

BCA BAR ASSOCIATION

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

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EDITOR'S COMMENT

by Jim Nagle

For those of you who were unable to make the first annual meeting of the BCA Bar Association, you missed a terrific time. We had two panel discussions on excellent subjects, ADR and pre-trial procedures. Topping off the meeting was our luncheon speaker, M. Samuel Self, Senior Vice-President, Group Controller, Texas Instruments, Defense Systems and Electronics Group. Mr. Self spoke on "The Disputes Process — An Appellant's View". He pulled no punches and gave a very informative and entertaining talk.

If you were unable to attend the annual meeting, fear not. We are going to reproduce some of the materials and Mr. Self's luncheon speech in this and future newsletters. For those of you who are interested in purchasing all the materials from the meeting, please contact Steve Porter of the Army Contract Appeals Division at (703) 696-1500.

We are also graced in this issue with an article for the Judge's Corner from Judge Sherman P. Kimball, the president of the BCA Judges Association, and the Vice-Chairman of the Energy Board of Contract Appeals. I am sure judges and practitioners alike will value his remarks. Some of his remarks dovetail with two of our features dealing with ADR. Linda Shramko has continued her column on developments in ADR, especially the new legislation on this subject, which is a fitting accompaniment to Frank Carr's

article on that subject, which is an abbreviated version of his speech at our annual meeting.

Peter McDonald has contributed another article relating to accounting. I have entitled that "The Accountant's Corner" and hope that Peter and our other members will continue to supply us with pertinent articles.

At the meeting, Ron Kienlen of the ASBCA was elected President; Frank Carr, the Chief Trial Attorney of the Corps of Engineers became President-Elect; Marcia Madsen of Morgan, Lewis & Bockius became Secretary; and Rob Schaefer of Hughes Aircraft became Treasurer. Jay Gallagher of McKenna & Cuneo, Stanfield Johnson of Crowell & Moring, and James F. Nagle of Oles, Morrison & Rinker, were elected to the Board of Governors.

The association joins a long list of government contracts practitioners and organizations that owe a great deal to our past president, Marshall Doke. His energy, persistence and vision were indispensable in creating and sustaining the association. Marshall's extensive network of contacts, derived from a lifetime of respected work and thoughtful friendship, was and remains one of our greatest assets.

As always, we solicit your suggestions, comments and articles.

We strive to truly reflect the interests and concerns of our members. We cannot succeed in a vacuum. We need your input. Please send your articles to me at Oles, Morrison & Rinker, 3300 Columbia Center, 701 Fifth Avenue, Seattle, Washington 98104.

IN THIS ISSUE

- The President's Column
- The Dispute's Process: An Appellant's Perspective
- The Judge's Corner
- ADR Update
- The Accountant's Corner
- ADR: An Agency Program
- Bifurcation: The Contractor's View
- Bifurcation: The Government's View
- Pre-Trial Discovery

THE PRESIDENT'S CORNER

Ron Kienlen

The first annual meeting was the beginning of a myriad of opportunities to participate in the events that change and form the climate and culture of the federal contract disputes process.

At our first Board of Governors meeting we selected Monday, October 28, 1991 as the date for next year's annual meeting. There will be a Board of Governors meeting in February and another in May.

Right now, our activity turns to our six committees, where the issues are many. This is the best opportunity to shape, and risk being influenced by, the ideas and concerns of our colleagues of the bench and bar. There are those who believe that the process belongs to the litigators and that the judges should sit on the sidelines until called in by one of the parties. There are others who are convinced that the process is better served if the judge takes charge and sets the trial agenda. It seems to me that the law and the rules will permit both or either culture to dominate. Are you leaving it to others to decide?

Is it true that a protracted discovery process has become the norm, and that increased use of sanctions for delayed discovery response is essential? That seemed to be the position of Stanley Dees and "Hugh" Long at our annual meeting. Do you have a view on this issue or ideas on how discovery should be limited or orchestrated and when discovery should be under the close control of the judge, and on what sanctions should be imposed? Call Clarence Kipps at (202) 626-5840.

Perhaps you believe that judges should spend their time writing detailed findings of fact designed to withstand appeal, rather than deciding petty discovery disputes. Maybe judges spend too much time deciding facts that nobody cares about; after all, it's only the bottom line that counts. Would you participate in a program geared to the critique of BCA decisions? What if you were guaranteed anonymity. Call Clarence, or John Chierichella (202) 879-3660.

Maybe you believe, with "Hugh" Long, that the "culture" of the process is more effective than sanctions in reducing delay. Are you willing to spend just a little effort to help form that culture? There are those pet peeves you've always wanted to tell a judge, or those questions you've wanted to ask. Are you interested in the opportunity of small informal gatherings with a judge visiting your area of the country?

We are looking for those who would be interested in participating in such gatherings from time to

time, whenever a judge may be in town. There are many places to pick, but we want to start with areas where there are interested lawyers and the likelihood of a judge being in the area a few times during the year. Especially if you are from the following locations, give John Chierichella a call at (202) 879-3660:

Anchorage, AK; Atlanta, GA; Dallas, TX; Dayton, OH; Los Angeles, CA; Pasadena, CA; Philadelphia, PA; Sacramento, CA; San Antonio, TX; San Diego, CA; San Francisco, CA; Seattle, WA; St. Louis, MO.

Evolutionary changes are successful when they are based on a consensus of those affected. Whether your concern is the need for uniform Board rules, a litigator's skill refresher program, a certification program, more single judge decisions, or unpublished opinions, you can contribute to a consensus on these and other issues.

Express your concerns and your ideas for doing things a little better. Call me at (703) 756-8524, or call any of the officers, members of the Board of Governors, or the committee chairs.

THE DISPUTES PROCESS: AN APPELLANT'S PERSPECTIVE

Presented to the
BOARDS OF CONTRACT APPEALS BAR ASSOCIATION
October 29, 1990
by

M. S. Self
TEXAS INSTRUMENTS INCORPORATED

When Steve called with the invitation, I was intrigued by the topic he proposed—The Disputes Process: An Appellant's Perspective. After he assured me that there would be no time for rebuttal arguments, I decided that I did have a few things I'd like to say on that subject. So I accepted the invitation and appreciate the opportunity to communicate with this group.

Before I go any further, let me say a little about my company for those of you who may not be familiar with it. Texas Instruments is a \$6.5B company with operations in 41 locations around the world.

We are best known as a manufacturer of semiconductor products, but we also build consumer products, materials and control products, and sell computer hardware and software services. I am here today representing the second largest business of Texas

Instruments—the Defense Systems & Electronics Group—whose 1989 revenue of \$2.2B represented 33% of TI's total revenue.

The Defense Systems & Electronics Group provides avionics systems, weapon systems, and advanced technology products to the Department of Defense, other defense contractors, and foreign governments. Although we are the prime contractor on a number of systems, such as the High Speed Anti-Radiation Missile (HARM), we are primarily a subsystems manufacturer. We supply various electronic systems, such as radar sets, missile guidance controls, and infrared tank sights, to major prime contractors.

This results in many relatively small contracts, the majority of which are under \$1M. To achieve manufacturing efficiency and economies of scale, we usually execute multiple fixed price contracts for similar products in one account and commingle the cost. Except for cost reimbursable contracts and several relatively large systems, such as HARM, we generally do not collect cost by individual contract.

It was this characteristic of our accounting system that led to a long-standing dispute with DCAA and our first encounter with the disputes process. In June 1973, we appealed a contracting officer's final decision alleging non-compliance with Cost Accounting Standard 401. Since then, we have had four additional ASBCA hearings. Two were appeals against allegations of defective pricing. We also appealed the improper exercise of an option by a contracting officer as well as the unilateral establishment of price by a contracting officer.

In addition to those five cases which resulted in Board decisions, we also received a partial summary judgment in another defective pricing case.

To summarize, we've had first-hand experience with the disputes process for over 17 years. It began in June 1973, and the most recent Board ruling on a TI case occurred in March 1990. We are currently involved in trial preparation on one remaining appeal before the Board. While TI may not be the defense contractor who is most familiar with the disputes process, we've had more than our share of time in the barrel, and I believe we have a pretty good perspective on the process.

Today, I want to discuss five observations based on TI's experience and make a few suggestions as to how the disputes process might be improved.

DCAA Plays Too Big a Role

My first observation is that the DCAA plays far too big a role in the disputes process. Contracting offi-

cers are generally reluctant to disagree with DCAA audit recommendations or defective pricing allegations. It is rare that a contracting officer will side with the contractor rather than the DCAA.

I think the contracting officer's reluctance to overrule the DCAA can be traced back to Department of Defense Directive 7640.2 of December 1982. That directive made it administratively painful to disagree with DCAA by requiring the contracting officer to report every instance where he took an action different from that recommended by the DCAA.

An Electronic Industries Association letter of December 10, 1982, commenting on the change accurately predicted the result of the directive. "Given the choice of preparing a justification for an equitable decision for presentation to a higher authority or accepting an audit determination, it becomes immediately evident that the contracting officer, if only because of the press of time, may yield to the concept of audit determination versus contract negotiation. We believe this to be an ero-

sion of the independent authority of the contracting officer."

Even though the DoD directive was revised in 1988, I think the damage was done. There are still contracting officers today who do not know that they have the authority to make an independent decision contrary to a DCAA audit recommendation.

Even when you are dealing with a strong contracting officer, he often doesn't understand the complex technical issues in a dispute. DCAA has usually prepared an extensive audit report, and the contracting officer simply may not take the time to understand the details of the technical issues. In such cases, the decision generally will support the audit recommendation.

DCAA has recognized that it will usually be supported by the contracting officer and has learned to use the disputes process to "encourage" contractors to implement DCAA-desired changes. One of their most effective tools is the defective pricing allegation.

Let me give you an example. I mentioned earlier that TI does not always collect cost by individual contract, preferring instead to commingle fixed price contracts in one account for manufacturing efficiencies. A former resident auditor at Texas Instruments testified that it had been a long-term mission of DCAA to force TI to collect cost by contract. They first tried to accomplish this in the CAS 401 non-compliance case in 1973, which was not resolved until 1979. When that case was decided in favor of Texas Instruments, the DCAA changed tactics and began issuing defective pricing allegations that basically questioned TI's method of estimating and col-

The DCAA plays far too big a role in the disputes process

lecting cost. At one point, we had about 20 defective pricing allegations, involving essentially the same issue, on appeal before the ASBCA.

Disputes Process Takes Too Long

A second observation is that it takes too long to get a dispute resolved. There are many delays in the process. Waiting for the official DCAA audit recommendation or post-award audit is usually the first delay. The next delay occurs between the DCAA allegation and the contracting officer's final decision and can take a year or more. The frequent change of government attorneys assigned to a dispute is a major problem. There is usually a lengthy delay as the new attorney becomes familiar with the case. That sometimes results in a change in the Government's position, which results in delays as the contractor's attorney addresses any new issues. All of these extend the time between origination of a dispute and its resolution by the Board. The process can literally take years!

A good example of this is the one remaining TI appeal before the Board today. The post-award audit was completed in June 1983. The contracting officer's final decision—the first "final decision"—was issued in June 1984. Coincidentally, Texas Instruments also completed the contract in 1984, but over \$5.6M was withheld by the Government pending resolution of the defective pricing allegation. After several years of little government activity and at least six changes of government lawyers, TI filed a motion for summary judgment in January 1989.

In May 1989, we received a revised government complaint—second complaint—just ten days before the hearing on our motion for summary judgment.

Although we received a partial summary judgment in our favor in March 1990, the Government still believes that other issues remain unresolved, and preparation for a trial is currently underway. By the way, the eighth government attorney has recently been assigned to the case.

To summarize, the agreement on price occurred in 1982. The contract was completed in 1984. Today, eight years later, the issue has yet to be resolved. Nor have we received the \$5.6M that has been withheld from Texas Instruments for over six years.

Let me contrast that chronology with an example from our commercial business at Texas Instruments. In February 1986, TI filed a complaint before the International Trade Commission against eight Japanese and Korean semiconductor manufacturers alleging infringement of TI patents on Dynamic

Random Access Memories (DRAMs). The lawsuit made news across the country because it was the first time that a U.S. manufacturer had challenged the Asian semiconductor industry seeking to prevent their products from entering the U.S. without payment of royalties. Many large companies were involved, and a great deal of money was at stake.

One year later, in February 1987, the hearings were completed before the ITC. Three months later, in May 1987, the initial ruling was received, supporting TI's complaint. Texas Instruments immediately began to negotiate royalty agreements with the Japanese and Korean companies, and today, only four years after filing the complaint, we have received over \$600M in royalties.

I know there are many differences that can be found in these two examples. But in the case of the government contract dispute, a \$5.6M issue is unresolved after eight years. On the commercial side, in a much more complex case, the issue was resolved in just fifteen months. I believe this illustrates my point: resolving a dispute on a government contract simply takes too long. Something is wrong with the process!

Appeal Process Expensive for Contractors

Another observation about the disputes process is that it costs too much! It is simply too expensive for some companies to pursue an appeal when it may take five to eight years before resolution.

One of the significant costs is outside legal fees. Because of the complexity of the procurement regulations, all of us have to rely on outside legal counsel who specialize in government procurement cases. Marshall Doke and many of his peers are prospering.

But there are other major costs involved that are not so obvious.

In addition to the outside legal fees, the entire process is a distraction to our own people. Gathering data, finding documents, investigating and understanding the issues, and everything else that is involved is in addition to their normal job responsibilities.

Because of the cost involved, Texas Instruments has only appealed those final decisions where we feel that a significant principle is involved. In other cases where we are wrong, or in some cases even if we're right but the amount doesn't justify litigation, we accept the final decision of the contracting officer and reimburse the Government, if appropriate. But when we feel that the Government is wrong in its interpretation of the law, or that someone is using the process to pursue a hidden agenda, TI will appeal and expend whatever resources are necessary to resolve the issue.

Unfortunately, smaller defense contractors often cannot afford to take that approach. They don't have the financial resources to hire the outside legal specialists. Nor do they have the people resources available within the company to support a lengthy appeal. I suspect that in some cases, the contractor just accepts the decision of the contracting officer to avoid the cost of an appeal.

Favorable ASBCA Opinions Are Often Hollow Victories

Another observation I would make is that favorable ASBCA opinions are often hollow victories. Suppose that, despite the length of the process and the cost involved, your company decides to stay the course for an appeal. And suppose that it ultimately receives a favorable Board decision that you believe puts the matter to rest. Often, to paraphrase John Paul Jones, you have just begun to fight.

A Board opinion often results in no change in the behavior of either the DCAA or the contracting officer. They may reluctantly accept the loss of the specific case that was presented to the Board, but they may not concede that the philosophical issues of the case have been resolved. They get around that by interpreting the Board decisions very narrowly or, in some situations, simply deciding that the Board was wrong and disregarding unfavorable decisions.

The best illustration of this is some testimony before the Board in one of our defective pricing cases. The government attorney told the judge that a Board decision in favor of TI probably would not terminate DCAA's allegations of defective pricing against Texas Instruments.

The judge replied, "And what is the Board to do - go through 50 more of these appeals. Assuming TI wins, you're telling me that DCAA is going to do whatever they want to and ignore our precedent, and you're going to come forward and represent them in those positions." The government attorney replied, "Don't make me be that painfully honest up here."

Another example of disregard for Board decisions is a quote from DCAA's standard audit report boilerplate that goes out to all of our customers: "Although the ASBCA ruled . . . that Texas Instruments is consistent with CAS 401 in its estimating and accounting practices . . . in our opinion, the system is not adequate to meet the needs and requirements of the government for negotiated firm-fixed-price business. Accordingly, we recommend that the contractor be required to maintain contract cost segregation through specific contractual terms." These words were written in 1988, nine years after an

ASBCA decision saying that we were not required to segregate cost by contract!

Accountability of Government Personnel

Those examples highlight government behavior patterns that are extremely frustrating, but not uncommon, and lead me to my next observation: there is a lack of accountability on the part of government personnel. I think this lack of accountability can be traced to two deficiencies in the disputes process.

First, penalties for irresponsible behavior on the part of government employees are inadequate. The second deficiency is the apparent disregard by the government of the cost associated with pursuing a particular dispute. I'll explain each of these in more detail.

Let's talk first about penalties. Penalties are an important part of any system and influence the behavior of participants in any process. For example, such disincentives as suspension, debarment, indictment, and conviction for violations of government procurement regulations have a significant impact on the behavior of defense contractors. We develop systems, train our people, and perform compliance reviews to prevent any of those penalties from affecting our companies.

I don't see such penalties on the government side of the disputes process. For example, there appears to be little personal risk for government employees whose irresponsible behavior results in a lengthy and costly legal battle over a frivolous defective pricing allegation. I have never heard of reprimands or unfavorable performance evaluations in such cases. Instead, the system forces many government employees to be more concerned that they will be second guessed, possibly by the IG, if they make a decision that ends a dispute in favor of the contractor.

There is another problem caused by the lack of personal disincentives in the system, and that is improper behavior by some government employees. Depositions and testimony in, some of our ASBCA cases have revealed that the Government doesn't always "play fair". We have had evidence that government employees tampered with documents, actually erasing auditor's notes and "whiting out" information detrimental to the government case. There was also evidence that a key government witness was persuaded by a group of her superiors to change her testimony.

In each of these situations, a defense contractor probably would have been investigated for similar behavior. To my knowledge, there was no disciplinary action taken against any of the government employees involved in those incidents.

Let's move to the second system weakness that I mentioned—the lack of litigation cost awareness by the Government. From our perspective, government employees do not appear to be sensitive to the cost involved in the disputes process.

As I mentioned earlier, the cost to the contractor is very evident, real, and identifiable in hard dollars. On the government side, however, no one seems to feel the cost impact of a decision to make a defective pricing allegation and pursue it to an ASBCA hearing.

For example, there is no cost to DCAA for the government attorneys involved in preparing for and arguing a case before the ASBCA. Also, the contracting officer who issues a final decision supporting a DCAA audit recommendation does not feel the cost of the litigation against his contract or program. It's always easy to promote a fight as long as you know your nose won't get bloodied!

We at Texas Instruments are concerned about this lack of accountability on the part of government employees. To try to emphasize the point, we filed two claims requesting that contracting officers reimburse us for costs incurred in pursuing two ASBCA hearings which resulted from what we believe was government abuse of the disputes resolution process. I'll bet you can guess what the response was from the contracting officers—both claims were rejected.

But we strongly feel that a point needs to be made and that the Government needs to think about what it is doing and the cost involved. With lower DoD budgets ahead, neither contractors nor the Government can afford to expend scarce resources on activities with little value-added. Therefore, we have taken both of the claims to the Claims Court where they are currently pending.

How Can the Process Be Improved?

That completes my list of observations about the disputes process. To summarize, I think the DCAA plays too big a role. The process takes far too long and is too expensive, at least for contractors. Favorable decisions are often hollow victories. And finally, there is an apparent lack of personal accountability on the part of government employees.

You may not agree with these observations but remember the topic of my speech: it is the appellant's perspective that I'm trying to present today. However, I believe you will find that other defense contractors share my view.

But it's not fair to point out shortcomings in the process without making some suggestions as to how it could be improved. So I would like to close by making a few recommendations for your consideration.

1. The primary improvement we would like to see is a strengthening of the authority of the contracting officer. We need someone in the system who has the courage to make difficult decisions independently and be willing to stand accountable for those decisions. The system needs to reward guts and good judgment rather than simply making safe decisions.
It may take some time to change the culture of government contracting officers, but it can be done through improved selection, training, and rewards to increase the professionalism of that very important group of procurement specialists.
2. To speed up the process, why not require that allegations of defective pricing must be made within a year after contract award while the people who were involved and the documentation upon which the pricing was based are still readily available?
But to do something really significant, lets put a time limit on disputes resolution. The ITC has a rule that hearings must be held and decisions reached no later than twelve months after a complaint is filed. Why shouldn't something similar be instituted by the ASBCA? At the time a case is docketed, the judge could review the schedule with both parties and they would know that it would not be changed.
3. I know that there are a lot of government lawyers sitting in the audience today—this one's for you. I think you need to be much more rigorous early in the disputes cycle in determining how strong a case you have and convincing your client that weak cases should be dropped as early as possible. This action will do two things. First, it will save an enormous amount of cost by preventing us from going too far before a case is dropped. But more importantly,, it will send a message back down through the different organizations to exercise more care before coming forward with allegations and final decisions that may result in litigation.
4. Government employees who are key participants in the disputes process must be made to feel accountable for their actions. Those who make and pursue irresponsible allegations and push them further down the line for resolution should be disciplined in some manner. At least a report should, be filed for consideration in the employee's performance evaluation. Those who use unethical or improper practices in disputes litigation should be terminated, just as we do our employees for similar types of infractions.
5. I believe the Disputes Clause should be

amended to allow injunctions by the ASBCA to prohibit government agencies from disregarding Board decisions. It is unfair for a contractor to go through the entire process, get a favorable ruling, and then have it disregarded by the government agencies with whom he has to work. I realize that amending the Board's jurisdiction may require congressional action, but something should be done.

6. To sensitize government employees to the cost of the disputes process, a method should be developed to charge the Government's actual cost of litigation back to the agencies or programs that initiate the action. That would increase the amount of due diligence contracting officers perform before adopting recommendations from others.

In addition, when a contractor wins a case before the ASBCA, the program, involved in the dispute should pay the contractor's legal fees.

Well, there you have it. One company's perspective on the disputes process and some ideas as to what could be done to improve it. While you may not agree with everything I have said, I believe you'd agree that the process is very inefficient. I won't presume to tell you how to implement changes in the disputes process. But from a manager's perspective, I want to suggest a way to get started.

Our company, along with many other defense contractors and the DOD, is actively implementing the Total Quality Management (TQM) concept in our everyday working life. The cornerstone of TQM is continuous improvement. To achieve continuous improvement in any process, you must eliminate non-conformance. For example, we all can agree that both sides of a dispute are entitled to speedy resolution. When the process doesn't provide speedy resolution, that indicates non-conformance in the process. To eliminate non-conformance, the root causes must be identified and corrective action must be implemented.

That is a simple concept, but it takes hard work and dedication on the part of everyone involved. I challenge you, as a group, to use TQM to improve the disputes resolution process. This means more than just talking about it. You must identify the problems. You must change the process to eliminate them and you must work toward continuous improvement.

You're a distinguished group of professionals doing an important job in an area of great significance to everyone involved in government contracting. I consider it a privilege to have been your speaker today. Thank you very much for inviting me.

THE JUDGE'S CORNER WHERE DO WE GO FROM HERE?

Sherman P. Kimball

*President, BCA Judges Association
Vice Chairman, Energy Board of Contract Appeals*

Boards of contract appeals have come a long way since the Supreme Court in *United States v. Adams*, 74 U.S. 463 (1868), upheld the right of the Secretary of War to appoint a board to hear and settle claims submitted by Civil War contractors. Almost one hundred years later, the Supreme Court limited the scope of review of board decisions, as a result of which the judicialization of the boards began in earnest. The informal, limited process described in *Adams* has, thus, evolved into a formal system, designed to provide completeness and fairness, which now sports its own BCA Bar Association, in addition to a BCA Judges Association, and has spawned a cottage industry of publications and forums devoted in large part to the work of the boards.

The boards have clearly arrived, but having done so, where do we go from here, as we move towards the 21st century in an atmosphere of increasing dissatisfaction with the entire process of disposing of cases at virtually all levels? Such developments as ADR, rent-a-judge, and even the dramatic increase in anti-lawyer jokes should signal us that something is thought to have gone awry in the legal system. Whether justified or not, the outcry of dissatisfaction could lead to enforced change in the system overall not necessarily for the better.

It is therefore incumbent upon boards and the bar to examine existing practice and to make refinements or improvements, if needed, as Paul Williams, the learned Chairman of the ASBCA, suggested in his article in the Fall 1990 issue of this publication. I am not advocating change for the sake of change, nor am I suggesting that refinements are necessary, only that we take a good, objective look at the present system.

To begin with, in my view, BCAs are not and were never intended to be mere carbon copies of the Claims Court or any other court. Long before ADR was a twinkle in someone's eye, BCAs were created to provide the inexpensive, expeditious disposition of cases that ADR advocates are now seeking to provide. It does not detract one iota from the dignity and status of boards, or the respect which should be accorded boards, to be flexible, innovative, and creative in deciding cases. Boards need be neither hidebound nor ponderous to be fair and complete.

Speaking only for myself and not for the BCA Judges Association or for the Energy BCA, some possible changes or refinements come to mind. Surely there are others. I stress that I am not necessarily advocating any of them, but am only presenting possibilities in order to encourage discussion. Our aim is to improve the process, if improvement be needed. In that quest, the cooperation of the bar is imperative, as it is in all endeavors of the boards.

1. We should examine the length of decisions. It should go without saying that, generally, the longer the decision, the longer it takes to write that decision. Do we devote too much time and space to a painstaking rendition of all the facts? Are decisions cluttered with excessive citations to the record? As one who undoubtedly holds the dubious record for most footnotes in one decision (Steenberg Construction Company, 72-1 BCA 9459 (IBCA)), can we not reduce their number, as well as the number of citations of authority generally? Where a CCH citation is available, and the year of issuance is obvious from it, why not save space and eliminate the BCA docket number and date, as I have done above? Do we need to devote extensive space to the positions of the parties or to follow every rabbit trail down which counsel may have led us?

2. Many BCA cases engender large records because of numerous issues and claims. Other BCA cases produce unnecessarily large records by reason of litigation by paper avalanche or by following the ancient administrative practice of "letting it in for what it's worth." Tighter case management both before and during the hearing could save time. Discovery should not be allowed to run amuck. More effective case management could reduce the rabbit trails.

3. The use of one-judge and bench decisions can speed the process. Decisions by panels provide collective safeguards, but, of necessity, require more time. Should one-judge decisions be the rule in cases without novel or complex issues? What safeguards should be imposed, if any, on one-judge and bench decisions?

4. The quality of pleadings and briefs should be improved. Particularly in a large, complex case, the quality of the decision and the speed of its issuance are directly affected by the quality of the briefs.

5. In place of the appeal file, should the parties attach documents on which they rely to their pleadings? In this regard, and in connection with all aspects of board practice, it should be kept in mind that the Federal Rules of Civil Procedure are not binding on BCAs.

6. In a series of recent cases the Supreme Court has expanded the availability of motions for sum-

mary judgment as a device for disposing of meritless claims at an early stage, but overall motion practice should be sparingly used. Problems can be better handled by conference call. Motions for reconsideration are particularly abused and should be confined to those few well established situations where boards grant reconsideration.

7. Presiding judges are reluctant to plunge headlong into settlement discussions because of concern for potential prejudice on the merits if the case is not settled. The systemized interchange of judges among the boards for the express purpose of presiding over settlement negotiations would eliminate that concern.

Having said all of this, none of the above is offered as a panacea that will guarantee expeditious and inexpensive disposition of cases by BCAs. At most they might reduce the time and cost somewhat. In truth, there is no panacea. We live in an impatient, fast-paced society which places a premium on speed. Yet, no one tells the surgeon to speed up the operation or to cut the costs. Similarly, there are limits to the degree of expedition and cost-saving available in the judicial process. Short of deciding cases by coin toss, reaching a fair decision will always take some time and cost some money. Nevertheless, the bench and the bar should maintain a constant effort to improve the process. The impressive manner in which the BCA Bar Association has arrived upon the scene augurs well for the future, as the boards and the bar consider where we go from here.

ADR UPDATE

Linda F. Schramko

*Trial Attorney, Contract Law
Office of the Chief Trial Attorney
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In the midst of the annual *angst* over the national budget, Congress nevertheless passed a very important piece of legislation having a potentially profound effect on practice before the Boards of Contract Appeals.

On October 26, 1990, the Administrative Dispute Resolution Act, as amended by the Senate, was passed by the House. President Bush signed the Act on November 15. This is an Act to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes. The text of the Act

can be found at 136 Cong. Rec. H 12967.

Some highlights of particular interest include the following:

Federal agencies are specifically authorized to use ADR (Sec. 4b), and each agency is required to adopt a policy addressing the use of ADR and case management (Sec. 3).

The Administrative Procedure Act is amended to empower administrative law judges to encourage the use of ADR, and to authorize them to require attendance at settlement conferences of representatives of each party who have the authority to negotiate concerning resolution of the issues in controversy (Sec. 4a). Added protection is provided for confidentiality of communications in the settlement process (Sec. 4b).

The Contract Disputes Act is amended to give specific authorization to Contracting Officers to use ADR procedures to resolve claims (Sec. 6a). The use of an ADR proceeding is voluntary on the part of both parties (Sec. 6a). The decision to use or not to use an ADR proceeding is discretionary with the Federal agency, and not subject to judicial review (Sec. 4b).

The Act, while it establishes a general Federal policy favoring the use of ADR, addresses some possible exceptions to its use. It states that an agency "shall consider not using a dispute resolution proceeding" when, among other things, a resolution having precedential value is desirable; when the outcome would significantly affect persons who are not parties to the dispute; or when a full public record is desirable, and an ADR proceeding would not provide such a record (Sec. 4b).

The Act also sets out in some detail the use of arbitration, including the judicial review of arbitration awards (Sec. 4b; Sec. 5).

The Federal Mediation and Conciliation Service is authorized to provide the services of neutrals, and to train neutrals (Sec. 7). The Administrative Conference of the United States is charged with establishing standards for neutrals, maintaining a roster of neutrals who meet those standards, entering into contracts for the services of neutrals and developing procedures permitting agencies to obtain services of neutrals on an expedited basis (Sec. 4b).

In his January 31, 1990, statement on the Administrative Dispute Resolution Act to the House Subcommittee on Administrative Law and Governmental Relations, Marshall J. Breger, Chairman of the Administrative Conference of the United States,

addressed some of the reservations that have been expressed concerning the use of ADR in disputes involving the Government. Some of those reservations include the concern that resolving too many conflicts through informal ADR will result in insufficient legal precedent for the future; that predictability of outcome will be undermined; that the public interest may not be properly served through secret negotiations; that it will result in second-class justice for less advantaged litigants; and that there are whole classes of cases, such as those involving civil rights, that may be inappropriate for resolution through ADR.

In responding to these concerns, Breger emphasized, first, that ADR is not intended to be a substitute for litigation, but to serve as a complement to it.

He went on to point out that governmental officials already routinely negotiate and compromise "tens of thousands" of claims by and against the Government pursuant to guidelines that are generally recognized as protecting the public interest, including providing for decisional accountability. Accountability for settlements made through ADR need be no different from justifying other discretionary decisions. By way of example, Breger cited a letter dated November 22, 1987, addressed to him from Deputy Inspector General Derek J. Vander Schaaf, Department of Defense, in which the Office of the Inspector General of the DOD specifically endorsed the standards for documentation of agency settlement decisions,

for purposes of reviewing for accountability, developed by the Administrative Conference of the United States for use in ADR of contract claims.

In looking at the alleged unfavorable impact of ADR on less advantaged litigants, Breger asks, "Compared to what?" He points out that often the backlog, delay, and expense of a full-blown proceeding in a "first-class" justice system result in justice denied. In fact, a less formal ADR process may be more responsive to a complaining party's real needs. In reality, a speedy, less expensive, or informal dispute process can effectively enhance access to justice.

Regarding the fear that informal resolution of certain classes of individual grievances will divert public attention from social conflict, thereby preventing solutions on the systemic level of social ills, or will result in too few precedents, Breger emphasizes that the vast majority of cases, particularly at the lower court and agency levels, already are resolved through

Federal agencies are specifically authorized to use ADR (Sec. 4b), and each agency is required to adopt a policy addressing the use of ADR and case management (Sec. 3)

voluntary settlement, without addressing any issues of importance to society at large.

The primary sponsor of the legislation before the House was Rep. Dan Glickman (D-Kan), who has said that, while Congress in enacting the Administrative Procedure Act intended to provide for prompt, expert, and inexpensive means of resolving agency disputes, the fact is that administrative proceedings have become increasingly formal, time-consuming, costly, and less likely to result in a consensual outcome. (136 Cong. Rec. H 3156)

According to him, ADR procedures "have been used in the private sector for years and have, in many cases, led to faster, cheaper, more creative and less contentious results. The Government would benefit similarly by adopting them in appropriate cases where the Government serves as the decisionmaker, or to which it is a party. Such common-sense procedures also will benefit the private parties involved in drawn-out, expensive administrative proceedings."

THE ACCOUNTANT'S CORNER

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

From time to time, this column will feature accounting information of practical use to those who toil in the government contract vineyards.

Bankruptcies occur with some degree of regularity in government contracts. In any bankruptcy, losses are frequently incurred by all creditors (even secured creditors). Whether you represent the contracting officer, the prime contractor or a supplier, when an unbonded company goes under during contract performance, everybody loses either time, money, or both. Obviously, it is advantageous to know a company's prospects for bankruptcy in advance. In this regard, accountants know that certain financial ratios can reliably indicate the probability of bankruptcy long before it happens.

For this purpose, accountants use a formula known as the Zeta number, or Z factor. This formula is considered to be a highly reliable indicator of bankruptcy and provides in Section 4.804.4(a) of the DCAA Audit Manual as follows:

$$Z = .012(X1) + .014(X2) + .033(X3) + .006(X4) + .010(X5)$$

where X1 = ratio of working capital to total assets
X2 = ratio of retained earnings to total assets

X3 = ratio of earnings before interest and taxes to total assets

X4 = ratio of market value of equity to book value of total debt

X5 = ratio of sales to total assets

In the formula, the percentage values for the X1-X5 ratios are written as absolutes, i.e., 20 percent is written as 20.0, 200 percent as 200.0, and so on. Also, the figures for calculating the X1-X5 ratios are obtained from the contractor's financial statements. The meaning of the Z score is shown below.

Z Score	Possibility of Bankruptcy
1.8 and below	probable
1.81 - 2.67	possible
2.68 - 2.99	remote
3.0 or more	no chance

Zeta numbers are maintained for almost five thousand companies by Zeta Services, Inc., 5 Marineview Plaza, Hoboken, N.J. Their score, which uses more financial ratios than the five set forth in the DCAA Audit Manual shown above, is usually used by financial analysts who are interested in the company as an investment.

Members of the BCA Bar Association may be surprised to learn that this important information is not generated by accountants who work in government contracts. An auditor would not report a company's Z factor in his report, because it is beyond the scope and purpose of an audit. Along the same lines, a government cost-price analyst would not calculate the Z factor because his line of inquiry is considerably narrower (specifically whether the contract costs are adequately supported and whether the prices charged are reasonable). Company accountants also do not normally provide this information to management as they are tasked with handling internal accounting requirements (payroll, accounts payable, inventory, financial statements, and so on). For these reasons, those who deal with a troubled firm frequently find out about its bankruptcy only when it is too late (i.e., three months prior to filing).

There will be many more corporate bankruptcies in the near future as the different markets shake out the weak sisters (the ones that lack the financial strength to ride out protracted periods of revenue retrenchment). Having the servicing accountant compute the Z factor will alert you to financial hazards that can be avoided.

ALTERNATIVE DISPUTE RESOLUTION AN AGENCY PROGRAM

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INTRODUCTION

The use of alternative methods for resolving disputes is a recent development in the Federal government. Traditionally, government agencies have relied almost exclusively on negotiations by managers or attorneys and litigation before third parties, such as arbitrators or judges to resolve disputes. In the past several years, however, this reliance has begun to change. Interest in alternative dispute resolution (ADR) methods has gone from isolated curiosity by a few government managers to active programs in several agencies.

At this time, government agencies including the U.S. Army Corps of Engineers have demonstrated a willingness to use various ADR methods. The Corps has developed a whole continuum of ADR methods and has used these methods in numerous functional areas. The Corps has used ADR to resolve conflicts involving contract claims, hazardous waste cleanup, and permits. Currently, the Corps is considering how to use ADR methods for real estate acquisition problems, employee grievances and EEO complaints. ADR methods have included mini-trials, non-binding arbitration, dispute review panels, mediation and facilitation.

Recently, the Corps of Engineers established an ADR program to promote an understanding of alternative methods to litigation. The program includes executive and management level training, "how-to" publications, case studies and technical assistance. Also, government/industry Round Table sessions have allowed participants to learn about ADR efforts, share perceptions, and exchange ideas to promote ADR efforts.

Institutionalizing ADR within the Corps of Engineers, however, has not, been easy. This paper will examine the implementation of the Corps ADR effort.

REASONS FOR ADR

The Corps of Engineers began to consider the use of ADR in the mid 1980's in the contract claims

area. Three primary reasons motivated the Corps to consider ADR methods for resolving contract disputes. These reasons were: (1) the costs of litigation; (2) delays in obtaining decisions from administrative contract appeals boards and courts; and (3) the disruptions to management in defending litigation.

Although the direct costs of litigation were more apparent to our contractors, the Corps incurred considerable direct and indirect costs associated with contract litigation. The increasing number of attorney hours devoted to more numerous and highly complex contract appeals had a noticeable impact on personnel allocations and discovery costs were rising rapidly. Additionally the Corps was spending more on fees for expert witnesses and computerized litigation support services.

Delay in getting decisions was another problem. The time between filing an appeal and receiving a decision was running from two to four years. Also, our caseload was increasing drastically from approximately 400 in 1982 to about 550 in 1985.

A final significant concern that confronted the Corps of Engineers was the disruption to management, during litigation. Litigation required not only an attorney's time and efforts but the dedication of many other personnel resources. Certainly, anyone directly connected with the factual basis for the claim could be involved for substantial amounts of time during discovery and, of course, at the trial. Also, in complex cases, litigation support teams were often formed. Such teams, consisting of technical experts, auditors, and managers consumed much additional staff time and diverted valuable people from current projects. This disruption to support litigation was, obviously, not productive.

Additionally, there were many other adverse impacts of litigation besides the three discussed above. Perhaps the most obvious of these other impacts was that lengthy litigation caused economic hardships and destroyed otherwise good business relationships. Certainly, these results were not desired by either party when initiating litigation.

ADR DEVELOPMENT

Considering the costs of litigating a claim, the delays in obtaining decisions, the disruption to management, and other adverse impacts, the existing litigation system was unsatisfactory. As such, the Corps of Engineers began looking for ways to reduce our litigation by resolving disputes innovatively. ADR appeared to be the answer for an alternative to litigation.

Of course, we recognized early in our efforts that ADR was not going to be a replacement for traditional negotiations between the parties to a dispute. In

fact, negotiations have been used successfully to resolve numerous contract disputes and will continue to be the method of choice in the future. However, negotiations alone have not stemmed the tide of rising caseloads at the boards of contract appeals and the courts. In addition, too many appeals were being settled by negotiations on the courthouse steps only after time consuming and costly discovery has been completed. Obviously, other methods were needed to supplement traditional negotiations as an alternative to litigation. As such, the Corps of Engineers decided to try ADR.

ADR EXPERIENCE

The first ADR method used by the Corps of Engineers to resolve a contract dispute was the mini-trial. Although the term mini-trial was coined, the label really is a misnomer. The mini-trial is not an adversarial judicial proceeding. Rather than presenting the case to a judge at a trial, the case is heard informally by representatives of the parties who will attempt to negotiate a settlement. Thus, the mini-trial is nothing more than a structured negotiating process that uses a blend of traditional negotiations, mediation and arbitration. The mini-trial has been defined by the Corps of Engineers as a "voluntary, expedited and nonjudicial procedure whereby top management officials for each party meet to resolve disputes".

Looking beyond the definition, the general characteristics of a mini-trial are easy to understand. They expand on the basic definition and may be organized into five distinct elements. These characteristics include: involving top management; limiting the time of the mini-trial; conducting an informal conference; holding non-binding discussions; and considering guidance from a neutral advisor. Each of these elements may be tailored to achieve the best fit of the mini-trial to the dispute at issue.

The involvement of top management in the mini-trial is essential to the success of the process. Having top management decide the dispute enables the parties to utilize management skills and policies to resolve a dispute.

Ideally, the management official should not be personally involved in the dispute. Participation, of a

higher level of management ensures that a principal's deliberations and judgments are not clouded by any previous involvement in the dispute. This affords each party an opportunity to take a fresh look at the dispute. However, getting a higher level management official to participate may not be practical in every case.

At the mini-trial's informal conference, the management officials act as the "principal" representatives. In order to expedite the process, the principals should have full authority to settle the dispute.

The mini-trial's duration is short. In most cases, the process should be complete within one to three months, including the time for discovery and the conference.

As far as the principal's time is concerned, it is considerably less than the period necessary to complete the mini-trial process. Normally, prior to the conference, each party has an attorney prepare its position, for presentation to the principals. Thus, the principal's time is limited to the conference which typically lasts for only one to two days followed by settlement discussions.

In order to maintain the short time period for the mini-trial, the parties need to agree to a schedule at the beginning of the process. A fixed schedule commits the parties to an expedited process.

The actual conference is informal. The length of time allowed for the presentation of the case and rebuttal is scheduled in advance

and strictly adhered to during the conference. In keeping with the informal nature of the proceeding, no transcript of the conference is produced and the rules of evidence and procedure are not enforced.

The informal conference is not truly adversarial since the purpose of the conference is to quickly inform the principals of the facts underlying the dispute. The parties are allowed considerable flexibility in the manner in which they present their case. Witnesses, experts, documents, oral argument, graphs and charts may all be used to quickly inform the principals about the dispute. No objections are allowed. Furthermore, witnesses are allowed to testify in a narrative form.

In keeping with the voluntary and cooperative nature of the mini-trial, the discussions at the conference are kept confidential. Neither party may use any statements made at the conference in subsequent litigation as evidence of an admission by the opposition.

The last characteristic of the mini-trial is the

The mini-trial has been defined by the Corps of Engineers as a "voluntary, expedited and nonjudicial procedure whereby top management officials for each party meet to resolve disputes"

use of a neutral advisor to assist the principals in assessing the merits of the dispute. The use of the neutral advisor is optional, but if the parties decide to use, a neutral advisor, they need to clearly define the neutral advisor's role. The neutral advisor may assist the parties by acting as a mediator, facilitator or arbitrator as the process proceeds.

The Corps of Engineers has been recognized as the leader in the Federal government in using the mini-trial to resolve contract disputes. The Corps conducted several successful mini-trials prior to its full implementation in July 1986 and has conducted more mini-trials since that time.

The Corps of Engineers' first mini-trial was conducted in 1984 to settle a contract claim in the amount of \$630,570 in less than three days for \$380,000. The comments of the participants after the conclusion of the mini-trial were significant. The parties agreed that by using the mini-trial, they were able to present the same amount of evidence in several days that would have taken them weeks at a board hearing or court. Further, the principals received a much clearer appreciation for the opposing party's position and its supporting evidence which facilitated settlement.

The Corps of Engineers' second mini-trial involved a contract for the construction of the Tennessee Tombigbee Waterway (Tenn-Tom). The contractor's \$55.6 million claim was settled for \$17.2 million. Following a three day mini-trial on June 12-14, 1985 and a follow-up one day mini-trial on June 27, 1985, the principals agreed to settle the claim. This mini-trial effectively demonstrated the flexibility of the mini-trial process. Although the attorneys had completed their planned presentations on June 14, the principals decided that they needed additional facts in order to discuss settlement. At the joint request of the principals, the attorneys had to make a further presentation two weeks later on the additional facts. After the principals received this information, they were able to settle the dispute. Obviously, the principals had taken command of the mini-trial.

Another significant development of the Tenn-Tom case was that the Department of Defense Inspector General (IG) investigated the settlement. The investigation was initiated because of an inquiry about the appropriateness of the settlement procedures. After conducting an extensive review of the documents and interviews with personnel involved with the case, the IG made a formal report. The IG found that the settlement in the Tenn-Tom case was in the best interest of the government, and concluded that the mini-trial, in certain cases, is an efficient and cost-effective means for settling contract disputes. This conclusion provided a strong validation of the mini-trial

as an ADR method for resolving government contract disputes.

Since these two early mini-trials the Corps of Engineers has averaged 2-3 mini-trials per year. Although the number has been small, many of these mini-trials have involved multiple claims of a complex nature and high dollar value.

Even with mini-trials being used, the Corps caseload continued to rise. Accordingly, the Corps began to explore and develop other ADR methods. The next ADR method the Corps used is referred to as a "dispute resolution panel." Although this method is new to the Federal government, it has been used by several state governments in large construction projects performed in the western states. Under this ADR method, a technical panel is chosen before work begins and the parties agree that contract disputes arising during construction may be voluntarily submitted to the panel for an opinion as soon as disputes occur.

The Corps of Engineers dispute resolution panel consists of three private technical experts. The government and the contractor each select one member of the panel and the third is selected by agreement of the two members. The procedure provides for disputes to be submitted quickly to the panel and for them to make a nonbinding written recommendation to the contracting officer and the contractor.

The dispute resolution panel differs from the mini-trial in several respects. The first of these is timing. The panel operates, during the construction period when disputes first arise and the panel's recommendations are received prior to the issuance of the contracting officer's final decision. Second, the panel is composed of technical, not legal, personnel. Accordingly, the best use for the panel is the resolution of highly technical questions of fact. Third, since the panel is available during contract performance, it should have a preventive effect. Unlike other ADR methods which handle disputes at the litigation stage, the panel attempts to resolve a dispute at its inception before the government and the contractor have begun to expend substantial resources in support of the litigation. Further, easy accessibility to the panel and the prompt resolution of disputes should cause a minimum of disruption and enhance the working relationship between the parties.

At this time, two Corps of Engineers Districts are in the process of implementing this ADR method. These two Districts have used a disputes resolution panel provision in several contracts which makes this ADR method available to the parties. So far, a panel has been used under one contract to resolve six disputes.

Another ADR method the Corps of Engineers

considered using was arbitration. Arbitration has been defined as a "consensual means for the settlement of disputes and controversies by reference to a private party or parties instead of a judicial tribunal." We found that this ADR method had been used extensively in the private sector to resolve disputes between parties. Typically, the parties submit the dispute to a private arbitrator and agree to be bound by the decision.

The Federal government has used binding arbitration in certain areas when expressly authorized by statute. According to the Comptroller General, such statutory authority is required for the use of arbitration to bind the government. Since there is no specific statute which authorizes binding arbitration for contract claims, the Comptroller General has stated that a contracting officer may not submit a dispute arising out of a contract to arbitration. Therefore, binding arbitration was not available for use by the Federal government. However, nonbinding arbitration was an alternative.

In 1987, the Corps of Engineers agreed to submit its first contract claim to a private arbitrator for a nonbinding report. Since the dispute was highly technical, the parties agreed to select an arbitrator with technical expertise rather than a legal background.

The interesting aspects of this nonbinding arbitration were that the procedures were in many ways very similar to the mini-trial procedures, and the contracting officer participated in the process. The parties agreed to a procedure involving a two step process. At the first step, each party made an informal presentation of the facts and its position to the private arbitrator. Based on this presentation and the documents furnished to the arbitrator, the arbitrator expeditiously prepared a written report. For the second step, the arbitrator met with the principals who had full settlement authority. The arbitrator was required to make an oral presentation of the findings, and recommendations in the report. After hearing the arbitrator's presentation and reviewing the report, the principals began settlement discussion. The case was settled the same day in accordance with the arbitrator's recommendation.

Following the successful use of nonbinding arbitration in this case, the Corps of Engineers used the process in four other cases. In two of these cases the dispute was submitted to a panel, rather than a single arbitrator, for a report. All cases were settled for the amounts recommended in the reports.

Although nonbinding arbitration was successful in these cases, the obvious disadvantage of nonbinding arbitration is that the parties are not bound by the deci-

sion of the arbitrator. However, since the parties selected the arbitrator, the arbitrator has credibility with both parties and the recommendation of the arbitrator should be accorded considerable weight.

Currently, the Corps of Engineers is using a nonbinding arbitration panel to consider over 100 claims involving millions of dollars under a contract for the construction of Fort Drum, New York. The panel began hearing disputes in May 1990. The panel is scheduled to render five recommendations per week. Since the panel's recommendations are nonbinding, the principals will have to consider the panel's recommendation on each claim as the basis for negotiations.

The most recent ADR method used by the Corps of Engineers involving a contract claim was mediation. In February 1990, the Corps used a private mediator to resolve a dispute in the amount of \$3,100,000 for \$1,555,700. The mediator,

working separately with each party, was able to work out a settlement agreeable to the parties in one day.

The Comptroller General has stated that a contracting officer may not submit a dispute arising out of a contract to arbitration.

ADR PROGRAM

Initially, the Corps of Engineers approach to ADR was informal. With our well publicized successes in contract cases, we had high expectations that our managers would readily embrace ADR. Unfortunately, our expectations were not realized as we encountered many obstacles. We quickly discovered it was difficult to get individuals to change the way they would try to resolve disputes. If they were accustomed to negotiations, they were reluctant to consider alternatives. Secondly, there were many misconceptions about ADR that had to be clarified. Too often, the critics of ADR viewed it as an alternative to negotiation rather than litigation.

Mindful of these obstacles, the Corps of Engineers developed a three-prong ADR program in 1989. The program consists of training, publication and technical assistance.

In the Corps of Engineers, we realized that mind-sets had to change if ADR was to be adopted. We believed that skillfully developed training was essential to this change. Accordingly, the Corps developed a two-level ADR training program which has become part of the mainstream training for managers.

For mid-level employees, the Corps has presented two to four sessions each year of a five day conflict management training course. More than 400 Corps employees have attended this course since it began. The course covers ADR philosophy, methods and appli-

cations. The Corps also initiated a special two day executive training course in ADR for all Corps executives and commanders to complement the five day conflict management training course. This training will be presented to over 600 of our commanders and senior managers. More than 300 of our executives have already attended this seminar. We are also planning ADR audio visuals and self-learning training packages. The objective is to put in place executive and mid-level management training that will be available on a readily accessible basis.

The development of assorted publications on ADR was crucial to clarify our ADR program. We found that there was a general lack of knowledge about ADR because there were very few practical articles on this subject. As such, we decided to provide guidance on the use of ADR. Our publications consist of two types. There is a series of pamphlets on the various ADR methods. There are "how-to" pamphlets designed to explain in plain language what the method consists of and the steps required to initiate the ADR method. The first pamphlet addresses the mini-trial. The next set of publications consists of case studies. These are in-depth studies of selected cases which present the background underlying the dispute, the reasons for selecting the particular ADR method, and frank evaluations by the parties of the process. Case studies concerning contract cases and environmental disputes have already been published.

Also, we found that technical assistance was vital to encouraging employees to adopt new ideas. The Corps technical assistance effort provides support by designing special "on-site" training, based on specific problems; helping managers prepare for negotiations by scoping optional approaches to negotiations/bargaining or by identifying issues, interest, and positions of major interested parties; mediating disputes, both where the Corps is a party and where the Corps is a facilitator; employing ADR techniques to internal Corps conflict situations where requested; and assisting managers in locating and employing credible third parties where needed. In addition, the ADR program provides help in special purpose training and has cooperated in presenting ADR Round Table sessions. The Round Table includes representatives of the Corps, major contracting firms and their lawyers who meet to learn about the Corps, ADR initiatives and to share perceptions about obstacles to greater use of ADR procedures. These sessions have encouraged communication - the most important step in creating a climate for productive negotiation.

Training, publications and technical assistance are all important parts of bringing an organization along to accept ADR. Success stories are important, but as the Corps learned, publicizing successes is not enough.

Only through a comprehensive ADR program we are beginning to see results. ADR is now becoming accepted as an additional tool by many of our managers for resolving disputes.

CONCLUSION

The Corps of Engineers recognized the need to use more innovative approaches to resolve disputes that involved the agency. Relying exclusively upon traditional negotiations and the judicial process was not working. The Corps found that protracted litigation wasted valuable resources and often resulted in unsatisfactory decisions.

We decided that ADR methods such as the mini-trial, a dispute review panel, nonbinding arbitration and mediation held the promise for developing an alternative system which could help resolve disputes quickly and efficiently. Accordingly, these methods were used in numerous cases covering a wide range of the Corps functional areas and they were used successfully. Although the Corps has used ADR primarily in contract cases, it has also been used to resolve environmental and permit cases. Today, ADR is being expanded to our real estate area and employee relations.

Clearly, ADR offers hope for the future. The Corps of Engineers has established that by using ADR we can get quicker and more satisfying settlements engineered by the parties themselves. For ADR in the Corps, the future is now.

THE IMPACT OF TELEDYNE ON BIFURCATION AT THE BOARDS

(Contractor's Perspective)

John W. Chierichella and Jeffrey M. Villet

Jones, Day Reavis & Pogue

The practice of bifurcating Contract Disputes Act appeals before the Boards into separate entitlement and quantum phases has become a regularized Board practice. Although no Board Rule specifically addresses this procedure, litigants are now advised by pro forma letters (at least at the ASBCA) that cases will be bifurcated unless good cause is shown for a contrary procedure.

The rationale supporting bifurcation can be a sensible one. The consumption of time and resources on quantum can be antithetical to the Contract Disputes Act's focus upon economical and timely justice when a decision on entitlement might either be outcome determinative of quantum or provide a meaningful guide for a

non-litigative solution of the issue.

That rationale is further supported by practical reality. At the ASBCA, over 2500 cases currently are docketed for only 37 judges to decide. Filings show no sign of abatement — 60 cases were docketed during the first ten days of October alone. Obviously, stripping those appeals of their quantum elements saves time and serves to reduce backlog. Moreover, the practice is often followed without serious drama since many cases involve quantum stipulations, are readily resolved upon an entitlement decision or are settled by the parties after entitlement is decided.

Notwithstanding necessity and sound rationale, the potential prejudice to litigants from bifurcation has been raised (once again) by a recent Federal Circuit decision on appeal from the ASBCA, Teledyne Continental Motors v. United States, 906 F.2d 1579 (Fed. Cir. 1990). In Teledyne, Judge Mayer concluded that the court lacked jurisdiction over the contractor's appeal because the Board's decision was not "final" in that it addressed only entitlement in a case triggered by a Contracting Officer's Final Decision that had addressed both quantum and entitlement.

Given the Teledyne decision and its potential impact on both litigants and Board proceedings, this paper addresses four questions.

First, what does Teledyne really hold and what are its implications?

Second, was Teledyne correctly decided as a matter of law?

Third, is the rule of law enunciated in Teledyne judicious?

Fourth, are solutions necessary, prudent or available?

I. TELEDYNE

A. The Facts

From a substantive perspective, Teledyne presented to the Federal Circuit a difficult CAS 413 question concerning the allocation of pension costs to two segments with shifting workforces and business mixes. From a procedural perspective, Teledyne presented a considerably less taxing concept to the court. The Contracting Officer had issued to Teledyne a Final Decision (i) claiming that Teledyne's method of allocating pension costs (i.e., on the basis of active employee headcount) violated CAS, and (ii) demanding repayment of \$2,700,000.

At the ASBCA, the appellant joined with the Government in crafting a "test case" under two specific contracts, asking the Board (i) to determine whether Teledyne's allocation method complied with CAS and,

(ii) if not, to determine whether the Government's alternative allocation methods complied with CAS. Notably absent from these "test case" issues was the express question of whether the Government was entitled to its claimed \$2,700,000. The Board sustained the appeal in part and denied it in part, remanding to the parties for "the formulation of proper allocation bases." Teledyne appealed to the Federal Circuit.

B. Holding

The Federal Circuit ruled that, in light of the fact that the Contracting Officer's Final Decision addressed issues of both entitlement and quantum, the Board's decision on entitlement alone was not "final" for purposes of vesting the court with jurisdiction. In brief, the court ruled:

the issues of CAS compliance and monetary relief are part of a single claim that Teledyne's allocation of pension costs violates the Cost Accounting Standards. Appeal must await the final resolution of both issues.
906 F.2d at 1583.

C. Implications

Teledyne was not a bifurcated case. However, Teledyne was a case in which the parties stipulated to the issues before the Board, issues that did not include any express quantum determinations. Thus, Teledyne is closely analogous to the entitlement phase of a bifurcated proceeding and fairly can be said to speak to those cases. The message from Teledyne is clear — if the underlying Final Decision contains both entitlement and quantum elements, but the Board's decision does not, no appellate jurisdiction will lie.

The implications of Teledyne are troubling. In cases involving disputed elements of both quantum and entitlement, litigants must run the risk of either (i) engaging in conflict with the Board at an early stage to avoid bifurcation and thereby preserve immediate appeal rights upon issuance of the Board's entitlement decision (if disputed), or (ii) accepting the possibility of conducting quantum negotiations or engaging in a separate quantum case even where an issued entitlement decision is clearly destined for appeal.

II. UNDERSTANDING TELEDYNE

A. The Historical Back-drop

Teledyne is not the "alpha and omega" on the issue of Board decision finality but is, rather, a conservative reconciliation of the internal and comparative

inconsistencies of two previous Federal Circuit cases (both issued on October 1, 1986): Dewey Electronics Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986), and Teller Environmental Systems, Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).

1. Dewey

In Dewey the contractor appealed the "deemed denial" of nine claims to the ASBCA. The ASBCA found for the contractor on five of the claims (remanding to the parties on quantum) but found against the contractor on the other four. The contractor appealed the Board's decision concerning the four claims and the Government claimed that the Federal Circuit lacked jurisdiction for want of a "final" Board decision on those four claims.

The court suggested that the resolution of finality issues concerning Board proceedings did not rest on finality analyses employed with respect to district court proceedings. The court noted that the inquiry concerning administrative proceedings involved, instead,

"whether the process of the administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action."

803 F.2d at 654, quoting ICC v. Atlantic Coastline R. Co., 383 U.S. 576, 602 (1939).

Under this standard the court found jurisdiction, noting that the Board's decision was "final" because the Board "decided all of the issues then before it, i.e., whether the Board deemed denial as to each of the claims was proper." 803 F.2d at 655. The court appeared to suggest that deemed denials, unlike affirmative final decisions, contain only entitlement elements because they involve "no administrative consideration of damage issues by the contracting officer and . . . no occasion for the board to consider these issues."

The finality inquiry as framed by the Dewey court focused upon the nature of the matter as presented to the Board, suggesting by extension that an entitlement decision in a bifurcated case might also be "final" as long as the Board resolved all issues before it in the case as presented. But Dewey sent contrary signals as well. The court clearly stated:

It is thus necessary to determine the scope of the contracting officer's decision, for this determines the extent of the contractor's right of appeal and the Board's jurisdiction.

803 F.2d at 655. This statement suggests a central

focus upon the scope of the contracting officer's decision rather than, or in addition to, the manner in which issues are presented and addressed at the Board.

2. Teller

The boundaries of the finality rule were clarified by the Teller case. In fact, Teller (in which the court found no jurisdiction) supported (at least under one reading) the notion that finality could arise from an entitlement decision in a properly bifurcated case.

In Teller, the Board had found the contractor liable to the Government for defective repair work and remanded the issue of quantum to the parties for determination. Teller appealed to the court, raising in response to the Government's jurisdictional arguments "the Board's practice of bifurcating the issues of entitlement and quantum. . . ." 802 F.2d at 1388.

Even though the court noted that finality inquiries in the administrative arena might be less rigid than those applicable to judicial decisions, the court refused to apply a different standard, stating "the circumstances referenced by Teller do not warrant application of a less restrictive finality rule in this case." 802 F.2d at 1389. By so holding, the court suggested that the traditional finality rule developed with respect to district court proceedings generally did apply with equal force to Board proceedings — somewhat of a retreat from Dewey.

Regardless of this different standard, the court went to considerable lengths to undertake the same inquiry undertaken in Dewey, i.e., whether the Board decided all the matters before it. The court ruled that the Board had not done so. The court noted that the Board remanded quantum even though the Board "considered both the liability and the damages issues" and "then discussed the allowability of each of the several elements of damages," concluding that "both the entitlement and quantum aspects of that claim were before the Board."

The court perceived no adverse impact from its holding in Teller on the routine Board practice of bifurcating appeals:

The controversy here is not typical of the contract issues normally presented to the Board and in which the bifurcation practice occurs.

* * *

[T]he contracting officer expressly determined not only that Teller was liable to the government for the allegedly faulty repair work, but also the specific amount of damages due the government. And the Board considered and dealt with both issues in its opinion. . . .

802 F.2d at 1390.

Thus, Teller could be read to stand for the

proposition that a properly bifurcated case in which only entitlement is decided — and no mention is made of quantum — might generate a “final” decision capable of appeal. Such a reading is bolstered by the court’s continual references to issues “before the Board,” suggesting that if quantum issues are not “before the Board” (i.e., as a result of a Board-ordered bifurcation) and are not considered by the Board, an appealable judgment might result.

Like Dewey, however, Teller sent mixed signals in this regard. Lurking in the foreground was the fact that the Final Decision in Teller addressed both quantum and entitlement and that the Board’s decision did not. In addition, elsewhere in the opinion the court clearly stated (as did the Dewey court) that:

The contracting officer’s decision covered both aspects of the claim and the Board’s jurisdiction is to review that decision

802 F.2d at 1389 (emphasis added).

These statements clearly left open the issue of whether the court considered (or might consider) coextensiveness between the Final Decision and the Board’s decision as jurisdictional.

3. Conflicts in Dewey and Teller

It seems fair to say that these cases when read together created a framework ripe for clarification on the following fronts:

1. Dewey established the proposition that, for the purposes of appellate jurisdiction, finality in an administrative proceeding was subject to a less restrictive standard than finality at the district courts; Teller however, seemed to suggest the applicability of district court “finality” principles, with exceptions to be fashioned on a case-by-case basis. These apparently contradictory positions portended the need for resolution; and
2. Dewey and Teller relied on the notion that finality requires the Board to resolve everything before it, suggesting that a properly bifurcated decision might be final, while at the same time suggesting the need for coextensiveness between a Final Decision and a Board decision thereon. This internal conflict in both decisions also begged for resolution.

4. Teledyne

Teledyne was decided against this backdrop and resolved many of the issues left open by Dewey and Teller.

a. Traditional Finality Standard

The court in Teledyne resolved the finality stan-

dard simply by ignoring statements in Dewey and Teller concerning the less restrictive standards that **do** apply or **may** apply to administrative proceedings. Instead of addressing the conflict, the court merely applied traditional “final judgment rule” caselaw without discussing the propriety of that standard.

b. Jurisdictional Finding

The application of such a traditional standard converted a difficult question of jurisdiction into a single one because, under that traditional standard, a decision on both liability and damages is necessary for finality. Under the standard applied in Teledyne, finality requires that the Board decide not only everything actually before it, but everything placed in issue by the underlying Final Decision.

In short, Teledyne resolved the issues left open by Dewey and Teller by following the conservative threads in those opinions and ignoring the rest, creating a standard of review for finality that seems to require absolute coextensiveness between a Final Decision and a Board decision in order to support a jurisdictionally sound appeal.

B. The Problems with Teledyne

1. Irreconcilable Differences: Boeing

Teledyne could have easily gone the other way. The court could have adopted the notions in both Teller and Dewey that finality standards for administrative decisions are different from those applicable to district court proceedings and analyzed the case accordingly. Under those standards, the court could have looked to whether

the process of the administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.

ICC v. Atlantic 383 U.S. at 602 (discussed supra). Applying this standard, the court could have determined that the Board “resolved everything before it” and concluded that appellate review would not disrupt adjudication in a case in which the obligations of Teledyne had already been determined by way of an entitlement decision.

But the court went the other way. And given the inconsistencies in Teller and Dewey that colorably could support diametrically opposed conclusions, the court’s ruling would be understandable (if not acceptable) were it not for the fact that the court had **already** applied Dewey in a completely contrary manner.

In United States v. Boeing Company, 802 F.2d 1390 (Fed. Cir. 1986) — decided on the same day as Teller and Dewey — the court noted jurisdiction over a

government appeal of a Board decision by simply citing Dewey without a decision of jurisdictional elements or finality. However, a review of the Board decision establishes beyond question that while the contracting officer's Final Decision allowed \$16,033 in pension costs from a Boeing account containing over \$1,000,000 in such costs, the Board's decision said nothing of quantum and remanded the case to the contracting officer for a quantum determination. Boeing Co., ASBCA No. 1985, 85-3 BCA 18,435 at 92,581-82 and 92,608. Even though the Board decided "everything before it" in light of the fact that the parties had crafted the appeal as a test case under two contracts, the Board certainly did not issue a decision coextensive with the contracting officer's Final Decision and the quantum remand left more (potentially) for the Board to decide.

While this result comports entirely with a liberal reading of Dewey and Teller (and with manner in which the court **could** have decided Teledyne), it stands at odds with the conservative approach actually adopted in Teledyne — especially in light of the striking factual similarities between Boeing and Teledyne.

The court in Teledyne ignored the conflict created by Boeing. In fact, the court attempted to construe Boeing in a manner fitting within its newly articulated rule on coextensiveness, claiming that in both Dewey and Boeing:

the contracting officers denied the contractors money claims and therefore made no determination of amount [leaving nothing more of the final decisions to be resolved].

906 F.2d at 1583. Of course, the court's reading of Boeing is inaccurate. At a minimum, the Final Decision in Boeing allowed \$16,033 of costs; alternatively construed, the Final Decision disallowed over \$1,000,000. However one construes the underlying Final Decision in Boeing, it is clear that the court's characterization is a fictitious scenario leaving nothing but Teledyne to resolve issues of finality.

III. WHERE DOES TELEDYNE LEAVE US?

Teledyne establishes the relatively clear proposition that entitlement decisions from the Board cannot be appealed if the Final Decisions to which they relate contain quantum elements.

The quandary is obvious. Board decisions may proceed interminably without appeal in the absence of a quantum ruling. Contracting Officers may attempt to manipulate the system by including a nominal quantum element, even when entitlement is the

only issue. Litigants may alienate judges by suggesting that bifurcation is inherently unsound. Appellants may attempt to sidestep Teledyne by advocating to the Federal Circuit — at considerable expense and risk — that Teledyne ought not apply to their cases. Or worse, appellants may delay the appeal of an entitlement ruling until a quantum ruling is issued only to be told on appeal that the statutory appeal period has expired on their entitlement decision, which (for whatever reason) really was "final enough."

IV. WHAT ARE THE SOLUTIONS?

Teledyne's impact on bifurcation can be addressed in three ways, — ie., by a change in practice, Rule or statute — only the latter of which seems sound.

First, the Boards could stop bifurcating cases unless requested to do so by the parties. While this would solve the Teledyne problem, the backlog at the Boards would undoubtedly increase and the mean time to decision would obviously increase.

Second, a rule similar to Rule 54(b) of the Federal Rules of Civil Procedure could be adopted into the Uniform Rules permitting a Board to enter a "final judgment" on less than an entire claim. Of course, such a rule would not be binding on the Federal Circuit for jurisdictional purposes. Moreover, Rule 54(b) relates to the entry of final judgments on entire "claims" in a multi-claim case, not to a segmented claim. To the extent that the Federal Circuit continues to apply "final judgment rule" caselaw to Board decisions, any attempted extension of Rule 54(b) undoubtedly would be evaluated under the same body of law that caused the Teledyne problem in the first place.

Third, legislation could be pursued to amend 28 U.S.C. 1292(b) in order to permit interlocutory appeals from Board decisions. This option has two weaknesses in that (i) interlocutory appeals are discretionary both at the trial and appellate level, granting appellants little reason to accept bifurcation, and (ii) interlocutory appeals address only "controlling questions of law as to which there is substantial ground for difference of opinion" — which likely do not arise in most entitlement decisions and certainly cannot be predicted when a bifurcation decision must be made.

Only one avenue of relief seems advisable — direct amendment of the Federal Circuit's jurisdictional statute, 28 U.S.C. 1295(a)(10). Amendments (underlined below) might provide that the court has jurisdiction:

(10) of an appeal from a final decision of an agency Board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of

1978 (41 U.S.C. 607(g)(1)), including decisions entered separately on the entitlement and the quantum elements of a bifurcated appeal.

Such a revision would promote efficiency and economy by securing the practice of bifurcation against the case-by-case challenges of litigants, assuring that time saved in bifurcation need not be repaid three-fold through senseless proceedings before appeal rights can be exercised.

BIFURCATION: IS IT TIME TO RETHINK THE DIVIDED CASE?

(Government Perspectives)

R. Anthony McCann

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1. Central Issue.

Does bifurcation reduce the work involved in litigating the case. If it does, bifurcate; if not, do not. Exceptions to this rule are rare.

2. The Ordinary Case.

In the every day case brought before the ASBCA the only issue that needs to be litigated is entitlement. Most cases brought before the ASBCA involve fairly simple issues: is the specification defective, has there been a constructive change to the contract, etc. There is no need for the parties to get into the issue of quantum in these cases. If the quantum presentation is simple, a respectable argument can be made that quantum should be litigated. It makes the handling of the case quick and easy.

However, litigating quantum often should be a waste of a lot of valuable time. The Government wins a large number of these cases on entitlement grounds. In these cases any time and effort expended trying quantum would be completely wasted. Furthermore, when quantum is tried prior to a determination on entitlement one must speculate on what the entitlement decision might be. Consequently, the presentation on quantum must cover all possible entitlement determinations. This could lead to a quantum presentation far in excess of what is actually needed.

Example: a building construction claim for

changes and delay. A quantum presentation at the entitlement hearing would have to cover all constructive change claims, plus a delay and critical path analysis presupposing that each alleged constructive change was on the critical path. If the determination by the Board is that there were some constructive changes, but that many were not on the critical path, a lot of effort has been wasted trying to quantify the delay costs associated with the changes not on the critical path.

3. Time.

Probably the biggest complaint about handling cases without trying quantum is that it takes too long. After winning, a contractor has to go back to the Contracting Officer and again try to get his money. This is sometimes a problem, but most often it is not. Contrary to the opinion of many, most Contracting Officers are reasonable people who are just overworked. With a fairly definitive entitlement decision a quantum settlement should be finalized within a few months. The vast majority of quantum claims are settled quickly. I see no reason to change this procedure.

4. Resources.

The case load at the Navy has increased dramatically over the past several years as it has at the Army, and Air Force. Since 1980 our case load has increased from approximately 300 to about 1100 and the cases over \$1,000,000 have gone from about 25 to 75 in that time period. We do not have the resources to increase our work load by adding a quantum trial to all of our entitlement trials. Granted, when we do lose it is incumbent upon the Contracting Officer to try to negotiate the quantum which he often does successfully. This may be Government effort, but it is not trial attorney effort, and this is good in our minds.

5. The Unusual Case.

In certain cases quantum really is inextricably tied up with the entitlement issue and cannot be efficiently separated. These cases, from a Government perspective, must have quantum and entitlement tried together.

Example: Ship repair claims. A contractor submits a multimillion dollar claim for a fifty constructive change, plus delay, disruption, and acceleration. He may be claiming between \$100 and \$200,000 for each claim, \$2,000,000 for disruption, \$1,000,000 for delay and \$300,000 for acceleration. In this type of situation bifurcation simply serves no purpose. In a claim like this, there is invariably going to be some entitlement with associated money damages. The question is where is it, and how much is it worth. Trying to figure out which constructive changes are valid or partially valid, what the critical path was, what the associated

delay was, and what caused the disruption, and then attempting to agree on the quantum makes little sense. The reasons it makes little sense are:

(a) It takes forever. A case tried in this manner will not come to trial for one to two years after it is filed. Then it will take one to three years before a decision will be rendered by the Board. The case then might be appealed, if it is considered final, or a motion for reconsideration might be filed. If appealed, who knows how much longer things will drag on. Once the entitlement decision is finalized (not necessarily final for appeal purposes) then the parties must start the negotiation process. If they can reach agreement the process might end. If they can't, a new trial is needed, and an additional decision must be rendered by the Board. At this stage, the decision has definitely become final so that an appeal on either the entitlement or quantum issues can be taken. If an appeal is taken, years will go by before the litigation will come to an end. Many people will have expired of old age by the time the process ends. Bifurcation in this situation just does not work.

(b) There is no way to separate individual claims from the overall delay, disruption, acceleration claim. Trying parts or pieces of a ship building, ship repair or similar cases just does not make sense. I have yet to see a contractor reduce his claim for delay or disruption materially when he is shown or proven to be wrong on any of the underlying claims. In the above example, if the government proves a contractor wrong on entitlement on 25 of the 50 constructive change claims the delay, disruption, and acceleration claim remains virtually intact. Somehow it all mysteriously shifts to those constructive changes that the contractor is able to prove. These changes, of course, have very little relation to the total dollar amount claimed. Consequently, when the Government wins on one of these claims, its victory has little value, because the delay, disruption and acceleration claims are not correspondingly reduced. On the other hand, if entitlement and quantum are tried together the contractor is forced to attach a proportional amount of quantum including delay, disruption and acceleration to each change. Consequently, if the Government wins on 50 percent of the constructive change issues, the ASBCA will likely reduce the contractor's delay, disruption, and acceleration costs accordingly.

6. Controlling issues should be litigated and decided wherever possible prior to a full scale trial.

(a) Not only is bifurcation normally a proper way to proceed because it reduces litigation time, other measures should be taken to reduce and focus the litigation.

Example: A construction contract claim primarily based on delay. If a majority of the issues in a case can be resolved by the Board making a determination as to what the critical path was, try that issue alone, and come back to the Board only if you cannot resolve the issues using the defined critical path. The Navy recently had a case called Sante Fe Engineers. It related to the construction of the Naval hospital in Bangor, Washington. The case consisted of 100 separate claims with associated delay and disruption. The trial lasted for six months. Most of the money in the case depended on whether the changes were on or off of the critical path. If the critical path could have been established,

Jurisdictional and dispositive motions have got to be decided by the ASBCA prior to trial. Litigation is simply too expensive to be extended needlessly.

many of the individual claims probably could have been resolved. The Government tried to get the ASBCA to try just this issue, but the ASBCA would not. The case turned into an absolute monster. The Government's Rule 4 file consisted of 17,000 pages and appellant supplemented it with 2,000 pages. The Government's main brief was three feet thick with 15 feet of attachments. God only knows when a decision will be rendered. Neither the Board nor the Government has the resources for this kind of litigation. Further, it is not fair to put contractors to this kind of expense. If the EAJA does not apply, they have to foot the bill for the attorney fees.

7. Jurisdictional and dispositive motions have got to be decided by the Board.

(a) Along the same lines, jurisdictional and dispositive motions have got to be decided by the ASBCA prior to trial. Litigation is simply too expensive to be extended needlessly. There is no good reason to try a case that can be taken care of without going through the arduous and expensive procedure of discovery, trial and briefing.

For years the mentality of the Board has been to accord contractors their day in court. Every effort was made to allow contractors to come into the ASBCA and make their pitch, even if that pitch had absolutely no merit. This thinking goes back to the

time the Board was created, where non-lawyers sat as commissioners and tried to come to a quick, easy and inexpensive resolution of a case. The years have simply changed all of that. It is now just about as expensive and time-consuming to try a case before the ASBCA as it is before the Claims Court or a District Court. Since this is the situation that we find ourselves in we should do everything possible to make litigation as quick and inexpensive as possible.

Example: Appeal of Dr. Robert E. Kaplan. Dr. Kaplan entered into a contract with the Navy to provide Champus medical services (something like medicare services). Ultimately, he filed a claim with the ASBCA under this contract. The Board, however, detected a possible jurisdictional problem and directed the parties to brief the jurisdictional issue, which they did. After all the briefs were submitted, the Board decided to invoke its prerogative under Rule 5 of the Rules of the ASBCA and defer ruling on jurisdiction until after a hearing on the merits had been completed. This is nonsense. Neither the Government nor contractors have the time or the money for this kind of proceeding. If, after a hearing on the merits, the Board decides that it had no jurisdiction then all of the time and money on both sides has been wasted. We feel that we know why the Board did what it did. The judge got angry with the Government for not properly and expeditiously answering the complaint, so he thought, so he refused to rule on the jurisdictional issue. But where has he done the contractor a favor? The contractor still has to pay attorney fees, unless he is a small business. Even if he is, look at the time and effort that the contract has wasted. Such actions by the Board are just not justifiable. Timely jurisdictional and dispositive motions should always be decided prior to trial. Both sides can afford no less.

ASBCA CHANGES ITS AREA CODE

The Directory of the ASBCA that we provided to you in our last issue must be changed. The government changed the area code for many of the government offices in northern Virginia from 202

(Washington, D.C.) to the more geographically correct 703 (northern Virginia). Please annotate the directory in your first edition.

NEW TELEPHONE SYSTEM FOR THE CLERK'S OFFICE IN U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

For those of you involved in appealing BCA decisions to the Court of Appeals for the Federal Circuit, you will be interested to know that the clerk's office has a new telephone system.

All calls to the main number (202-633-6550) are answered by an automated attendant. Callers will be asked to make various selections using their touch-tone telephones so the call can be routed to the appropriate deputy clerk or person. Callers requesting copies of the rules or applications for admission to practice will be asked to leave the mailing information on a recording machine. Callers inquiring about decisions will be transferred to the answering machine that announces the daily dispositions of cases. Calls to the Court of Appeals for the D.C. Circuit will be transferred to that clerk's office. Callers asking frequently asked questions will be given a prerecorded message.

Regular callers can avoid the automated attendant by dialing direct to the staff members who handle particular matters: Diane Frye (202-786-6203), Oral Argument Calendar; and Pam Twiford (202-786-6422), Admissions and Judicial Conference.

For the District Court, CIT, Court of Veterans Appeals, ITC, Patent and Trademark Office and Board of Contract Appeals cases: Charles Ricks (202-786-6204), Briefs; Linda Purdie (202-633-5882), Motions; and James Benjamin (202-633-6554), New Appeals.

For the Claims Court and MSPB Appeals: Scott Petrisko (202-786-6201), Briefs; Spencer Green (202-786-6205), Motions; and Beverly Heath (202-786-6198), New Appeals.

PRE-TRIAL DISCOVERY: ARE REMEDIES FOR UNNECESSARY DELAY REQUIRED?

(Government Perspectives)

*Presented at
Board of Contract Appeals Bar Association
Annual Meeting Seminar
On Pre-Trial Procedures*

*Washington, D.C.
October 29, 1990*

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Practice

1. "Voluntary discovery." In an ideal world, voluntary discovery seems eminently reasonable. After all, aren't we all on a search for the truth? Reality is quite different. Experience shows that in many cases the protestor or appellant is actually looking for enough information to file a valid, amended protest or complaint. If "voluntary" means that the Army has to dump reams of information on the protestor or appellant, we would rather keep the process highly formalized. A good interim solution could be patterned after Judge Borwick's (GSBCA) practice of limiting the number of depositions and leaving the specific deponents to the designation of the parties.

2. Discovery conferences are held at the GSBCA, not at the ASBCA.

3a. I do not perceive any problems with enforcement of deadlines for response before the GSBCA in bid protest actions. What I do see is a pattern of vague, non-answers to specific questions, without elaboration, and categorical responses ("industry sources") given as the defense against allegations of non-compliance. I have never seen my office or a major law firm be late with answers to discovery at the GSBCA in a bid protest. I have seen a number of non-responsive answers or productions (hopefully not by my office).

3b. The ASBCA is a different ball game. It is true that discovery responses are often late there. That is because an "active" culture of dilatoriness has been

allowed to develop at the ASBCA, allowing everyone's worst procrastinating tendencies to emerge. The ASBCA can change this only by changing its own behavior.

Solutions.

1. Early discovery conferences are held at the GSBCA. At the prehearing conference, discovery types and amounts are specifically authorized by the judge, with a termination date clearly designated.
2. Arbitrary limitations on written interrogatories are simply the wrong answer. Specific questions identify the issues and allow the attorneys to refine the issues before the hearing, saving both time and money.
3. Depositions are where the truth comes out. This is true in any adversarial proceeding. They should not be used as tools of oppression, but can be limited on a case-by-case basis.
4. Sticking to a discovery schedule helps everyone. The case moves along at the GSBCA because the parties don't have the luxury of long periods of time to ruminate, but are forced to think and act quickly. One extension could be granted almost as a matter of course, but, human nature being what it is, if one extension is automatic, count on it being requested in every case.
5. The status of discovery should be monitored. Ultimately, the judge is the person responsible for the progress of the case. Possessing the power to expedite the proceeding, that power is ill-used if abuses go undetected until it is too late to correct them.

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