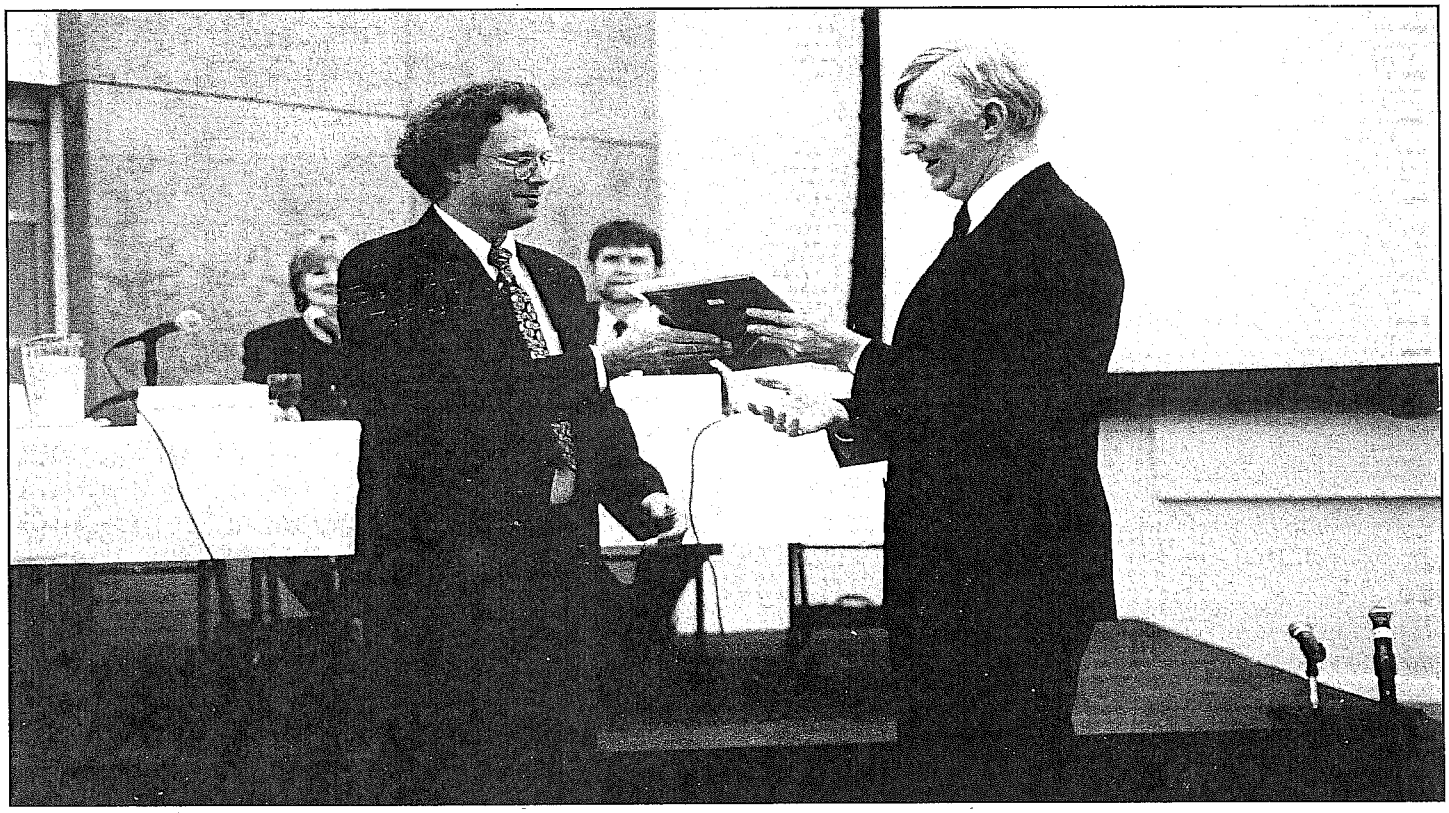
The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Winter Issue, February 1998, Vol. VIII, Issue I

BCABA

1997 Annual Program & Meeting Review



The Honorable Allen Goodman receives "The Best Article in The Clause for 1997" Award From Former BCABA President James Nagle

Table of Contents

FEATURES

DEPARTMENTS

President's Column

by the Hon. Cheryl S. Rome

Department of Interior, Board of Contract Appeals

Hon. Cheryl S. Rome

I am very pleased to serve as BCABA president this year and look forward to an active year of continuing education and growth for our association as a whole and for our individual members.

But hey! Did I say we all need to pay our dues promptly? Our annual program normally has been self–supporting, but this past year dues payments dwindled and have impaired our ability to carry some of the program costs and to develop new plans and projects. Did I say dues are $30 for Government personnel and $35 for others? Did I say I was no longer treasurer and have not been for years? If you did not do so in September, please promptly send your dues for FY 1998 ($35 private practitioners; $30 Government) to our secretary as follows:

Barbara Wixon–Bonfiglio, Esq.
Williams & Jensen
1155 21 Street, N.W., Suite 300
Washington, D.C. 20036

This reflects a change in our administrative system voted into place at our extensive officers' and board of governors' meeting on January 21, 1998. The secretary will now keep the membership roster, to be updated as dues payments arrive. This roster will serve as the basis for publication of our highly sought after annual membership directory. Barbara will forward the checks for deposit to our treasurer, Jim McAleese. If you sent in $25, based upon one notice issued inadvertently last Fall seeking that incorrect dues amount, please send in the additional $10 or $5, as the case may be. We are very sorry for the inconvenience and extend to you a thousand mahalos. You will receive a separate payment notice, but, as Confucius said, "Remedying 'in the red' requires Rome's ruthless repetition."

If you cannot ascertain from your own records whether you are current on annual dues, please call Jim's chief financial officer, Andrea Comes, at (703) 917-8900.

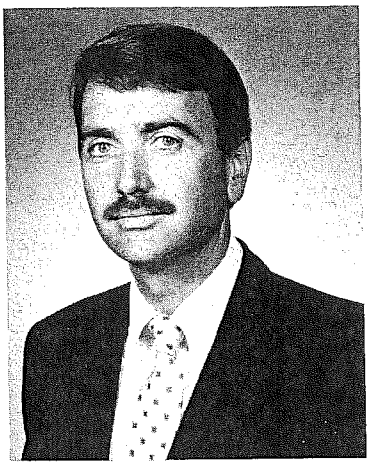
Your membership will serve you well. For example, Ty Hughes is organizing a short, cheap, educational program for early Spring, to be followed by another if the first is well–received and well–attended. We also are reviving the Membership, Practice and ADR Committees to foster membership growth, ease of communication, and the pursuit and implementation of projects already underway, as well as new ones.

In addition to publishing an accurate and complete membership directory, my other top priority as president is to ensure that we have an interesting, educational, and well–attended annual program. Judge Carol Park–Conroy of the Armed Service Board of Contract Appeals has kindly agreed to co–chair and we are seeking a volunteer from private practice to serve with her. If you have ideas for topics or speakers, please call Judge Park–Conroy at (703) 681–8527 or call me at (703) 235–3813.

Thanks to all and I hope to see you at our programs this year.

EDITOR'S COLUMN

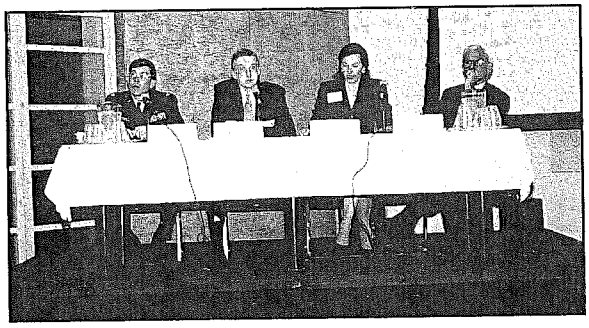
by Professor Andre Long, CPCM
Air Force Institute of Technology

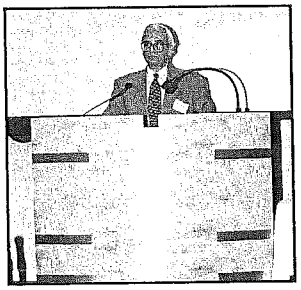


Andre Long

EDITOR'S COLUMN WITH ANNUAL MEETING HIGHLIGHTS

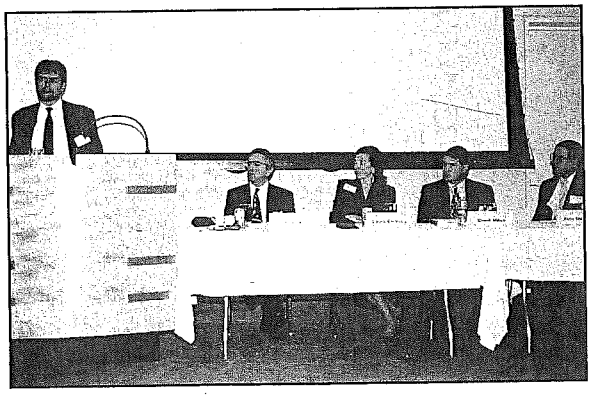
I am pleased to report on the outstanding success of this year's BCABA Annual Program and meeting held on October 22 in Washington, D.C.. This was the second consecutive year that Arnold & Porter hosted the event and Jim Dobkin and his assistant Ted Stone deserve our kudos for another job well done!





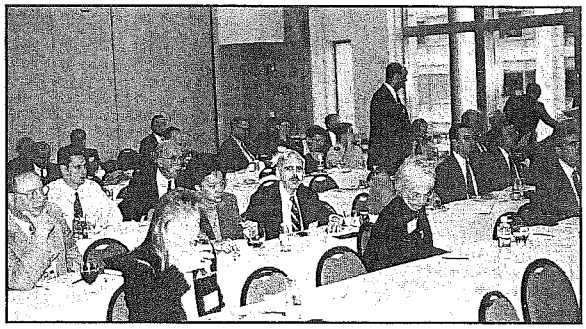
The honorable Guy H. McMichael, III , Chairman of the VABCA, started the morning with the Bar Association's third annual "State of the Boards" speech. Judge McMichael shared with us his perspective on the past year's boards of contract appeals activity and other related issues concerning the preservation of independent Boards. This was followed by a panel analysis of two appeals in which the ASBCA converted a termination for convenience to a termination for default. The panel moderator, Laura K. Kennedy (Seyforth, Shaw, Fairweather & Geraldson), lead a very different and interesting discussion regarding defective specifications, abandonment, and practice issues with panelists participants David P. Metzger (Holland & Knight), Michael J. Hoover (Chief Trial Attorney, U.S. Air Force), and Donald P. Arnavas (Sonnenschein, Nath & Rosenthal). This was followed by another panel moderated by Joe West (Arnold & Porter). Participants included Judge Robert Parker (GSBCA), Patricia McNall (Deputy Chief Counsel, FAA) and Steven L. Schooner (OFPP). Each panelist gave their own assessment of procurement reform and a prediction of its affect on Board practice.

During a delicious and extravagant buffet lunch, the Honorable Allan Goodman (GSBCA), received a plaque recognizing his article "Alternative Dispute Resolution at the GSBCA" as the best article published in *The Clause* during the past year. The selection was made by a committee of three attorneys and chaired by John Thompson (Naval Facility Training Command). Following the award was the luncheon keynote address. Those expecting an opportunity for a short nap were pleasantly surprised by Professor William E. Kovacic (George Mason University School of Law) presentation on procurement reform. His dynamic and stimulating speech left the audience charged and ready for the afternoon presentations.



After lunch, Peter A. McDonald (KPMG Peat Marwick) and Joseph D. West (Arnold & Porter) moderated a helpful discussion on the use of technology during Board hearings. Panelists included Judge Ronald Kienlen (ASBCA), Judge Gene Bond (Chairman, Interior BCA), and Judge Wesley C. Jockisch, (Chairman, COEBCA). A demonstration was given on how tech-

nology can be used to present large quantities of technical, operational, accounting and other data during trial. After the program, the BCABA business meeting was held. A discussion ensued as to



whether the BCABA should take collective action to defend the independence of the Boards. The membership agreed that the Boards, in particular the Interior Board, needed the support of our association. A unanimous vote directed James Nagel, president of the BCABA, to send a letter to the Secretary of the Interior requesting a comprehensive review of any decision that would dissolve the Interior Board or transfer its cases to another Board. The letter sent is printed in this edition of *The Clause.* Other business conducted at the meeting included the election of new officers and board members. Elected as President — the Honorable Cheryl S. Rome, President elect —David Metzger, Secretary - Barbara Wixon, and Treasurer - James McAleese. The three new members of the Board of Governors are Don Kinlin, Hugh Long, and Richard Gallivan.

WANTED - NEW MEMBERS

PRIVILEGES OF MEMBERSHIP INCLUDE:

- Subscription to the *CLAUSE.* A publication unique to Board practice which includes helpful practice tips from judges and experienced practitioners and informative articles on the latest issues in government contract law.

- Inclusion in and a copy of the 1998 annual directory, containing your name, address, phone number and e-mail. Also listed are sample forms used in Board practice along with a listing of Board addresses, judges and phone numbers.

- Participation in various focus groups such as our Practice and Procedures Committee.

- Discounts in attending the BCABA Annual Meeting and Program along with other events offered throughout the year.

- Membership in an established network of Board judges, private practitioners, and government and industry attorneys who are interested in practice proficiency.

*** *Refer to back page for a membership application* ***

Interview of Judge Cheryl Scott Rome, President, BCABA

by Professor Andre Long

1. When did you first get involved in Government contract law?

My first "exposure" to Government contract law was when I was selected after my first year at Duke Law School to be a summer legal intern at the General Services Administration. I worked on Government contracts in at least one of GSA's divisions. After graduating from law school, I entered private practice in Manhattan where, as an associate at two midtown law firms, I gained experience in litigation and with commercial and private contracts. I first became extensively involved in Government contract law when I joined the Civil Division, Commercial Litigation Branch, of the U. S. Department of Justice in January, 1980. For nearly 10 years, during most of which I was a Senior Trial Counsel, I litigated affirmative contract fraud actions under the False Claims Act, other statutes and the common law and also handled affirmative general contract actions — all in U.S. district courts and courts of appeal. I also defended innumerable contract actions at what is now the U.S. Court of Federal Claims and at the United States Court of Appeals for the Federal Circuit. While I was at DOJ, I took a year off to help found a private litigation support company. There, I drafted the company's contracts. None were with the Government, however, and I have never had occasion to file a Government contract claim myself.

2. What kind of cases do you hear at the Interior Board?

At the IBCA we adjudicate a wide variety of CDA (and rare pre–CDA) procurement contract claims for the many agencies of DOI, which include the National Park Service, Bureau of Reclamation, Bureau of Land Management, Geologic Survey, Office of Aircraft Services, Bureau of Indian Affairs, Fish and Wildlife Service and Office of Surface Mining. We also handle the CDA claims for the Environmental Protection Agency, the Office of Personnel Management, the Peace Corps, the Indian Health Service of the Department of Health and Human Services, and ACTION. Under the Indian Self–Determination and Education Assistance Act and the Tribally–Controlled Schools Act, we also adjudicate certain grant claims.

3. What are your plans for your year as president?

I wish to maintain a vibrant organization that is a continuing education leader in the field of Government contract law and also serves as a strong, readily–accessible, communications link among Government contract practitioners. I want to expand our membership through publicity and by offering programs and services that attract new members and benefit our current members. We offer great value at a highly reasonable price. We need to ensure that our publicity and billing systems are well–organized and effective. Most practitioners want to be in our sought–after directory, but I know from my term as treasurer that most (1) are careless about paying our minimal dues on time (the amount is not big enough to invoke an annual flinch) and (2) some have preserved their dues bill from years ago when I was Treasurer, and dues were $25 — I still get checks sent to me as treasurer in that amount. Dues are now $30 for Government employees and $35 for private practitioners. I provide current information in my President's Column as to where to send checks and whom to call for questions about payment. (I get two chances in this issue to trumpet for the treasury.)

4. What opportunities or difficulties do you anticipate as the new president?

Apart from the need to bolster our treasury, I see more opportunities than difficulties. The field of Government contract law is changing in view of FAR part 15 rewrite, commercialization, contracting–out, ADR (which I do not find to be new, only newly–emphasized) and other initiatives — but I think that this means more business for practitioners and adjudicators and the likelihood that new questions in the interpretation and application of Government contract law will be raised and resolved.

5. As a serving board judge, how do you think we can obtain more participation in our association from your colleagues on the other boards?

We have a fairly healthy participation already, given many judges' attendance and service at the annual program meetings, on committees, etc. Within the bounds of judicial propriety, I intend to "strong–arm" as many more judges as possible to join the BCABA. It is important to us as judges to support a group that has the interests of the Government contracting community at its core.

6. Do you plan on any coordination with other bar associations or professional groups?

I would like to explore possible coordination with the Board of Contract Appeals Judges Association and the Public Contract Law Section of the ABA on a "short" educational program or two. We must first have the money to do so. The BCABA has coordinated with bar associations on social events in the past. While this keeps our name in lights, and has been helpful to the other associations, there has been some feedback that the "good will" was not worth the hit to our budget, but I will confer with the board of governors about this.

7. What is new at the Interior Board?

The IBCA's workload, which involves many millions of dollars in Government contract claims, and is increasing regularly, is very strong for a 3–judge board. We are highly cost–effective. Although the past year has been fraught with constant administrative interruptions, we nonetheless have had the continuing priority of getting well–considered decisions out as fast as possible to the private and Government contracting litigants and communities we serve. We understand that the Director of Interior's Office of Hearings and Appeals, who undertook what many believe to have been an ill–founded and unwarranted initiative to transfer the board's heavy workload elsewhere, is slated to transfer to another job at Interior at the beginning of February. We are hopeful, but are not yet assured, that this will mean the end of his abolition program. The IBCA has received several letters of support from bar associations, including the BCABA, and from judges and private practitioners, and we are extremely grateful.

November 5, 1997

Honorable Bruce Babbitt
Secretary of Interior
U.S. Department of Interior
1849 C Street, N.W.
Washington, D.C. 20240-0001

Re: **Department of Interior Board of Contract Appeals**

Dear Secretary Babbitt:

I am writing to you on behalf of the Board of Governors of the Boards of Contract Appeals Bar Association (BCABA). The BCABA strongly supports an independent Interior Board of Contract Appeals (IBCA or the Board) and requests your comprehensive review of any decision that may be in process either to dissolve the Board or transfer its cases to another Board. We request that you delay any such action until after you have made a thorough review of the situation.

The BCABA is a voluntary association of Administrative Judges, public and private practitioners, associates and legal assistants, academics and others interested in the composition, practice and procedures of the Boards of Contract Appeals. The over 500 members of the BCABA take an active interest in matters affecting the viability of the Boards of Contract Appeals.

It has come to the attention of the BCABA that the Department of Interior (DOI), through actions of its Office of Hearings & Appeals (OHA) and possibly others, is considering either transferring or dissolving the IBCA. In response to that information, the BCABA unanimously adopted the following resolution at its Annual Meeting on October 22, 1997.

> RESOLVED, that the Boards of Contract Appeals Bar Association (BCABA) strongly supports an independent Interior Board of Contract Appeals; and
>
> FURTHER RESOLVED, that the BCABA Board of Governors promptly express this strong support in a letter to the Secretary of the Department of Interior, with a copy to the Office of Federal Procurement Policy (OFPP), and to other individuals or entities as the Board of Governors deems advisable.[1]

The BCABA is committed to the preservation of the independence and impartiality of the Boards of Contract Appeals. The Boards' independence from the agencies they serve is squarely rooted in the legislative intent of Congress in passage of the Contracts Disputes Act of 1978 (41 U.S.C. δ 601 et. seq.):

> The boards are full time and staffed so as to insure the independence and impartiality of the members.
>
> . . .
>
> Key elements of this system (the Contracts Disputes Act of 1978) would be agency boards of contract appeals, acting as quasi-judicial forums and strengthened by adding additional safeguards to assure objectivity and independence.

See Legislative History of Contracts Disputes Act of 1978, P.L. 95-653, S. Rep. No. 95-1118, 95th Cong., 2d Sess., 24, 1978 U.S.C.C.A.N. 5235, 5258; H.R. Rep. No. 95-1556, 95th Cong., 2d Sess., 22 (1978).

The BCABA is concerned about the preservation of independence and impartiality for all the Boards of Contract Appeals, but especially in this case, that of the IBCA. The agencies which have Boards of Contract Appeals have the power and right to evaluate their continuation based on work load studies and similar empirical agency data. Id. at 5259 (". . .if the volume of contract claims is not sufficient to justify an agency board, or if the agency head considers it otherwise inappropriate, the agency head can arrange to have appeals from decisions of contracting officers from his agency to be decided by a board of contract appeals of another agency."). However, because of the need for independence, it is inappropriate on the part of the agencies to interfere with the work of the Boards on *other grounds.*

[1]The IBCA judges recused themselves from all involvement in the resolution or this letter.

The IBCA has a demanding work load, and in all respects is performing the valued service the Congress established for the Boards of Contract Appeals in 1978 - providing DOI speedy, responsive, expert, efficient, flexible and informal contract disputes resolution. Because the IBCA has a normal and demanding work load, we are concerned about the appearance of the current intervention by DOI's OHA. Without justification relating to work load, DOI, through its OHA, risks an appearance that it is thwarting the will of Congress by inappropriate intervention in the affairs of the IBCA.

Your leadership and interest is important in this matter. The need for independence and impartiality on the part of Boards of Contract Appeals is a matter of deep historical significance. As an agency head, this matter is entrusted to your care. We strongly urge your personal and thorough review of this matter. Please feel free to contact me at (206) 623-3427 if you have any questions regarding the BCABA's views.

Sincerely,

James F. Nagle[2]
President
Boards of Contract Appeals Bar Association

JFN:cjs
C JFN LE BABBITT firmjfriboca.doc

cc: Steven Schooner
Administrator, Office of Federal Procurement Policy

[2]The BCABA Annual Membership directed me to send this letter as my last official act as BCABA President.

ACCOUNTANTS CORNER

Fixed and Variable Costs in Overhead

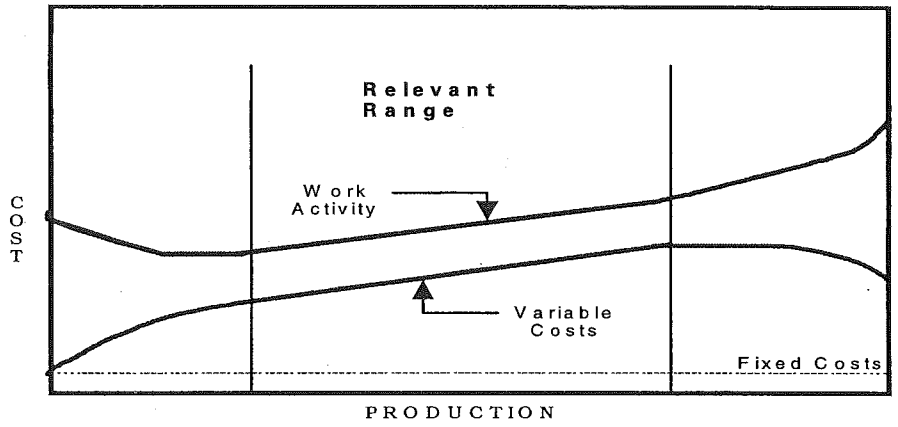
by
Peter A. McDonald
C.P.A., Esq.
KPMG Peat Marwick LLP

Republished from "Government Contract Audit Report, The Lynam Group, Washington, D.C.,", September, 1997, issue

When the Government issues change orders under a contract, justifying and quantifying the amount due a contractor under a request for equitable adjustment (REA) is required. As a result of a recent decision of the Armed Services Board of Contract Appeals, one of the more interesting facets of correctly computing a request for an REA will involve overhead. Regardless of the kind of contract involved (construction, service, supply, and so on), overhead rates are generally applied to the total direct costs. What is not widely known, though, is that overhead rates have fixed cost and variable cost components, and the ASBCA decision now makes this distinction important.

Some may assume that the term "fixed costs" refers to costs that are uniform from one period to the next. However, this is not completely true. Actually, most fixed costs are just similar in amount from one accounting period to the next. While there are some fixed costs that are exactly the same in each period, such as lease payments or depreciation expense, most fixed costs fluctuate within a narrow range. Regardless of the amount, though, accountants consider fixed costs to be those that are unaffected by variations in activity. Variable costs, on the other hand, rise (and fall) in a manner that is directly commensurate with the volume of work being done. Not to be misunderstood, the relationship between variable costs and work output is rarely mathematically precise. However, there are normally comparable trends, i.e., when the workload increases, the variable costs increase, and when the workload decreases, the variable costs decrease as well. Within defined parameters (called the relevant range), there is usually a correlation between the two (see Figure 1). Outside the relevant range, however, the relationship breaks down.

Figure 1 - Relevant Range



In Figure 1, the relevant range has been drawn to cover a fairly sizable middle portion. In fact, the relevant range for a company will depend on the data from its cost history. A relevant range might only exist in the lower levels of activity (in Figure 1, the left third), or only in the higher levels (the right third), or perhaps not at all. Also, there will likely be different relevant ranges for each overhead pool, so the range for one field office overhead pool will not be applicable to another field office overhead pool.

Semivariable costs are costs that have fixed and variable features. For example, there may be an initial fixed cost component, beyond which the item acts as a variable cost albeit less volatile than fully variable costs. Depending on the type of company and nature of the work under the contract involved, there are some expenses that could appropriately be classified as semivariable.

Fixed and variable costs in overhead rates may be affected when the time allowed for completing the work changes, as well as when the costs of performance change. Mathematically speaking, fixed costs operate as a function of time, while variable costs are a function of work activity. In plain language, this means that fixed costs increase when the contract schedule (or period of performance) increases, and variable costs increase when the intensity of the contractor's performance increases. Figure 2 below illustrates the impact these changes have on fixed and variable costs.

Note that changes in the schedule for performance do not generally affect the variable costs, while changes in the performance costs do not affect the fixed costs.

Figure 2 - Impact of Change on Costs in Overhead Rates

		Schedule		
		Decrease	Unchanged	Increase
Performance Costs	Decrease	FC <; VC <	FC same; VC <	FC >; VC<
	Unchanged	FC <; VC same	FC same; VC same	FC >; VC same
	Increase	FC <; VC >	FC same; VC >	FC > ; VC >

FC = Fixed costs; VC = Variable costs

A recent case that discusses these points in greater depth is M.A. Mortenson Co., ASBCA No. 40750, 97-1 BCA ¶28623. In that case, the Board held that the contractor was not entitled to additional field overhead costs because the changes did not affect the delivery schedule, and no variable costs or additional fixed costs had been incurred.

Historically, contractors have included a percentage for overhead (including field overhead) in pricing their REAs. In Mortenson, all of the disputed field overhead costs were fixed costs: supervisory salaried positions, rent, utilities, and housing allowances. None of these expenses increased because of the change orders. Moreover, the work required by the change orders was accomplished without any increase in the schedule (i.e., the time allowed for performance). Under these facts, the Board found that the contractor was not entitled to additional costs it had not incurred. Because the contract was completed on time, the fixed cost components in the overhead pool had not increased, and there had been no increase in any overhead variable cost components.

The contractor argued (unsuccessfully) that FAR 31.105(d)(3) permitted the recovery of field overhead through the application of a percentage rate:

Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

In other words, according to the contractor, recovery for the cost of the work under the Changes clause should simply be the overhead rate multiplied against the direct costs plus an allowance for profit. In addition, there were no cases specifically supporting the Government's contention that the overhead pool was to be analyzed by its fixed and variable cost components. Unfortunately for the contractor, the Board was unpersuaded by these arguments because it concluded that cost incurrence should be the yardstick by which recovery cost measurement should be made.

One disappointing facet of the Mortenson decision was the lack of any discussion concerning accounting evidence of the relevant range. This strongly suggested that neither side introduced any. Such overhead cost data might have assisted the contractor's case by demonstrating that costs categorized as fixed were in fact variable (or even semivariable).

This holding will be of great importance far beyond the circumstances presented in Mortenson. The methodology used by Mortenson is generally applied by most contractors when calculating their Change clause REAs, as well as REAs for other reasons (stop work orders, differing site conditions, constructive or actual delays, and so on). Few even denote which costs in their overhead pools are fixed or variable (or semivariable). Indeed, the accounting records for indirect costs in overhead pools do not even reflect their status as fixed or variable. The straightforward calculation almost universally applied (direct costs times overhead rate plus profit) will no longer be so simple. Instead, for each portion of their REA contractors will have to analyze their overhead costs in accordance with the table in Figure 2. This may not always be easy, and will undoubtedly provide fertile ground for disputes with government auditors. Obviously, the Mortenson decision provides government auditors with a valid tool to challenge overhead costs, many components of which can be substantial (even larger than some direct costs).

In light of Mortenson, contractors preparing REAs or claims should obtain the assistance of knowledgable government cost accounting practitioners when their overhead costs are measured.

Upcoming Luncheon Programs of the Board of Contract Appeals Bar Association

The Board of Contract Appeals Bar Association will host two mini-CLE programs this Spring. Each program will consist of single panel and will last about two hours. Lunch will be served.

"Design/Build Project Delivery"
March 25, 1998

The design/build project delivery approach is being employed with greater regularity on federal construction projects. This program will address recent statutory and regulatory changes affecting design/build contracting. The program will also explore other recent legal developments involving design/build contracting and recent noteworthy federal projects employing the design/build approach. The program moderator will be Robert S. Brams.

"Effective Use of Laptop Computers in Litigation"
April 22, 1998

Information technology can be a great equalizer in contract litigation. Understanding how to use the software tools that are available today on laptop computers can help litigators organize a case for trial, manage discovery, find critical information quickly and make effective presentations at trial. This program will cover electronic trial notebooks, document management, retrieval of information from depositions and documents, and trial presentation techniques. The program moderator will be Ty Hughes.

The luncheon programs will be held at the Kaiser Parks Room of the Marvin Center, George Washington University, 800 21st Street, N.W. (near the Foggy Bottom Metro stop). Cost will be $30 per person.

Reservations are required. Attendance at each program will be limited to sixty-five people. Guests of BCABA members are welcome but priority will be given to BCABA members. ***To reserve your place send a check ($30 for each program) to Ty Hughes at Patton Boggs, L.L.P., 2550 M St., N.W., Washington, D.C. 20037.*** Make checks payable to the "BCA Bar Association." For further information call Ty Hughes at telephone 202-457-6000, or send an e-mail to tyhughes@tech-law.com.

The Decision To Use ADR
An Evaluation For Contract Disputes

by Frank Carr

"When is a claim ripe for ADR?"
"How do I know it's the right time to use ADR?"
"Is it too early to consider ADR in this case?"
"Should I do ADR now or wait until later?"
"This claim might not be right for ADR."
"ADR, is it ever appropriate?"

These are frequently asked questions by contractors, contracting officers, project managers, and attorneys who are confronted with unresolved contract claims. Although these are simple questions to ask, the answers they receive are often vague and provide little or no guidance. As a result, too frequently, the decision to use ADR is deferred and an opportunity to resolve a claim is lost or significantly delayed while litigation costs continue to accrue.

So where can managers and attorneys look for help and advice? The Administrative Disputes Resolution Act of 1996, Pub.L. 104-320, 110 Stat. 3870 (Oct. 19, 1996), provides some guidance in evaluating a claim for ADR. The guidance, however, is minimal with its primary focus on when not to use ADR. The Act lists six examples when a Government agency shall consider not using a dispute resolution proceeding: need for a precedent; involves a significant question of Government policy; need consistent results among individual decisions; the matter significantly affects non-litigating parties; requirement for a full public record; and, the agency must retain continuing jurisdiction over the matter.

Other potential sources of assistance are agency policy statements. Generally, these statements are good for providing senior management support for ADR, but they do not provide much additional guidance. Almost uniformly, agency policy statements encourage the use of ADR in "appropriate" cases. Unfortunately, what is appropriate states the question, not the answer.

What senior managers and attorneys need is a clear and concise guide that can assist them in developing the answer. The following questionnaire is a tool that can help provide direction in reaching an answer. The questionnaire recognizes that there are objective and subjective matters to be considered when evaluating a contract claim for ADR. Accordingly, parties evaluating the claim using the same questionnaire may reach different conclusions because they perceive facts and issues differently. Remember the questionnaire is designed to assist each party in evaluating the contract claim for ADR from its perspective.

ADR QUESTIONNAIRE

How would you complete the following statements? Select the answer under each statement that best reflects your feelings at this time to complete the statement.

1. A precedent is needed:
   a) No
   b) Not really

2. The issue in dispute is:
   a) Factual
   b) Factual & Legal
   c) Legal

3. The claim is for:
   a) Quantum
   b) Entitlement & Quantum
   c) Entitlement

4. Future relationship between the contracting parties:
   a) Important
   b) Somewhat important
   c) Not important

5. The present attitude of the other negotiators can be best described as:
   a) Cooperative
   b) Positional
   c) Hostile

6. A decision on the claim is needed:
   a) Quickly
   b) Within the near future
   c) No hurry

7. Negotiations between the parties have:
   a) Identified facts and issues
   b) Reached disagreement on fact and issues
   c) Not been conducted

8. Transaction costs for litigation are expected to be:
   a) High
   b) Average
   c) Low

9. Discovery in this case is:
   a) Completed
   b) Ongoing
   c) Not started

10. Disruption to other work is anticipated to be:
    a) Substantial
    b) Annoying
    c) Minimal

11. Publicity about the case:
    a) Should be avoided
    b) Is not a concern
    c) Must occur because a public hearing required

12. Credibility of witnesses:
    a) Is not a concern
    b) Should not be a great concern
    c) Is a significant concern

13. Technical issues are:
    a) Highly complex
    b) Simple
    c) Don't know

14. Additional support for the decision is needed to reach settlement:
    a) Yes
    b) Helpful
    c) No

15. Management interest in resolution is:
    a) High
    b) Low or none
    c) To punish the other party

16. Knowledge of dispute resolution options can be described as:
    a) Highly knowledgeable
    b) General understanding
    c) None

17. The outcome of this case is:
    a) Extremely important
    b) Limited concern
    c) No interest

18. The claim concerns:
    a) Knowledge and data disagreements
    b) Credibility and reliability issues
    c) Organization reputation on the line

19. The negotiations are:
    a) Going nowhere
    b) Proceeding slowly
    c) Moving forward

20. Do "you" want to resolve the claim:
    a) Yes
    b) Unsure
    c) No

Computing the Score

After you have completed the questionnaire, you can compute your score by assigning the following point value to each of the 20 questions. Then you need to add the point values for all questions to find your final score for ADR evaluation.

POINTS:
- a = 1 point
- b = 2 points
- c = 3 points

When you have computed your final score, you are ready to evalute the claim for ADR. The below decision-making chart is provided to assist you.

DECISION-MAKING:

20-30 points:	Absolutely ready for ADR.
31-40 points:	Seriously consider ADR.
41-50 points:	Re-evaluate ADR at later date.
51-60 points:	No ADR.

Frank Carr is Chief Trial Attorney and Agency Dispute Resolution Specialist for the U.S. Army Corps of Engineers in Washington, DC., and presently serves as colonel, military judge, in the Army Reserve. He received B.A. and J.D. degrees from Duquesne University and an L.L.M. from Georgetown University. He formerly held positions with committees for the ABA Public Contract Law Section and is past president of the Board of Contract Appeals Bar Association. A highly decorated military officer, Mr. Carr currently serves on committees for several dispute resolution groups. Mr. Carr is a frequent lecturer on federal government procurement and litigation topics and alternative dispute resolution/partnering systems designs and techniques. He has authored, coauthored, and contributed to numerous articles, pamphlets, and books on these subjects.

TREASURER'S REPORT

by James McAleese
McAleese & Associates, P.C.

James McAleese

January 31, 1998

BCA Bar Association
Statement of Financial Condition
For the Period Ending January 31, 1998

Beginning Balance from October 1, 1997	$ 995.16	
Fund Income:		
Dues & Annual Meeting checks:	$ 5,555.00	
Subtotal		$6,550.16
Fund Disbursements:		
Andre Long (Plaque)	$ 40.00	
A & B Litho	$1,163.01	
Federal Bar Association (Labels)	$ 220.84	
Network Printing (Annual Mtg.)	$1,101.42	
Total Fund Disbursements		($2,525.27)
Ending Cash Balance		**$4,024.89**

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: $35.00 ($30.00 for Government Employees) [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: - _____

City/State/Zip: _____

Work Phone: _____ Fax: _____

email address: _____

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

❑ I am applying for associate membership (for non-attorneys only)

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

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

Employment: Firm_____ Corp _____ Govt _____ Judge _____ Other _____

SECTION III

Date: _____ Signature: _____

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

Barbara Wixon-Bonfiglio
Williams & Jensen, Suite 300
1155 21st Street, NW
Washington, DC 20036