Bar Membership Directory.

pendently reviewed, on the basis of information brought to our attention by people who know what they're looking for, makes the system honest.

So the protest system we have now is good for people who buy—as well as sell—computers, but not for everyone else in the private sector who wants to provide goods and services to the government. They are stuck with the inadequate alternatives that the computer firms avoid whenever possible. And the procurement system, as far as other vendors are concerned, isn't getting any better. Looking from the other side of the fence, this also means that for the government, the system isn't working as well as it could.

Is there any reason why the rest of federal procurement shouldn't catch up with the computer area in making competition full, fair, and open? Isn't it time that those of us who are familiar with the Board protest process, and know how it works, start talking about how the process can be expanded to cover procurements of other kinds of goods and services?

This is not to say that every single procurement should be subject to the intensive review we give computer and telecommunications procurements at the GSBCA. Some consideration should be given to putting a dollar floor on the acquisitions that could be protested to a board. Perhaps other restrictions should be put on access to the process, too. If we are really serious about improving government procurement, though, expanding the protest process could be an extremely useful step.

This subject leads me into the question of the desirability of unifying protest venues. The Section 800 Committee suggested that consideration be given to establishing a single venue within the next few years. Personally, I think the committee is barking up the wrong tree.

There are two possible problems with permitting the same complaining party to protest to several different forums. The first is that the same agency action could lead to multiple forms of litigation. This is obviously not a good

thing; no one wants to force the government to defend the same lawsuit in different places at different times, and no one wants the possibility of having different judges issuing contradictory rulings on the same matter. Anyone who wants to bring legal action against the government ought to be required to choose one place for each suit. But this doesn't mean that there should be only one place for all suits.

The second potential problem is that different forums might look at similar situations differently, and issue decisions establishing inconsistent rules for how procurements should be conducted. This is the same problem that results from any jurisdiction having various divisions of trial and appellate courts. It is properly cured generally, and it can be in this instance, by having appellate courts and legislatures make the rulings consistent. In fact, it is more easily cured in the protest area than in others, because amendments to government procurement regulations can be quick and easy to fix.

On the other hand, there is a considerable disadvantage to having only one protest forum: it would destroy the kinds of competition among forums that we have today—competition to develop the most efficient and effective kinds of practices and procedures for the suits that are filed, and competition to write the best-reasoned, most persuasive legal and factual analyses possible.

The GSBCA is obviously the forum of choice for most protestors today. The Section 800 Committee recognizes that our practices and procedures are so useful that they should be used as a model by a single forum. But, if anyone had suggested a single forum even a decade ago, it's not likely he or she would have considered having that court act as we do, because the way we go about our protest business had not yet been invented. And, of course, that way is still evolving. As it continues to evolve, we keep looking at how other forums do their work; we're not too proud to crib from them when they have good ideas.

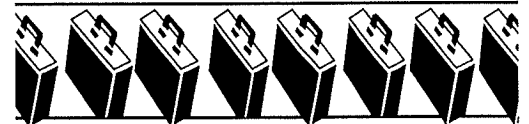
With a single forum, though, the evolution would have to come from within. That sort of

movement always comes slowly, held back by group-think and possibly the heavy influence of one or two people. It doesn't work in industry, and it doesn't work in courts, either.

In my judgment, consideration should be given to expanding protest jurisdiction to other boards of contract appeals—so that, just as at the GSBCA, judges who have special familiarity with certain kinds of procurements can quickly and knowledgeably resolve contracting disputes. If the scope of protestable procurements is broadened, somebody will have to hear the cases, and the other boards are a wonderful untapped resource. Because the decisions of the boards are all reviewed by the Court of Appeals for the Federal Circuit, having the bulk of protest activity take place in the boards would also have the additional result

that a single appellate court would be setting the controlling precedents.

I have no doubt that these ideas are not the last word on the subjects I've raised. I do hope, though, that they will stimulate discussion on how the public contract law community can improve government contracting. For the last several years, the GSBCA has been an innovator in exploring new and better ways for the legal profession to serve the contracting area. We will strive to remain at the forefront of this activity, but we can't do the job ourselves. Perhaps this article can open a dialogue in which all of us can participate together.



THE MEDIATION ALTERNATIVE



Daniel A.
Kile

CENTER FOR BUSINESS DISPUTE
RESOLUTION

Mediation is the intervention into a dispute by an impartial, neutral third party (who has no authoritative decision power) to help the disputing parties voluntarily reach a mutually acceptable settlement of the issues in dispute. Mediation is neither a truth nor a fault inquiry, and may be broken down into four key, operative parts:

- (1) The mediator is impartial, favoring neither side;
- (2) The mediator is neutral, indifferent to the outcome;
- (3) The mediator lacks decision-making power, and only guides the process; and
- (4) Acceptance of a settlement is voluntary as all disputing parties must agree.

In choosing how to deal with disputes, consider four interrelated costs and benefits: (1) transaction costs; (2) satisfaction with results; (3) effect on the relationship; and (4) recurrence of disputes. Litigation definitely comes with high transaction costs. If you win, it is sweet, but if you lose, it's sour grapes and second guessing. Often litigation results in destroyed or damaged relationships. It may not stop future problems of the same type from occurring. Using a more cooperative dispute resolution process, such as mediation or negotiation, lessens the obvious costs and risks. The benefits also increase. Litigation is a "high-cost" system for resolving disputes. Mediation is "low-cost." Again, in making your choice of how to deal with disputes, weigh the following interrelated costs and benefits:

Transaction Costs—There are the obvious direct costs of hiring lawyers, consultants, experts, filing fees, etc. There are also indirect costs of time and resources. Add to them the emotional energy, and lost business opportunities from concentrating on a dispute involving the past.

Satisfaction with Results—Another way to rate the different ways to deal with disputes is

- Most citation errors in a single brief; and lastly
- Best looking Irish-American attorney-C.P.A. BCA Bar member working for Deloitte & Touche in Washington, D.C. who has a dog named Sandy (this should be a cash award).

Of course, an individual could win in more than one category. Well, boys and girls, it saddens me to tell you this, but the responsible, mature adults on the Annual Meeting Committee shot my idea down. (Some people just don't know how to have fun.) Now, if they'd put me in charge of the annual meeting . . . (!)

As far as serious BCA business goes, there are two big announcements. First, the annual

meeting will be held on October 26th (see Barbara Wixon's column). Second, ANNUAL DUES SHOULD BE PAID NLT SEPTEMBER 30th. Just copy the back cover, fill it out and send it in with a check. Please be sure that the information is complete and legible because the 1994 Directory will be compiled from these forms.

In the last issue, I said that we could have a "Who's News" column in which award, promotion or transfer announcements could be made. While many people thought it was a good idea, nobody sent in any items. I will repeat the offer, and make it a standing policy to publish whatever announcements are submitted.

Finally, there were the usual interesting articles not accepted for publication: "Toddler Performs Surgery!," "Vegetables Unionize!!," and "Evidence Excluded at BCA Hearing!!!"

the satisfaction with the result. If you will continue to work together, the satisfaction needs to be mutual. Fulfilling one's interests is satisfaction. "Fairness"—of the process and result—is the key to satisfaction. This in turn revolves around opportunities to have your say, your control over the decision and its acceptance, and the fairness of outside parties (judge, arbitrator, mediator).

Effect on the Relationship—How one goes about resolving a dispute directly affects the future of the parties working together in harmony. Some methods will strengthen the relationship, such as mediation. Others will destroy it, such as threats. The focus is on the nature and conduct of the process.

RECURRENCE OF DISPUTES

Simply put: Will the chosen method for resolving disputes curtail or prevent future disputes between the parties?

Obviously, mediation is not appropriate for every government contract dispute. To help you decide, look to the following five considerations:

- (1) Power relationship adequately balanced;

- (2) Issues of enough breadth or importance;
- (3) Flexible or ambiguous rules;
- (4) Resources and talent available; and
- (5) Issues sufficiently tangible.

What types of disputes are suitable for mediation? Any dispute where there is a *chance* of agreement. Even if there is no chance of an agreement, mediation can at least help you know clearly and precisely what is in dispute. You can narrow the issues and stipulate to facts that you agree upon. This saves time and money in future arbitration or litigation.

If mediation is appropriate, its value is a winner overwhelmingly when compared with other methods of dispute resolution. When one considers the factors of speed of resolution, costs, control over process and its outcome, and certainty of resolution, mediation wins over doing your own negotiations, third-party negotiations, arbitration, and litigation. The only individual factor that it would not be "the" best value is certainty of resolution. Only courts or arbitration will give you a decision (like it or lump it). Still, statistics show that mediation is

80% successful, thus making it a close second for "best value" in this factor.

You mediate when *talking* serves your interests or goals, and sufficiently defined issues permit specific solutions. A good time to mediate is after exchanging core information. The mediation process itself is simple. You meet at a *neutral* location. Attendees include individuals who have settlement authority, their attorneys and the mediator. The mediator sets the date, time and place for the session. Prior to this session, each side generally provides the mediator with a one or two page summary of the issues in dispute. At the meeting, the parties sit around a table. The mediator opens the session by defining the ground rules, and describing the mediator's role and responsibilities. The mediator explains the concepts of *confidentiality* and *private sessions*. Then the parties make brief, uninterrupted opening statements. Next, all parties will join in, defining and discussing the issues. The mediator calls private sessions as needed to discuss points in confidence with a party. This process of *communication* produces options and solutions, and *resolution* follows.

There are many positive results from mediation. There is an increase in the clarity of communication, and you probably learned something you didn't expect to learn. Mediation is an environment where creative solutions—not limited to money—arise. The dispute is limited to specific and well understood points, and there is confidentiality of terms and conditions effecting the resolution. Both sides evince satisfaction with the process and result, and this contributes toward the maintenance of the party's working relationships. For this reason, there is a lessened recurrence of disputes, so you save time, money and resources.

When selecting a mediator, it is beneficial to select professional mediators who have undergone certified training in the mediation process and techniques. The mediator should have a basic competency in the subject area of the dispute, such as government contracts, but need not be an expert. Members of the Society

of Professionals in Dispute Resolution (SPIDR) are professional mediators.

The benefits of mediation notwithstanding, attorneys and negotiators generally do not like mediators because they get in the way of their dynamics of negotiating. A few comments about this attitude will suffice. Mediators help parties get at the underlying interests and information because they have no stake in the outcome. Attorneys and negotiators traditionally try to limit the amount of information that the opposing side has available. A satisfactory resolution comes from complete knowledge and understanding of all the facts and interests. Further, mediators are like referees or umpires at sporting events—they keep the process on track.

Egos get in the way of attorneys and negotiators using a mediator in a dispute. Using judges or attorneys—who have not taken the certified training as mediators—reinforces the notion that you don't need mediators because they are seen as just another attorney with an opinion. Judges who have undergone the specialized mediation training readily admit that it is difficult not to tell the parties of the error of their ways and suggest solutions based on their experiences.

The parties enter a dispute believing that they are entitled to receive something. This is a tricky concept. The goal and ethical obligation of the attorneys is to get the maximum recovery permitted under law despite the future consequences. The client may win the battle, but lose the war. So, the client needs to consider the underlying causes of the dispute. Mediation can get at those interests and move the focus from wants to needs. Attorneys provide a valuable service during the mediation process and are invaluable in generating options and solutions. During the private sessions, the attorneys must go back to their legal responsibility to be sure that their clients fully understand their rights. The ultimate settlement may be creative and result in a good accord and satisfaction. Obviously, attorneys operate within a rights-based framework, but there is also room to fit the client's interests.

Attorneys have an obsession with cutting to the bottom line and trying to reconcile the disparate positions based on entitlement theories. Our legal profession encourages it. A better method of satisfying needs and getting more durable solutions is mediation. By talking about needs and interests, the parties can place dollar figures on them or develop non-monetary solutions that will best meet their needs and interests. Through this rationale process, you avoid the syndrome of splitting the difference.

Several sentences describe the differences between arbitration, mini-trial and mediation. An arbitrator, like a judge, decides the dispute, and the parties choose whether it will be binding. The focus of a mini-trial is on resolving factual disputes, applying the law, and negotiating. It is a structured settlement process which blends negotiations with adversarial case presentations. Presiding over the mini-trial is a neutral expert advisor, who offers to each side's decisionmakers an opinion on the probable result if the case went to trial. Mediation reaches legally acceptable resolutions through interest-based bargaining by using a neutral who facilitates effective communication.

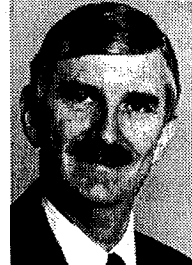
Combining mediation and arbitration (Med-Arb) give you the advantage of both facilitation and adjudication. It parallels the judicial settlement conferences technique before trial. However, mediation-arbitration occurs in a private setting. Traditionally, mediation occurs first, but if it proves to be unsuccessful the parties go to arbitration using the same neutral. Perhaps a better way is to do arbitration first followed by mediation, and disclosure of the arbitrator's decision happens only if the parties do not agree. Using this procedure destroys the cost advantages of mediation, but it avoids some structural problems of mediation-arbitration while promoting mutual resolution.

MEDIATION IS WIN-WIN

Mediators help parties to a dispute communicate more effectively. They do more than just "use common sense." They act in deliberate and structured ways. Their training in the techniques of

mediation and experience make them dispute resolution professionals. As neutrals, they promote reconciliation, settlement and understanding. Unlike the courts, the final decision is definitely faster and cheaper. Try it—you will like it because YOU decide the terms and conditions of the resolution of the dispute.

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James F. Nagle

OLES, MORRISON & RINKER

This is the second installment in our series of bibliographies. Convenience terminations are not normally litigated, but with their increasing frequency as the DOD downsizing continues, we should see more disputes. Consequently, this comprehensive bibliography is offered to aid in your research.

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CONTRACTOR CLAIMS: THE PROCEDURAL MORASS CONTINUES



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THE QUESTION of what constitutes a valid claim under the Contract Disputes Act ("CDA"), 41 U.S.C. §§601-613 (1988), continues to be a procedural nightmare for government contractors.

The two sources for this problem are (1) the CDA itself, which does not define the term "claim," and (2) the tendency of the courts and the Boards of Contract Appeals to dismiss actions on the basis of narrow procedural grounds. The practical consequences of a court or board finding that a claim is not valid under the CDA are that the action will be dismissed for lack of jurisdiction, and the contractor must begin the claim process anew.

Contractors have expended a tremendous amount of time and money trying to answer what should be a simple question: "What is a proper claim under the Contract Disputes Act?" In 1991, the issue receiving the most attention was whether the proper person certified the claim. However, a second issue that initially received less fanfare, but has grown equally vexing, is whether a "dispute" existed at the time the contractor submitted its claim.

I. INTRODUCTION

Most of the procedural wrangling in the past two years regarding certification followed the decision in *United States V. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 330 (1991), in which the United States Court of Appeals for the Federal Circuit applied a particularly strict

approach as to who may certify a claim. One result of the *Grumman* decision was the dismissal of many long-pending cases on the basis of supposedly defective certifications. Now that *Grumman* apparently has been resolved through legislative means, contractors face yet another procedural pitfall - the requirement that there be a "dispute" *before* a claim is filed. This article (1) sets forth the problem presented by the Federal Circuit's decision in *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), which took a very narrow approach to the disputatiousness requirement; (2) examines subsequent decisions analyzing *Dawco*; and (3) offers constructive advice on how to best avoid the procedural problems presented by the *Dawco* decision.

II. THE LANGUAGE OF THE THREE DISPUTE CLAUSES

The Office of Federal Procurement Policy ("OFPP") has promulgated three Disputes clauses since 1979. Although the CDA does not define the term "claim," the OFPP addressed the issue in 1979 with the Interim Disputes clause:

- (b) Claim means
- (1) a written request submitted to the Contracting Officer;

(2) for payment of money, adjustment of contract terms, or other relief;
(3) which is in dispute or remains unresolved after a reasonable period of time for its review and disposition by the Government¹ ... [Emphasis added.]

The 1979 Interim Disputes clause expressly mandated a preexisting "dispute" as an element of a "claim." The Federal Circuit upheld this interpretation in *Mayfair Construction Co. v. United States*, 841 F.2d 1576 (Fed. Cir. 1988) (holding that a settlement proposal under a termination for convenience was not a claim because it was not in "dispute"; "[i]t is beyond cavil that under this clause, no claim exists unless it involves a dispute") *cert. denied*, 488 U.S. 980 (1988); see also *Espirit Corp. v. United States*, 6 Cl. Ct. 546, 549 (1984) (stating that the CDA itself requires a preexisting dispute, regardless of the specific content of the OFPP regulations), *aff'd*, 776 F.2d 1062 (1985)².

In 1980, the OFPP promulgated a final Disputes clause that replaced the provision in subparagraph (3) with the following language:

Avoucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim [pursuant to the Act]³.

Although the 1980 Disputes clause dropped the express requirement of a "dispute" from the provisions of the clause, the Claims Court nevertheless found that the CDA itself imposed a "dispute" requirement. See *Gardner Mach. Corp. v. United States*, 14 Cl. Ct. 286 (1988). One exception to this view was an IBCA decision holding that neither the CDA nor the 1980 Disputes clause required a preexisting "dispute." *A&J Construction Co., Inc.*, IBCA No. 2269, 87-3 BCA P19,965 at 101,078-79.

The current Disputes clause, which became effective with the FAR in 1984, inserted the term "routine" in the first sentence of subparagraph (3):

A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act⁴. [Emphasis supplied.]

When confronted with the 1984 Disputes clause, the Claims Court (now known as the Court of Federal Claims) inferred a "dispute" requirement from the CDA definition of "claim." *Frawley v. United States*, 14 Cl. Ct. 766, 768 (1988). Similarly, in *Hugo Auchter GmbH*, ASBCA No. 33123, 88-3 BCA P20,926 at 105,763-64, the ASBCA dismissed an appeal under the 1984 Disputes clause because, although the contractor labeled its settlement proposal a "claim," no dispute existed between the parties at the time the proposal was submitted. See *Honeycomb Company of America, Inc.*, ASBCA No. 33936-246, 87-2 BCA P19,795; *HSQ Technology*, ASBCA No. 32272, 86-3 BCA P19,221.

Thus, although the Interim Disputes clause defined "claim" to require a "dispute," the Disputes clauses of 1980 and 1984 did not affirmatively require a "dispute." Instead, the clauses posed the "dispute" requirement in the negative: if a "voucher, invoice, or [other routine] request for payment is not in dispute [it] is not a claim under the Act."

III. THE CURRENT "DISPUTE" REQUIREMENT

As with the certification issue, the recent controversy in the "dispute" area originates with a Federal Circuit decision. In *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), the Federal Circuit concluded that a contractor's certified "claim" was not a claim under the CDA because the contractor requested that the contracting officer "review the proposal and schedule negotiations imme-

diately⁵. The Federal Circuit began its analysis in *Dawco* with the FAR definition of a claim, which, as noted above, states in part that "a ... routine request for payment that is not in dispute when submitted is not a claim under the Act⁶." The Federal Circuit stated that the FAR definition

is not ambiguous, it means what it says: A contractor and the government contracting agency must already be in dispute over the amount requested. Unilateral cost proposals or correspondence suggesting disagreement during negotiations, while they may ultimately lead to a dispute, do not, for purposes of the [CDA], satisfy the clear requirement that the request be in dispute⁷.
[Emphasis in the original.]

The court found that the contractor's references to continued negotiations demonstrated that no "dispute" existed between the parties. Likewise, *Dawco's* communications with the contracting officer were clear evidence that *Dawco* "was attempting to spur negotiations" and there was "no indication that *Dawco* was discontinuing negotiations ... in favor of seeking a final decision by the contracting officer⁸." Thus, the Federal Circuit concluded, there was no "claim" under the CDA.

IV. THE CONSEQUENCES OF THE DAWCO DECISION

Since the *Dawco* decision was issued, the Federal Circuit, the Court of Federal Claims, and the ASBCA have taken similarly restrictive views of a requirement that a dispute exist before a claim is filed. Although the Federal Circuit initially showed some inclination to soften the harsh standard imposed by *Dawco*, a more recent Federal Circuit decision may have reversed that trend and once again advocated a technical analysis of jurisdiction.

A. THE ASBCA

Even before the Federal Circuit issued the *Dawco* decision, the ASBCA took a fairly rigid view of the "dispute" requirement. The *Dawco* decision merely provided the Board with additional support. The ASBCA continues to make mechanistic distinctions between "requests for payment" and "claims." See *Laine H. Kinney*, ASBCA No. 41159, 92-3 BCA P25,051 (finding no evidence in the record that a dispute existed before denial for payment made to the contracting officer).

The ASBCA's definition of what constitutes a "dispute" is quite narrow. For example, the ASBCA has held that an agency's referral of a claim proposal to the Inspector General because of suspected fraud was not dispositive of whether a dispute exists. See *Debcon, Inc.*, ASBCA Nos. 42836-7, 92-1 BCA P24,710. In *Debcon*, the government, after receiving the contractor's proposal, asked the contractor for additional information. The government's letters never disputed any of the costs and stated only that the "claim and/or settlement proposal" was being held in abeyance. Unbeknownst to the contractor, however, the contracting officer had referred the proposal to the agency's Inspector General for suspected fraud. The Board found that despite the internal government suspicion of fraud, "such an *uncommunicated* expression of internal suspicion does not satisfy the requirement that there be a dispute⁹ [emphasis added]." See also *DEL Mfg. Co., Inc.*, ASBCA Nos. 43801-02, 1992 WL 231,919 (September 10, 1992) (finding that no dispute existed even when the government instituted an audit of a contractor following a denial for payment¹⁰).

Likewise, that contractors certify their requests for equitable adjustments and characterize them as "claims" does not guarantee success on the dispute issue. *Santa Fe Engineers, Inc.*, ASBCA No. 36292, 92-2 BCA P24,795, *aff'd*, 1993 WL 129,181 (Fed. Cir., April 27, 1993); *Oman-Fischback Int'l*, ASBCA No. 41474, 91-2 BCA P24,018 at 120,268-69;

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91-3 BCA P24,141. A request for payment must be in dispute *at the time it is submitted*. That such a payment request later becomes disputed does not, standing alone, transform the prior submission automatically into a claim. *Saco Defense, Inc.*, ASBCA Nos. 44792, 45171, 1992 WL 471,247 (September 18, 1992)¹¹.

Critical to the ASBCA's decisions is the requirement for an unequivocal statement on the record by at least one party that the amount requested has previously been denied by the contracting officer and that further negotiations will not resolve the issue. So long as the record demonstrates that the parties have reached an impasse, the fact that further negotiations take place after the claim has been filed is not fatal to a contractor's case. See *Holmes & Narver Services, Inc./Morrison-Knudsen Co., Inc.*, ASBCA No. 40111, 92-3 BCA P25,052. In *Holmes & Narver*, the contractor submitted a claim to the contracting officer after a series of meetings where the contracting officer clearly stated that he would not grant the requested equitable adjustment. In support of its argument, the contractor submitted an affidavit from the person with whom the contracting officer spoke. The ASBCA found the government's failure to rebut the contractor's affidavit persuasive in determining that a dispute did exist at the time of filing¹². If the dispute requirement is met at the time of filing, later negotiations will not vitiate the claim.

Although *Holmes & Narver* supports the proposition that evidence of a dispute does not necessarily have to be in writing, the more prudent course is for the contractor to put in writing a clear and unequivocal statement that negotiations have reached an impasse.

B. THE COURT OF FEDERAL CLAIMS

Two days after the Federal Circuit issued its decision in *Dawco*, the Court of Federal Claims entered the fray. In *Essex Electro Engineers, Inc. v. United States*, 22 Cl. Ct. 757,

aff'd, 956 F.2d 1576 (Fed. Cir. 1992), a contractor sought to recover interest on amounts that the government had paid pursuant to an administrative settlement relating to change orders. Relying on *Dawco*, the court found that the contractor's letters to the government did not constitute a claim because the parties "must have reached something approaching impasse on some of the elements of the contractor's demand before a claim can arise¹³."

Two months later, the court again utilized the "impasse" standard and described *Dawco* as holding "that a claim only exists when the parties *clearly have abandoned negotiations* and the amount claimed is *definitely* in dispute [emphasis supplied]." *Sun Eagle Corp. v. United States*, 23 Cl. Ct. 465, 473 (1991). The court concluded that the circumstances in *Sun Eagle* were sufficiently ambiguous to prevent it from concluding that the parties had negotiated to an "impasse." A "disagreement alone, without an intent to discontinue negotiations, is insufficient to transform a request [for compensation] into a dispute, hence a claim¹⁴." Under this standard, the court held that the contractor had not submitted a proper claim.

In 1992, the court issued a decision that appeared to weaken the standard enunciated in *Essex Electro* and *Sun Eagle*. In *Isles Engineering Construction, Inc. v. United States*, 26 Cl. Ct. 240 (1992), the court rejected the government's argument that statements in the contractor's claim proposal indicating a willingness to negotiate meant that the claim was not in dispute. The court recognized that "a request for a final decision of the contracting officer need not be hermetically sealed from words such as 'negotiate' or 'settle.'" Merely because a contractor expressed a continuing desire to negotiate should not vitiate the previously disputed claim¹⁵.

C. THE FEDERAL CIRCUIT

In 1992, the Federal Circuit issued a decision, *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572 (Fed. Cir. 1992), that appeared

to soften the rigid requirements of *Dawco*¹⁶. However, a more recent Federal Circuit decision distinguishes *Transamerica* and reimp-poses the strict disputatiousness requirement. See *Santa Fe Engineers, Inc. v. Garrett*, 1993 WL 129,181 (Fed. Cir.)(April 27, 1993).

In *Transamerica*, a surety brought an action against the United States to recover the difference between the amount ordered under the government's unilateral contract modification and the amount sought as an equitable adjustment. On a ruling from the bench, the Claims Court dismissed the complaint for lack of subject matter jurisdiction because (1) the contractor's claim did not specifically request a final decision, and (2) there was no evidence of a "dispute" between the parties before the contractor filed the claim. The plaintiff appealed the dismissal to the Federal Circuit.

Relying on an earlier decision, *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586 (Fed. Cir. 1987), the Federal Circuit noted that the CDA does not impose any requirement that a claim be submitted in a particular form using particular wording. One of the issues the Federal Circuit explored in *Contract Cleaning* was whether certain letters submitted by the contractor requesting payment constituted a CDA claim. The letters requested the payment of monies allegedly owed under the contract and indicated the contractor's willingness to work with the contracting officer to "finalize and conclude this matter," suggesting that the parties sit down, discuss and resolve the issues through negotiations.

The Federal Circuit cited with approval language from *Contract Cleaning* that states

[t]he fact that in those letters the appellant frequently expressed the hope that the dispute could be settled and suggested meeting to accomplish that result does not mean that those letters did not constitute claims¹⁷.

The court reasoned that the purpose of the CDA was to foster dispute resolution, not litiga-

tion¹⁸. There is "no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution." Consequently, the court advised that "[a]ll tribunals should foster negotiation as a mechanism for the resolution of disputes instead of erecting definitional structures which preclude, for their own validity, ongoing settlement measures¹⁹."

The *Transamerica* decision may have provided only temporary relief from the strict *Dawco* standard. On April 27, 1993, the Federal Circuit held that the decision in *Transamerica* did not negate the *Dawco* disputatiousness requirement²⁰. *Santa Fe Engineers, Inc. v. Garrett*, 1993 WL 129,181 (Fed. Cir.)(April 27, 1993). In *Santa Fe*, the Federal Circuit ruled that the contractor and the Navy were not in dispute regarding the contractor's certified cost proposal at the time of its submission. The parties met several times over a two-year period following *Santa Fe's* submission of a cost proposal. The court ruled that the parties had not reached an impasse because *Santa Fe* continued to furnish information to the Navy in support of its proposal. The Federal Circuit distinguished its decision in *Transamerica* by stating:

The government in *Transamerica* did not argue that the contractor's claim was not "in dispute," but contended that the claim was vitiated by the fact that the contractor attempted to settle it after it had been submitted to the contracting officer²¹.

Thus, the court found that *Transamerica* only stood for the proposition that negotiations occurring after a claim is submitted will not vitiate a disputed claim²².

Crucial to the court's analysis in *Santa Fe* was the Navy's reaction to the contractor's claim proposal. In its response letter, the Navy did not state it disputed *Santa Fe's* claim. Instead, the Navy said it had no basis to determine whether it would dispute the claim and

JUDGE TING SEVERELY INJURED

On June 19th, Judge Peter Ting of the ASBCA was among the injured when a car ran out of control and struck several pedestrians who were leaving a concert at Wolf Trap, Virginia. The injuries he sustained were severe, including a severed artery in his left leg. He was taken by helicopter from the accident scene to Fairfax Hospital where, for a time, he was in critical condition. He is now in stable condition, but his recovery may be protracted due to the nature of the injuries. Those wishing to send cards or letters are requested to use his ASBCA address.

that it required further information. The court noted that this request for information and the two years of exchanges between the parties demonstrated the lack of a dispute.

V. THE CURRENT DEBATE

On March 2, 1993, the ABA Public Contract Law Section submitted letters to the FAR Secretariat, the DAR Council, and the Office of Federal Procurement Policy recommending changes to the regulatory definition of a "claim"²³. Among the ABA recommendations was that the definition of a "claim" eliminate any requirement that a matter be "in dispute" before it may be the subject of a claim²⁴. The Department of Justice opposed the ABA's recommendations in an April 5th letter from Acting Assistant Attorney General Stuart Schiffer to the same parties addressed by the ABA. DOJ proposed that contractors be required to demand specifically a final decision from the contracting officer. DOJ also proposed that the definition of a claim delete the reference to a claim as an assertion, seeking as a matter of right "the adjustment or interpretation to the contract terms or other relief." Instead, DOJ would add the following to the definition of a claim:

A claim may also mean a written demand or written assertion by one of the contracting parties seeking as a matter of right, termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards or other nonmonetary relief the grant of which would not interfere with a contracting officer's authority to direct the manner of performance of a contract.

In its letter, DOJ strongly opposed the ABA's proposed elimination of the "dispute" requirement. DOJ asserted that the requirement for a preexisting dispute predates *Dawco*, and even the enactment of the CDA. DOJ noted

that the identification of the existence of a dispute is significant because it triggers the contractor's right to recover interest.

The ABA Public Contract Law Section is currently working on a response to DOJ's letter. The response is expected to be completed by the end of June.

VI. AVOIDING THE DISPUTATIOUSNESS MORASS

Recent case law indicates that the government will continue to use the *Dawco*, *Sun Eagle*, and *Santa Fe* decisions as additional procedural roadblocks to avoid addressing the merits of some contractor claims in litigation. One can expect the government to argue that claims long pending before the Court of Federal Claims and the Boards should be dismissed based upon the alleged absence of a dispute. The government likely will assert, among other things, that the contractor's submission was a request for payment for which there had been no previous "impasse" between the parties prior to submission of the claim, or that the record contained no evidence that the parties had intended to abandon negotiations.

Contractors will have to live with the facts as they exist for their pending claims. Should the government raise the "disputatiousness" issue with regard to a pending case, the facts should be marshalled to demonstrate that negotiations had reached such a precarious point when the claim was submitted that a "dispute" really existed. The contractor can then point to the *Transamerica* and *Contractor Cleaning* decisions as support for its arguments.

Of course, the better approach would be to avoid the issue altogether. There are a number of approaches contractors can take with respect to future claims to make it more difficult for the government to argue the absence of a dispute.

First, in most instances, the contractor's initial written submission should not be characterized as a claim, even if the contracting officer already has indicated that he or she

believes the contractor is not entitled to additional compensation. Instead, the first submission should be characterized as a request for equitable adjustment ("REA").

Second, the REA should state that the contractor wishes to commence negotiations immediately. It also should state that, if negotiations do not begin promptly, the contractor will treat the government's inaction as a refusal to negotiate, which in turn will be treated as the "impasse" necessary to create a dispute.

Third, if the government begins negotiations on the REA, the contractor should ensure that the record clearly reflects the progress, or lack thereof, of the discussions. If negotiations are not proceeding satisfactorily, the contractor should remind the contracting officer that the Disputes clause states an REA may be converted to a claim if the REA "is not acted upon in a reasonable time²⁵." The contractor should specify the amount of time that it views as "reasonable," and declare that it will treat the parties as having reached an impasse if the matter has not been resolved by that time.

Finally, once the parties have reached an impasse or otherwise abandoned negotiations, the contractor should confirm the circumstances in writing and not say or do anything that might indicate a contrary intent.

One properly can argue that the approach suggested above is contrary to the "give and take" situation that must exist in any successful negotiations. However, the decisions in *Dawco*, *Sun Eagle* and *Santa Fe* suggest that the submission of a claim—and the beginning of the period for which interest must be paid—should be viewed not as part of a negotiating strategy, but as a final step once negotiations have failed.

ENDNOTES

1. 44 FED. REG. 12,524 (1979).

2. HOWEVER, THERE WAS AT LEAST ONE DECISION THAT FOUND THAT A PREEXISTING DISPUTE REQUIREMENT WAS INCONSISTENT WITH THE LEGISLATIVE HISTORY AND INTENT OF THE CDA. SEE *R.G. BEER CORP.*, EBCA No. 4885, 85-2 BCA P18,162 AT 91,200. AT THE

TIME, THIS DECISION CLEARLY REFLECTED THE MINORITY VIEW.

3. FINAL CONTRACT DISPUTES REGULATORY COVERAGE AND CONTRACTS DISPUTES CLAUSE, 45 FED. REG. 31,035 (1980), CODIFIED AT 32 C.F.R. SEC. 7-103.12c (1983).

4. FAR 52.233-1.

5. 930 F.2d AT 879. THE COURT OF FEDERAL CLAIMS AND THE FEDERAL CIRCUIT APPARENTLY WILL APPLY THE "DISPUTE" REQUIREMENT TO ALL CLAIMS SUBJECT TO THE CDA. SEE *ESPIRIT CORP. V. UNITED STATES*, 6 CL. CT. 546, 549 (1984). IN CONTRAST, IN AT LEAST ONE DECISION, THE ASBCA HAS HELD THAT NONMONETARY CLAIMS, SUCH AS REQUESTS FOR EXTENSIONS OF TIME, DO NOT HAVE TO BE IN "DISPUTE" PRIOR TO SUBMISSION OF THE CLAIM AND, THEREFORE, ARE NOT SUBJECT TO THE LIMITATIONS IMPOSED BY THE *DAWCO* DECISION. *SKIP KIRCHDORFER, INC.*, ASBCA Nos. 40515-16, 43619-20, 1993 WL 70921 (MARCH 3, 1993).

6. FAR 52.233-1(c).

7. 930 F.2d AT 878.

8. *Id.* AT 879.

9. *Id.* AT 123,346.

10. SIMILARLY, THE BOARD RECENTLY HELD THAT THE GOVERNMENT'S UNILATERAL ISSUANCE OF A MODIFICATION REDUCING A CONTRACTOR'S FUNDING IN RESPONSE TO ITS REQUEST FOR AN EQUITABLE ADJUSTMENT WAS NOT EVIDENCE THAT THE GOVERNMENT DISPUTED THE CONTRACTOR'S "CLAIM" FOR ADDITIONAL REIMBURSEMENT. *RMS TECHNOLOGIES*, ASBCA No. 44727, 1993 WL 130,173 (APRIL 14, 1993).

11. IN *SACO*, HOWEVER, THE BOARD FOUND THAT THE CONTRACTOR'S RESUBMISSION A YEAR LATER WAS A CLAIM BECAUSE THE DISPUTE HAS "CRYSTALLIZED." THE GOVERNMENT ARGUED THAT THE CLAIM HAD NOT CRYSTALLIZED INTO A DISPUTE BECAUSE *DAWCO* REQUIRES A VIRTUAL DEADLOCK AND "COMPLETE ABANDONMENT" OF NEGOTIATIONS BY BOTH PARTIES. THE BOARD FOUND THAT *DAWCO* REQUIRES ONLY ONE PARTY TO ABANDON NEGOTIATIONS. THE CONTRACTOR'S SUBMISSION OF A NEW CLAIM ONE YEAR AFTER ITS INITIAL SUBMISSION WAS SUFFICIENT EVIDENCE THAT IT HAD ABANDONED HOPE OF A NEGOTIATED SETTLEMENT.

INITIAL SUBMISSION WAS SUFFICIENT EVIDENCE THAT IT HAD ABANDONED HOPE OF A NEGOTIATED SETTLEMENT.

12. *Id.* AT 124,858.

13. *Id.* AT 765.

14. *Id.* AT 474.

15. *Id.* AT 243.

16. IN *TRANSAMERICA*, THE FEDERAL CIRCUIT ALSO CALLED INTO DOUBT THE *SUN EAGLE* DECISION. 973 F.2D AT 1577.

17. *TRANSAMERICA*, 973 F.2D AT 1579 (QUOTING *CONTRACT CLEANING*, 811 F.2D AT 592).

18. THE FEDERAL CIRCUIT NOTED THAT THE LEGISLATIVE HISTORY OF THE CDA STATES THAT THE PURPOSE OF THE CDA WAS TO "INDUCE MORE RESOLUTION OF CONTRACT DISPUTES BY NEGOTIATION PRIOR TO LITIGATION ..." *Id.* QUOTING S.REP. NO. 1118, 95TH CONG., 2D SESS. 1 (1978), REPRINTED IN 1978 USCCAN 5335.

19. *Id.*

20. SEE ALSO "LEGAL DEVELOPMENTS," BNA FEDERAL CONTRACTS REPORT, VOL. 59 AT 611 (MAY 10, 1993), FOR A DETAILED DISCUSSION OF THE *SANTA FE* DECISION.

21. *Id.* AT 5.

22. PRESUMABLY, THIS SAME ARGUMENT COULD BE USED TO DISTINGUISH THE COURT OF FEDERAL CLAIMS DECISION IN *ISLES ENGINEERING*. SEE DISCUSSION *SUPRA*.

23. SEE "CLAIMS," BNA FEDERAL CONTRACTS REPORT, VOL. 59 AT 552-53 (APRIL 26, 1993).

24. THE ABA LETTER ALSO RECOMMENDED DELETING THE REQUIREMENT THAT THE CLAIM BE FOR A "SUM CERTAIN," THEREBY PERMITTING CONTRACTORS TO SUBMIT CLAIMS FOR ANTICIPATED COSTS.

25. FAR 52.233-1.

INTERVIEW WITH... COL JAMES BABIN

CHIEF TRIAL ATTORNEY

U.S. AIR FORCE

[THE OPINIONS EXPRESSED BY COL BABIN ARE HIS ALONE AND DO NOT REPRESENT THE OFFICIAL POSITION OF THE U.S. AIR FORCE MATERIEL COMMAND, THE DEPARTMENT OF DEFENSE OR THE U.S. GOVERNMENT.]

1. As the Chief Trial Attorney of the Air Force, you are responsible for a great deal of the Government's contract litigation. What are some of your biggest problems?

I'm sure my colleagues in the Army and Navy face the same general problems we do year in and year out. Manpower, training, budget, and case management readily come to mind. Fortunately, we have had a relatively stable civilian trial attorney workforce in the last few years. Military trial attorneys normally serve three to four years on the Trial Team before they are reassigned. Whenever someone leaves, an inevitable reshuffling of cases occurs and the learning curve with the new attorney begins. Our budget seems to shrink each year, yet the costs of defending claims continues to rise. The Air Force Trial Team is responsible for all appeals world-wide. This means travel to many areas of the country and the world, and the cost is considerable. Case assignment and management is a continuing challenge. Deciding which assets to place on a construction claim out of Crete as opposed to a multi-million dollar major weapon system claim makes life interesting. While the base commander on Crete may have a much smaller im-



pact in the great scheme of things, he or she is entitled to the same quality of representation as anyone else. In my tenure here, the biggest challenge has been the relatively recent increase in major claims, which spawn unbridled discovery wars, and require a significant amount of personal leadership and the dedication of tremendous resources.

2. What are some trends you have seen during your years in this position?

In the three years I have been in this position, I have experienced the same "trends" in government contract litigation that most practitioners in this area have—the most memorable is probably the claim certification saga. Now we are in the midst of defining exactly what is a claim. While these concepts have commendable intentions, somewhere along the line in their implementation the process went awry. We found and still find ourselves embroiled in jurisdictional disputes which really have no parallel in other venues and which hinder for the most part the orderly resolution of substantive issues. Also, I would again point to the increase in high dollar claims by government contractors. At the present time, we have more dollars at risk than at any other time in the history of the Air Force—more than 50% greater than any previous high. Furthermore, it wouldn't surprise me to see yet another substantial increase in the near future. These large claims also bear a striking resemblance to one another: allegations of government delay, disruption, defective specifications, and misdirection spread over years of contract performance, wrapped into a total cost claim with little or no traceability. Not surprisingly, you will often find a fixed-price contract in a development effort scenario. You can speculate as to why this is happening—perhaps because of a shrinking defense budget, there is no promise of future business to make up losses. Whatever the reason, this phenomenon has had a significant effect on the way the Trial Team operates.

3. The Army contract appeal trial attorneys are all military, the Navy's trial attorneys are all ci-

vilians, and your office uses a mix of military and civilian attorneys. Why do these significant differences exist and which do you think is best for government contract litigation?

I'm not sure why the Army is all military or why the Navy is all civilian. The Air Force Trial Team is about 40 percent military right now. As I understand it, the Air Force Trial Team was almost all military in the early days. Over the years, civilian positions were gradually added as the mission increased. There was apparently never any specific strategy to create a team with any given mix. As the years went by, either military or civilian positions were added as the situation permitted. I'm not sure any structure based upon any given ratio of military or civilian is "best." What is best for government contract litigation is that we recruit and retain the finest attorneys we can. An all military structure has its inherent problems of inevitable rotation of resources, but at times in the past we have had a civilian attrition rate equal to that of military personnel. I personally like the military/civilian mix because it provides the Team with an institutional memory and trial experience from our civilians, while at the same time allows the freshness in thought and approach that new military officers bring to the Team. These military attorneys have varied backgrounds in litigation, and in contract formation and administration. They bring experiences from all commands in the Air Force, but most importantly from the field units of the Air Force Materiel Command. Notwithstanding the turmoil that comes with military rotations, I think we have the best of both worlds.

4. What is your assessment of the future of ADR in government contract disputes?

ADR techniques have a valuable role to play in the procurement process. Like my Army counterpart, Colonel Riggs Wilks, I believe they are most effective at the contracting officer's level before claims become docketed appeals. However, we will consider the use of ADR at any level or point in time. I think the tools and techniques of ADR have been publicized widely, but ADR needs to be institutional-

ized before it will have any great effect in the government contract arena. The Air Force is trying to do just that. The concept of ADR needs to become a natural option that a contracting officer thinks about in resolving a dispute, and the means and money must be there to carry out an agreed-to solution. When I say the "concept," what I mean are those means other than standard negotiation and settlement techniques we routinely employ. It is these other techniques, such as mini-trials, facilitators, mediation, arbitration, etc., that require extra effort up front and many times additional funds to see the thing through. When contracting officers are convinced that these techniques save time and money in the long run, then ADR will have arrived.

5. How does your office handle "monster" cases?

As I mentioned earlier, we have more major cases now than ever before. "Monster" cases would be those that stand apart even from the "ordinary" big cases. After awhile, it all becomes relative, but these very large cases require a level of effort far above the rest. The dollars at risk are in the hundreds of millions and the issues typically involve events which span years of contract performance and many millions of documents. These appeals dictate a focused, full-time team composed of contracting, auditing, technical and legal personnel. Several Trial Team attorneys will be assigned to the case, and the program office will normally fund additional attorney and paralegal positions. Litigation support contractors are a necessity. At present, we have three sets of appeals where teams of this nature have been formed. One team consists of over 30 full-time personnel from all functional areas, with their own rented space and support contractors. We are in the process of staffing an even larger team for another set of appeals. Needless to say, the amount of attention necessary to properly manage these lawsuits is considerable. Only a handful of cases occupy 80 percent of my time. However, the risks involved clearly warrant the approach I've outlined here.

6. In terms of case management, how is a typical case assigned to an Air Force trial attorney in your office?

The Air Force Trial Team is made up of three divisions based upon geographical boundaries. When an appeal arrives, our docket clerk determines from which base the appeal arose. She then sends it to the Eastern, Central or Western Trial Division. From there, the division chief assigns the typical case based upon a determination of caseload and complexity. Cases arising out of foreign countries are assigned on an ad hoc basis. Major, highly complex cases are assigned by me without regard to the particular geographical division. Most of our major cases have more than one attorney assigned. This structure has proven quite manageable, as each division has a relatively equal caseload. However, the only way to manage the big appeals is on a case-by-case basis.

7. Does your office allow field attorneys with other commands try cases before the ASBCA, and if so, under what circumstances?

As I stated earlier, our mission is to represent the Air Force world-wide, but the increase in the number and complexity of appeals over the past few years have prompted us to delegate some smaller cases to the field. We have done this mainly within the Air Force Materiel Command because each of their bases has experienced government contract lawyers. However, we have delegated a small number of cases to other commands. In all of these cases, we appoint a Trial Team liaison attorney to provide assistance. The field attorney is the attorney of record and represents the Air Force, but all pleadings, motions, and settlement agreements are reviewed and signed out by this office, just as if they were Trial Team assets.

8. What are the policies in your office concerning settlements?

Our policy is simply to settle a case when it is in the best interests of the Air Force. In my experience, there are very few cases in government contract litigation that are sure win-

ners or sure losers. Therefore, it is a rare case in which some form of settlement should not be considered. It is also a rare case in which some form of settlement should not be considered. Any settlement must obviously be based upon a solid legal and technical risk assessment. This assessment can normally only be made after some form of discovery by both sides. Historically, we have settled about 75 percent of our cases, and I believe we do a good job in this area.

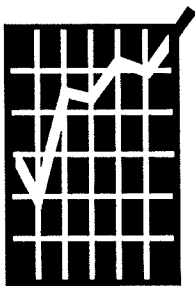
9. What actions or programs do you believe the BCA Bar Association should undertake for its members?

Training specifically aimed at practice before the Boards of Contract Appeals should be

pursued if feasible. Crossfeed between government attorneys, private practitioners and judges is another area to focus on, and this publication is a good start. A journal-type publication with emphasis on BCA trial practice would be useful. There are many outstanding law periodicals and journals out there, but one dedicated to government contract litigation might be welcomed. Of course, all of these suggestions will only work if our members support them with their own efforts.

10. We appreciate you making yourself available for this interview.

Thank you very much.



THE ACCOUNTANT'S CORNER

Peter A.
McDonald, C.P.A.,
Esq.



UNDERSTANDING STATEMENTS OF CASH FLOWS

Generally accepted accounting principles require financial reports of for-profit organizations to set forth three financial statements: a balance sheet, an income statement and a statement of cash flows¹. Because the arrival of the statement of cash flows is comparatively recent, most attorneys (particularly those that graduated from law school more than four years ago) are not familiar with it and do not fully understand what it is supposed to show.

Attorneys know that a balance sheet is nothing more than a snapshot of a company's finances on a particular day, and that an income statement measures the profit or loss in a defined period of time (typically, a month, quarter, or fiscal year). The statement of cash flows, however, details the changes in a

company's cash position for the same period as the income statement.

A statement of cash flows is divided into three sections: operating activities, investing activities and financing activities. Taken together, these sections explain how changes seen in the balance sheet and the income statement occurred.

A large number of transactions are reported under the operating activities section, which has two subsections: "cash provided by operating activities" and "cash used by operating activities." Any cash² received or paid out as a result of a company's operations are listed. For example, money received from customers, interest received, and dividends from investments are all reported in the first subsection because they are all cash inflows. Wages

paid to employees, payments to suppliers and subcontractors, tax payments, and interest payments are listed in the second subsection because they are all cash outflows.

The next section is investing activities. This shows the amount of cash paid or received for the purchase or sale of property and investments (stocks, bonds, etc.). Loaned money that was repaid will also be listed. The last line in this section will combine all these amounts and state: "net cash flow from investing activities."

The last section is financing activities. This lists the amount of cash paid for dividends, the retirement of debt (bonds, capital leases, and so on) or the purchase of treasury stock. It also lists the amount of money received from the sale of a company's own stock, bonds or notes. The final entry in this section totals these figures as "net cash flows from financing activities."

The net cash amounts from operating, investing, and financing activities are usually shown in the far right column of the statement. The information presented in these sections will then be summarized at the bottom as follows:

total cash at end of period:	\$x
total cash at beginning of period:	<u>-\$y</u>
net increase (or decrease) in cash:	\$z

Following this summary, there is a reconciliation between the net income figure (from the income statement) with the net cash flow from operating activities. In other words (and this is important), the statement shows how much of the net income shown on the income statement resulted in an increase (decrease) in cash from its operations.

Of the three sections in a statement of cash flows (operating activities, investing activities and financing activities), the most important by far is the first. This figure tells how much cash the company made from its business activities, which is what it does every day. It is all fine and good if money is made on its

investments and in its financing activities, but these do not and cannot sustain a business. For this reason, the statement of cash flows is crucial to an understanding of how an enterprise is faring: It provides information not discernable from the balance sheet or income statement. A company simply must be able to consistently generate a positive cash flow from its business functions or it will not survive. The net cash flows from operating activities focuses attention on the crucial test of a for-profit enterprise—its ability to make money from its normal operations.

In addition, government contract litigators should understand that statements of cash flows may also, under certain circumstances, be useful in calculating damages. As but one example, actual statements of cash flows can be contrasted against constructs that use certain isolating assumptions, i.e., that no events other than the one in dispute would have impaired a contractor's performance, etc. In this manner, the difference between the operating cash inflow realized under a contract and what the figure otherwise might have been may be calculated. Of course, the validity of such a figure is dependent on the validity of the supporting data provided as well as the underlying assumptions.

As government contract litigators, understanding the statement of cash flows can be very useful for evaluating quantum issues.

ENDNOTES

1 . SEE FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF ACCOUNTING STANDARDS No. 95, EFFECTIVE FOR FISCAL YEARS ENDING AFTER JULY 15, 1988.

2 . I USE THE TERM "CASH" TO MEAN "CASH AND CASH EQUIVALENTS," A TERM WHICH IS DEFINED BY A COMPANY'S POLICY. IN THE NOTES TO ITS FINANCIAL STATEMENTS, A REPORTING ENTITY MUST DISCLOSE ITS ACCOUNTING POLICY CONCERNING ITS CLASSIFICATION OF CASH EQUIVALENTS. MANY ORGANIZATIONS, FOR EXAMPLE, CONSIDER COMMERCIAL PAPER, TREASURY NOTES, AND DEBT SECURITIES WITH A MATURITY OF THREE MONTHS OR LESS TO BE CASH EQUIVALENTS.

WIN-WIN OR JUST WIN?

Ellie Bomar

DEFENSE CONTRACT MANAGEMENT
DISTRICT SOUTH

[THE VIEWS EXPRESSED BY THE AUTHOR ARE HERS ALONE AND DO NOT REPRESENT THOSE OF THE DEFENSE LOGISTICS AGENCY, DEPARTMENT OF DEFENSE OR ANY OTHER AGENCY OF THE U.S. GOVERNMENT.]

Trial attorneys spend more time negotiating settlements than going to trial. Clearly, negotiating skills are important and there are guides that no government contract litigator should ignore.



To begin with, BE PREPARED! This is the single most important part of the negotiation process. While its significance should be obvious, many negotiators unfortunately skimp on their preparation. For example, careful thought should be given to negotiation team composition and structure. Usually in pre-litigation matters, the contracting officer (K.O.) and her contractor counterpart will be the chief spokespersons. Of course, attorneys should be on the teams, and if the K.O. chooses not to be the speaker then the government's counsel is a natural choice. DCAA and other technical personnel may be part of the team depending on the issues, although it usually helps to have at least one "numbers" person. There should also be a designated note-taker. In any event, the K.O. should determine the composition of the contractor's team and develop settlement assessments accordingly.

Prior to the first meeting, the team should meet to determine the Government's version of

the facts and ensure that files are complete. The team should also agree in advance upon objectives and strategies, as well as internal discipline for conducting the negotiations. For example, the team needs to agree on a caucus signal. Finally, attention should be paid to proper logistical preparation, such as where to hold the negotiations and seating arrangements.

The second most important part of the process is to determine what is important to your opponent. In government contract litigation, contractors typically have only two goals: money and time, i.e., they want to be paid as much as possible and as quickly as possible. Contractors with cash flow problems are more interested in time than money, so they are willing to take a smaller amount for a quicker settlement. From the government perspective, on the other hand, neither time nor money are motivating factors. Instead, a contractor that demonstrates an injustice to the satisfaction of the procurement team will probably obtain a settlement more quickly than a contractor whose issues are in dispute.

It is usually helpful to lower your opponent's expectations. If the contractor's spokesperson begins the negotiation process with an unrealistically high number, tell him so and tell him why. For example, in convenience terminations my TCO clients typically begin negotiations by explaining that termination settlement negotiations are not like negotiating forward pricing agreements. Rather, they have a figure to offer that is supported by history, contract documents, and incurred costs. TCOs are obligated to reimburse contractors for what they have supported in their proposal. Therefore, if the contractor can support a settlement of \$100,000 the TCO would not offer \$80,000 or \$120,000. TCOs hear lots of whining, moaning, yelling and complaining, but their stock response is that the contractor needs to submit additional supporting documentation to justify a higher settlement figure. Usually, contractors come around, and if not, it just may be that litigation is inevitable.

I prefer to choose the meeting times and places because I want to control the negotiations agenda as much as possible. In fact, when an opposing counsel suggests a meeting date to one of my TCO clients, she will suggest another date just to win the first battle, even when the requested date is free. I am usually reluctant to have two consecutive meetings at an opposing counsel's office because that can cede control of the negotiations. This is because hosting the negotiations tends to elevate that side's power. In some cases, for example, the Government may want to emphasize this effect by meeting at the office of the U.S. Attorney. Alternating meetings between the two territories, or meeting on neutral ground, promotes an aura of fairness.

As a rule in negotiations, always get something in return. There are no throwaway items. Even if there are matters that are not meaningful concessions to your side, if the other side wants them they are by definition negotiable. You may even be able to invent "straw man" concessions. For example, a contractor can offer to not file a motion that it has no intention of actually filing. In one of my bankruptcy cases, the contractor had been overpaid by approximately \$220,000. Of course, we wanted all our money back. In preparing for negotiations with the contractor on this matter, I discovered a buying activity that was interested in awarding further contracts to this same contractor notwithstanding the debt. I persuaded the buying activity to forbear awarding the contracts long enough for me to use the award of further business as leverage for the contractor to agree to repay the entire overpayment with interest.

For the negotiation process to be efficient, it is important to set time aside to discuss each point. Some say that 90% of negotiations occurs in the last 10% of the time. Of course, if you know your opponent you can choose whether to discuss the "soft" points first and wear him down, or put the "hard" points on the agenda first.

For the negotiations to be effective, you must make the other side believe you are amenable to a settlement, but at the same time not afraid not litigate. Negotiations will only continue where the other side believes that progress is occurring. Settlement is unlikely unless the negotiating teams develop some degree of trust. This is because settlements are basically an exchange of promises. Moreover, a negotiator builds his reputation for trustworthiness or untrustworthiness on his actions. If he demonstrates an effective technique, then future negotiations will be easier. Thus, the negotiator becomes more valuable to his client and prospective clients.

Obviously, before going into settlement negotiations you have to know what your side wants. On that point, it is very helpful to know when you can walk away from the table. In government contract litigation, the alternative to a negotiated settlement is a trial. As a general comment for government counsel, a trial is something to be avoided if possible. This is because trials are burdensome, expensive, decisions can take time (I have waited four years for an ASBCA decision), and there are no guarantees you will win. However, the Government is financially better to withstand a long siege than contractors. Nonetheless, if the most the government is willing to offer in settlement is below the least the contractor will accept, then there will likely be a hearing.

Government counsel know that the contractor's attorney is not their friend. The negotiating relationship mentioned above is not intended to result in friendship. On the other hand, it won't hurt the settlement process to develop a good rapport with your opponent so don't talk to him as an enemy. This may be your opponent's big case and the most important matter to his client. If your attitude is "this is just another precontract costs case," then you unnecessarily offend your opponent and jeopardize settlement negotiations.

It is poor tactics to let your opponent know how much authority you may have in a particular case. If the government attorney is given

authority to settle for \$200,000, for instance, the contractor could be given an incorrect impression of a much lower ceiling figure through the use of progressively smaller increments. In this example, suppose that the initial negotiations hovered around \$120,000. As negotiations continued, the government's case was shown to be weaker and weaker. The settlement figures accordingly rose to \$135,000, \$145,000, \$147,000, and then \$147,500. These diminishing increments suggest that your authority figure is \$150,000. The contractor must then decide whether to take nearly \$150,000 now or go to trial. Contrast this with increasing settlements of \$120,000, \$140,000, \$160,000, and \$180,000. Your opponent will almost expect the next offer to be \$200,000.

In government contract litigation, you should avoid abusive or inappropriate behavior, in my opinion. The reputation you engender with such conduct, both in and out of the Government, will be a detriment to your career. Further, hollering at your opponents or insulting them will not promote a settlement because they will no longer listen to you. Negotiations will go smoother with a "saint" approach. This is not to say, however, that losing your temper is never appropriate. Changing styles during negotiations can at times be effective. However, you must have a very good reason to lose your temper and you should never do so more than once.

The government team must also coordinate with their public affairs office and reach agreement regarding press releases. Your opponent should not be able to learn anything bearing on the negotiations except what is said at the negotiating table. Some government agencies have a problem with policy changes issued from Washington that adversely affect their negotiating positions. However, contractors also have this problem. I was involved in protracted settlement negotiations where the contractor made certain specific representations. Contrary to these representations, we clipped numerous newspaper articles where

the contractor's own press releases made conflicting statements.

A good part of the work in any settlement is making sure that there are no loose ends. In closing the deal, be vigilant and distrusting of the other side, and ensure that the ultimate agreement does not leave out any salient points.

In conclusion, settlement negotiations involve role playing. The successful negotiator formulates a strategy to achieve the goals of his side. Over time, the negotiator will experiment with different techniques until he knows what style works best for him. One common thread, though, is that by playing fair you establish trust and set the stage for effective communication.

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EPA FINAL GUIDELINES FOR CONTRACTOR INDEMNIFICATION

J. Kent Holland, Jr.

WICKWIRE GAVIN

[EDITOR'S NOTE: THIS ARTICLE FIRST APPEARED IN THE MAY/JUNE 1993 ISSUE OF "HAZARDOUS MATERIALS CONTROL." REPRINTED BY PERMISSION.]

On January 25, 1993 EPA published in the Federal Register the long awaited Final Guidelines for Response Action Contractor (RAC) indemnification under Superfund. These Guidelines significantly change and reduce the indemnification that EPA had previously been giving RACs.

The Guidelines govern indemnification of RACs performing work at National Priority List (NPL) sites and Removal Action sites under contract for EPA or states under Superfund Cooperative Agreements. EPA continues to decline to indemnify contractors working for Potentially Responsible Parties (PRPs).

For all response work initiated after October 17, 1986, the date of enactment of the Superfund Amendments and Reauthorization Act (SARA), these new guidelines will be applied by EPA. This will be done by retroactive application of the Guidelines. EPA states that it will accomplish this by negotiation with the contractors to modify the terms of the indemnification contained in the contracts under which they were working. Even where the work has been completed and the contract closed out, it is EPA's intent to reopen the contract and require the contractor to accept the new, less favorable indemnification terms.

Any contractor that refuses to agree to the contract modification sought by EPA will have its contract terminated by EPA (presumably a default termination) and will be denied any indemnification whatsoever. For contracts on which EPA determines that indemnification is appropriate, the new guidelines establish specific coverage terms as follows:

Coverage Term. An EPA indemnification agreement will cover claims submitted to EPA within ten years after the contract term. For multi-site contracts, the ten-year coverage term will be site specific and begin with completion of work at an individual site.

Limits and Deductibles will be set for indemnification. The limit and associated deductible included in the indemnification agreement will be subject to negotiation in one of the following amounts depending upon the amount of the contract:

Limit <i>(occurrence</i> <i>/aggregate)</i>	Deductible <i>(occurrence)</i>
\$2 million	\$20,000
\$5 million	\$50,000
\$10 million	\$100,000
\$25 million	\$250,000
\$50 million	\$1 million
\$75 million*	\$2 million

(*: THIS LIMIT MAY ONLY BE SELECTED BY A RAC WITH A CONTRACT DURATION OF MORE THAN 5 YEARS.
DOLLAR-FOR-DOLLAR CO-PAYMENTS ARE REQUIRED FOR AMOUNTS IN EXCESS OF \$50 MILLION.)

Subcontractors. For cost reimbursement subcontracts, the prime contractor may flow down up to \$15 million coverage in the aggregate to subcontractors, with a maximum of \$5 million coverage to any single subcontractor. The coverage is separate from the prime contractor's limit and will not reduce the amount available to the prime. This separate pool of funds does not apply, however, for team subcontractors, with whom a prime may choose to share its indemnification. Coverage provided to the team subcontractor will subtract from the prime contractor's coverage and not be an additional indemnification exposure to EPA. EPA must give prior written approval of the subcontract which contains the indemnification agreement between the prime and sub, and the subcontractor is required to submit the same diligent efforts documentation required of the prime contractor.

LEGAL PROBLEMS WITH EPA IMPLEMENTATION GUIDELINES

Several interesting legal issues are raised by EPA's retroactive application of its new guidelines. Retroactive application would be a material, substantive change. Case law governing federal procurement holds that such changes cannot be made without the mutual consent of both parties to the contract. Otherwise, it may constitute a breach of contract. EPA asserts as its authority for requiring indemnification modification a contract clause contained in the original contracts that expressly states: "This clause will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines..." Although the contract language provided for modification of the indemnification clause, it would have been reasonably assumed by all parties to the contracts that (1) the Final Guidelines would be published within a reasonable period of time following contract execution, (2) the Guidelines would be refinements to the indemnification provisions, not wholly inconsistent with the indemnification bargained for and agreed upon

under the contract, and (3) the Guidelines would be applied exclusively to work that had not yet been performed under the contracts.

Many of the contracts to which EPA intends to apply the new Guidelines have already been completed and formally closed out, with the RAC having received final payment. EPA intends to reopen these contracts to modify the indemnification provisions.

The dramatic departure of the Final Guidelines from what was bargained for in the existing contracts is so material as to have been unforeseeable by RACs at the time of contract execution. Consequently, the contract clause permitting modification cannot be used to justify this contract change. It is likely that the Boards of Contract Appeals and federal courts would find this to be a breach of contract by EPA, entitling the contractor to financial consideration for accepting the change, or to specific performance of the existing indemnification provision of its contract.

Finally, RACs could not have reasonably foreseen and bargained for EPA publishing Final Guidelines materially curtailing the indemnification that would be provided on work that has already been completed. When work was performed under these RAC contracts, the broad indemnification clause contained in the contract would have been in full force and effect. It would be dispositive of any claims arising out of that work. There is no legal basis for EPA to retroactively cut off or reduce the indemnification that it has committed to providing for such previously performed work.

A potentially persuasive argument by a contractor is that it would have declined work assignments or opted to terminate its contract prior to performing work orders if EPA had published the Final Guidelines before the work was performed. By unreasonably delaying the Final Guidelines and attempting to apply them retroactively, EPA has thus prejudiced the rights of the contractor.

Another issue to be resolved through litigation will be whether a contractor that signs the contract modification required by EPA did

so by its own free will or through duress. EPA states that "if RACs do not accept modification of their existing contracts to conform to the final guidelines, the contracts will be terminated, and EPA's potential liability under the interim guidance effectively will cease as of the date of contract termination." This is a transparent attempt by EPA to force RACs to "mutually" agree to modify their contracts. The potentially devastating impact of losing all indemnification could compel a RAC to act against its will in accepting the modification forced upon it by the EPA.

A significant body of government contract case law holds that contract modifications entered into by the contractor acting under duress are null and void. Contract modifications obtained by EPA may, therefore, be held unenforceable by the courts. In that event, the original indemnification provision might be applied to give the RAC the full indemnification contained in the original contract.

SUBSTANTIVE FLAWS

Elimination of indemnification from work to be performed under new contracts is contrary to the best interests of expeditiously and cost-effectively cleaning up hazardous waste sites under the Superfund program. Cleanup progress will be slowed and the cost for cleanup will be increased as a direct result of EPA's new anti-indemnification policy.

Although insurance that is currently available to protect engineers and contractors against pollution liability has improved greatly in both limits and premium costs in the last year, it is not a substitute for indemnification. Contractor pollution liability coverage (CPL) and engineer's professional pollution liability coverage is available in amounts of \$10 million and more. The available coverage is still insufficient, however, and likely always will be, for protection against the truly catastrophic potential loss that might occur in the hundreds of millions of dollars. If, for example, a contractor inadvertently punctures and uncontaminated aquifer that supplies potable water and thereby

causes it to become contaminated, the damages could be extraordinary. There may be cleanup damages, natural resource damages, and third party injury claims by those claiming to have been harmed from drinking the contaminated water. It is unreasonable for EPA to think that the insurance industry would provide insurance for such a catastrophic loss. And it is unreasonable to expect contractors to assume the risk of this uninsurable liability. It is ironic that EPA has suggested that it believes that because there have been no catastrophic losses to date, there is no need for fear by the contractors and no need for indemnification. If EPA believes that, what is EPA's fear in providing the indemnification agreements desired by the contractors? Some EPA officials, on the other hand, have suggested that the rationale for the anti-indemnification rule is that indemnification has the potential to raid the federal treasury without limit. It follows, therefore, that those officials believe that a contractor should accept the risk of unlimited loss and bankruptcy for the dubious privilege of performing work for EPA. Both arguments ring hollow.

Within the next few years, I predict that RACs, particularly engineering firms, will divide into two distinct groups—those who work for EPA and those who work for everyone else. Between the rules for anti-indemnification, conflict of interest, limitation on future contracting, cost accounting, and release of confidential business data to a contractor's competitors, not every RAC will choose to work for EPA which will be a small player in terms of the overall cleanup market in any event. Those working for EPA will bid higher prices to account for costly burdens placed upon their businesses by EPA.

Another detriment to EPA will be that in order to defend against litigation brought by third parties and PRPs, engineers working for EPA will be more likely to over-engineer the work with what is commonly called "defensive engineering" designed to withstand future lawsuits. This will result in duplicative engineering and excessive costs. Whereas during the design

phase of a project the engineers have routinely relied upon the feasibility studies and preliminary engineering work performed by predecessor engineers, it will be less likely that they will do so without indemnification.

CONCLUSION

EPA's indemnification guidelines will harm the Superfund program by slowing progress and making cleanups more costly. EPA should leave the indemnification agreements in the currently existing contracts in place and without change. The guidelines should be retracted and completely revised before being applied to new EPA contracts.

PRACTICE & PROCEDURES COMMITTEE

Carl Peckinpaugh

AKIN, GUMP, STRAUSS, HAUTE & FELD

EVENTS AND PROJECTS

The Practice and Procedures Committee has been meeting on a monthly basis to discuss current issues in Board practice. In recent meetings, the Committee has drafted a position paper on the proposed Department of Energy reorganization as it affected the DOEBCA, started work on the Practice Manual project, and held our first two Focus Group sessions. A synopsis of the first Focus Group session is at the end of this column.



The Focus Group sessions have been particularly successful. We have had a good mix of judges and Government and private

practitioners. The discussion has been lively and interesting. Our first two sessions focused on the discovery process in Board practice. Future Focus Group sessions will include discussions of the Boards' powers to sanction misconduct and failures to cooperate, the presentation of evidence in hearings, and the application of the hearsay rules to Board practice.

The Practice Manual project is progressing well. We are collecting and organizing relevant materials that already are available for our use, and organizing the writing of other sections. In this regard, we are especially interested in getting copies of any standard docketing or preheating orders used by any of the Boards or individual judges. If you have materials that may be helpful in this project, please let us hear from you.

We also are planning to have a guest speaker at some of our meetings. For example, Jeffrey Lubbers of the Administrative Conference of the United States (ACUS) has agreed to come to our September meeting to discuss the ACUS draft study of the Federal Administrative Judiciary.

We will continue to meet on the last Tuesday of each month, with the exception of August and December, in which we will not be meeting. Thus, our meeting schedule for the rest of 1993 will be June 29, July 27, September 28, October 26, and November 30. Committee meetings are held at the offices of Akin, Gump, Strauss, Haute & Feld, L.L.P., 1333 New Hampshire Avenue, N.W., 5th Floor, Washington, D.C. 20036. Please call Connie McVay at 202-416-5410 at least one day before if you plan to attend. Lunch is provided for a charge of \$8.00.

If you have any questions, please call me at 202-887-4521, or Donald Suica at 202-401-4062.

FOCUS ON DISCOVERY

On a periodic basis, the Practice and Procedures Committee of the Board of Contract Appeals Bar Association conducts special fo-

cus group sessions on matters of interest to the Bar. These Focus Group sessions are intended to provide an opportunity for Board judges, Government counsel, and private practitioners to discuss ways to improve the professionalism of practice before the BCAs. The meetings allow judges and attorneys to candidly share ideas outside the confines of particular cases.

In order to promote frank and open discussion, positions taken in the Focus Group sessions are not attributable to individuals, but the major points of the discussion are summarized. The following summarizes the discussion at the first Focus Group session, held March 30, 1993. The session addressed discovery, including norms of attorney conduct in cooperative discovery, and the role of the judge in facilitating discovery.

Every judge has a unique perspective on discovery and the judge's role in it. However, the majority of judges do not want to be involved at all. The rules of most Boards encourage the parties to cooperate in conducting discovery on a voluntary basis, without involving the Board.

In contrast, many practitioners, both Government and private, believe that early involvement by the presiding judge is a key factor in making the cases go more smoothly. Having a discovery plan, even if fairly general and subject to amendment, with the parties' and judge's agreement to it, is important. In this regard, there was a general consensus that the establishment of a hearing date, even one relatively distant, provides the most effective focus for conducting meaningful discovery.

In the Armed Services Board of Contract Appeals (ASBCA), the parties are not even notified that a judge has been assigned to their case until something significant happens. However, the parties can almost always get a judge assigned by asking for a trial date or bringing a discovery motion to the Board. Also, the parties may ask for a scheduling conference with a judge. Asking for a hearing date will always get a judge assigned. Parties that want a judge

involved at the ASBCA should consider asking for a hearing date, even if more than eighteen months away, and for a date by which discovery is to be completed.

The rules of the General Services Board of Contract Appeals (GSBCA) currently include two completely different procedures for the conduct of discovery. For appeals, the rules encourage the parties to conduct voluntary discovery, similar to most other Boards. For protests, however, the rules require leave of the Board in order to conduct any discovery, and the Board establishes specific deadlines on all phases of discovery at an early preheating conference. As part of the recent draft amendments to its rules, the GSBCA has proposed to extend to appeals its rules requiring preheating conferences and leave of the Board as a condition of conducting discovery.

Practitioners tend to believe that extending the GSBCA's approach to supervising discovery to all appeals would make cases go faster and more smoothly. Many believe that similar rules should be adopted by all Boards. However, some judges believe that accelerating the hearing date will create a greater backlog of unwritten decisions.

Much of the judges' time is consumed in cases involving pro se claimants, often with a relatively small amount of money at stake. Although judges try to accommodate the special needs of these litigants in discovery, their discovery requests sometimes become unreasonable and may be denied on that basis. Some observers believe that having a more regularized approach, such as that used by the GSBCA in protests, would actually make the management of these pro se cases easier.

Generally, copies of interrogatories and requests for the production of documents are not filed with the Board. Seeing copies of interrogatories and document requests filed with the Board often is an early sign that discovery may soon become contentious.

Often, one can tell from who the attorneys are how things will go. In some circumstances, when possible problems are anticipated, a

judge may enter an order requiring the parties to consult and try to work out their differences as a prerequisite to bringing a discovery dispute to the Board's attention, similar to the procedure used in the Court of Federal Claims.

Relevancy objections, especially in large cases, generally are denied because they are fact-specific and judges are unable to become sufficiently familiar with the facts in the context of a discovery dispute to determine that the information sought will not be relevant. Other types of objections, such as privilege objections, are more easily handled as legal issues.

Although some judges will let the parties enter interrogatory answers and deposition transcripts into the record, others will not absent a good reason to do so.

CONSOLIDATIONS AFFECT NASA AND DOE BOARDS

Effective July 12th, the NASA Board of Contract Appeals will be merged into the Armed Services Board of Contract Appeals (ASBCA). Appeals arising under NASA contracts on or after that date should be filed directly with the ASBCA. Judge Lisa Todd, who formerly chaired the NASA Board, will move to the ASBCA to fill the one position funded by NASA.

The appeals on the current docket of the NASA BCA will be transferred to the ASBCA.

In an unrelated development, the Department of Energy Board of Contract Appeals (DOEBCA) was organizationally transferred to the DOE Office of Hearings and Appeals as a separate and independent component of the Department of Energy. However, it will continue to exercise jurisdiction over present and future appeals arising under DOE contracts.

There is general agreement that the Boards have the power to sanction discovery abuses through orders precluding the presentation of evidence, etc., similar to FRCP 37. There is more disagreement on whether they have, or should have, the power to order the payment of costs for abuse of the discovery process. Most judges probably do not want to impose Rule 11-type monetary sanctions.

There was some feeling among the practitioners that early involvement of a judge can encourage the parties to consider settlement more seriously. However, it was pointed out that two-thirds of the cases settle anyway, so that the marginal gain might not be large.

Finally, it was noted that those who are content with the present system of discovery

are not going to change their practice absent changes in the rules. It is incumbent on those who would like to see changes to propose specific rules changes which can be discussed.

ANNUAL MEETING COMMITTEE

Barbara Wixon

WILLIAMS & JENSEN



The planning of the BCA Bar Association's Annual Seminar is well on its way. This year's event will be held on Tuesday, October 26, 1993, at the Holiday Inn Crowne Plaza at Metro Center in Washington, D.C. While there is still more planning to be done, most of the substantive part of the program has been finalized and is presented below:

LEGISLATION & REGULATIONS COMMITTEE

Ty Hughes

KING & SPALDING

The next three meetings for the Legislation and Regulations Committee are scheduled for August 2, September 13, and October 25.

The meetings will be held at 8:15 a.m. at the offices of King & Spalding at 1730 Pennsylvania Avenue, N.W. The Farragut West Metro stop is two blocks away.



Among the issues to be discussed are: review of recent proceedings of the Administrative Conference of the U.S.; review of the Section 800 Panel of Recommendations Concerning a Single Bid Protest Forum; and review of the new GSBCA Charter

For further information contact Ty Hughes at 202-626-2928.

8:00—8:30	Registration
8:30—8:40	Opening Remarks by Marcia Madsen
8:40—9:15	Legislative Developments
9:15—10:15	Cost-Effective Litigation Techniques
10:15—10:30	Break
10:30—11:30	Effective Use of Experts
11:30—1:00	Lunch—Speaker (TBA)
1:00—1:15	Break
1:15—2:30	A Practical Look at the Boards' Rules of Procedure
2:30—2:45	Break
2:45—4:00	The Judge's Panel—Topic(TBA)
4:00—5:00	Business Meeting

This is the Association's big event, so don't forget to mark your calendars!

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: \$25. [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: _____

City/State/Zip _____

Work phone _____ :Fax: _____

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

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

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

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

SECTION III

Date: _____ Signature _____

FORWARD THIS APPLICATION WITH A CHECK FOR \$25 PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:

Laura Kennedy
Seyfarth, Shaw, Fairweather & Geraldson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4004