The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

PRESIDENT'S COLUMN

Robert Schaefer

HUGHES MISSILE SYSTEMS

Our members have overwhelmingly amended the BCABA Constitution to add associate members. We now have opened the BCABA to all those who are interested in practice relating to the Boards of Contract Appeals. Our goal is for the BCABA to become the home for everyone: judges, lawyers, their assistants and others who want to improve their individual capabilities and jointly seek to improve the dispute resolution process of the Boards of Contract Appeals. This is an exciting step forward as the BCABA seeks to have a real impact on the total dispute resolution process before the Boards of Contract Appeals.

We all know the significant contributions that nonlawyers make to the ability of judges and lawyers to perform professionally, but we seldom give them the recognition they deserve. Even less often do we listen as they offer insights that might really be helpful. It's time to change that attitude. As members of the BCABA, associate members can make their contribution to the practice before the Boards of Contract Appeals on a much wider scale. I encourage our new associate members to attend the annual meeting, and to make their needs and desires known to the BCABA leadership. An application for membership is enclosed with this issue.

While we welcome our new associate members, the BCABA renews its commitment to focus on issues and programs which relate to practice before the Boards of Contract Appeals. Our ability to focus on our charter is not only the best way we serve our members and the Boards of Contract Appeals most effectively, but it is also our future. Professional organizations

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IBCA ADOPTS BCABA RULES

The Interior Board of Contract Appeals (IBCA) announced that effective May 1, 1994, it will adopt and support the use of a Code of Professional Courtesy for both judges and practitioners. Their new Code is based on the draft Code of Professional Courtesy recently recommended by the Practices and Procedures Committee of the BCA Bar Association (chaired by Carl Peckinpaugh at Winston & Strawn).

The BCABA draft Code was initially presented for the consideration of the eleven boards of contract appeals at the annual meeting of the BCA Judge's Association held in late April. The BCABA draft Code was itself based on a similar code adopted by the State of Kentucky for the guidance of litigation attorneys in that state.

Although the IBCA does not contemplate the use of the Code of Professional

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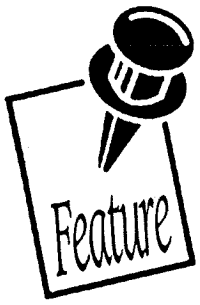
tend to lose their direction by taking on programs and concerns beyond their charters. Demands quickly overwhelm resources and the organization begins its decline because no one is well served.

There are frequent opportunities for the BCABA to become embroiled in issues unrelated to the practice before the Boards of Contract Appeals. These opportunities will become more frequent and more seductive in the years to come as the BCABA gets larger and its reputation for professional excellence grows. As we talk about certification, the focus will be on practice before the Boards of Contract Appeals, as opposed to procurement law and related areas of practice. The proposed Code of Professional Courtesy, which is being sponsored by Carl Peckinpaugh and his Practice & Procedures Committee, is a statement of how we ought to conduct ourselves before the Boards of Contract Appeals. The process is less formal, and Board judges may exercise certain prerogatives to assure appellants receive a fair review of their complaints. The Code of Courtesy is crafted for this unique environment. The membership will receive reports and discuss both the certification initiative and the Code of Courtesy at the annual meeting.

Dave Metzger is orchestrating an annual meeting that is a definite "don't miss." If you practice before the Boards, you will find the substantive programs to be invaluable. There will be distinguished panelists making presentations on discovery, ADR and fraud issues. All of the panels will focus on BCA practice, but the substantive messages will be applicable to other practices as well. Watch for the program brochures and register early.

We have been talking with the U.S. Court of Federal Claims Bar Association, and Chief Judge Loren Smith, to coordinate our respective fall programs. The 1994 Court of Federal Claims Judicial Conference is scheduled for the afternoon of October 24th, just a few blocks from our annual meeting hotel. Coordinated scheduling should be helpful for those coming from out of town who want to take advantage of both meetings. The subject matter of the two meetings will be different, so put them on your calendar.

Steven Porter's Nomination Committee is still accepting suggestions for both the three scheduled openings on the Board of Governors and Association officer positions. If you have some suggestions for strong candidates, or would like to volunteer, please give him a call. We always need people who want to make a difference.



CACI V. STONE:

THE CONTINUING BATTLE OVER GSBCA JURISDICTION

Gena E. Cadieux

DAVIS, GRAHAM & STUBBS

The Federal Circuit's recent decision in *CACI, Inc. v. Stone*, 990 F.2d 1233 (Fed.Cir. 1993) significantly raised the stakes in correct decisions about whether a procurement requires a delegation of procurement authority (DPA). This article analyzes the *CACI* decision and its application to date by the GSBCA.

THE CACI DECISION

In *CACI*, the government admitted during the GSBCA proceedings that it was required to obtain a DPA and had not done

so. The Board permitted the agency to continue contract performance while obtaining a proper DPA from GSA. *CACI, Inc.-Federal*, GSBCA No. 11523, 92-1 BCA P24,590 (1991). The Board refused to suspend contract performance because the agency needed the services being provided through the disputed contract. The Board's decision was based on a long line of Board precedent beginning with the *Computervision* decision, in which the Board concluded that if it granted protests for failure to obtain a DPA, the only relief it would offer was a suspension or continued monitoring of the agency's procurement authority while the agency went through the administrative procedure to obtain a DPA. *Computervision*, GSBCA No. 8709-P, 87-1 BCA P19,518 (1986).

On appeal to the Federal Circuit, protester CACI argued for the first time that the contract had to be suspended because the lack of a DPA meant that the agency did not have the authority to enter into a contract. The Federal Circuit agreed, finding that it was plain error for the Board not to have declared the contract void based on the agency's lack of actual authority to enter into the contract. The Federal Circuit stated: "...to the extent that the Board held that a government procurement or contract may proceed without a valid DPA, the Board was in error." 990 F.2d at 1236. The Federal Circuit relied upon the basic principle of government contract law that a contract does not exist unless the government's agent had actual authority to enter into it, regardless of the apparent authority of the agent.

The GSBCA's decisions in cases regarding lack of a DPA had never addressed the legal consequences of the lack of procurement authority. Instead, the GSBCA relied on the stated goal of the Brooks Act to effectuate efficient and economic procurement. In *Computervision*, the Board stated that:

> ...failure to obtain a DPA, serious as it may be, does not necessarily nullify and render void the solicitation and all activities and actions taken pursuant thereto without any possibility of redress or recourse. The lack of a requisite DPA is a deficiency which is within the power of the government to cure. It would be contrary to the goals of efficient and economic procurement to declare the award a nullity and thus preclude respondent from exploring with GSA officials a course of action which might cure deficiencies in the procurement which stem from the initial error on the part of the [agency].

The Federal Circuit rejected the GSBCA's approach, finding that the GSBCA lacked the authority to ratify a contract that had been entered into without a DPA. The Federal Circuit held that the GSBCA's authority under the Brooks Act only permits the GSBCA to suspend, revoke, or revise procurement authority, and does not authorize the Board to grant procurement authority to ratify actions taken without procurement authority.

The *CACI* case thus magnified the importance of an agency contemplating a procurement to correctly decide whether a DPA is required. The case leaves several questions open, including (1) whether the GSA (which can grant procurement authority) can ratify a contract by an agency that belatedly seeks a DPA; (2) whether the lack of procurement authority means that an agency must start the entire procurement process over if it is determined that the agency needed a DPA and did not get one; and (3) what timeliness rules apply to the filing of such protests.

GSBCA'S APPLICATION OF *CACI*

The GSBCA has only had the opportunity to interpret and apply the *CACI* decision substantively in two cases. In *Science Applications International Corp. v. NASA*,

GSBCA No. 12616-P, 94-1 BCA P26,553 (1993), NASA had not obtained a specific DPA because it contended (1) the procurement was not subject to the Brooks Act and (2) the procurement was covered by the regulatory DPA. In this pre-award protest, the GSBCA determind that the Brooks Act applied and that the value of the procurement exceeded the regulatory DPA of $2.5 million. NASA argued that GSA could ratify the procurement actions taken by NASA (including selection of the awardee but not contract award) through the DPA process. The GSBCA recognized that the Federal Circuit had held that the GSBCA could not ratify these actions, and declined to issue an advisory opinion whether the GSA could do so.

In a later case, the GSBCA appeared to hold that all procurement actions taken without benefit of an existing DPA would be void. In *Pinddar Donnelley Partnership v. Dept. of Commerce*, GSBCA Nos. 12667-P, 12670-P, 94-2 BCA P26,672 (1993), the GSBCA dismissed a protest filed by Graphic Designs, Inc. (GDI) because GDI had protested a previous stage of the procurement to the GAO. GDI had protested its exclusion from the competitive range, but had withdrawn its GAO protest before a decision. GDI had protested to the GSBCA after another offeror (Pindar Donnelley) protested the award selection. In addition to protesting, GDI moved to intervene as of right in Pindar Donnelley's protest. The Board denied GDI's motion based on the fact that GDI had filed a GAO protest. However, the Board held that GDI could participate as a permissive intervenor with respect to the count of Pindar Donnelley's protest challenging the agency's failure to obtain a DPA. The Board stated: "...if the Board should find that the agency improperly failed to secure a delegation of procurement authority, the proposed award and entire procurement woud be void, including GDI's exclusion from the competitive range." For standing purposes, at least, the Board refused to rule out the possibility of a decision voiding the entire procurement. The Board eventually determined that the procurement was authorized by a regulatory DPA, and thus this issue was not tested further. *Pindar Donnelley Partnership v. Dept. of Commerce*, GSBCA No. 12,667-P, 94-2 BCA P26,673 (1993).

GSBCA'S APPLICATION OF TIMELINESS RULES TO DPA PROTESTS

The *Pindar Donnelley* decision highlights the potential for DPA protests to be filed long after an offeror would otherwise not have a timely basis of protest. GDI had been excluded from the competitive range months before the protest was filed and had already pursued its protest opportunity at the GAO. The Board dismissed GDI's protest because of the GAO protest, and thus did not reach the question whether GDI had timely asserted a protest against the agency's failure to obtain a specific DPA.

An agency's failure to obtain a DPA almost always occurs at the outset of the procurement. The GSBCA's decision in *Pindar Donnelley* suggests that failur to obtain a DPA will invalidate all procurement activities leading up to award, in addition to voiding any contract that results from the procurement. Therefore, offerors or potential offerors have as much cause to protest the failure to obtain a DPA at the outset of a procurement as they do after the award decision. Moreover, the FIRMR requires the agency to insert a clause in the solicitation identifying the kind of DPA that applies to the procurement[1]. If the clause is not included in the solicitation, offerors are on notice that the agency has not concluded that the procurement requires some sort of DPA.

The GSBCA usually applies its timeliness rules strictly. GSBCA Rule 5(b)(3)(i) requires a protester to fie a protest "based

on alleged improprieties in any type of solicitation which are apparent before bid oening or the closing time for receipt of initial proposals." All other grounds of protest must be filed "no later than ten working days after the basis for the ground of protest is known or should have been known, whichever is earlier." As noted above, except in unusual situations where the procurement does not become subject to the Brooks Act until after the initial solicitation, the agency's failure to obatin a DPA is evident from the solicitation. Even if the failure to obtain a DPA is not interpreted as a solicitation impropriety, an offeror should have known that the government failed to obtain a DPA because of the absence of the required solicitation provision. Thus regardless of the fact that the government erred by not obtaining a DPA, application of the GSBCA's rules should result in dismissal of port-award protests on this ground[2]. However, the GSBCA has rejected timeliness challenges to such protests.

In *Universal Automation Labs, Inc. v. Dept. of Transportation*, GSBCA No. 12370-P, 94-1 BCA P26,323 (1993), decided just three, months after *CACI*, the GSBCA refused to dismiss a belatedly raised DPA protest issue as untimely. The Board stated: "This issue...is...obviously a matter of fundamental importance and requires close review." Because the decision was issued just a few months after the Federal Circuit's *CACI* decision, it was unclear whether the Board was ruling out timeliness objections to DPA claims or whether it was taking the opportunity to address these issues quickly in order to resolve the application of the *CACI* decision. Later, in *SAIC v. NASA*, the Board expounded on its rationale for considering the DPA issue long after the submission of initial proposals:

> Because protesters' allegations that the Government lacked a valid DPA affects our jurisdiction to hear the merits of this protest, we may decide the issue regardless of its timeliness. Even prior to *CACI*, we have raised the issue of our jurisdiction *sua sponte* if jurisdiction appeared in doubt.

The Board's stated reasoning for continuing to hear these cases ignores the fact that its jurisdiction depends solely on the nature of the procurement and does not depend on whether the agency actually obtained a DPA. The Brooks Act was amended in 1986 to clarify that "[a] procurement is conducted under the authority of the Brooks Act by application of the Act, not by actions or inactions of an agency, particularly one which is a party to a protest[3]." Thus, the Board's stated rationale does not justify proceeding with a clearly untimely protestthat has the potential to disrupt an extensive and expensive procurement process. Admittedly, if such a protest were permitted, the agency could defend by arguing that the GSBCA has no jurisdiction because the procurement was not for ADPE and thus that no DPA was required[4]. This fact does not turn an untimely claim into a timely one. Neither the GSBCA nor the courts have ever held that a claim is timely because the facts that form the basis of the claim may be presented in the form of a defense to an action. This application of GSBCA's timeliness rules would not present an unfair advantage to the agency. The agency that would be arguing the GSBCA's lack of jurisdiction would not have had an earlier opportunity to present this defense, but the protester that could have brought the claim knew or should have known that the agency had not obtained a DPA and had the opportunity to protest in a timely fashion.

An agency's failure to obtain a DPA is a serious matter, but so are many of the other types of protests that must be brought before the GSBCA in a timely manner or be forfeited. Unlike the General Accounting Office, the GSBCA has not articulated

ENDNOTES

[1] FIRMR Secs. 201-39.106-4, 201-39.5202-3.

[2] Unlike the GAO, the GSBCA does not have an exception to its timeliness rules depnding on the importance of the issue presented. See GAO Rule 21.2(c), 4 C.F.R. 21.2(c)(GAO will process untimely protests if they present a significant issue).

[3] H.R. Conf.Rep. No. 1005, 99th Cong., 2d Sess. 775 (1986).

[4] See *US West Communications Services, Inc. v. United States*, 940 F.2d 622 (Fed.Cir. 1991).

[5] One such example would be if the agency was proceeding under a regulatory DPA, but the offers came in much higher than $2.5 million.

[6] See Pachter & Shaffer, "The CACI Decision - The Risk That Lack of a Delegation of Procurement Authority Voids the Contract," Federal Contracts Report, Vol. 61, p. 614 (April 18, 1994).

a "significant issue" exception to its timeliness rules. Moreover, nothing prevents the GSBCA from notifying the pertinent officials within GSA if it is discovered that a required DPA was not obtained. The GSA can then consider whether to ratify the procurement or to take other action to address the invalidity of the contract.

The Board's reason for hearing these protests may be to avoid prejudicing offerors who assumed they would be able to raise the DPA issue post-award. If that is the reason, the Board should address it head on and refuse to hear protests on this issue that relate to procurements begun after the *CACI* decision. The Board's *Computervision* decision permitting the agency to obtain a retroactive DPA may have reduced protesters' evaluation of the value of bringing such protests. The *CACI* decision changed that dynamic. Now, a protest based on failure to obtain a DPA is an atom bomb, potentially obliterating the entire procurement. It is unfair to permit offerors to hold the bomb for the entire procurement, and then detonate it only if they lose. The public interest would be better served if the timeliness rules were applied, resulting in this issue being raised at a time when it can be addressed without derailing a procurement and further delaying government purchases. For that reason, offerors should be required to protest the lack of a DPA on or before the closing of a solicitation, absent unusual circumstances that create the DPA requirement after the date for receipt of initial offers[5]. If the agency had obtained a DPA but failed to note it in the RFP, the protest can be easily resolved. If the agency had not obtained a DPA, the issue can be resolved well prior to evaluation and selection of the awardee, thus avoiding extensive and wasted effort on the part of the agency and the offerors, and possible inability on the part of the awardee to be compensated for its work prior to the determination that the government lacked authority to enter into the contract[6].

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Courtesy for disciplinary purposes (and emphasized that it was not adopting a new standard of care for legal advocacy), the IBCA, echoing the views of the BCABA committee chairman, Carl Peckinpaugh, stated that its new Code was intended as a statement of principles and goals in the hope of improving professionalism among the parties appearing before it.

In addition to the fifteen suggested obligations addressed to advocates, the IBCA agreed with the BCABA that the boards themselves have the obligation to be courteous, respectful and civil to the parties, as well as a special obligation to be considerate of the parties' and their witnesses' time schedules. These Board obligations are also set forth at the end of the new Code as adopted.

A copy of the new Code of Professional Courtesy, set forth below, will be included with the docketing notice sent to the parties after the notice of appeal has been received by the IBCA.

DEPARTMENT OF THE INTERIOR BOARD OF CONTRACT APPEALS CODE OF PROFESSIONAL COURTESY

Note: This Code of Professional Courtesy, as hereby adopted, is based upon a very similar Code presented in draft form at the 1994 Annual Seminar of the Board of Contract Appeals (BCA) Judges Association by the Chairman of the Practices and Procedures Committee of the BCA Bar Association (BCABA). The BCABA draft was based on an existing code in use in the State of Kentucky. Apart from minor editorial revisions, and the addition of Obligation No. 15, the obligations are essentially as drafted by the BCA Bar Association.

PREAMBLE

Advocates for parties appearing before the Interior Board of Contract Appeals, both lawyers and those representing pro se parties, should strive to make the adminis-

trative appeal process work as fairly and efficiently as possible. The following Code of Professional Courtesy is intended as a guideline for advocates in their dealings with opposing parties and their counsel, this Board, and, in the case of lawyer advocates, their own clients.

The Code is not intended as a disciplinary code or as a legal standard of care in providing professional services. It may not be used as an independent basis for litigation or for sanctions or penalties. It does not supersede or modify an advocate's obligations under any other code of conduct or professional responsibility. Rather, it is intended as a statement of principles and goals in the hope of improving professionalism among advocates.

OBLIGATIONS OF AN ADVOCATE

1. An advocate will endeavor to file and serve all pleadings, motions, and other documents in a way that does not unfairly limit any other party's opportunity to respond. For example, if a document is faxed to the Board or to any one party, it should be faxed to all parties.
2. An advocate will promptly return telephone calls and respond to correspondence from the Board and from other parties.
3. Before proposed dates are presented to the Board, an advocate will voluntarily consult with the other parties' advocates or representatives regarding scheduling matters in order to avoid unnecessary time conflicts.
4. An advocate will engage in formal discovery only when actually needed to ascertain facts or information. Informal methods of discovery will then be attempted as a first resort. Discovery will never be used for the purpose of harassment or to increase litigation expenses.
5. An advocate will respond to document requests reasonably and will not strain to interpret the request in an unduly restrictive manner in order to avoid disclosure of relevant non-privileged documents. An advocate will not respond to a request for the production of documents in a manner designed to hide or obscure the existence of particular documents.
6. An advocate will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
7. An advocate will not attempt to obstruct questioning or object to questions during a deposition unless necessary under the applicable rules to preserve an objection or privilege for resolution by the Board.
8. An advocate will avoid making unwarranted or ill-considered accusations of unethical conduct by an opponent, either to the opponent or to the Board.
9. An advocate will not engage in discourteous behavior in connection with any Board proceeding or related activity.
10. An advocate will not seek to embarrass another advocate before the Board, and will avoid personal criticism of other advocates or parties during the course of any Board proceeding.
11. An advocate will not seek unjustified sanctions against, or the disqualification of, another advocate, and in any event will never seek sanctions solely to obtain a tactical advantage.
12. An advocate will maintain a courteous tone in correspondence, pleadings and other communications pertaining to a matter before the Board.
13. An advocate will keep all express promises and will adhere to agreements with other parties, whether oral or in writing, and in general will be honest and forthcoming with others in any matter before the Board.
14. An advocate should confer with the other party or parties about Alternate Dispute Resolution procedures and other settlement negotiations early in the proceedings, and prior to discovery if practicable. However, an advocate will never suggest or encourage settlement negotiations as a dilatory tactic or as a means to gain any other tactical advantage.
15. A lawyer advocate will make every effort to be completely fair and open in all dealings with pro se parties and their representatives, and will scrupulously avoid anything that could intentionally or unintentionally mislead them concerning either procedures before the Board or the merits of their case.

OBLIGATIONS OF THE BOARD

1. The Board will be courteous, respectful, and civil to advocates, parties, and witnesses. It will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to ensure that all of its proceedings are conducted in a civil manner.
2. In scheduling hearings, meetings, and conferences, the Board will attempt to be considerate of the time schedules of advocates, parties, and witnesses, to the extent not inconsistent with the informal, expeditious, and inexpensive resolution of appeals before it.

INTERVIEW WITH...

COL Steven Porter

PRESIDENT-ELECT

1. You will be assuming the presidency at a time of great change, so your views on a number of topics are important. For example, what is your opinion of the BCA Bar Association certification program?

A. I agree that this is a period of great change both within and without the profession. As in every period of change there is uncertainty about the future, and how we should respond to the forces of change. During these times, a professional association such as the BCA Bar Association is essential as a forum for the exchange of ideas and information.

Many of the initiatives now being considered by the membership are in response to the changes being encountered by our profession, and the way we practice. For example, I believe that it is in the interest of the membership to build closer ties with other related professional organizations. Joint programs and activities are not only cost effective, but they increase the information and visibility of our Association. Examples of such joint activities are the CAFC Judicial Conference, and the BCABA "breakout" sessions in which we have participated; timing our meetings so that our out-of-town members can attend our annual meeting and the CAFC Judicial Conference; and lastly, programs such as the recent joint meeting of the D.C. Bar Association, the ABA Public Contract Law Section, and ourselves.

Regarding the proposed certification program, if there ever was an issue related to change, this is it. With the reality of downsizing and economic change all around us, there undoubtedly will be those attorneys that will attempt to do all things for all clients. While the Canons of Ethics preclude us from accepting an assignment for which we are unqualified, there will be a growing number of attorneys at the Boards of Contract Appeals who will hold themselves out to be greatly qualified. Without a professional organization such as the BCA Bar Association providing certification of experience or expertise, there will be disserved clients. Disserved clients reflect badly on all of us. Couple all of this with the increased potential for Board litigation resulting from the rewrite of the FAR and, yes, I do see a need for certification to maintain and improve our profession and practice before the Boards.

2. In your view, what is the impact of ADR on government contract litigation?

A. ADR is badly needed in many cases. We have all seen cases where too much was spent by the Government and by the contractor to litigate a dispute, and as a result the management of both parties was unhappy with the legal profession. Anything we can do to resolve cases without trial, we should do. ADR will not cause unemployment, just as computers do not cause unemployment. With the correct tools, we merely shift the nature of the work to that which is more appropriate.

That is not to say that discovery as we know it will end. We all have seen cases where ADR eventually was used to settle a case, but only after a full period of discovery. The question that is always asked is why did we need to do all that discovery if we resolved the case through ADR? The answer is that we did not know enough about the case to use ADR until

discovery provided some of the needed information.

We should also remember that the Boards of Contract Appeals themselves began as a type of ADR, where both the Government and the contractor could informally and inexpensively reach a quick solution to a problem in dispute. Hopefully, we will all keep those original goals in mind as we add the tools provided by the newer forms of ADR to our practice at the Boards.

3. What goals would you like to see the BCA Bar Association accomplish during your year?

A. I believe the Association should have only one goal, and that is service to its membership. The BCA Bar Association is a creature of the membership, and must be responsive and creative in meeting their needs. What are those needs? We need to provide a forum for discussion, and a mechanism to carry out membership directives. When each member believes that BCA Bar Association membership is essential to professional development, when the judges at the Boards believe that practice is becoming more professional because of the BCA Bar Association, then we will have met our goals.

4. Pete McDonald has been pretty much running amok over at "The Clause." Can't anything be done about it?

A. The Clause has become the glue that holds us all together. We have occasional meetings, and call each other on a regular basis, but The Clause has become unique in professional legal circles in its readership. I view The Clause as being very similar to a Shakespearean play: There is something for everyone. There are notices of professional interest, articles that increase our professional knowledge, and the iconoclastic and irreverent Editor's Column. Most of the lawyers I know read the Editor's Column first. Perhaps that says something about our membership...or our Editor.

5. What have been some of your disappointments during your membership in the BCA Bar?

A. I have had disappointments such as an adverse Board decision, and occasionally having to work instead of attending a conference. However, none of my disappointments are related to the BCA Bar Association. The BCA Bar Association fills a need. I am gratified that we have so many government attorneys on our rolls. You may remember that our predecessor was the Armed Services Trial Lawyers Association, which was 100% government and which I felt was not diverse enough. Now, we have a great mix of Board judges and attorneys from government, corporate and private practice. Our diversity gives us great strength. I do not know of any other professional organization that has the professional balance we have achieved.

Our annual meetings have increased in attendance and stature each and every year. We all look forward to receiving The Clause, because it has become a publication we use. The articles are timely, and the Editor's Column usually makes us chuckle (or gasp). Our annual Directory of Members has become a big hit in the government contracts community. Where else can we be assured of finding the correct name, address, work, and fax phone numbers of all our colleagues?

As you can see, my disappointments are few, and none related to the BCA Bar Association.

6. What do you view as strengths of the BCA Bar Association?

A. Our strength is our membership. The more responsive we are to serving the needs of the "Bench and Bar" of the Boards of Contract Appeals, the stronger we will become. As I mentioned before, we are very fortunate in the balance we have achieved between the various groups that form our membership. This is reflected in our balanced approach to prob-

lems confronting the profession. Let's hope that never changes.

7. What programs do you plan on initiating during your tenure?

A. There is a continuing need for professional education. I would propose that we continue our educational efforts, and expand those efforts wherever possible. The "Visiting Judge" program we experimented with a few years ago should be revisited. The program was begun because there was a need for a neutral forum to promote communication between judges and the bar, particularly away from the D.C. area where BCA judges are not seen as often. We need to look at ways that we can encourage BCA judges can communicate practical solutions to problems, points of procedure, and otherwise contribute to . We also need to do this in a correct way, so that participation by the judges is voluntary, officially sanctioned by their Board, and part of a recognized program.

8. Do you believe the BCA Bar Association should comment on proposed laws and regulations affecting the government contract field?

A. Our Association was formed to improve the practice of law at the Boards of Contract Appeals. In the past, we have commented on proposed legislation when the subject of the legislation affected Board practice. I expect to continue such comments when there is an impact on our practice. However, legislation that does not directly affect Board practice should not be the subject of comments.

9. What impact, if any, do you envision the Administration's procurement reforms having on government contract litigation?

A. The National Performance Review (NPR) recommended that the FAR be rewritten. There will be a public meeting on August 17th to discuss the various alternatives. None of the alternatives envision leaving the FAR as it is today. Most alternatives involve moving away from mandatory clauses, and allowing contracting officers to tailor nearly all contract clauses as part of contract negotiations. If this comes to pass, Board practitioners will become simply overwhelmed, in my opinion. The potential for disputes at the Boards of Contract Appeals will increase enormously when we lose our case law precedents. Presently, we rely very heavily upon on our case law to elaborate on the duties and responsibilities of the contracting parties. When we rewrite or omit all of those standard contract clauses, we have no guideposts, and for awhile we will be truly lost. The FAR rewrite could have as large an impact on our profession as the Contract Disputes Act of 1978.

10. What direction would you like to see the BCA Bar Association taking years from now?

A. I hope that years from now the BCA Bar Association will continue to have the same goals as today, that is, a desire to improve the professionalism of the practitioners and the practice at the Boards of Contract Appeals.

TREASURER'S REPORT

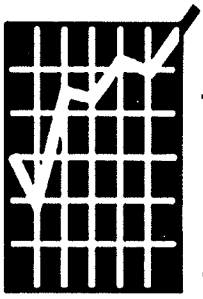
Jim Nagle

OLES, MORRISON & RINKER

BCA BAR ASSOCIATION
STATEMENT OF FINANCIAL CONDITION
FOR THE QUARTER ENDING JUNE 30, 1994

Beginning Cash Balance, May 1, 1994		$6,799.85
Fund Income:		
Membership dues	$375.00	
Annual meeting payments	$170.00	
Total Fund Income		$545.00
Subtotal		$7,344.85
Fund Disbursements:		
Newsletter (Spring)	$1,034.95	
Total Fund Disbursements		$1,034.95
Ending Cash Balance, June 30, 1994		$6,309.90

ACCOUNTANT'S CORNER



HEADS I WIN, TAILS YOU LOSE: THE NEW RULES FOR IMPAIRED ASSETS UNDER GOVERNMENT CONTRACTS

Roger N. Boyd

CROWELL & MORING

Peter A. McDonald

COOPERS & LYBRAND

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When a new Financial Accounting Standard goes into effect at the end of this year, it may compel some government contractors and nonprofit grantees to write down asset values to current market where their value has been diminished by changed circumstances, such as a program cancellation, military base closing or environmental liabilities. Future depreciation and cost of money costs would be reduced for the affected assets, and the write-down would be an expense of the current period. As currently drafted, the Proposed Standard would not allow for a reversal of the devaluation, even if the impairment were later remedied.

Conversely, the Cost Accounting Standards Board (CASB) is proposing to change CAS 404 and CAS 409 to prevent government contractors from stepping-up asset values to reflect current market values, where assets are obtained in a merger or business combination. The net result, for government contract costing purposes, may be that assets will be valued at the lesser of current market value or the original cost incurred by the initial purchaser.

On existing flexibly-priced contracts, there may be disagreements concerning allocability and allowability of significant write-down expenses, particularly with regard to environmental impairment that cause remediation costs in future periods. On all future contracts, devaluation of assets will impact forward pricing rates and the pricing of new contracts.

Government contractors should review the Proposed Financial Accounting Standard and submit comments to the Financial Accounting Standards Board (FASB), particularly with respect to the revaluation of assets after the impairment has been partially or completely removed.

I. INTRODUCTION

The Financial Accounting Standards Board (FASB) regulates the accounting practices of public companies, i.e., ones subject to the jurisdiction of the Securities and Exchange Commission. Its rules are called Statements of Financial Accounting Standards. Proposed Standards are issued for comment and public hearing in the form of Exposure Drafts (EDs).

For almost ten years, FASB has known of the need to promulgate a rule for the proper accounting of impaired long-lived assets.

Several studies had found divergent accounting practices concerning both the reporting and measurement of the impaired value of such assets[1]. FASB concluded that accounting standards were needed to eliminate inconsistent practices, as well as

provide for current and future impairment questions. Their Proposed Statement of Financial Accounting Standards, dated November 29, 1993, is set forth in FASB Exposure Draft No. 132-B, entitled "Accounting for the Impairment of Long-Lived Assets[2]." The deadline for public comments was March 15, 1994.

As shown below, this Proposed Accounting Standard (also known as an Exposure Draft (ED)) potentially will have a significant adverse impact on government contractors and nonprofit grantees. Long-lived assets (such as land, buildings and facilities) whose value becomes impaired may have to be written down to their new fair values, and in many instances this loss may be unrecoverable, even when the cause of the impairment is later eliminated. In addition, the Proposed Accounting Standard and its attendant rules may be only slightly modified from what is presently proposed. Finally, these new rules will take affect at the end of this year: There will be no transition period.

II. ACCOUNTING ISSUES

The threshold issue is whether or not a loss[3] has even occurred, i.e., does the carrying amount of an asset exceed its fair value? The Proposed Accounting Standard sets forth the following test:

If the sum of the expected future net cash flows (undiscounted and without interest charges) is less than the carrying amount of the asset, the entity shall recognize an impairment loss in accordance with this Statement[4].

The expression, "sum of the expected future net cash flows," generally means the total cash the owning entity expects to recover for that asset during its estimated useful life. Simply stated, it is all the money the owner can ever reasonably expect to receive for that asset.

The next question is how to determine when a loss, resulting from the diminished value of an asset, should be recognized. FASB considered the criteria of economic impairment, permanent impairment, and probability of impairment. Of these, FASB concluded that

...only if there is reason to believe an asset is impaired...must the asset be tested for recoverability. If that test indicates that the estimated undiscounted cash flows to be generated by the asset are insufficient to recover the carrying amount of the asset, only then is the asset considered impaired, reduced to its fair value, and a loss recognized[5].

As for when an impairment is to be recognized, the proposed rule establishes an occurrence-specific requirement. Instead of imposing the burdensome and wasteful practice of regularly reviewing the carrying amounts of long-lived assets, the Proposed Accounting Standard provides that an asset's valuation should be revisited "whenever events or changes in circumstances indicate that the carrying amount of the assets may not be recoverable[6]." Examples of such events are:

1. a significant decrease in the market value of an asset;
2. a significant change in the extent or manner in which an asset is used;
3. a significant adverse change in legal factors or in the business climate that affects the value of an asset;
4. an accumulation of costs significantly in excess of the amount originally expected to acquire or construct an asset; and
5. a projection or forecast that demonstrates continuing losses associated with an asset[7].

Of course, these are only illustrative of the circumstances that could cause an asset to be revalued.

Once there is an impairment loss, the extent of that loss would be the difference between an asset's carrying amount and its fair value. The definition of fair value is lifted from FASB Statement No. 15[8]:

Fair value of assets shall be measured by their market value if an active market for

them exists. If no active market exists for the assets transferred but exists for similar assets, the selling prices in that market may be helpful in estimating the fair value of the assets transferred. If no market price is available, a forecast of expected cash flows may aid in estimating the fair value of assets transferred, provided the expected cash flows are discounted at a rate commensurate with the risk involved.

FASB recognized that, in some cases, the impairment of a particular asset would be complicated by a firm's asset grouping practices. Of course, management enjoys considerable latitude in such determinations. However, FASB decided on this issue that assets must be "grouped at the lowest level for which there are identifiable cash flows that are largely independent of the cash flows generated by other asset groups[9]."

Once recognition of the impairment occurs, the asset would be carried at its new (i.e., lower) value. Subsequent depreciation would then use this new basis over the asset's remaining useful life.

A significant provision of the Proposed Accounting Standard provides that once recognized, an impairment loss cannot be reversed. FASB's rationale for this is as follows:

> The Board considered whether to prohibit or require restoration of previously recognized impairment losses. It decided that an impairment loss should result in a new cost basis for the impaired asset. That new cost basis puts the asset on an equal basis with other assets that are not impaired. In the Board's view, the new cost basis should not be adjusted subsequently other than as provided under the current accounting model for prospective changes in depreciation estimates and for further impairment losses[10].

Unless this particular rule is modified, the only changes allowed to an asset's new cost basis would be through either additional impairment losses or changes in applicable depreciation estimates. On that last point, FASB stated that

> ...the depreciation method and estimates of useful life and salvage value should be reviewed periodically and should be changed if current estimates are significantly different from previous estimates[11].

The next major issue addresses the appropriate financial disclosure requirements. On this point, FASB provided that the reporting of an impairment loss would be part of "income from continuing operations before taxes." At the present time, generally accepted accounting principles do not require the reporting of "income from operations," although such reporting is widely used. Those companies that do subtotal income from operations on their income statements, however, will have to include the amount of the impairment loss in such subtotals. For those that do not, it would appear that an impairment loss would be reported as an extraordinary loss.

The Proposed Accounting Standard mandates full disclosure of all the following:

1. a description of the assets impaired and the facts and circumstances leading to impairment;
2. the amount of the impairment loss and how fair value was determined (based on market value that exists in an active market for the asset or similar assets or present value of expected cash flows);
3. if the present value of expected cash flows is used as a basis for estimating fair value to measure the amount of the impairment loss, the discount rate used in that measurement; and
4. for public companies, the business segment(s) affected[12].

Finally, the new rule would apply to all financial statements issued for fiscal years beginning after December 15, 1994[13]. There would be no transition period.

III. GOVERNMENT CONTRACT IMPLICATIONS

The Proposed Accounting Standard would affect the long-lived assets of government contractors performing existing cost-reimbursement contracts, flexibly priced contracts, and the pricing of forward pricing rates. It will also increase the cost uncertainties associated with future fixed-price contracts, i.e., the loss expense of an impaired long-lived asset during the period of performance.

A. FAR COST PRINCIPLES

The FAR is silent on the appropriate accounting treatment to be accorded impaired long-lived assets. In numerical order, the following cost principles may be affected by the Proposed Accounting Standard:

1. FAR 31.205-9, Environmental costs (draft)
2. FAR 31.205-11, Depreciation
3. FAR 31.205-16, Gains and loses on disposition of depreciable property or other capacity costs
4. FAR 31.205-17, Idle facilities and idle capacity costs

The potential impact of the Proposed Accounting Standard on each of these is discussed below.

ENVIRONMENTAL COSTS

Typically, contractors first learn of an environmental problem through an internal inspection, and environmental audit, a regulatory inspection, or a lawsuit. Regardless of how environmental contamination is reported to management, this article only concerns its accounting impact on a long-lived asset.

FASB decided that an asset is impaired when its carrying amount is not recoverable, and that the new basis for the asset should be its fair value (as defined above). Applying these conclusions to the environmental arena, a long-lived asset (such as land, a manufacturing or processing plant, storage facility, or office building) that is discovered to be environmentally contaminated may, under the new rules, have to be written down to its impaired value.

Once again, the criteria in the Proposed Accounting Standard concerning impairment speaks in terms of:

1. a significant decrease in the market value of the asset;
2. a significant change in the extent or manner in which an asset is used;
3. a significant adverse change in legal factors or in the business climate that affects the value of an asset;
4. an accumulation of costs significantly in excess of the amount originally expected to acquire or construct an asset; and
5. a projection or forecast that demonstrates continuing losses associated with an asset.

Environmental contamination of a long-lived asset could meet one or more of these tests for impairment. The controlling test is, again, whether "events or changes in circumstances indicate that the carrying amount of the assets may not be recoverable."

Some environmental impairments could substantially diminish or even equal the carrying value of an asset, and FASB realized that impairments of that magnitude could occur. In such cases, the owner must decide whether to sell the long-lived asset for whatever it will bring, or bear the remediation costs in order the asset to operational use. FASB likened this choice to being "economically similar to a decision to invest in an asset and, therefore, the impaired asset should be measured at its fair value[14]." If the decision is made to sell the asset, then it can no longer be depreciated.

Because assets will be recovered through sale rather than through operations, accounting for those assets is a process of valuation rather than allocation[15].

With respect to restoration of value, some might wonder why an environmentally impaired asset that is remediated should not be restored to its original value. After all, the owning entity has borne the

cost of removing the contamination. The answer lies in the fact that, remediation notwithstanding, the tainted asset is simply not worth what it was before the contamination was discovered. Of course, the asset is worth at least its impaired value. Undoubtedly, it will be worth more after remediation, so some of the remediation costs should be attributable to value restoration (and for depreciable assets, capitalized). That value, however, is unknown and, until the asset is actually sold, perhaps unknowable. Consistent with the accounting principle of conservatism, then, the carrying amount of the asset for financial statement reporting would be its impaired value, unless the proposed rule is modified to include a portion of the remediation costs. What that portion should be will vary depending on the circumstances.

As noted earlier, FASB's final rule may (and hopefully will) diminish the harsh result of this "no reversal of impairment" position. Again, the FASB staff is working on this specific issue. Unless altered, contractor-owned contractor-operated facilities (COCOs) would be especially at risk of unrecoverable asset impairment due to environmental contamination.

Whether all or any part of an entity's remediation costs are allowable depend on the facts that caused them to be incurred. The contractor would expense its remediation costs but, in the legal climate that exists at the time of this writing, allowability of those costs under its government contracts would be an open issue.

DEPRECIATION

In an impaired asset scenario, a plant kept in operation can still be depreciated. FAR 31.205-11 (Depreciation) provides that such charges are an allowable cost provided they are reasonable, a term defined for cost allowability purposes in subparagraph (d) as follows:

Depreciation shall be considered reasonable if the contractor follows policies and procedures that are:

1. Consistent with those followed in the same cost center for business other than Government;
2. Reflected in the contractor's books of accounts and financial statements; and
3. Both used and acceptable for Federal income tax purposes.

Depreciation costs may have been allowable when paid, but a plant or facility whose value has been impaired will likely have been overdepreciated. This results from the use of the original (unimpaired) value as the basis for depreciation. When a long-lived asset becomes impaired, that basis for depreciation becomes considerably smaller. The accumulated depreciation account may now be excessively large in comparison to the impaired value, i.e., there may be some overdepreciation. If that overdepreciation had been charged to government contracts, the contractor could face a government claim, pursued through litigation. Also under the proposed rules, disputes relating to the reasonableness of future depreciation costs will surely arise.

GAINS AND LOSSES ON DISPOSITION OF DEPRECIABLE PROPERTY OR OTHER CAPACITY COSTS

Where a plant's remediation costs exceed its carrying amount, management must decide whether to keep it in operation. If management decides to sell the asset for scrap, the applicable cost principle would be FAR 31.205-16 (Gains and losses on disposition of depreciable property or other capacity costs), the pertinent portion of which states in subparagraph (b):

The gain or loss for each asset disposed of is the difference between the net amount realized, including insurance proceeds from involuntary conversions, and its undepreciated balance.

The general rule in this area is that gains or losses are considered as adjustments of depreciation costs. Applying this rule to an

impaired asset situation, however, leads to confusion. Specifically, what is the "undepreciated balance" from which the gains or losses are to be measured? Contractor's would argue that the term, "undepreciated balance," refers to the asset's unimpaired value. On the other hand, the government might argue that the loss should be measured from the asset's impaired value. The issue of proper loss measurement, which is almost certain to arise, will likely require judicial resolution.

IDLE FACILITIES AND IDLE CAPACITY COSTS

Assume that a project is terminated, a base closed or a program curtailed. In most instances, long-lived assets related to contract performance could be deemed impaired. Under the rules proposed by FASB, the diminution in asset value would have to be reflected in the financial statements of the period in which the impairment occurred. Consequently, the cost of idle facilities could have a more immediate impact on government contractors than has hitherto been the case.

B. COST ACCOUNTING STANDARDS

The Cost Accounting Standards (CAS) also appear to be silent on the treatment of impairment to long-lived assets. CAS 409 (Depreciation of tangible capital assets) comes the closest in subparagraph e:

Changes to estimated service lives, residual values, or consumption of services may be required as a result of significantly changed circumstances. Any resulting adjustment to the undepreciated cost will be assigned only to the cost accounting period in which the change occurs and to subsequent periods. No retroactive adjustments will be made.

The term, "residual value," used above, refers to the estimated value of an asset at the end of its economic life (similar terms are "scrap value" and "salvage value"). However, there are no accounting rules for determining a depreciable asset's residual value. Rather, the estimated amount will reflect a company's policies and experience.

According to CAS 409e, changes to depreciation are allowed where a change to one of three factors arise: estimated service life, residual value, or consumption of services. Because asset impairment is not mentioned in CAS (and specifically CAS 409e), there appear to be no conflicts between the requirements of the Proposed Accounting Standard and CAS. Where the FAR and CAS are silent, generally accepted accounting principles govern[16].

IV. DISCUSSION

Government contractors, including nonprofit organizations, should be very concerned about this Proposed Accounting Standard. To begin with, the impact is almost immediate (the effective date is only six months away). Secondly, in many instances the question of whether an asset's lost value is an allowable cost may be challenged. Unlike commercial contractors, government contractors are not free to pass on all their costs to their customers. On this point, contractors operating COCOs are particularly vulnerable to unrecoverable environmental impairment costs[17]. Regardless, however, of the outcome of the cost allowability question, impairment of a long-lived asset's value will have to be reflected in a contractor's financial statements. Accordingly, government contractors will suffer an impairment loss in the accounting period in which it arises, while their cost recovery (if any) under their contracts would be unclear at best.

V. CONCLUSION

The cost recovery of impaired assets under government contracts may be the next jihad between government agencies and their contractors. While that struggle ensues, it is likely that compliance with the Proposed Financial Accounting Standard will have a disproportionately adverse impact on the financial statements of affected contractors.

ENDNOTES

[1] The FASB Emerging Issues Task Force (EITF) considered this issue at its meetings in October 1984, December 1985, and February 1986. A March 1985 survey by the Financial Accounting Standards Advisory Council (FASAC) listed the impairment of assets as FASB's second most important issue. In September 1986, the Financial Executives Institute (FEI) published its "Survey on Unusual Charges," which found widely varying reporting and measuring practices relating to the impairment of assets. A similar survey done by FEI in 1991 determined that the inconsistent practices in this area, found in their previous survey, continued unabated. Similar results were reported in a research study, "Impairments and Write-offs of Long-Lived Assets," which was published in May 1989 by the Institute of Management Accountants (IMA). FASB formed a task force that same month to prepare a Discussion Memorandum on the problem. That Discussion Memorandum, "Accounting for the Impairment of Long-Lived Assets and Identifiable Intangibles," was released in December 1990. FASB received 146 comment letters, and twenty witnesses testified at the August 1991 public hearing. FASB undertook consideration of the issue in January 1992.

[2] A copy of this Exposure Draft can be obtained from the Financial Accounting Standards Board Order Department, 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856-5116.

[3] ED No. 132-B, Paragraph 71.

[4] ED No. 132-B, Paragraph 7. On the issue of defining a loss, the Exposure Draft stated the following in Paragraph 52:

> The term inability to recover has been usedinterchangeably with the term impairment by those who have written on the subject. In applying the term to long-lived assets and identifiable intangibles, the Discussion memorandum offered a more complete definition of impairment as the inability to recover fully the carrying amount of assets over their estimated useful lives.

[5] ED No. 132-B, Paragraph 71.

[6] ED No. 132-B, Paragraph 5.

[7] ED No. 132-B, Paragraph 6.

[8] Accounting by Debtors and Creditors for Troubled Debt Restructurings, Paragraph 13.

[9] ED No. 132-B, Paragraphs 94-98.

[10] ED No. 132-B, Paragraph 99.

[11] ED No. 132-B, Paragraph 119.

[12] ED No. 132-B, Paragraph 14.

[13] ED No. 132-B, Paragraph 30.

[14] ED No. 132-B, Paragraph 73.

[15] ED No. 132-B, Paragraph 111.

[16] FAR 31.201-2(a)(3).

[17] The requirements of the draft Environmental Cost Principle (FAR 31.205-9) are stringent. See "Environmental Costs of Government Contractors: Gordian Knot Redux," by Scott Isaacson and Peter McDonald, BNA Federal Contracts Report, Vol. 57, No.22, June 1, 1992. Republished in Toxics Law Reporter, Vol. 7, No. 2, June 10, 1992. See also "What IS an Environmental Cost?" by Peter McDonald, The Clause, Vol. 3, No. 2, Spring, 1993.

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BORED OF CONTRACT APPEALS

I decided that it would be a good idea to expand on the services we offer our members. Toward that end, I let it be known that I would publish Letters to the Editor, and in this manner foster an exchange of views among members on topics of current interest. Below is a sampling of what I received:

Dear Editor:

I'm so sick and tired of always behaving myself and doing the right thing to please everybody. A lifetime of conformity is really boring. I wish I could be a rebel like Pete McDonald, disparaging the authorities (and having the authorities disparage me). I enjoy it when, his voice soaked in sarcasm, Pete talks about "the mature responsible adult types." Why can't I do that? Instead, I have to be kindly and honest all the time. Why, I'm so compulsively honest I even signed my real name to this letter, and I'm just sick about it.

Steven Porter

President-Elect

Dear Steve: You're right – If I were you, I'd want to be me, too. *–Ed.*

Dear Editor:

We just wanted to drop you a note and say thanks for coming by the Contract Appeals Division the other day. We know you're busy, but we really enjoyed seeing you again. We especially appreciated your patient explanations of what the jokes were in your last Editor's Column ("Terrorists Assault CAD!!!"). Visits like that certainly enhance our ability to "get it" (get it?!). Anyway, thanks again, and see you at the Christmas party!

The CAD Team Chiefs

Dear CAD Team Chiefs: I enjoyed my visit, too. Believe me, I laughed all the way home. *–Ed.*

Dear Editor:

Why do you refuse to allow members to advertise in The Clause? I think your decision is unfair to solo practitioners and highhanded. I would simply like to run a plain ad similar to the one as follows:

> **Fred Schmerdlap, Esq.**
> Certified Government Contracts Attorney
> AUTHORIZED MARRIAGE COUNSELOR
> AND
> LICENSED LIVE BAIT DEALER

If you refuse to change your mind on this, I'm going to file a formal complaint against you with the BCA Bar Board of Governors.

Outraged

Dear Outraged: Well, you've certainly got me frightened. *–Ed.*

Dear Editor:

I can't believe you guys let someone like Pete McDonald be the editor. Don't you know what everybody says about him? I mean, he is probably the most bad-mouthed guy around. I don't know anybody more poorly regarded than him. He's such a jerk. I've been saying the same thing for years: We ought to have an editor who's got some brains, and who is well liked.

The Oles Morrison Perspective

Dear Oles Morrison Perspective: Just keep those cards and letters coming, Jim! *–Ed.*

All in all, I view this idea as a failed experiment...(!!)

Note the enclosed annual dues notice. **Those not paying dues by September 30th will not be listed in the directory.**

Finally, there were the usual articles not accepted for publication: "Dog Repairs Computer!", "Man Eats Tort!!", and "ABA Members Read The ABA Journal!!!"

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

PRACTICE & PROCEDURES COMMITTEE

Carl Peckinpaugh

WINSTON & STRAWN

The Practice & Procedures Committee has ben very active in recent months. During the May meeting, our guest speaker was Joseph McDade, Deputy Dispute Resolution Specialist for the U.S. Air Force, who discussed the role of Alternate Dispute Resolution (ADR) techniques in claims and dispute litigation before the Boards of Contract Appeals. Mr. McDade also described the Air Force ADR Program and recent amendments to the Federal Acquisition Regulations in the ADR area.

The most recent committee meeting was July 26th. During that meeting, we held one of our "Focus Group" sessions. We also discussed the role of expedited and accelerated procedures under the Contract Disputes Act (CDA). As part of the discussion, we addressed whether it would be advantageous to raise the $10,000 threshold on the election of expedited proceeedings (41 U.S.C. Sec. 608a) to at least match the current $25,000 small purchase threshold. In this regard, 41 U.S.C. Sec. 608f grants the Administrator of the Office of Federal Procurement Policy the authority to raise the CDA expedited threshold, but this power has never been used.

Please note that the location for the committee meetings has changed. Meetings are now held at the offices of Winston & Strawn, 1400 L Street, NW, Washington, D.C. 20005. Please call Sandie Carkin at 202-371-5828 at least one day before if you plan to attend. Lunch will be provided for a charge of $8.00.

Finally, there will be no meeting in August.