

The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION



The President's Column

Marcia Madsen

MORGAN, LEWIS &
BOCKIUS

The Boards of Contract Appeals Bar Association was formed in December 1988. The Association has come through its organizational start-up phase, has initiated a newsletter, and has sponsored some very good programs. However, the mission of the BCA Bar Association is broader. This Association was formed to improve the administration of justice in the Boards and the quality of practice before the Boards.

During the next two years, the Boards and the contract disputes process are likely to be faced with significant challenges. With declining budgets and case loads and the potential retirement of several judges, there is likely to be pressure to restructure the Boards. In addition, there are some in Congress who are continuing to push "criminalization" of disputes and would remove jurisdiction from the Boards over certain issues. The BCA Bar Association needs to be in a position to step up to these challenges.



In the area of quality of practice, the BCA Bar Association should now be in a position to focus on specific areas of practice and ethics that will improve the effectiveness and efficiency of the Boards. There are issues relating to discovery, case management and discipline

of proceedings that can be usefully addressed by the BCA Bar Association.

This Association has the talent and ability to make a significant contribution to the successful functioning of the disputes process. We need to renew our enthusiasm for the task and take some positive steps this year. I look forward to working with all of you. ■



Editor's Corner

Peter A. McDonald

DELOITTE & TOUCHE

You will notice that Jim Nagle relinquished the position of editor and, as some of you may suspect, there is an interesting but

unpleasant story behind it.

The officers of the BCA Bar had become dissatisfied with Jim Nagle as the editor and gradually concluded that a replacement would be necessary. The cause of their dissatisfaction was that Jim was always doing such a scholarly and professional job that it made the BCA Bar uncomfortable.

In short, by establishing and maintaining high editorial standards, Jim was alienating the BCA Bar leadership. In their discussions on this topic, they felt that to spur membership interest the



quarterly issues needed to be a much more mediocre product, and if Jim didn't come down to their level he would have to be replaced. On the subject of mediocrity, there was quick agreement that Pete McDonald was about the most mediocre guy any of them knew. Well, the

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quality of the summer issue pretty much sealed Jim's fate. The task then was how to persuade Jim to quietly leave. On one of his trips they arranged to have the head of a dead horse put in his motel bed, and got his resignation the next day (it was that easy).

It would be nice if I could bring myself to thank Jim Nagle for his years of editorship.

However, the outstanding job he did puts such enormous pressure on me that my expression of gratitude would be insincere (and he knows it). So rots o'ruck, Jim!!!

In this issue, we have an interview of the Army's Chief Trial Attorney, COL Riggs Wilks. We also have the President's Corner by Marcia Madsen, an article by Barbara Wixon on October's annual meeting, the Judge's Corner by Judge Rollin Van Broekhoven of the ASBCA, a reprint of Agnes Dover's recent article in Federal Contracts Report, and the Accountant's Corner by a gifted but tormented writer.

The Clause presents a continuing opportunity for articles to make it into print. For this issue, only three submissions were not accepted for publication: "Woman Gives Birth to Squirrel," "Alien Eats Buick," and "Pete McDonald Earns Respect of Colleagues." If you can write an article on a slightly higher plane, it will be given serious consideration.

By this time, you should have all received your 1993 BCA Bar Directory (**YESSS!!!**). Those of you who haven't should contact me immediately. Your comments or suggestions for improvement are invited. On that point, the 1994 Directory will include work and fax phone numbers. Also, a listing of chairs and vice-chairs of the BCA Bar Committees will be added and the list of sample forms expanded. On that point, a couple of BCA judges jokingly suggested that there be sample forms for the judges to use for their "appeal sustained" and "appeal denied" decisions. (That's very funny, Your Honor...)

Finally, as an editorial comment about how NOT to conduct oneself as a government contract litigator, I quote from a recent BCA opinion (the case cite and counsel are not provided to protect the guilty):

"The Government asserts that appellant's motion ... was filed ... 'to personally and professionally insult' Government counsel. The Government points to language in appellant's motion referring to Government counsel as 'de-

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ceptive' and 'deceitful,' 'conveniently' ignoring facts, and having 'complete disrespect for proceedings before this Board,' and calling her Brief 'sheer and intentional sophistry,' 'grotesquely inaccurate,' and a 'grotesque attempt at deception.'

...We wish to make it clear, however, that we regard language such as that used by appellant as inappropriate, gratuitous and understandably taken as offensive by Government counsel. Legal practitioners who believe that triers of fact can be or are swayed by the use of such language are in serious error."

'Nuf said. ■

The second panel was chaired by Sally Pfund (Williams & Jensen). This panel discussed both the problems associated with litigating mid-sized disputes at the Boards and alternative techniques to expedite the process. The panel members were Judge James Robinson (VABCA), Judge David James (ASBCA), John Dale (Navy OGC), and Howard Pollack (Braude & Margulies).

At lunch, the Association was fortunate to have Mr. Norman Augustine as its speaker. Mr. Augustine, whose distinguished career in the defense industry led him to the CEO position at Martin Marietta, offered his observations about the relationship between industry and government in the contracting process, as well as the merits of cost versus fixed-price type contracts



Annual Meeting Highlights

by Barbara Wixon

CORPS OF ENGINEERS—
BOARD OF CONTRACT
APPEALS

The Association held its third annual meeting on October 26th, and by all accounts it was another success for the nearly one hundred members who attended. Offering attendees a more substantive program and more CLE hours, the program extended into the afternoon with the addition of a well-received third panel.

The first panel of the day, chaired by Pete McDonald (Deloitte & Touche), discussed the draft environmental cost principle from different perspectives. The other panel members included Scott Isaacson (an environmental law attorney with Bogle & Gates); Rob Nutt (an attorney with a prominent environmental contractor, CH2M Hill, Inc.); Larry Hourcle (formerly with the DOD General Counsel's Office who participated in drafting the environmental cost principle); and Judge Ronald Kienlen (ASBCA), who presented a view from the bench.

This panel should not have been missed by newer attorneys to government contract litigation.

in defense R&D contracting. His thought-provoking presentation was liberally sprinkled with good humor, resulting in a thoroughly enjoyable speech.

After lunch, Dave Metzger (Davis, Graham & Stubbs) chaired a panel of distinguished Board judges. Judge Richard Sollibakke (ENG BCA), Judge Carroll Dicus (NASA BCA), Judge Rollin Van Broekhoven (ASBCA), Judge Stephen Daniels (GSBCA), and Judge Ruth Berg (ASBCA) each offered insights into various aspects of Board practice. This panel should not have been missed by newer attorneys to government contract litigation. It was so worthwhile that it is likely to become a permanent fixture of the annual meetings, according those who attend an opportunity to learn matters important to Board practice. ■

[EDITOR'S NOTE: NEXT YEAR'S MEETING IS ALREADY IN THE PLANNING STAGES. ANYONE WITH SUGGESTIONS OR COMMENTS SHOULD CONTACT BARBARA WIXON (CHAIR, 1993 ANNUAL MEETING COMMITTEE) AT 202-272-8936.]



Interview with... Army's Chief Trial Attorney

COL Riggs Wilks

DEPARTMENT OF THE
ARMY

What do you regard as the three most important government contract issues today?

The time and expense of resolving government contract disputes is certainly one. Dispute resolutions take years and consumes resources both in terms of money and time. The ongoing personnel reduction throughout the Department of Defense will mean even more delays in resolving disputes.

Source selection is another major problem area. Selecting the right contractor at the right price/cost is the key to successful contracting and dispute avoidance. Awarding a contract to the right contractor at the wrong price or the wrong contractor at any price is typically the root cause of contract disputes.

Finally, contract administration is a significant source of contract litigation. Even if a contract is awarded to the right contractor at the right price, faulty contract administration (either by the Government, the contractor, or both) will produce disputes and ultimately litigation.

In your opinion, how could each of these issues be resolved?

I see two ways to resolve the issue of unwarranted consumption of time and money. To begin with, set limits on litigation, such as limit-

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ing the amount of discovery and hearing preparation. The Federal Court system does this and it is effective and helpful in speeding their docket along. One of the requirements of the Contract Disputes Act was to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolutions of disputes." These requirements benefit both parties, and we should implement measures to reinforce them.

Secondly, employ alternate disputes resolution (ADR) techniques. The Army recently conducted its first ADR conference at which two hundred attendees were trained in the basics of ADR. I favor using both litigation limits and ADR. ADR is a particularly effective means of resolving disputes at the local level. It is not as well suited at the appellate level where both sides are scrambling for lawyers and focusing on lengthy and costly discovery practices. I

The Army should steadfastly avoid buy-ins and rely on past performance to a greater extent. More risk should be placed on and accepted by contractors, and the price/cost of contracts should reflect that risk. Mechanisms such as strong pre-production engineering clauses and performance specifications are methods of shifting risk, but these must be carefully planned, artfully drafted and accompanied by realistic pricing and appropriate contract types. In short, we in the contracting community must apply the requisite thought to ensure solid contracts and reduce disputes.

Regarding contract administration problems, I sometimes wonder if those of us, both the contractor and government sides, who work in this area are missing the lessons of past litigation. We are a relatively stable community characterized by repetitive contractual relationships and a mobile but identifiable workforce.

We are a relatively stable community characterized by repetitive contractual relationship....Why, then, do we see the same problems over and over again?

will, however, consider ADR in any case at any time, and my trial attorneys have been so informed. It is a tool that we should have in our tool box, but I think it is better suited to early resolution at the local level. I have also instructed my trial attorneys to seek litigation limits and actively participate in setting schedules where possible. Delays rarely benefit the Government and I expect my lawyers to resist unnecessary delays.

Although my office is not directly involved in source selection per se (except for GSBGA protest defense), I view much of the litigation we are involved in as resulting from unwise contract awards. Shrinking budgets and fewer contracts will result in stiffer competition, which makes source selection extremely important.

We are all trained and have varying degrees of experience. Why, then, do we see the same problems over and over again? It's like a broken record. We repeatedly litigate the same issues: defective specifications, superior knowledge, lack of cost overrun notice, lack of actual authority, defective pricing, estoppel, and on and on. We all know the issues and the law. What is the problem? I suspect it is caused by improper contract awards, inattention to detail, faulty specifications and shoddy contract administration. You'll notice that all of those areas center around communications between the respective parties. Communication is both the problem and the solution. Many of the ADR techniques presented at the Army's ADR Conference were simply methods of facilitating

More New Members

The BCA Bar Association warmly welcomes the following new members:

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Arnold & Porter
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Carl P. Tobey, Jr.

Gardner & Ferguson
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Martin Marietta Corporation
P.O. Box 179, MS 5120
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communication. Communication is an individual capability. The Army's emphasis on creating a truly professional contracting workforce, the Acquisition Corps, should develop these individual skills on our side of the table. On the other hand, contractors should ensure good communications occur with the government-customer. Most disputes can be avoided by thoughtful communications.

What settlement authority do Army trial attorneys have?

Army trial attorneys have no settlement authority unless it is delegated to them by the contracting officer. My trial attorneys are not contracting officers and cannot bind the government. I think this is well understood by all but the smallest government contractors. All settlement agreements must, however, be approved by the Chief Trial Attorney.

What are the settlement policies at the Army's Contract Appeals Division?

Settlement for settlement's sake is inappropriate. The best interests of the Army must be served. That does not mean that the Army must totally win every dispute. A settlement of

see serious settlement discussions near the middle to end of discovery, which is another reason why I prefer limitations on discovery. Settlement is preferable to full litigation; however, not all cases will or should settle.

What is the average caseload for your trial attorneys?

We presently have 550 cases in our office spread out among 25 trial attorneys. Mathematically, that averages out to 22 cases per attorney. Some of my more experienced attorneys are involved in larger, more complex cases and necessarily carry a numerically smaller caseload. Some attorneys, therefore, will have a greater number of small to mid-sized cases.

How are "monster" cases handled in your office?

We rely upon our clients to provide litigation teams to support large cases. I do not have the ability to hire more attorneys or more support staff for large cases. Therefore, the amount of litigation support I am able to assign to a given case is limited, typically one trial attorney as lead counsel and one paralegal.

Certain firms...acquire reputations, but the institutional memory in our office is not long, due to personnel turnover.

ninety cents on the dollar may be in our best interest under certain circumstances. Both sides should enter settlement negotiations from a win-win position. I encourage intelligent settlements at the appropriate time. Intelligent settlements require information which requires some degree of discovery. When a case reaches my office, the contracting officer has taken a position which may or may not be correct. I expect my trial attorneys to focus initially on the development of trial strategy, issue identification and fact finding, not settlement. As this process progresses, settlement will be considered in every case. Typically, I expect to

None of my trial attorneys are assigned full time to only one case. Several cases have more than one trial attorney assigned on a part-time basis. The bigger the case, the more support I expect from the client.

How does the Army's personnel rotation policy affect case management at the Contract Appeals Division?

Personnel rotation in the military is both an occupational problem and a blessing.

On the problem side, it disrupts case management continuity. If cases were resolved more rapidly, it would be less of a problem. I can expect to have a trial attorney assigned for

three to four years. Our lawyers are hand picked, but none come to this assignment with experience in this type of civil litigation. Some have contract experience, many have criminal trial experience, but only a few have both contract and trial experience. The learning curve to develop into a good contract law attorney varies, but I estimate that it takes two years to develop the basic skills and knowledge needed. This means only one or two years of high productivity before we lose the attorney. Fortunately, we get outstanding officers who are bright, industrious and have historically held their own against even the most skillful opposition.

On the blessing side, frequent rotation helps to infuse fresh thoughts and ideas. It also helps to reduce burnout in a high stress environment.

Are Army trial attorneys trained in government contracts prior to being assigned to the Contract Appeals Division (CAD)?

Government contract experience is a highly desirable, but not always attainable, commodity for assignment to our office. Those officers with a lack of experience in government contracts are sent to the Judge Advocate General's School in Charlottesville, Virginia, for training. We also conduct in-house training for new trial attorneys. Training is tailored for each new attorney depending upon that officer's experience. It is also my policy that each team chief assign himself as co-counsel on at least one case with each of the attorneys on that team. The object is to allow the inexperienced attorneys to feast from the banquet table of those more experienced. In that sense, training is mentoring.

Do some law firms and/or their attorneys acquire reputations at your office and, if so, what role does that reputation play in case management?

Certain firms and attorneys do acquire reputations, but the institutional memory in our office is not long due to personnel turnover. Typically, contractors in large cases have large law firms representing them. My trial attorneys

naturally discuss amongst themselves their cases with opposing law firms and reputations are formed—both good and bad. However, as trial attorneys are transferred and cases are resolved, that perception is lost and new ones are formed. As far as I am concerned, reputations play no part in case management. The better and more experienced the lawyers involved, however, generally the smoother the case.

What is your opinion about cases being decided by a single judge, i.e., bench decisions?

I think bench decisions are appropriate in some cases; usually those of relatively small dollar value and where there are no significant issues involved, a decision about which would influence the procurement process. Bench decisions are one way to help speed cases along. In bench decision cases, both sides avoid having to file post hearing briefs and the hearing judges avoid having to write a formal decision. Additionally, the parties waive all appellate rights. On the flip side, however, bench decisions generally don't do anything to save time on the front end, that is, in the discovery and pre-hearing expenditure of time and effort and expense. Also, in my opinion, bench decisions may tend to encourage, strictly because of human nature, all parties involved to focus, even unintentionally, on equitable solutions.

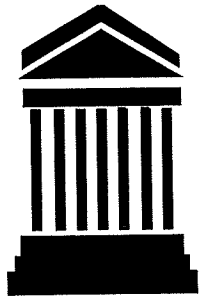
We appreciate your talking with us.

Thank you very much. ■

**U. S. Army Corps of Engineers
Board of Contract Appeals**

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THE JUDGE'S CORNER: Cultural Analysis and Changing Notions of Judicial Decisionmaking

Rollin A. Van Broekhoven

ASBCA

[EDITOR'S NOTE: THIS ARTICLE IS CONDENSED FROM THE AUTHOR'S PAPER OF THE SAME TITLE PRESENTED AT OXFORD UNIVERSITY, U.K.]

In order to carry the necessary authority for decisions of a court to be accepted, the question arises as to how the adjudication process is to be accomplished. There are certain underlying assumptions about the traditional juridical role. In the United States, the system of adjudication developed attributes that distinguish it from juridical systems in most parts of the world.

Our system is based on an "adversarial" model in which the parties control the pace and shape of the litigation. The parties investigate, prepare, and present evidence and arguments. The fact finder, whether jury or judge, receive the evidence by listening to testimony and examining exhibits presented during the trial.

This is distinguished from the "inquisitorial" model, used in most parts of the world with a civil law tradition, where agents of the state control the litigation.

It is frequently heard that there is a crisis of congestion in the courts. The number of cases docketed continues to climb. Part of this is due simply to growth in the population and economy, but there are other contributing causes such as the greater number of lawyers, the proliferation of laws, a litigious society, and so on.

The public's expectations concerning the courts is having an affect on the way courts decide disputes. Former California Chief Justice Rose Elizabeth Bird wrote in a 1981 ABA Judge's Journal:

The most overwhelming impression that our culture conjures up is one of speed. It is life in the fast lane, characterized by a feeling of urgency born of desperation and boredom rather than a sense of purpose.

Our society demands instant answers to the most complex problems. We are willing to



take action, and even adopt the most radical ideas after little or no reflection.

A trend in our society is what has been called a "cultural war," which has significance both in the nature of the societal dialogue about our identity as Americans and in the role of courts in America. Cultural war or conflict is defined very simply as political and social hostility rooted in different systems of moral understanding. This trend has implications for the adjudication of disputes and, indeed, for the kinds of disputes that come to the courts. This trend is also one of several bases for many of the reforms being pressed upon the adjudicatory process.

Many judges have departed from the earlier notions of the traditional nature and function of the judicial process and have adopted a more active "managerial" role. Rather than describing the task of judging as judicial decisionmaking, judges are now describing their task as "case management." Judges are not only adjudicating the merits of disputes presented to the courts, but they are also meeting with considerable regularity in chambers with litigants to encourage settlement and to oversee case preparation. Therefore, judges are playing a much more critical role in shaping litigation and influencing its results.

Traditionally, judges took a much more passive role in case preparation and pretrial

activities. The parties were responsible for preparing their case for trial according to the own devices. The creation and implementation of new discovery rules in 1938 changed this. Parties could now seek judicial assistance in obtaining from each other all information "not privileged which is relevant to the subject matter in the pending action." Rule 26 of the Federal Rules of Civil Procedure further provides that the court may direct the parties to appear before it for a conference on discovery, and to deal with matters such as the issues as they then appear in the case, a proposed plan and schedule for discovery, and any limitations to be placed on discovery.

The implications of this activity are far reaching. Judges must now immerse themselves in the factual details of the case much earlier than previously required. Secondly, in deciding discovery issues, judges must often consider the party's theory of the case and litigation strategy. For example, what theories would make certain kinds of information relevant? What evidentiary problems does this party face? Has the party sought more information than is needed? Is a motion to compel production of certain documents or a motion opposing the production of documents simply a tactic to delay the processing of the case, or an attempt to intimidate the opposing party in order to gain an advantage rather than find the facts? Would public disclosure of the information sought cause harm unrelated to the specific case to the party? Instead of judging the merits of a case on the basis of an analysis of the legal import of past events, judges are having to assume the position of a party and then guess about the future course of the case. Rulings on these kinds of discovery issues can well alter the future shape of the case and the results by making certain theories and proofs possible and others impossible.

The case management approach to judicial decisionmaking changes the form and substance of the adjudicatory process. Whereas the image of justice is evoked in the formal and stylized structure of courtroom interaction and

proceedings, the informal pretrial conference setting in chambers evokes the image of an ordinary business meeting. Rather than an adjudicatory process which, for the most part, takes place in the public domain and in which the public record is within reach of an appellate court, pretrial conferences are away from the public view and judicial acts are rarely exposed to either public scrutiny or appellate review. In-chambers attorney arguments replace witnesses' testimony, given under oath and subject to the lawyer's and judge's detailed examination. Judicial proposals for compromise replace formal orders.

With blindfolds removed, judges become participants in the shaping of the storytelling upon which they must base their decisions. Their involvement in the planning stage allows them to evaluate the strengths and weaknesses of the claims and defenses before the parties have had the opportunity to develop their claims or defenses through the sworn testimony of witnesses. The result is that judges can acquire, test, and use knowledge in ways that judges adjudicating disputes under the traditional judicial models could not.

There is another consequence that is often overlooked in evaluating the effects of managerial judging. Where the process is hidden from public view or examination, where results

Directory Updates for NASA BCA

Members are requested to note the following change of address and phone number for the NASA BCA listed on page 5 of the Directory:

NASA Board of Contract Appeals

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Carroll C. Dicus, Jr.

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Lisa Anderson Todd

RECORDER

Grace Feola

*With
blindfolds
removed,
judges
become
participants
in shaping
the
storytelling .*

are dependent on compromise, efficiency, expediency, and judicial jaw-boning, the public (and perhaps even the litigants) may wonder about justice, equality, fairness, neutrality, and independence from partisan or private interests outside the confines of the particular dispute. Each case can result in an *ad hoc* accommodation to competing demands, thereby introducing chaos, confusion, and uncertainty in the development and explication of law, depriving law of its important purpose of providing society with a stable basis and guide so that people may conduct themselves with some reasonable expectations concerning the consequence of their conduct.

Closely related to this consequence in the case of managerial judging is that pretrial activity tends to affect fewer people than would be the case in a full blown trial where the results of judicial decisionmaking are more often based on the merits of the case and are visible to more people. The heart of the adjudication of disputes is that it somehow uniquely fixes responsibility and accountability for the conduct of the participants in the events giving rise to the dispute. It answers the questions: What happened? Who is to blame? What rights does one have? What is wrong with certain conduct? Who behaved well and met the obligations imposed by law? Who, by design, greed, neglect, or insensitivity to the rights of others has caused injury or harm? How and why is responsibility to be borne by the participants or apportioned between the parties? In managerial judging, these questions are often left unanswered. Fundamental problems remain uncorrected. Individuals and organizations do not learn from their mistakes. Therefore, the problems continue to persist and the number of disputes requiring judicial resolution continue to increase.

Professor Judith Resnik, in a Harvard Law Review article on managerial judges, suggests that the erosion of traditional due process standards has been a by-product of judicial management. As a general proposition, she argues that the techniques, goals, and values of

judicial management appear to elevate speed over deliberation, impartiality, and fairness. This would appear to be supported on the basis of much of the current literature on judicial management, which seldom stresses the values of due process and impartiality, such as the accuracy of decisionmaking, the adequacy of judicial reasoning, and the quality of adjudication. Rather, the emphasis in this literature is on speed, control, and quantity.

There are several reasons why there might be an erosion of traditional due process as a consequence of judicial management. The first relates to judicial power. Judges have considerable power because they decide contested issues and can compel obedience to rulings through the use of sanctions. Since a single judge retains control over all phases of litigation under the individual calendar system, transforming the judge from adjudicator to manager significantly expands the opportunity for judges to use, or abuse, their power. The judge can create rules for the processing of the case without being required to submit his or her rulings and ideas to the discipline of a written justification or to outside scrutiny. Moreover, there are few or no explicit norms or standards to guide judges in their demands on litigants, or in their determination of what is good management of the case, or what is an appropriate speed for preparation.

Secondly, strong-willed case management can be a threat to impartiality, along with privacy and informality inherent in much of the pretrial activity, the amount of information the judges receive before the trial, frequent pretrial interactions between judges and parties or counsel which can generate feelings of admiration, friendship, or antipathy, and peer review of comparative performance data by colleagues on the bench. The judge's prestige may ride on efficient management of cases and the rapidity and number of dispositions. As a result, judges may gain stakes in the cases they manage. With the individual calendars, the considerable investment in time and scrutiny of the merits of the case during its pretrial

processing (and emphasis on the number and rapidity of dispositions), judges may be reluctant to recuse or disqualify themselves when their impartiality is questioned. An adjudicatory process that is open to the public and in which written decisions must be justified on the basis of clearly stated facts and reasoned application of the law, which decisions and rulings are subject to outside review, would preserve the legitimacy of the judge's decisions or rulings in the face of such challenges.

In conclusion, both the background factors mentioned above and the public expectations concerning the role and operations of courts and boards of contract appeals should prompt judges and trial lawyers practicing before courts to reflect on these issues. While American litigation may not have completely abandoned the "adversarial" nature of the Anglo-American tradition, these trends suggest a movement toward the "inquisitorial" model of

litigation followed in most civil law systems practiced throughout the world. Moreover, while these trends may be found in federal and state courts throughout America, to the extent that the practice before boards of contract appeals becomes increasingly judicialized, the trends are beginning to become apparent in our practice. This can be more troubling than would be the case in federal and state courts because boards of contract appeals are functionally located in the executive branch of the government and are regarded, to some extent, as agents of the heads of the agencies in which they function. The way that we respond to these changing notions of litigation and judicial decisionmaking can affect the public perception of fairness and due process provided by the boards of contract appeals and the legitimacy and authority of their decisions. ■



Treasurer's Report

Laura Kennedy

SEYFARTH, SHAW,
FAIRWEATHER & GERALDSON

Boards of Contract Appeals Bar Association
Statement of Financial Condition
For Fiscal Quarter ending 31 Jan 1993

BEGINNING CASH BALANCE,
30 Nov 1992¹
\$16,550.69

FUND INCOME

Membership dues 75.00
1992 Annual Meeting² 85.00

TOTAL FUND INCOME
\$160.00

FUND DISBURSEMENTS

Newsletter (Fall) 923.94
1993 Directory 2,832.02

TOTAL DISBURSEMENTS
\$3,755.96

ENDING CASH BALANCE
\$12,954.73

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The Defense Conversion, Reinvestment, and Transition Assistance Act of 1992

Agnes P. Dover¹

STEPTOE AND JOHNSON

LAST YEAR, Congress passed the Defense Conversion, Reinvestment and Transition Assistance Act of 1992 ("the Act") as part of the National Defense Authorization Act for Fiscal Year 1993. Pub. L. 102-484. The Act sets out an extensive program for assessing, planning, and promoting the defense industrial base and, in a significant departure from the Bush Administration's free market approach, provides support and assistance directly to the defense industrial



sector.² Over \$1.5 billion is authorized to implement the Act; nearly half of that amount is dedicated to defense industry and technology base programs.³

The Act is an ambitious initiative characterized by numerous joint industry-government programs designed to revitalize the nation's industrial and technology base and to ease the transition from primarily military to commercial enterprises. It offers numerous opportunities for industry to work together with government to research and develop dual-use technologies, and to promote the growth of high technology industries in both defense and non-defense areas.

Significantly, the Act explicitly embraces a policy for civil-military integration and recognizes that current procurement laws are barriers to such integration. It also articulates a policy for reducing the government's dependence on sectors that are economically dependent on Department of Defense (DoD) business.

In recent years, Congress has undertaken various attempts to encourage DoD to make greater use of commercial items.⁴ However,

these previous efforts were motivated primarily by a desire to maximize the cost efficiencies of buying from commercial suppliers. This year's legislation is different in that it addresses the need for greater use of dual-use and commercial items in the broader context of preserving national industrial base capabilities.

The Act also goes further than previous efforts by providing financial and technological support to industry to pursue research and development of dual-use and commercial items.⁵ Given the significant support authorized for dual-use initiatives, particularly at the early research and development phases, it offers hope for being an effective vehicle for civil-military integration.

In addition, in recognizing the need for procurement law reform, the Act ties in well to on-going efforts to streamline acquisition laws. Specifically, the Advisory Panel on Streamlining and Codifying Acquisition Laws ("§ 800 Panel") is reviewing acquisition laws applicable to DoD.⁶ It is expected to complete a report in early 1993 that will include recommendations on repealing or amending laws that may be unnecessary or unproductive. Given the Act's ref-

erences to the need to streamline acquisition laws, the Panel's recommendations will undoubtedly be of great interest; they have the potential to provide a blueprint for further legislative action.

This article addresses portions of Titles 41 and 42 of the Act concerning technology and industrial base issues. Other titles of the Act, concerning community adjustment, personnel education, training programs, etc., are beyond the scope of this article.

BACKGROUND

In the past few years, there has been significant concern in Congress and the private sector about the adverse effects that defense budget reductions are having on the nation's technological and industrial capabilities. Numerous private and public studies documented the decline in U.S. industrial competitiveness and how that decline has been exacerbated by reductions in U.S. government defense spending.⁷ Many in the defense community began to call for government action to stem the tide⁸ while Representative (and now DoD Secretary-designate) Les Aspin offered new ideas for strengthening U.S. industrial capacity.⁹

In the midst of this renewed focus on industrial competitiveness, two congressional task forces were appointed to study and make recommendations for strengthening the defense industrial base in an era of declining defense budgets. The House Armed Services Committee's Panel on the Structure of the U.S. Defense Industrial Base, chaired by Representative Dave McCurdy,¹⁰ issued a report on April 7, 1992 and the Senate Democratic Task Force on Defense/Economic Transition, chaired by Senator David Pryor, issued a report on May 21, 1992.¹¹

The House Panel's report recommended both short-term and long-term initiatives to strengthen the defense industrial base. Many of the Panel's recommendations were ultimately included in some form in the Act as passed, e.g., conducting a national critical

skills and manufacturing capacity assessment; accelerated development of dual-use technologies, promoting government-industry partnerships for critical technology development and eliminating barriers to civil/military integration.

The Senate Democratic Task Force addressed many of the same initiatives recommended by the House and offered several additional recommendations, some form of which were also eventually included in the Act, e.g., establishment of regional technology alliances, funding of regional and state manufacturing extension services, and redirecting the activities of federal laboratories.

While the House and Senate panels were addressing defense conversion and industrial base issues, the Defense Conversion Commission also began its work. Congress authorized the establishment of the Commission last year to "[d]efine the economic and labor difficulties that [DoD] and defense-related industry can expect to face" and to "[r]ecommend a coordinated national strategy to address these concerns."¹²

The Commission was not appointed until April of this year and did not begin to hold public hearings until July 30. Its report was issued just recently.¹³ In the meantime, Congress moved ahead at a much faster pace.

Following publication of the two Congressional task force reports, the House and Senate began consideration of concrete legislative solutions. Amendments to the then pending FY 93 DoD Authorization bills were offered and passed in both the House and Senate, giving birth to the Defense Conversion, Reinvestment and Transition Assistance Act of 1992.

This article highlights three key areas of the defense industrial base portions of the Act: Policies and Planning; Government-Industry Partnership Programs; and Defense Advanced Research Projects Agency.

POLICIES AND PLANNING

The key policy and planning organ for defense industrial base issues will be the Na-

tional Technology and Industrial Base Council made up of the Secretaries of Defense, Energy, Commerce and Labor.¹⁴ The Council will have an overall coordinating role to ensure cooperation among the various federal agencies, to provide advice and recommendations on specific programs and changes in acquisition policy and to provide overall policy guidance.

The Council is to have various responsibilities. For example, it is required to conduct comprehensive assessments of the capabilities

of the national technology and industrial base to attain national security objectives. § 4215. In addition, the Council is required to work with the Secretary of Defense to establish a program for analysis of the national technology and industrial base. § 4213. The Council is also required to prepare multi-year plans for ensuring that the federal agencies' programs are appropriately planned and coordinated to reach national security objectives. The plans are required to include goals, milestones and priorities relating to programs dealing with critical technology development, manufacturing technology, reducing foreign dependence, etc. § 4216.

These plans must also include recommendations on acquisition reform—ways to eliminate the "adverse effect of federal law on the capability of the national technology and industrial base" § 4216. Further, the regulations governing preparation of the plans are required to provide guidance on, *inter alia*, expanding the government's use of commercial specifications, reducing the use of unique accounting and acquisition requirements, and identifying effective mechanisms for transferring technology from the DoD and DoE to other government, academic and commercial entities. § 4220.

Giving the Council responsibility for assessing the strengths and weaknesses of the defense industrial base appears to be a response to congressional concerns about the lack of adequate data about industrial capabilities at the contractor and subcontractor levels. The House Panel concluded that "[t]here has been no adequate, unbiased assessment of the defense industrial base in terms of what we need, how to retain it or how to develop it."¹⁵ In the joint explanatory statement accompanying the conference report, the conferees expressed their apparent dissatisfaction with DoD studies of industrial base capabilities, noting specifically that

[T]his provision has been included out of recognition that the Department has not established the necessary capability to undertake a comprehensive

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analysis of the industrial and technology base; it is not to be used as an excuse for delay in developing that capability. In particular, this provision may not be used as a basis for failure to undertake assessments required by existing law or that are readily within the capability of current public and private sector organizations.¹⁶

Additionally, the Act contemplates contractor-sponsored efforts to project and plan their own defense conversion efforts. It contains a provision that would require DoD to provide incentives to defense contractors to undertake their own industrial diversification planning. § 4239. While this provision is not as specific as the Senate bill, which would have made the costs of industrial diversification planning expressly allowable,¹⁷ it does indicate congressional recognition of the importance of planning by contractors as well as the government.

The creation of the National Defense Technology and Industrial Base Council as a central policy-making and planning function with inter-departmental representation is a sound approach for gathering essential information and for developing sensible long-term plans. The Council's coordinating role will also extend to serving on the Economic Adjustment Committee,¹⁸ another interdepartmental organization charged with coordinating and facilitating defense economic adjustment programs. § 4212.

The need for coordination among the various effected federal agencies is essential to ensure that the numerous defense conversion initiatives are effectively executed. Additional guidance and direction from the Executive Office of the President would also help give the transition initiatives an appropriate level of priority among the agencies.¹⁹

Although intended to enable the Council to prepare its assessments and reports, Pub. L. 102-484 contains a sweeping data collection provision that is potentially burdensome to the defense contractor community. Section 4217 of

the Act allows the President to obtain information through review of documents or through sworn testimony and to require reports from "any person as may be necessary or appropriate". Failure to comply may result in criminal penalties, including fines or imprisonment. The data collection provision parallels language contained in the Defense Production Act (DPA), 50 U.S.C. App. § 2155. The provision was added in conference reportedly because of concerns about the expiration of the parallel DPA authority. However, the DPA was reauthorized,²⁰ thus presumably negating the need for separation data collection authority in Pub. L. 102-484.

Further, § 4217 requires issuance of regulations ensuring that the data collection authority be used "only after the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency." Thus, to the extent that data are already being collected by the Department of Commerce under its DPA authority or otherwise, the data collection authority of Pub. L. 102-484 is not necessary. Finally, to the extent that regulations implementing § 4217 are separately issued, the drafters should provide appropriate safeguards to ensure that the authority will not be over-reaching and that the data requests under the Act do not duplicate the numerous other

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data and audit requests directed at contractors.²¹

GOVERNMENT-INDUSTRY PARTNERSHIP PROGRAMS

The Act authorizes several partnership programs designed to encourage cooperative arrangements for the research and development of dual-use, commercial-military and advanced manufacturing technologies.²² These partnerships require cost-sharing among participants and allow for significant involvement by the DoD laboratories.

For example, Section 4221 of the Act recodifies the defense dual-use critical technology partnerships that were established under 10 U.S.C. § 2523 in 1991. Continuation of the program permits DoD to provide financial and technical assistance to private firms and nonprofit research institutions through cooperative arrangements (as well as through grants, contracts or other transactions) to encourage research, development and application of dual-use critical technologies.²³ Thirteen partnership programs are already in progress and DoD expects them to achieve substantial technological advances in areas that are criti-

posals focussing on the extent to which they advance and enhance the national security objectives articulated in the Act. Further, Congress invited recommendations from private industry for partnerships with DoD laboratories.²⁴ Similar partnership programs are also created for commercial-military integration and defense advanced manufacturing technology. §§ 4222, 4232. To the extent that these partnership programs do in fact seek private sector input at the early stages of research, they offer significant opportunities for industry to offer ideas with commercial development potential.

In addition, the Act calls for the Secretary of Defense to establish a program to diversify the activities of the defense laboratories and to establish an Office of Technology Transition. §§ 4224, 4225. The Federal Defense Laboratories Diversification Program is designed to encourage greater cooperation between the defense laboratories and private industry and permits the laboratories to transfer defense or dual-use technologies from the labs to private firms via the exchange of patents or licenses, cooperative research and development agreements, etc.²⁵ The Office of Technology Transition will be charged with ensuring that

Thus, to the extent that data are already being collected by the Department of Commerce under its DPA authority or otherwise, the data collection authority of Pub. L. 102-484 is not necessary.

cal to national security, such as opto-electronics and high-speed communications.

The Act specifies partnership projects for FY 93 including, for example, digital communications, optical electronics, marine biotechnology, and robotics applied to defense environmental restoration efforts.

Partnership projects will be selected based on competitions, with evaluation of pro-

technology developed for national security purposes is integrated into the private sector. One of the Office's various coordinating functions will be to assist private firms in resolving "problems associated with security clearances, proprietary rights, and other legal considerations" involved in technology transfers.

Given the potential data rights issues and other difficulties in this area, the creation of an

Office to help resolve technology transfer issues is encouraging. Also, the Act establishes a Military-Civilian Integration and Technology Transfer Advisory Board (composed of representatives of both the private and public sectors) to advise the National Defense Technology and Industrial Base Council on planning and implementing programs for military-commercial integration and application of dual-use technology programs. § 4226. This would provide another vehicle for industry to raise technology transfer issues with government decision-makers.

Congress' interest in creating opportunities for greater cooperation between the government, including its laboratories, industry, and academia, is an invitation for industry to take advantage of the significant R&D capabilities of the government. While industry will be expected to bear more and more of the costs of these programs over time, the government's initial financial commitment—nearly \$600 million in FY 93 for the various partnership and technical assistance programs—should be a significant incentive to encouraging private sector participation.

DEFENSE ADVANCED RESEARCH PROJECTS AGENCY

The Senate bill provided a statutory charter for a civilian version of the Defense Advanced Research Projects Agency (DARPA). S. 3114, § 809. The notion of a statutory charter for such an agency was rejected in conference, but language expressing the sense of Congress on how DARPA should be operated was included instead. Specifically, the Congress suggested that DoD rename DARPA as the "Advanced Research Projects Agency" (ARPA) and that its mission be adjusted to focus on fostering an integrated national technology base. § 4261. Additionally, Congress suggested that the new ARPA undertake both dual-use and military projects, that it include in its research efforts advanced technology that has future civilian applications and that it stimulate increased emphasis on prototyping.

While the Act's "sense of Congress" provisions are not mandatory, the joint explanatory statement made clear that Congress would mandate the revisions next year if DoD did not implement them by regulation.²⁶

DARPA has been applauded for its work in developing innovative technologies for military applications.²⁷ Many in Congress and industry have long advocated expanding DARPA's mandate to include greater emphasis on dual-use technology.²⁸ Although Congress has attempted to steer DARPA's funding toward more generic, dual-use projects, the current Administration has resisted.²⁹ The Act's suggested changes to DARPA's mission are a step in the right direction and deserve to be given serious consideration as a means to helping U.S. industry regain its competitive position in commercial R&D.³⁰

CONCLUSION

Congress's leadership on defense conversion and industrial base issues is commendable. The Defense Conversion, Reinvestment and Transition Act of 1992 goes a long way toward redefining industrial and technological priorities. It addresses fundamental needs such as assessing defense industrial base capabilities and developing comprehensive plans and strategies for ensuring that industrial capabilities meet national security needs. The Act's financial support for dual-use technology development, its efforts to move toward greater use of commercial products, and its programs for cooperation between industry and government are also important to reshaping the way DoD conducts its business.

A key concern in the implementation of this legislation, however, is that so many ambitious and overlapping initiatives are undertaken at once. The success of the various initiatives will require significant coordination both within DoD and among the various agencies. The Departments of Commerce, Labor and Energy, which each have interests in revitalizing the commercial technology base, should be substantively involved in surveying

industrial capabilities as well as in shaping and implementing the overall industrial base plan.

A strong and effective National Technology and Industrial Base Council to coordinate the various agencies' participation is essential to ensuring that the ambitious program is carried out, even if its innovative initiatives are resisted within the governmental bureaucracy. Also, coordination by the Council is necessary to avoid duplicative or inconsistent initiatives within the agencies.

The ability of the Council to effectively serve in a coordinating function would be enhanced by the designation of a liaison from the Executive Office of the President. The President's representative could add considerable clout to the functions of the Council and serve a useful coordinating function not only among the agencies but with Congress.³¹ In addition, to accomplish the acquisition law reform called for by the Act there will be a need to carefully consider the § 800 Panel's Report and to develop interagency support for promoting further necessary legislative changes.³²

With continued support from Congress and the new Administration, the policies embraced in the Act have the potential to generate momentum for change in DoD as well as industry and will, hopefully, inspire greater cooperation

to achieve the new challenges of developing a strong national industrial base. ■

ENDNOTES

¹ Ms. Dover's practice is concentrated in government contract law.
² In its November 1991 Report on the Defense Industrial Base, DoD concluded that "[i]n a broad context, free market forces will guide the industrial base of tomorrow. The ability of the base to meet future DoD needs will depend in large measure on the ability of individual companies to shift from defense to commercial production—and then back again, when required." p. ES-7. Similarly, in a white paper on defense acquisition distributed on May 20, 1992, Under Secretary of Defense Don Yockey indicated that "the primary Department approach to ... downsizing will be to continue to let the free market prevail through competition."

³ The Department of Defense Appropriations Act of 1993 actually appropriated slightly higher amounts. Pub. L. 102-396 (Oct. 6, 1992).
⁴ See, for example, the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3816 § 907 (1986) (requiring DoD to define and fulfill its requirements through use of nondevelopmental items to the maximum extent practicable) and P.L. 101-189, § 824 (requiring DoD to develop simplified uniform acquisition contract forms and to eliminate barriers to the acquisition of commercial items).

⁵ Jacques Gansler, former Deputy Assistant Secretary of Defense, has touted the adoption of a dual-use strategy as "the best hope for addressing the problems that plague the defense industrial base; [it] promises significant cost savings to the DoD at a time of budgetary crisis; ensures adequate surge capabilities to meet emergency military requirements; and at the same time strengthens the science and technology base in the United States." April 16, 1991 testimony before Senate Armed Services Committee.

⁶ See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990).

⁷ See, for example, Office of Technology Assessment, *Holding the Edge: Maintaining the Defense Technology Base*, April, 1989; Center for Strategic and International Studies, *Integrating Commercial and Military Technologies for National Strength*, March, 1991; Carnegie Commission on Science, Technology and Government, *Technology and Economic Performance: Organizing the Executive Branch for a Stronger National Technology Base*, September, 1991; Office of Technology Assessment, *After the Cold War: Living with Lower Defense Spending*, February, 1992.

⁸ See, for example, "U.S. Industry Decries 'Industrial Darwinism': Bush Policy will Force Shakeout in Industry", *Defense News*, October 14, 1991.

⁹ In a February 12, 1992 speech before the American Defense Preparedness Association, Representative Aspin, Chairman of the House Armed Services Committee, articulated his strategy for maintaining the defense industrial base, noting that "we're going to have to maintain a technology based and an industrial base that will

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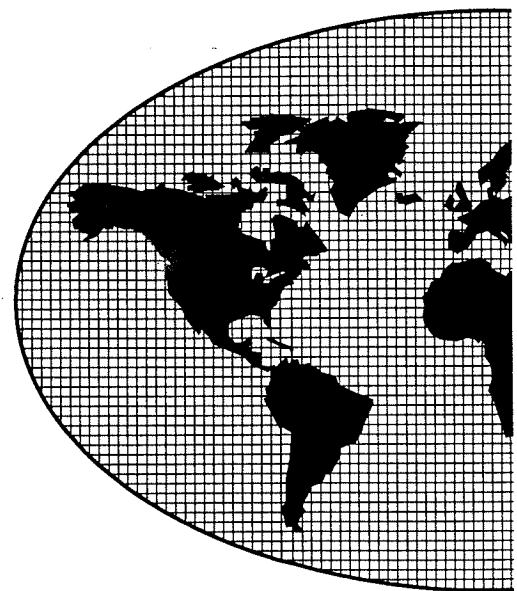
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give us a high-tech defense for the future with fewer resources and a whole new set of rules."

¹⁰ *Future of the Defense Industrial Base*, Report of the Structure of U.S. Defense Industrial Base Panel of the Committee on Armed Services, House of Representatives ("House Panel Report"), April 7, 1992.

¹¹ Senate Democratic Task Force on Defense/Economic Transition Report, May 21, 1992. In addition, the Senate Republican Task Force on Adjusting the Defense Base issued its report on June 25, 1992.

¹² Department of Defense Appropriations Act 1992, Pub. L. No. 102-172, 105 Stat. 1155 (1992).

¹³ The Commission's report supports integration of military and commercial technologies and recommends revision of procurement laws that are barriers to such integration. However, the Commission found that Congress's recent legislative initiatives "as a whole did not provide an integrated approach to transition problems." *Adjusting to the Drawdown*, Report of the Defense Conversion Commission, December 31, 1992.

¹⁴ The idea for a Council originated in the Senate Bill. S. 3114, 102d Cong., 2d Sess. § 801 (1992). The House bill called for establishing a new position in DoD for Assistant Secretary of Defense for Reinvestment to supervise the implementation of the conversion and reinvestment program. H.R. 5006, 102d Cong., 2d Sess. § 4103 (1992).

¹⁵ House Panel Report at p. 15.

¹⁶ National Defense Authorization Act for Fiscal Year 1993, H.R. Conf. Rep. No. 966, 102d Cong., 2d Sess. § 4218 (1992). The House Panel had previously noted that the Defense Department's November, 1991 Report to Congress on the Defense Industrial Base, required by § 825 of the FY 91 DoD Authorization Act, 10 U.S.C. § 2509, did not include the data necessary for a comprehensive analysis of the problems facing key sectors of the defense industrial base. Panel Report at p. 15. In the FY 91 DoD Authorization Act, Congress sought to expand the contents of the annual DoD report on the defense industrial base. National Defense Authorization Act of Fiscal Year 1991, H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. § 825 (1990), Joint Explanatory Statement.

¹⁷ S. 3114, § 810. Arguably, such planning costs are already allowable under the FAR cost principles. 48 C.F.R. §§ 31.205-11, 31.205-38.

¹⁸ The Economic Adjustment Committee was originally created by executive order but was permanently authorized in the Defense Economic Adjustment, Diversification, Conversion and Stabilization Act of 1990, Pub. L. 101-510.

¹⁹ The Carnegie Commission on Science, Technology, and Government recommended that the Office of Science and Technology Policy within the Executive Office of the President assume a lead role for "identifying, formulating and evaluating policy issues related to the technological aspects of economic performance." *Technology and Economic Performance: Organizing the Executive Branch for a Stronger National Technology Base*, September 1991.

²⁰ Defense Production Act Amendments of 1992 (Pub.L. 102-558), H.R. Conf. Rep. 102-1028, 102d Cong., 2d Sess. (1992).

²¹ Comparable regulations issued by the Department of Commerce provide procedures for issuance of administrative subpoenas, demands for information and inspection authorizations. National Security Industrial Base Regulations, 15 C.F.R. § 700.73 (1992).

²² Addressing the desirability of the partnering approach, Senator Jeff Bingaman explained, "The declining defense budget, combined with a very large commercial investment in critical dual-use technologies, makes it imperative that the Defense Department work in partnership with industry both to leverage the commercial investment in critical areas and ensure the existence of an industrial and technology base that can serve future defense needs." October 8, 1992 Press Release.

²³ In the past several years, the use of cooperative research and development agreements (CRADAs) for government-industry projects has increased. However, they have come under criticism because of the often lengthy approval process and difficulties in negotiating intellectual property rights. See for example, *Technology Transfer and Cooperative Research & Development Agreements*, NCMA Topical Issues in Procurement Series, Joseph T. Bolos, November, 1990; *Transfers of Technology to Industry from the U.S. Department of Energy Defense Programs Laboratories*, The Atlantic Council of the United States, July, 1992; "U.S. Dual-Use Technology Efforts Achieve Mixed Results" *Defense News*, October 12, 1992.

²⁴ Joint Explanatory Statement of the Committee on Conference, H.R. Conf. Rep. No. 966, 102d Cong., 2d Sess. 880 (1992).

²⁵ The establishment of a Federal Defense Laboratory Diversification Program is an elaboration on an existing provision, 10 U.S.C. § 2363, which called for DoD to encourage technology transfer from the laboratories but did not specify the means for the transfers.

²⁶ President-elect Bill Clinton has advocated the creation of a civilian DARPA that is consistent with the sense of Congress on the matter. His administration would therefore be likely to support a restructured DARPA as suggested by Congress.

²⁷ See, for example, "Pentagon Wizards of Technology Eye Wider Civilian Role", *New York Times*, October 22, 1991, which described DARPA as "a lean, mean wizard of high technology." See also, "DARPA: Turning Ideas into Products", *Defense Electronics*, July, 1991 which credits DARPA for inspiring systems such as the F-117, the Patriot missile and J-STARS.

²⁸ See, for example, "Technology And Economic Performance", Report of the Carnegie Commission on Science, Technology and Government, September, 1991.

²⁹ See Department of Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. 101-189, 103 Stat. 1352, § 251 (1989). See also Department of Defense Authorization Act for Fiscal Year 1991, H.R. Conf. Rep. 923, 101st Cong., 2d Sess. Joint Explanatory Statement, § 244 (1990).

³⁰ In the 1980s, the nondefense share of U.S. investment in R&D declined from 74 to 71 percent while the share of defense R&D in Japan and Europe increased from 90 to 92 percent. National Science Board, Committee on Industrial Support for R&D, *The Competitive Strength of U.S. Industrial Science and Technology: Strategic Issues*, August, 1992.

³¹ Note that in the Defense Production Act reauthorization, Congress has called for the establishment of a Congressional Commission on the Evaluation of Defense Industrial Policy. H.Conf. Rept. 102-1028, § 203.

³² There will also undoubtedly be additional technology and industrial base initiatives in the next session of Congress. See, for example, S. 3382, a bill introduced by Senator Hollings in the last days of the 102d Congress, which would provide expanded assistance to industry efforts to develop critical civilian technologies by establishing a Civilian Technology Corporation.

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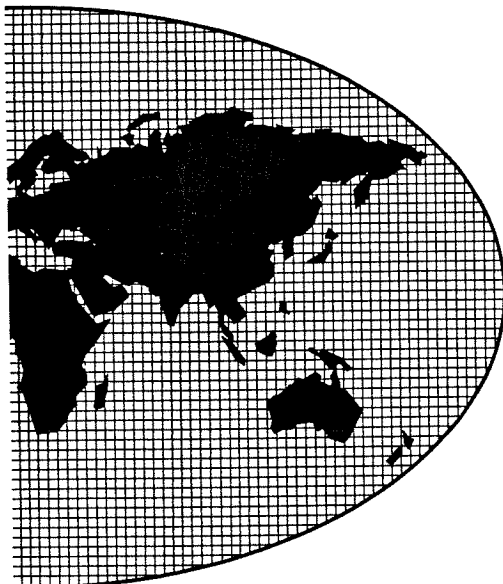
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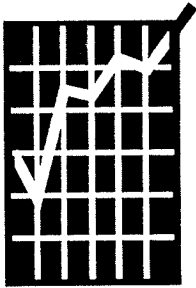
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DELOITTE & TOUCHE

The protracted recession has been hard on many businesses, and the declining defense budget has forced mass layoffs for numerous contractors (with more of the same on the way).

During periods of economic adversity, companies scramble to survive. In desperation, some will resort to creative accounting to bolster their financial statements. One of the more common solutions is to file a claim against the government, and then seek to book part or all of the amount claimed as revenue.

Not surprisingly, there are auditing standards that apply to this situation. Formulated by the Auditing Standards Division of the American Institute of Certified Public Accountants (AICPA), they are set forth in Statement of Position (SOP) 81-1 and provide in pertinent part as follows:

Recognition of amounts of additional contract revenue relating to claims is appropriate only if it is *probable* that the claim will result in additional contract revenue and if the amount can be *reliably estimated*. Those two requirements are satisfied by the existence of *all* the following conditions:

a. the contract or other evidence provides a legal basis for the claim, or a *legal opinion* has been obtained, stating that under the circumstances there is a reasonable basis to support the claim.

b. Additional costs are caused by circumstances that were *unforeseen* at the contract date and *are not* the result of deficiencies in the contractor's performance.

c. Costs associated with the claim are identifiable or otherwise *determinable* and are *reasonable* in view of the work performed.



d. The evidence supporting the claim is *objective and verifiable*, not based on management's "feel" for the situation or on unsupported representations.

If the foregoing requirements are met, revenue from a claim should be recorded only to the extent that contract costs relating to the claim *have been incurred*. The amounts recorded, if material, *should be disclosed in the notes* to the financial statements. [Emphasis added.]

When the auditors arrive on the scene, one of the first documents they will want to see is the outside counsel's legal opinion (see (a) above). There is a significant reason why they will want a copy of this opinion. If the company goes under and investors or creditors sue the auditors, the auditors **WILL** third party the outside counsel for malpractice.

The short message here is that government contract litigators in the private sector should be extremely wary about issuing such legal opinions. Creditors and investors, as well as auditors, will rely on the attorney's representation that recovery under the claim of additional contract revenue amounting to \$x is probable. Most of us have tried enough cases to know that such results are rarely so predictable in litigation.

Counsel are expected to zealously represent their clients within the bounds of the law. However, they should not let zeal blind them into forgetting to look out for number one.