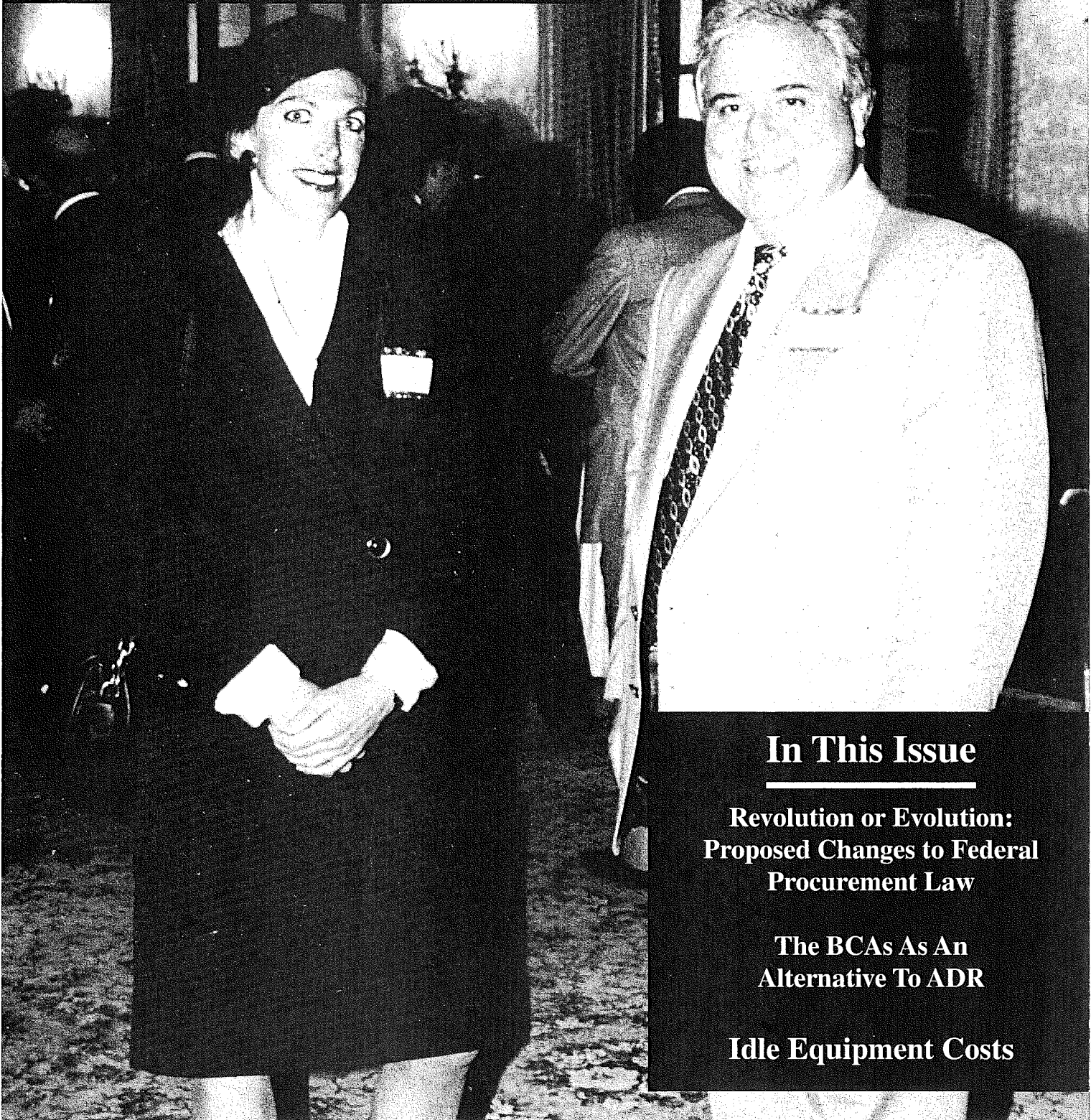


# The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Summer Issue, August 1995, Vol. V, Issue #3



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Proposed Changes to Federal  
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**The BCAs As An  
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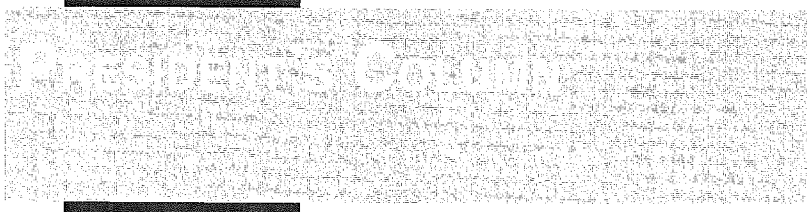
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Cover: *Laura Kennedy, BCABA Acting President, and the Honorable Morris Pullara, Jr., at the Judge's Reception in June.*



Laura K. Kennedy

I am pleased to assume the President's seat as Colonel Steve Porter moves on to his new position in Germany with the U.S. Army Contracting Command, Europe. Steve has made a great contribution to the BCABA over the past year and we wish him all the best in his new position.

First, I want to welcome Professor Andre Long as the new editor of *The Clause*. As a Professor at the Air Force Institute of Technology, Andre closely follows new developments affecting Federal procurement law and is well-positioned to present timely, provocative and useful information about our profession. He also has innovative ideas about improving the physical quality of the newsletter.

Welcoming Andre Long to *The Clause* is incomplete without recognizing the enormous contribution of our former editor, Peter McDonald. The BCABA owes a heartfelt thanks to Pete for his dedication to developing *The Clause* into one of the centerpieces of our Association. Over the years, Pete has spent countless hours contacting authors, editing articles and even stuffing envelopes for the publication.

During the past few months, the Association has been actively involved in co-sponsoring events with sister organizations. On May 25-26, we joined the Federal Circuit Bar Association in hosting a reception at their Tenth Annual Meeting and Continuing Legal Education Program. In addition, Judge Elizabeth Tunks organized an excellent ethics course for that Program. On June 6, 1995, the BCABA also joined the D.C. and Federal Bar Associations in hosting a reception honoring all of the BCA judges. These events were a great success and we look forward to participating in more of them in the coming year.

During the next few months, I plan to enhance our committee structure and form a new committee to focus on Emerging Issues. The field of Federal procurement is undergoing rapid change. Issues that dominated the field years ago are yielding to new ones. Areas such as electronic commerce and health care are gaining significance in the world of Government contracts. The

BCABA needs a committee to identify emerging trends and assess their impact on practice before the boards of contract appeals.

In the meantime, Jim Nagle is chairing a committee to evaluate and comment on proposed procurement reform legislation. You can find their comments starting on page 5. When the committee was formed months ago, it set out to study "FASA II." Since that time, FASA II has been replaced by "FAIA," the Federal Acquisition Improvement Act of 1995, H.R. 1388. Both FAIA and the Federal Acquisition Reform Act of 1995 "FARA" proposes dramatic changes in dispute and protest jurisdiction. Needless to say, this legislation is of intense interest to members of our Association.

Dave Metzger and Col. Riggs Wilks are hard at work to finalize plans for our Annual Meeting on November 15, 1995. The program promises to be lively, featuring luncheon speaker Alan L. Chvotkin, Esq., Assistant Vice President

for New Business Development for AT&T's Government Markets. His luncheon speech is entitled: "The Boards of Contract Appeals and our Profession Under Siege." The event will be held at the Grand Hyatt Hotel (at Washington Center) conveniently located near Metro Center.

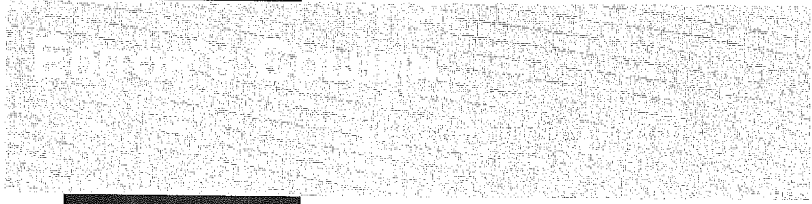
This year, we will also see changes in the BCABA Directory. E-mail addresses will be provided and, for a nominal fee, photographs for those who are interested. We are also considering using the Directory to certify attendance at annual BCABA programs and/or designated training programs.

Membership in our Association is healthy and growing. Carl Peckinpugh will become the chair of a new Membership Committee to develop methods of further enhancing our membership. Carl's new position on the Membership Committee will create a vacancy in the chairmanship of the Practice & Procedures Committee, for which I welcome candidates.

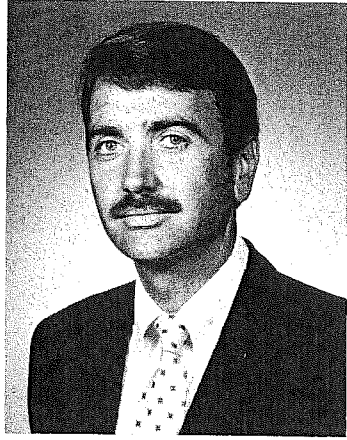
I also look forward to working with Judge Tunks on the Training Committee. Her ethics program for the Federal Circuit Bar Association's Annual Meeting was very well-received and she is filled with ideas for future programs.

The BCABA faces new challenges in changing times. We have an abundance of talent and I look forward to working with all of you to serve our membership.

## The BCABA faces new challenges in changing times.



This is my first column, marking the end of three years of above-average disclaimers from my predecessor, Peter McDonald. As for my own disclaimer, I must profess that the views I express in this column and as editor do not necessarily represent my employer the Air Force Institute of Technology, Air University, U.S. Air Force, the Department of Defense, or anyone else.

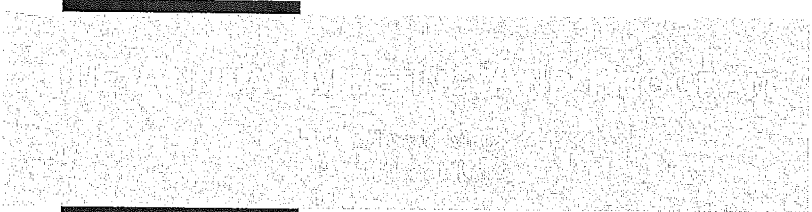


Andre Long

Through the years I have genuinely enjoyed Pete's column and have found *The Clause* to be both informative and useful. Pete has devoted a great deal of time to publishing a quality product and we all owe him many thanks for his efforts. I personally also want to thank him for his encouragement and support in getting this edition out. Some minor changes that you will see in this edition include a photograph cover, printed glossy bond pages, and a new column for para-legals and associate members.

To maximize the potential for the fall and other future editions, I encourage all members to reach out to your pro-

fessional community by submitting your opinions and sharing your expertise. *The Clause* can be an excellent forum for pulling together the collective thoughts of our membership. There are some forceful changes taking place in Board practice and government contract law so let *The Clause* leverage our strengths by promoting positive reform, improvement and excellence in our field of practice. Please send me your articles, ideas and comments and help me keep *The Clause* as an important reason for belonging and participating in the BCABA. I look forward to your calls and can be reached at (513) 255-7777 X3146, e-mail along@afit.af.mil.



We have an exciting Annual Meeting and Program planned for November 15th this year. Our luncheon speaker, Alan L. Chvotkin, Esquire, is Assistant Vice President for New Business Development for AT&T's Government Markets. Mr. Chvotkin, an experienced government attorney, will discuss the dramatic changes pending legislation in the Congress could have on the Boards of Contract Appeals and government contracts attorneys. His luncheon speech is entitled: "The Boards of Contract Appeals And Our Profession Under Siege."



David Metzger

The Honorable Gene Perry Bond, Chairman of the Department of Interior Board of Contract Appeals will present the first ever "State of the Boards" speech at the Annual Program. This address will focus on trends, developments, important precedents and other occurrences at the boards during the past year.

Three very experienced and strong moderators anchor our program seminars this year: James A. Dobkin, Arnold & Porter, Roger N. Boyd, Crowell and Moring and Richard O. Duvall, Holland & Knight. These deeply experienced government contracts lawyers have assembled a talented group of experts for their three panels.

Mr. Dobkin's panel entitled: "Terminate for Default/Terminate for Convenience: Between Scylla and Charybdis" will explore the difficulties for contractors and agents as programs and contracts are terminated. The panel members will include:



Andrew DeCicco, Assistant General Counsel, ITT Defense and Honorable Judge Catherine B. Hyatt, judge at the GSBCA.

Mr. Boyd's panel will discuss trial of cost and pricing cases and issues before the Boards, in a seminar entitled: "Quantifying Claims and Other Current Cost & Pricing Issues". The panel members will include: Honorable Eunice W. Thomas, judge at the Armed Services Board of Contract Appeals; Dr. Louis Rosen, Partner and National Director of Government Contract Services at Earnst & Young in Washington, D.C. and Jerome C. Brennan, Litigation Counsel for the Northeastern District for the Defense Logistics Agency in Boston.

Mr. Duvall's panel entitled, "Advanced Litigation Tactics and Strategies" will include ASBCA Judge Jack Delman, Colonel Chip Retson, Chief Trial Attorney, United States Army, and Mr. Edward G. Gipple, Animation Services Manager, FTI Corporation. The panel will present suggestions for more effective advocacy before the boards, including use of demonstrative evidence, use of depositions at trial, using and confronting expert witnesses and direct and cross-examination. An animated video used to support a delay claim in an actual board hearing will be utilized.

The Annual Program and Meeting this year will be held at the Grand Hyatt at Washington Center, located at 1000 H Street, N.W., in Washington, D.C. (800) 233-1234. While this is a new location for the Annual Program and Meeting, it is only one block away from the hotel we used in the past and is still convenient to the Metro Center Metro station.

Brochures with complete details concerning the program will be mailed in early September. In the meantime if you have any questions, please call Marty Duvall at Holland & Knight (202) 457-7142.

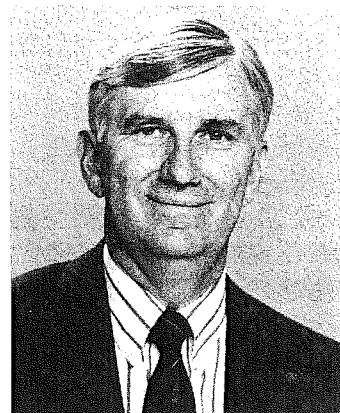
This year's Annual Program is shaping up to be one of the most informative and interesting yet. Please mark your calendars for November 15th and we hope to see you there!



**Jim Nagle**  
Chair FAIA Committee  
Oles, Morrison & Rinker

**Hugh Long**  
Office of General Counsel, USAF

**Andre Long**  
Air Force Institute of Technology



Jim Nagle

A BCABA committee was formed several months ago to evaluate and comment on "FASA II", originally proposed by the Clinton Administration, and later reintroduced as the Federal Acquisition Improvement Act "FAIA" of 1995, (H.R. 1388, S. 669), by Congressman William Clinger and Senator John Glenn. In addition to FAIA, another comprehensive bill under consideration with substantive differences from FAIA is the Federal Acquisition Reform Act "FARA" (H.R. 1670), introduced by Congressman William F. Clinger and Floyd Spencer. All together, there are seven bills in congress that could significantly affect federal procurement law by changing the disputes and protests process, jurisdictional requirements, socio-economic programs, standards of conduct, commercial items, arms exports and numerous other areas of interest to government contract law practitioners.<sup>1</sup> While our comments bellow are primarily directed towards FAIA, we also address FARA's proposed consolidation of the Boards.

## **Change in the time to bring an action in the Court of Federal Claims.**

The Contract Disputes Act currently provides that an appellant has ninety days from the receipt of a contracting officer's final decision to file an appeal in the appropriate Board of Contract Appeals, or one year to file a complaint in the Court of

Federal Claims. For a long time, the government has been trying to reduce the appeal period to the Court of Federal Claims. It has purely been a government-initiated attempt, since contractors can in no way benefit from such a move. This attempt to reduce the period was almost successful in FASA I, so it will in all probability become law. Unfortunately, reducing the appeal period to both forums to ninety days actually means that an appellant will have a shorter time to bring an action in the Court of Federal Claims. This is for two reasons.

First, to file an appeal in the Boards of Contract Appeals, the appellant need only file a Notice of Appeal, which is basically a one-sentence declaration that the appellant appeals the final decision. The complaint need not be filed until thirty days after the appellant receives Notice of Docketing from the Board. In the Court of Federal Claims, however, the full complaint must be filed in order to start the action.

Second, the Boards of Contract Appeals normally follow the mailbox rule. If an Item is dropped in the mail, even ordinary mail, by the ninetieth day, it is deemed to be timely filed. Not so with the Court of Federal Claims. Under Rule 3 of the Court's rules, the complaint must be received by the Clerk of the Court and date-stamped on the ninetieth day in order to be timely filed. Rule 3 does allow the plaintiff to be granted a time extension on motion "if there was a proper showing (i) that the complaint was sent by registered or certified mail, properly addressed to the Clerk of the Court...with return receipt requested; (ii) that it was deposited in the mail sufficiently in advance of the last date allowed for filing to provide for receipt by the Clerk on or before such date in the ordinary course of the mail, and (iii) that the party plaintiff as sender exercised no control over the mailing between the deposit of the complaint in the mail and its delivery."

Consequently, by merely stating that the appeal period to both forums is ninety days, the time period to the Court of Federal Claims will in fact be shorter because of what has to be filed and what filing constitutes in that forum. For that reason, if Congress intends to shorten the appeal period to the Court of Federal Claims to make it commensurate with that to the Boards of Contract Appeals, Congress should specify in the legislation that the two periods are to be truly equal. Otherwise, the period of filing in the Boards will be actually less than ninety days. Another alternative is to extend the appeal period of both forums to 120 days. In that case, appeals to the Court of Federal Claims have clearly been reduced by over eight months and contractors are given an extra thirty days to appeal to a Board of Contract Appeals.

## **Interlocutory Appeals.**

FAIA would amend 40 U.S.C. 759(f) by allowing interlocutory appeals of GSBCA determinations that find Automated Data Processing disputes 1) subject to this section, 2) timely filed, or 3) protestor as an "interested party". Interlocutory appeals would have to be made within 2 days of the Board's written determination. U.S. Courts of Appeals for the Federal Circuit permit appeals to be taken from U.S. Claims Court interlocutory orders within ten days (28 U.S.C. 1292 (d)(2)).

Two days is a very short time to file an appeal. If there is going to be a right to an interlocutory appeal, it should be meaningful. Ten days is more reasonable. Any concerns about excessive and unnecessary appeals can be remedied by a provision that would make an appeal allowable only after being certified by the Board as "useful".

## **Repeal of SBA's Certification of Competency, direct federal contracting with 8(A) companies, and restrictions on bid protests.**

The Small Business Administration is empowered to certify all elements of responsibility for small business concerns. This determination is conclusive and binding on the Contracting Officer (CO). The problem has been that on occasions, the SBA finds a contractor responsible that would not have passed the more careful scrutiny of the CO. Presently, if the CO is not satisfied with the finding, his only alternative is to

## **The present Board structure originated when there was a true line of demarcation between the various agencies and their procurement regulations.**

appeal the decision within the SBA, an option that is rarely successful or worth the effort. By repealing the SBA's COC authority, the decision will rest again with the one person who has the greatest incentive in selecting a competent contractor, the CO. It is the CO and the agency that has the largest burden in dealing with a non performing contractor, and not the SBA.

The same benefits can also be said of permitting direct federal contracting with 8(a) companies thereby eliminating the Small Business Administration (SBA) as a party to the contract. Contracting through the SBA adds little value to the process since most administrative burdens remains with the procuring agency.

The SBA will retain the authority to revoke this permission at any time before issuance of the solicitation and 8(a) companies can still request that the SBA be a signatory to the contract. The end result of both of these changes should be better and more competent small government contractors.

However, the CO will likely be less generous than the SBA in determining the responsibility of small businesses. Under FASA I, the simplified acquisition threshold (SAT) was raised to \$100,000. Also, contracts that have an anticipated value greater than \$25,000 but less than \$100,000, are exclusively reserved for small business participation. Under FAIA, the SAT for service contracts including construction, that have less than 20% of total contract value attributable to supply items, is raised to \$1,000,000 when conducted as a total small business set-aside. Also, "a protest, other than to the procuring agency, is not authorized in connection with the award or proposed award in any procurement -- (1) in an amount not exceeding the simplified acquisition threshold; or (2) conducted through a system with interim FACNET capability..."

This broad elimination of bid protests to the GSBICA, GAO or any other forum except the procuring agency, would significantly limit the recourse available to a small business regarding any award or proposed award but does not apply to protests regarding business size or status. If the small business felt the CO abused his discretion regarding a non responsibility determination for a procurement within the SAT threshold, the small business could only go to the procuring agency for a remedy. While bid protests above the SAT would still be allowable, the GSBICA and GAO must "review the agency's decision based on the agency record and determine that the decision is unlawful ONLY if the interested party establishes substantial prejudice and either (1) that the decision was obtained in violation of procedures required by law or regulation or (2) that the decision was arbitrary or capricious." This APA style review renders real relief for small or large business protestors difficult and will not give the government the rigorous review that it occasionally needs. FAIA would also make attorneys' fees and consultant/expert witness fees and other costs incurred in preparation, filing, or pursuing a protest unallowable under CAS covered contracts. A prevailing party could still receive costs under limited circumstances. Lacking the financial resources of the larger players, this provision may force some small businesses to forgo bid protests all together.

## **Consolidation of the Boards of Contract Appeals into one super-Board to review all procurement (proposed under FARA).**

The present Board structure originated when there was a true line of demarcation between the various agencies and their procurement regulations. Defense agencies were governed by the Armed Services Procurement Regulation while the civilian agencies were governed by the Federal Procurement Regulations. Such regulations, however, were merely the tip of the iceberg. The General Services Administration would use supplemental regulations which would be totally different from those used by the Transportation Department, for example. In such cases, the clauses and even the formats used in contracts could differ drastically. The FAR has imposed a great deal of uniformity than ever existed prior to 1984.

The vast majority of cases presented to the Boards now involve clauses, such as the Changes, Terminations for Default, or Differing Site Conditions, which are used in all the contracts of all the agencies. Consolidation of the Board would also mean the that workload per judges could be more equitably distributed. Some of the smaller Boards hear only a few cases per year.

However, the Secretary of Defense and other department secretary's would no longer have control over "their" Board. Some very specialized expertise could also be lost. For example, the Army Corps of Engineers Board certainly has specialized expertise in major construction matters, the Armed Services Board has greater expertise in aircraft and shipbuilding contracts, and the Department of Interior has greater expertise in forest services contracts. Perhaps the new "Super Board" could operate similarly to the old ASBCA, i.e., in which members were designated as the Army member or the Air Force member. Finally, since there is limited duplication of administrative support between the Boards, any cost savings from consolidation may be insignificant.

In conclusion, 1995 will likely result in sweeping legislative reforms, especially in the area of bid protests. Both FARA and FAIA attempt to consolidate protest and dispute jurisdiction. There is so much talk about streamlining the "wasteful" disputes process that enactment of some changes appear inevitable.

<sup>1</sup>. Federal Acquisition Reform Act of 1995 (H.R. 1670, replaces H.R. 1038), Federal Acquisition Improvement Act of 1995 (H.R. 1388, S. 669), Court of Federal Claims Administration Act of 1995 (S. 371), DOD Acquisition Management Reform Act of 1995 (H.R. 1368, S. 646), Davis-Bacon Repeal Act (H.R. 500, S. 141), DOD Authorization bill for FY 96 (S. 727), and Freedom From Government Competition Act of 1995 (H.R. 28).

## I. INTRODUCTION

In supply and service contracts compensation for idle equipment is usually included in overhead. Construction contractors treat the costs of idle equipment as a direct charge. As there are no industry standards for the computation of standby or idle equipment, one must look to decisions of the Board's and Courts for guidance in determining such costs when actual costs are unavailable.<sup>1</sup> The purpose of this article is to examine current law and thinking on the issue of idle equipment or equipment standby costs.

Ownership costs for unexpected periods of time when equipment cannot be used is an important part of calculating equitable adjustment amounts. There are many unexpected situations during the life of a project that equipment assigned to that project are idle and cannot be used on another project. A contractor is entitled to include within its unabsorbed overhead, some factor of compensation for the use of tools and equipment that were idled during such a situation. The concept of a separate standby rate for equipment, is based on the premise that when equipment is idle, the contract incurs reduced costs because of the reduced wear and tear and costs of operation. Over fifty years ago, the Court of Claims in *Brand Investment Company v. United States*,<sup>2</sup> allowed one-half of the active rate as the standby rate to be paid for idled equipment. The Court in *Brand* ruled that compensation to the contractor should be based upon "what would be required if it took the machines for a use for a temporary period, but did not in fact use them." This compensation is not for depreciation, but compensation for the cost of owning and maintaining the equipment.<sup>3</sup> This article examines the costs associated with equipment standing idle, while obligated to a particular contract.

## II. QUALIFYING FOR IDLE EQUIPMENT COSTS

Standby or idle equipment time is when the equipment is ready, able and available for work. However, sometimes the equipment is not being used due to some reason beyond the contractor's control. To qualify for idle equipment costs, equipment must be dedicated to the project and as a rule, may not be removed for use elsewhere.<sup>4</sup> Standby or idle equipment time does not include time when equipment is down for maintenance or repairs.<sup>5</sup>

There are at least three types of standby time:

1. Voluntary - at a contractor's option, a machine may be placed on a project as a standby unit that may be used if a similar machine is removed. The standby unit can then be placed unto service to maintain production rates.
2. Forced - equipment may be taken out of service if a project is shut down or postponed, but equipment is required to remain on the project site.
3. Legal - a government agency or court of law may order a project delay for legal reasons, but the equipment must remain on the work site.<sup>6</sup>

Prior to determining what a contractor's damages are regarding its idle equipment cost, it should be determined whether or not the contractor mitigated or tried to mitigate its damages. A contractor has a duty to find or attempt to find other uses for the equipment. The law is clear, a contractor has a duty to mitigate its damages.<sup>7</sup> In all cases where a contractor claims for idle labor (which would not be applicable) or equipment, it must also take appropriate action to mitigate its damages or reduce the cost of delay. This "duty" was summarized in *Hardeman Monier Hutchinson*, ASBCA 11785, 67-1 BCA ¶ 6210 at 28,748 as follows:

A contractor has the duty to minimize its costs in the execution of a change order in the same manner as he must mitigate his damage after breach. Normally he would be required to transfer or discharge idle men, and find uses for his equipment pending the time that work can commence.

A contractor will be compensated for cost of idle equipment when it is established that the contractor could have used it elsewhere. In *C. L. Fairley Construction, Co.*, ASBCA No. 32581, 90-2 BCA ¶ 22665 the contractor met the test of showing that the equipment could have been used elsewhere, by showing it had a "corporate policy" of moving equipment whenever possible. It should also be noted that a claim for idle equipment costs will be rejected when it is shown the contractor left the equipment on site for its own convenience.<sup>8</sup>



### III. ESTABLISHING COSTS

Issues concerning idle equipment rates generally arise out of the Forced and Legal Standby situations. Voluntary standby should be factored into the natural progress of the work on a particular contract. This voluntary standby cost should be an element of the contractor's bid. If a contractor prior to bid is able to calculate actual idle equipment costs during voluntary periods of standby, it would have actual costs for involuntary standby periods. Under ideal situations a contractor has records on each piece of equipment that it owns. Ideally those records would include cost of ownership-depreciation, interest, taxes, overhaul, storage and insurance spread over the life of the equipment. For idle equipment costs, the consensus is that ownership costs should be reduced by half to reflect lack of wear and tear.<sup>9</sup> Cost recovery methods for idle equipment can be covered by contract specification when actual records are not available. It can also be covered by regulation.

AGC and AED rates are discussed below. AGC refers to rates found in the Associated General Contractors of America's Contractor's Equipment Manual. AED refers to the rates found in the Associated Equipment Distributor's Construction Equipment Compilation.

The Courts and Boards favor actual equipment costs when actual data is available rather than rates published in manuals. In *Brezina Construction Co., Inc.* IBCA No. 757-1-69 73-2 BCA ¶ 10,195 at 48,059 the Interior Board stated:

... In a recent decision, this Board stated: When a contractor takes the position that its books and records are completely adequate for all purposes but equipment expenses and resort to AGC and AED rates may lead to overvaluation of the equipment, elementary fairness requires careful scrutiny of the figures in question.

Appellant urges that equipment depreciation charges carried on the books are based on income tax principles and involves different account practices than involved in presenting a claim under a Government contract. No explanation of the differences is offered which would account for ownership costs to be recoverable at more than double the percentage on a claim than on the ordinary contract work.

Appellant cites *L. L. Hall Construction Company v. United States* [11 CCF ¶ 80,791], 177 Ct. Cl. 870 (1966), as authority for requiring the use of the AGC manual to determine equipment ownership costs. In *Hall Construction*, the court made clear that actual cost of equipment ownership is to be used if available rather than resorting to such secondary evidence as the AGC manual. Here, actual costs are in evidence. Absent convincing reasons for such costs to be inappropriate for determining the true cost to appellant, we

find that ownership costs are recoverable on the claim on an actual cost basis, i.e., at the rate charged against total project costs in the contractor's records.

In *Meva Corporation v. United States*, 511 F.2d 548, 559 (1975) the Court of Claims rejected a claim based on AGC rates, stating therefore the contractor's own actual booked equipment costs "were applicable unless the contractor could prove this data was inadequate or incomplete or not representative of full costs. A contractor should be careful when it certifies that its books and records are complete for all purposes but equipment expenses and uses AGC and AED rates to price idle equipment rates. In those instances AGC and AED rates may lead to overvaluation of the equipment. The Boards have determined that fairness requires scripting of such figures.<sup>10</sup> AED rates require scrutiny because they are compiled by and published for dealers engaged in the business of renting equipment. They contain hourly or daily rental rates which result in inflated costs for equipment."<sup>11</sup>

Because most construction contractors do not keep records that accurately reflect the costs of equipment ownership and contract specifications fail to include contingencies for equipment costs, the boards and courts have allowed the use of secondary sources, among them rate manuals prepared by private organizations.

Federal Acquisition Regulations are incorporated by reference into most government contracts. The Federal Acquisition Regulation applicable to idle equipment rates since April 1985 is FAR 31.105(d)(2). The Federal Acquisition Regulation (FAR 31.105(d)(2)) has taken a position in favor of the use of actual cost data for both ownership's and operational cost of equipment. In instances where actual costs cannot be determined the FAR allows the contracting agency to specify the use of a particular schedule of predetermined rules. The FAR does not specify a particular schedule of construction equipment use rates. It gives the example of the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers. While it does not reference the AGC rate schedule it does state in its reference "industry sponsored construction equipment cost guides, or commercially published schedules of equipment use cost.

Another consideration is the contract clause. Many contracts use special clauses specifying the rates to be used under normal circumstances. These clauses usually specify a specific rate schedule or reference the FAR. The Claims Court has ruled that the contract provision controls.<sup>12</sup> It should be noted that the United States Claims Court has held that FAR § 31.105(d)(2) does not preclude recovery in excess of the Corps schedule in situations whereas the contractor possesses accounting records sufficient to document

its actual costs of equipment ownership, such records will be accepted over a schedule. In *C. Mowser Construction, Inc. v. United States* 23 Cl. Ct. 533 (1991), 537-538, the Court ruled that the equipment costs need not conform to the Army Corps of Engineers' schedule or formula.

A method used frequently by both Government Agencies and construction contractors is to calculate the idle equipment date based upon 50 percent of the equipment ownership expense rate published in the Contractor's Equipment Ownership Expense Schedule (1966) published by the Associated General Contractors of America, Inc. (AGC). This rate on a particular piece of equipment is a composite of depreciation, overhaul, repair, interest, taxes, storage and insurance spread over the useful life of the equipment. This is the total cost of owning the equipment spread over the useful life of the equipment. In *Massman Construction* ENG BCA No. 4760 86-2 BCA ¶ 18,766 at 94,527 the controlling regulatory provision was ASPR 15-402.1. At that time ASPR 15-402.1 required "that portions of an equitable adjustment pertaining to owned equipment "shall be based upon the AGC Schedule representing a percentage of acquisition cost per working month or fraction thereof for the period of time the equipment is required for the job. . . In periods of suspension of work . . . the allowance for equipment ownership expense shall not exceed 50 percent of the amount computed as herein indicated."

The fair rental value of machinery can be used as a measure for idle machinery. The rental value must be reasonable. In *W. G. Cornell Co., Etc. v. Ceramic Coating Co.*, the court upheld the principle of the reduction of the rental value by 50 percent in order to obtain the rate for idle equipment costs. This was in response to the argument that the rental value should only be reduced by 10 percent. The figure of 50 percent reduction of the established rate is used in consideration for lack of wear or tear of equipment standing idle.

In *Western Alaska Contractors, J. V.* ASBCA No. 46033, 95-1 BCA ¶ 27,392, the ASBCA recognized the contractor's use of Dataquest Blue Book rates and at formula which considered the age and the location of its use. The Board also allowed per FAR 31.205-11(i) recovery of costs in excess of the value of the equipment. The Board also deviated from the 50% of the cost set forth in the rate schedule because of factors of condition and value to allow the contractor to recover 55 percent of its Blue Book calculation in contrast to 50 percent. This extra 5 percent could have been given to the contractor due to the fact the equipment was on the island of Shemya in the Aleutian island chain of Alaska. At that location between the Bering Sea and the Pacific Ocean, everything is exposed to salt water damage from the sea on a daily basis.

#### IV. IDLE EQUIPMENT RECOVERY FOR SUBCONTRACTORS

A subcontractor who was forced into idleness as a result of a delay attributable to the Government can recover through the prime for its idle equipment costs. It has been held that a prime contractor can assert a claim for idle equipment damages irrespective of whether they were incurred personally or through a subcontractor.

This cause of action by the prime in behalf of the subcontractor for idle equipment costs is allowed by Boards and Courts when the subcontract between the prime and subcontractor allows it. In situations where the subcontract contains clauses absolving the prime contractor from liability to the subcontractor for breaches of contract, there cannot be any recovery by for idle equipment costs.<sup>13</sup>

#### V. IDLE EQUIPMENT RENTED BY THE CONTRACTOR

A contractor is entitled to charge the rental payments to the equitable adjustment. These are costs which the contract must incur directly whether the equipment is being used or not.<sup>14</sup>

Contracts which incorporate FAR 31.105(d)(2) contain guidance on idle equipment rented by a contractor. It allows costs of the rental. However, it does not allow costs for major repair and overhaul of the equipment.

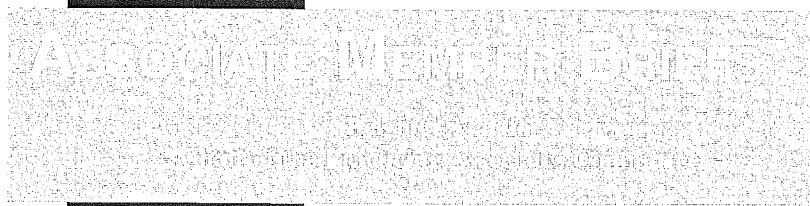
The ASBCA on at least two occasions has allowed rental costs of replacement equipment. These were situations where the respective contractors as a result of a delay on contract on remote islands, had to rent replacement equipment for performance of other contracts. The ASBCA allowed the rental costs of equipment for the project on the respective islands as a cost of idle equipment for each of the contracts located on a remote island.<sup>15</sup>

#### VI. CONCLUSION

As set forth above, the ideal situation in calculating idle equipment costs would be to have actual equipment cost records. However, if that is not available refer to the contract for guidance. If the contract fails to offer guidance, look to a published rate guide. Once an equipment rate has been established, reduce that by 50 percent in order to establish the idle equipment rate.

## Endnotes:

- 1 Rental Rate Blue Book for Construction Equipment Introduction Copyright 1995, Machinery Information Division of K-III Directory Corp. 102 Ct. Cl. 40 (1940)
- 2
- 3 M.E. Brown ASBCA No. 40043; 91-1 BCA ¶ 23,293 relying on Tom Shaw, Inc., DOT BCA Nos. 2106, 2108, 2109, 2110, 2131, 91-1 BCA ¶ 22,580.
- 4 Tom Shaw supra
- 5 Ronald Adams Contractor, Inc., AGBCA Nos. 91-155-, 91-155-1, 91-208-1, 92-219-1; 94-3 BCA ¶ 27,018.
- 6 Contractor's Equipment Cost Guide Introduction p 1-5 Copyright 1995, Machinery Information Division of K-III Directory Corp.
- 7 Kirk Brothers Mechanical Contractors, Inc., ASBCA Nos. 35771, 39803, 40172; 92-3 BCA ¶ 25,144.
- 8 Boublis Electric, Inc., ASBCA No. 34056, 89-3 BCA ¶ 22094.
- 9 Mosen-Osberg, ENG BCA ¶ 4069, 82-1 BCA ¶ 15,770; L.L. Hall Construction Co. v. United States, 177 Ct. Cl. 870,379 F.2d 559 (1966); Donald R. Stewart & Associates, 92-1 BCA ¶ 24,705 at 123,321 and 123,323.
- 10 Brezina Construction Co., Inc. Supra at 48,059 relying on Steenberg Construction Company, IBCA 520-10-65, 72-1 BCA ¶ 9459 at 44,042-43
- 11 Donald R. Stewart and Associates Supra at 123,322.
- 12 Servidone Construction Co. v. United States 19 Cl. Ct. 346 (1990) affd., 931 F.2d 860 (Fed Cir. 1991)
- 13 International Builders of Florida, Inc., FAA Cap 67-5, 69-1, BCA ¶ 7706, reconsideration denied 71-1 BCA ¶ 8790;
- 14 Weaver Construction Co., ASBCA No. 12,577; 69-1 BCA ¶ 7455.
- 15 Warren Bros. Roads Co. v. United States 105 F. Supp. 826 (1952) at 831
- 16 G B & E Electrical Contractors, ASBCA No. 34026, 87-3 BCA ¶ 20,119;
- 17 Western Alaska Contractors, J. V., ASBCA No. 46033, 95-1 BCA ¶ 27,392 at 136,557-558.



As a paralegal practicing in the government contracts area, I have had the opportunity to expand my role in the practice group in which I work and gain valuable new skills and knowledge along the way. Recently, I have had the opportunity to expand the resources available to me by becoming an associate member of the Board of Contract Appeals Bar.

The category of associate member is fairly new to the BCA Bar. For those who have become associate members of the BCA Bar, welcome. From the resources available through membership in the Association, we have an opportunity to learn a great deal about the government contracts area and to stay abreast of developments in this fast-changing field.

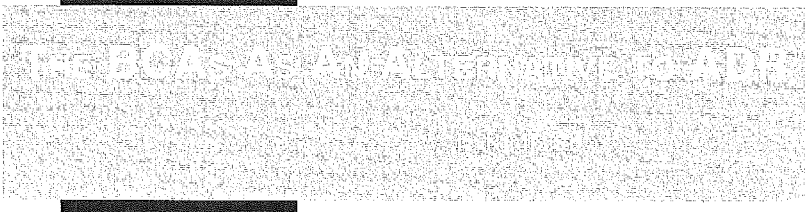
The annual conference is coming up in November. Last year, I attended the conference and found it a valuable educational and networking opportunity. I hope to see some associate members taking advantage of the seminars available at the upcoming conference.

Nonlawyer professionals such as paralegals and court clerks have a significant amount of responsibility in their

careers. Many handle both legal and factual research projects, draft documents, and manage complex case materials. In the next year I would like to see a growth in the membership and role of associate members in the BCA Bar.

I am pleased to announce the formation of a committee of associate members of the BCA Bar. The purpose of the Practicing Associates Committee is to establish an information network on government contracts issues for both attorneys and nonlawyer professionals, and to develop an educational program for attorneys and nonlawyer professionals on the utilization of paralegals and other nonlawyer professionals in government contracts practice.

Many law firms and companies throughout the country have very active government contract groups that employ nonlawyer professionals as members of their teams. If you work in such a team, either as a nonlawyer professional or an attorney, and would be interested in becoming an associate member or work with someone who would be interested in becoming an associate member of the BCA Bar, please contact Leigh Martin at Holland & Knight in Washington, D.C. at (202) 457-7169.



*An agency board shall provide to the fullest extent practicable, informal, expeditious and inexpensive resolution of disputes...*

Contract Disputes Act of 1978, 41 U.S.C. § 607(e)



Bill Rudland

Does anyone who has practiced before the agency boards of contract appeals think that the foregoing statutory purpose is being served? The truth is that the agency BCAs don't even pay lip service any more to the guiding principle that they provide "informal, expeditious and inexpensive resolution of disputes" except where the CDA mandates, in low dollar disputes, specific decisional time periods.

What we have, in short, are two competing forums, the boards of contract appeals and the U.S. Court of Federal Claims operating within the full panoply of civil procedure as developed in virtually every jurisdiction in the United States; hardly a prescription for "informal, expeditious and inexpensive resolution of disputes."

The question to be asked of those who manage the BCAs is a simple one: In light of the fact that the Court of Federal Claims is available to a contractor who desires to avail itself of the full range of common law procedure that the bar has come to know and love, has it ever occurred to anyone to take a different road; that is, a road that leads to the informal, expeditious and inexpensive resolution of contract disputes? What I mean is, suppose the board judges are told that the most important factor in measuring their performance is their success in deciding assigned cases within \_\_\_\_\_ months of docketing; that it is up to them to manage their dockets to achieve that bogey; that, indeed, they are charged with fulfilling the statutory mandate of rendering informal, expeditious and inexpensive resolution of disputes.

I have attended many ADR programs over the years, among which have been the BCA Bar Association's 1994 annual meeting program and the recent program entitled "The ADR Breakthrough and Government Contract Disputes" sponsored jointly by the Administrative Conference of the United States and the CPR Institute for Dispute Resolution. During the audience question period I invariably address the preceding question in one form or another to the judges' panel (there's always a judges' panel.) The embarrassed non sequiturs I receive in response lead me to conclude that I must be on to something.

Typical of the responses I receive is that it is not the judges who are responsible for protracting the litigation, but the parties. If the parties wanted to speed up the process they could do so. This point was illustrated by one judge's amusing story about an attorney pleading that the judge stop him before he takes another deposition.

**In sum, voluntary ADR is not the solution to what ails Government contract dispute resolution.**

This facile deflection of responsibility ignores the dynamics of our adversary system and requires a level of courage on the part of the clients' "solicitors," i.e., the house counsel of the contractor or the agency counsel of the Government, that is simply not going to be manifested in any world that I live in. Here's what such case management would entail. A contractor's in-house attorney would approach his corporate management with the following proposition: Despite the fact that our retained litigator believes it necessary to depose ten Government witnesses and copy 3,000 Government documents and submit 200 interrogatories, and despite the fact that the Government's trial attorney intends to engage in a similar level of effort, I believe we should hold our effort down to three depositions, 100 Government documents and 25 interrogatories. A similar scenario, of course, would be played out by the agency's counsel. Let's get serious. That's not going to happen. In any case, the statute charges the agency boards with providing informal, expeditious and inexpensive resolution of disputes, not the parties to the dispute!

Clearly this is not an issue plaguing only the contractor side of the disputes process. The taxpayers, as represented by agency procurement officials, are just as appalled by the slow, tedious and expensive pace of litigation before the boards of contract appeals. Darlene Druyun, at the time NASA's top procurement official, expressed her frustration in remarks to the October 28, 1991 annual meeting of the BCA Bar Association:

*Earlier I stated that my experience with the ASBCA process was not pleasant. I would like to share with you some of my experiences with a particular case that I was personally involved with at the Air Force Systems Command. The case was a defective pricing case with of the major DOD contractors. It took five years from the time the disputes issue surfaced until the hearing took place. During that time the PCO died, and the supervisor had left the Government. The key players on the Government's side were not around or were not available.*

*The discovery process was incredible! The number of feet of material referenced in the trial that the judge had to review reached 50 feet. This is not an exaggeration. And it will probably be two years from the time the trial was completed before a decision will be rendered. This is just one of several cases I was involved in this past year. Quite frankly, I'm appalled, discouraged, and furious as a professional in the procurement field and as a taxpayer. WHY? The process is convoluted and ridiculously expensive on both sides of the high priced trial teams, for the numerous attorneys, assistants, and employees involved in the case. Then you add the expense of education of the new team members due to the turnover when the case goes on for years. Neither we, the government, nor the contractors can afford this amount of money and time involved. THE PROCESS MUST BE FIXED.*

Druyun was obviously referring to the *Lockheed* case, which involved a great deal of money but whose factual issues were quite mundane. The case was decided by the ASBCA in May 1995, some four years (not the two of Druyun's nightmare) after hearing and ten years after the Government asserted the claim. If the Government appeals to the Court of Appeals for the Federal Circuit, another six months to a year will elapse before final resolution. Of course, attorneys' fees will continue to mount and the balance sheet footnote will continue to appear. Druyun put her finger, if not on the root of the dandelion, at least on the part that grows above ground. Discovery has become the inexhaustible quest for the elusive smoking gun.

But, you may say, how can you have perfect justice if the parties have to rush through the litigation process? My answer is that only litigators and judges feel the need for perfect justice. Clients have an entirely different view of dispute resolution and they, after all, are the ones whose interests are being represented. CEOs and senior Government procurement officials do not expect perfect justice. If

they can get 90 percent justice at a third of the cost of perfect justice they are happy. (It's that other 10 percent that's the killer.) And if they can get 90 percent justice in six months as opposed to perfect justice in six years, they are ecstatic.

Which brings us full circle to why we attend ADR programs. We attend ADR programs because we, i.e., the non-litigating bar, are desperately searching for a medium in which we can obtain informal, expeditious and inexpensive resolution of contract disputes. But here, too, there are a couple of catches. First, both sides must agree to ADR. There has been much patting oneself on the back lately in Government circles about the progress that has been made in the use of ADR. I don't question that effort has been expended by way of expressions of commitment at the highest agency levels and the development of ADR guidance, but, in the final analysis, nothing is going to happen unless the Government's litigators are personally committed. Having some experience in contract litigation on the Government side, I am familiar with the mindset of Government trial attorneys and I'm not holding my breath that ADR will provide the relief that's necessary.

The second catch has to do with the use of BCA judges for ADR. The problem here is that if you've ever attended an ADR program you came away with the sense that the judges are even less enthused about their role in ADR proceedings than are the litigators, particularly the Government litigators. One judge recently (with tongue in cheek, but revealing nonetheless) told his audience that he's in the business of judging because he enjoys viewing a good fight and is therefore not especially interested in mediating the controversy.

In sum, voluntary ADR is not the solution to what ails Government contract dispute resolution. The solution is the one Congress mandated 17 years ago when it enjoined the agency boards to render informal, expeditious and inexpensive resolution of contract disputes; which I take to mean something very much like the mini-trial in the ADR pantheon of dispute resolution techniques.

A final word from Ms. Druyun:

*I want to leave you with a challenge. And that is to do something! You meet at least annually. You have committees looking at issues. I read the proceedings of last year and find that we are still talking about the same problems and issues today with little, if any, progress made. What is the value of these meetings if the same things are discussed year after year? WHAT HAVE YOU DONE? . . . I believe the ball is in your court, we are in the fourth quarter, and your team is losing—which means we all lose.*

You will recall that this challenge was delivered in October 1991 to the BCA Bar Association. **WHAT HAVE WE DONE?**



**Pete McDonald**  
 C.P.A., Esq.  
 Coopers & Lybrand

There have been a number of recent developments in the cost accounting arena, and some of the more significant are mentioned below. It is not my intent to treat any of these current events in depth, but rather to comment briefly on their existence.

Perhaps the most significant development is the proposal in Section 131 of the DOD Management Reform Act to amend 10 U.S.C. Sec. 2324(e)(1) that would make bid protest costs unallowable where the protestor does not prevail. At the time of this writing, this provision had passed the House and was under consideration by the Senate. Should it be enacted (which appears likely), it will undoubtedly cause revenues from bid protests to shrink quickly and dramatically.

The Financial Accounting Standards Board (FASB) promulgated its proposed rules on asset impairment into a final rule, Financial Accounting Standard (FAS) No. 121, "Accounting for the Impairment of Long-Lived Assets." As detailed in last summer's article by Roger Boyd and myself ("Heads I Win, Tails You Lose: The New Rules for Impaired Assets Under Government Contracts," BNA Federal Contracts Report, Vol. 62, No. 2, July 11, 1994), government contractors will be disproportionately affected by this rule because of their general inability to pass along their losses to their "customers" (i.e., federal agencies). A pre-decisional FAR rule has been drafted and is being circulated in the Government to address FAS 121, which sets forth the Government's policy on contractor claims for asset impairment. While no one outside the Government has seen it yet, it is rumored that the proposed rule would allow payment of asset impairment claims ONLY where the impairment arose from a T4C. In all other cases, such claims would be denied.

To reverse the *Martin Marietta* decision, CASB announced an advanced notice of proposed rulemaking (ANPRM) that would amend CAS definitions and illustrations to provide that "a change in the manner in which costs are grouped and accumulated constitutes a change in cost accounting practice..." The ANPRM, which can be found at 60 Fed.Reg. 20,252, is of great interest because of the continuing number of mergers and reorganizations caused by defense industry downsizing. Reversing *Martin Marietta* would enable the government to recover price adjustments where a reorganization increases contract costs to the government.

The proposed rule for travel costs, that would have established the FTR/JTR rates as defining reasonableness of such costs in the absence of an advance agreement, was withdrawn. Instead, the present cost principle (FAR 31.205-46) was retained without change. The debate in this area began when Section 2191 of the Federal Acquisition Streamlining Act (FASA) repealed Section 24 of the OFPP Act, which was the statu-

tory basis for limiting contractor recovery of travel costs. The opposition of industry notwithstanding, the FAR Council construed the repeal to affect only the *statutory* authority to limit travel costs, leaving the *regulatory* authority in FAR 31.205-46 (Travel costs) unaffected. In the opinion of many, the validity of this position is open to substantial doubt, especially where FAR 31.205-46 is viewed as the implementing regulation of Section 24 of the OFPP Act.

- 60 Fed. Reg. 25,794: proposed rule according civilian agencies the authority to reduce or halt payments in instances of fraud.

- 60 Fed. Reg. 28,503: Interim rule in FAC 90-27 amending subparagraph (e) of FAR 31.205-26 (Material Costs) to permit interdivisional transfers at price rather than cost under criteria applicable to subcontracts eligible for exemption from cost or pricing data.

For a good trend analysis, see GAO Report NSIAD 95-116, "Overhead Costs: Defense Industry Initiatives to Control Overhead Rates" (May 3, 1995), which detailed increasing overhead rates among many defense contractors. Despite workforce reductions and a wide variety of cost cutting measures, the base to which overhead was charged had shrunk from 1980s levels, causing increases in overhead rates.

Finally, the ASBCA actually *granted* a contractor's motion for summary judgement in a defective pricing case (!)(see *Rosemount, Inc.*, ASBCA No. 37520, June 19, 1995). The rarity of such an event should qualify *Rosemount* to be listed in Ripley's "Believe It or Not."

# FINANCIAL REPORT



Cheryl Rome

BCA Bar Association  
Statement of Financial Condition  
For the Period Ending June 30, 1995

Beginning Balance		\$8,755.79
Fund Income:		
Dues	250.00	
Reception	60.00	
Joint Ethics Program	<u>140.00</u>	
Total Fund Income	450.00	
Subtotal		\$9,205.79
Fund Disbursements:		
Newsletter (Spring)	1,269.86	
Reception	175.00	
FY 95 Postage	1,712.44	
Photography	<u>149.97</u>	
Total Disbursements	3,307.27	
Ending Cash Balance		\$5,898.52

