

# THE CLAUSE

FALL 2005

A Quarterly Publication  
of the Boards of  
Contract Appeals

Volume XVI, Issue 3

## PRESIDENT'S MESSAGE

I am pleased to report on two important BCABA programs. The Association held its annual Trial Practice Seminar on September 21, 2005 at The George Washington University Law School. J. Michael Littejohn of Wickwire Gavin, Chair of the Trial Practice Committee and Secretary of the BCABA, moderated this event. The program panel consisted of Judges Stephen Daniels (GSBCA), Eileen Fennessy (DOTBCA), Reba Page (ASBCA), and Cheryl Rome (ASBCA). The panel discussed a number of issues, including the value of opening and closing statements, the use of pre-trial conferences, the timing of assignments to Board Judges, the frequency, timing and appropriate use of alternative dispute resolution, expert witnesses, telephonic testimony, the degree of informality in Board practice, resolution of discovery disputes, and Judges' "pet peeves." Judging by the comments of the participants ("very worthwhile," "great program," and "glad I came"), it was very well-received. We commend Mike for an outstanding job in putting together and moderating this program.

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PRESIDENT'S MESSAGE (CONT.)

Most recently, the BCABA held its Annual Program on October 28, 2005 at the City Center Hotel in Washington, D.C. The program, comprised of experts in the government contracts community, was truly outstanding. The BCABA was privileged to have as its keynote speaker Domenico Cipicchio, Acting Director, Defense Procurement and Acquisition Policy.

The first panel, "The Boards of Contract Appeals: Consolidation, Trends and Other Issues," consisted of Judges Stephen Daniels (GSBCA), Carroll Dicus, Jr. (ASBCA), Gary Krump (VABCA) and Howard Pollack (AGBCA). James McCullough, a partner at Fried, Frank, Harris, Shriver & Jacobson LLP, moderated the panel.

The second panel, "Industry Perspectives: Services, Funding Constraints and Increased Demands on Contracts," consisted of Michael Mutek, Vice President and General Counsel, Raytheon Intelligence and Information Systems, Stan Soloway, President, Professional Services Council, and Sheila Cheston, Senior Vice President, General Counsel and Secretary, BAE Systems. David Metzger, a partner with Holland & Knight LLP, moderated this panel.

The third panel addressed "Ethics in Government Contracting" and was moderated by Christopher Yukins, an Associate Professor of Government Contracts Law at The George Washington University Law School. This panel consisted of Richard Bednar, Senior Counsel, Crowell & Moring LLP, Stephen Epstein, Director of the Standards of conduct, Office of the General Counsel, Department of Defense, and Maryanne Lavan, Vice President, Ethics & Business Conduct, Lockheed Martin Corporation.

The final panel discussed "The Use and Abuse of the GSA Schedules." This panel, moderated by Carl Vacketta, a Partner with DLA Piper Rudnick Gray Cary US LLP, was comprised of the following: Carolyn Alston, General Counsel, Washington Management Group, Joseph Neurauter, Chief Procurement Officer, U.S. Department of Urban Housing and Development, and Jonathan Spear, Vice President, Law and Public Policy, MCI, Inc.

These panels were all extremely informative and thought-provoking. We thank all of the participants for their hard work and commitment in making these panels a successful part of our Program.

At the Program, the Honorable Stephen Daniels (GSBCA) presented the Life Service Award to Hugh Long for his long-time service and commitment to the BCABA. Hugh Long gave this year's Writing Award to Brent Curtis for the best article in *The Clause*. David Metzger presented a plaque to outgoing President, Joe McDade, for his outstanding service and dedication to the BCABA this past year. Joe McDade presented me with the President's Award, for which I was truly humbled and grateful.

As this past year's Annual Program Chair, I would like to extend my personal thanks to our immediate past President, Joe McDade, our Vice President, the Honorable Richard Walters, our Treasurer, Thomas Gourlay, Jr., and past Presidents, David Metzger and Peter McDonald, for their unparalleled energy and support throughout the year to ensure the Program's success. Special thanks go to Hugh Long, our editor of *The Clause*, for his continued commitment to the growth of the BCABA.

At the Annual Members Meeting following the Annual Program, the Members elected the following slate of officers: President: Michele Mintz Brown; Vice President: Honorable Richard Walters; Secretary: J.

Michael Littlejohn; and Treasurer: Thomas Gourlay, Jr. The following individuals were also elected to the Board of Governors: John Dietrich, Lynda Troutman O'Sullivan and Jennifer Zucker.

I am also pleased to announce a number of initiatives. The BCABA Directory will soon be available on our website at <http://www.bcabar.org>. Members of the BCABA will have password-protected access to the Directory. We thank Peter McDonald for his assistance in finalizing the Directory, and to James (Ty) Hughes, our website coordinator.

The BCABA Executive Policy Forum will take place in May 2006 in Washington, D.C. David Metzger will again chair this event. The BCABA will also hold its annual Trial Practice Seminar in September 2006. J. Michael Littlejohn has once again agreed to chair this program. In addition, the BCABA will hold its Annual Program in October 2006. The Honorable Richard Walters has agreed to chair this event.

I invite you to join us at our quarterly meetings that will take place at the Washington, D.C. offices of Holland & Knight LLP on the following dates: (1) December 15, 2005; (2) March 21, 2006; (3) June 27, 2006; and (4) September 19, 2006. The meetings will start at noon and generally last about one hour. While all of you are invited, please RSVP so that we can make the appropriate arrangements. I may be reached at (703) 720-8017 or at [michclb.brown@hklaw.com](mailto:michclb.brown@hklaw.com). I encourage you to contact me or any of our officers with your comments and suggestions.

We look forward to your participation and support in the coming year.

Michele Mintz Brown  
President

## EDITOR'S COLUMN

### IT CAN HAPPEN HERE

As I write this, the scenes from New Orleans can fairly be described as Biblical. Temporarily at least, law and order appears to have broken down. I am fortunate that my son got out of there in time. Not everyone can say that. At least one BCABA member has a dead relative in New Orleans. Now is the time to show compassion, and to contribute as much as you can to those in need. Three of the major charities are the Red Cross, the B'nai B'rith, and the Catholic Charities of America. There are others as well

Addresses are:

American Red Cross  
P.O. Box 37243  
Washington DC 20013  
[www.redcross.org](http://www.redcross.org)

B'nai B'rith Disaster Relief Fund  
2020 K Street, 7<sup>th</sup> Floor  
Washington, DC 2006  
[www.bnaibrith.org](http://www.bnaibrith.org)

Catholic Charities USA  
1731 King Street  
Alexandria, Va. 22314  
[www.catholiccharitiesusa.org](http://www.catholiccharitiesusa.org)

Please send as much as you can reasonably afford. Many Americans have already been generous, and our military, at least, has once again proven its competence and courage. LTG Honore makes every soldier feel proud.

## FRANCO-PHOBIA AND LAWYERS

Everybody hates the French. But almost no one can tell you why. The ones who can cite the usual reasons—too many different kinds of cheese, rude concierges, lack of gratitude, etc. But it took me a long while to figure it out personally. Then I found out about their work habits. Thirty five hours a week, 7 week vacations, and retirement at 55. I've been steamed at the country of Lafayette ever since.

Recently I was reminded of this when I read an article in the Washington Lawyer—the periodical I get because I joined the DC Bar a long time ago. The DC Bar is a so-called “integrated bar,” meaning you have to pay your dues in order to practice law around here.

In the July/August issue of their glossy magazine, there is a prominently featured article on sabbaticals for lawyers. A sabbatical, in case you didn't know, is a sort of extended vacation in which hard working lawyers take time off to deal with stress, smell the flowers, spend time with their families, and so forth.

I have been practicing law in DC for 25 years and in all this time I have never heard of lawyers taking a sabbatical. But such persons apparently do exist. The author, a young lady who took two years off to bicycle around the world with her husband, found five or six of them, mostly partners at heavy duty firms. Sabbaticals of up to two years are not unknown. They all think it's wonderful. I do not doubt it.

But if I were to ask my boss for such a time out, he would suggest that I take a Sabbatical for the rest of my life. So would the superiors of most of the members of the BCABA, private sector or public.

This was followed the following month by an approving article on lawyers who tired of the law and quit to do bee-keeping or

something. Why this is a problem was not fully clear to me, possibly because I still have to make a living. After reading this egregious nonsense, I began to feel about lawyers the way some Americans feel about the French—fed up.

### TREASURER'S REPORT (as of October 14, 2005)

As of today, our balance is \$27,736. (Also – I have about \$4k in checks for which there is no information right now as to what/whom they are for (i.e., dues and annual meeting).)

Regards,  
Tom Gourlay  
Treasurer

**BOARDS OF CONTRACT  
APPEALS BAR ASSOCIATION  
QUARTERLY BOARD OF  
GOVERNORS MEETING  
HOLLAND & KNIGHT LLP  
September 27, 2005**

**MINUTES**

The meeting was called to order at 12:17 p.m. by BCABA President, Joe McDade. In attendance were the following:

Name	Organization
Joe McDade	Air Force Deputy General Counsel
Michele Brown	Holland & Knight LLP
Rich Walters	VABCA
Gary Krump	VABCA
Jeri Somers	DOTBCA
Candy Steel	IBCA
Pete McDonald	McGladrey & Pullen LLP
Clarence Long	USAF
Steve Daniels	GSBICA
David Anderson	HUDBCA
Susan Warshaw Ebner	Buchanan Ingersoll PC
Beryl Gilmore	EBCA
Howard Pollack	AGBCA
Tony McCann	EBCA

**Old Business**

**Minutes.** Rich Walters, BCABA Secretary, had previously distributed copies of the minutes for the June 28, 2005 Quarterly Board Meeting. Motion made and seconded to accept the minutes. Passed. Joe McDade raised one "open item" in the minutes, namely, the posting of the BCABA Directory on the Association website and the creation of password protection to allow access. Joe obtained an estimate from Susan Donohue (the contractor for the website) of \$350 for this work. A motion was made to allow Joe to have Ms. Donohue proceed with posting the Directory and creating

password protection. The motion was seconded and passed.

**Treasurer's Report.** BCABA Treasurer, Tom Gourlay, was not present. He provided an e-mail message to Michele Brown, BCABA Vice-President/President Elect. According to the message, even after payment of a \$6,000.00 deposit to the Wyndham Hotel (for the Annual Program – see below), the treasury has a current balance of \$23,980.23. This is not including checks received by Joe McDade for membership dues and registration for the Annual Program.

**Annual Trial Practice Symposium.** Rich Walters reported that the BCABA Trial Practice Seminar was held on September 21, 2005 from noon to 2 P.M. at the George Washington University Law School Moot Court Room. Mike Littlejohn of Wickwire Gavin, Chair of the BCABA Trial Practice Committee, served as Moderator. The program panel consisted of Judges Steve Daniels (GSBICA), Reba Page (ASBICA), Cheryl Rome (ASBICA) and Eileen Fennessey (DOTBCA). A number of issues were discussed, including the value of opening and closing statements, the use of pre-trial conferences, the timing of assignments of appeals to Board Judges, the frequency, timing and appropriate use of alternative dispute resolution (ADR), expert witnesses, telephonic testimony, the degree of informality in Board practice, resolution of discovery disputes, and Judges' "pet peeves." Rich advised that the Seminar was excellent and well received. Mike is to be commended for a first-rate job.

**Annual Program.** The BCABA Annual Program is to be held on October 28, 2005 at the Wyndham Hotel on New Hampshire Avenue in Washington, D.C. Michele Brown, BCABA Vice-President/President Elect and Program Chair, reported that four outstanding panels have been lined up for the program, and CLE credit from Virginia has been requested – a total of 5 CLE credit

hours, including 1 hour for ethics. The luncheon speaker will be Domenico C. Cipicchio, Acting Director, Defense Procurement & Acquisition Policy (DoD). Attendees were urged to spread the word about the program and reminded that registration closes on October 20, 2005. In terms of publicity, at Rich Walters' request, Jerry Walz has mounted the program brochure and registration form on the ABA Public Contract webpage and has sent Rich Walters' reminder notice for the program out via his Public Contract Listserv. In addition, Rich will be sending reminder notices to a variety of other listservs, including the BCABA Listserv, his own ABA ADR Committee Listserv, a listserv he has created from the ABA Public Contract Law Section Leadership Directory, the NCMA Listserv, and possibly others. Gary Krump volunteered to contact David Drabkin to see if the reminder notice, program brochure and registration form might be distributed to the FACE Mailing List for agency Chief Acquisition Officers that David maintains. Joe mentioned that, at the program, a Lifetime Achievement Award will be presented as well as a new President's Award, previously authorized by the Board.

One further item was raised regarding the Annual Program. Michele stated that, in the past, a token gift has been provided to attendees. Last year, the gift was a BCABA key chain. She distributed samples of suggested gifts – all at the same price of just under \$5. The Board voted for a BCABA leather pad and pen set, notwithstanding that the minimum quantity to be ordered of those sets was a gross (144) (whereas the other possible gifts – pens – only required a minimum order quantity of 44).

#### **New Business**

**The Clause.** Joe raised the issue of printing and mailing costs. Annually, the costs of printing and mailing hard copies of The Clause have amounted to approximately

\$2,000.00. The Board discussed whether to dispense with hard copies and to disseminate The Clause solely via e-mail and by posting it on the Association website. Pete McDonald indicated that there is a “core group” of members historically who have insisted on hard copies. Hugh Long, Editor of The Clause, stated that the number is approximately 130 at this time. He said that printing currently is done on a per page/per number of copies basis, with no minimums. The concept of asking for additional fees for printing was considered and rejected. The consensus of the Board was that, since the dues notice recently sent out by the Association gave members the option of receiving The Clause in hard copy by mail, and since the cost was not excessive in light of the BCABA's “healthy” financial status, hard copies would be continued for the coming year. The Board's intent next year will be to require members to indicate affirmatively whether they need hard copies, rather than having them “opt out.”

**Gold Medal Firm Discounts.** Joe reported that one of the Gold Medal Firms, Crowell & Moring, had inquired as to whether there was any discount for Gold Medal Firms in terms of Annual Program tuition. Michele Brown moved that a 10% discount be extended as an additional incentive for Gold Medal Firm status (regardless of numbers of members or Annual Program attendees) and that a similar discount be furnished to any firm or organization sending 10 or more individuals to the Annual Program. This motion was seconded, by Jeri Somers, and later by Pete McDonald. After considerable discussion, the motion was passed. Gary Krump further suggested that something like Gold Medal membership be explored with federal agencies and that agencies be encouraged to build the BCABA programs into their own procurement training programs.

**Transition of Leadership.** Joe stated that he wanted to designate a Nominating Committee for development of a slate of

officers and Board members for the coming year. The Nominating Committee would consist of Pete McDonald along with Michele Brown and Rich Walters. A motion was made to accept the Nominating Committee. The motion was seconded and passed.

**Board Consolidation – Update.** The Joint Conference Committee has yet to consider the board consolidation issue as part of the Defense Authorization Bill. Westlaw’s The Government Contractor published an article entitled “BCA Consolidation Proposal Draws Fire” (written by Rick Southern, formerly Joe McDade’s Assistant Deputy General Counsel) analyzing the proposed legislation and the responses thus far – from the Senior Executives Association (SEA) and the non-Government members of the BCABA. She distributed a copy of the article to the attendees. Dave Anderson thanked the BCABA (Dave Metzger and Michele) for their excellent work in providing comments on the legislation.

**Other Matters of Interest.** Joe stated that, in conjunction with the DoD’s Quadrennial Defense Review (QDR), it was expected that a number of Congressional bills will emerge this Fall for targeted reductions within the Defense Department, including possibly some major weapons systems. In addition to the Air Force planning to cut 25% of its fighter force, Joe said, he expects some “historic changes” reflecting significantly less investment in a variety of Cold War weapons systems. This will likely mean termination claims and appeals at the Armed Services Board.

Gary Krump reported that, in his discussions with people at FEMA and DHS, FEMA indicated that it is seeking to hire hundreds and possibly thousands of mediators, not only for procurement disputes, including leases, but for other matters as well. He noted that waivers of offsets against federal annuities may be available, should anyone about to retire wish to contract with FEMA for mediation services.

Finally, Michele Brown, on behalf of the Board and BCABA membership, noted that this was the final Board meeting presided over by Joe McDade and expressed our deep appreciation for his wonderful leadership and contributions during the past several years. Joe, in response, advised that he had been offered and had accepted a non-legal management position with the Air Force – that, as of November 1, 2005 (just after our Annual Program), he would be in charge of Force Development (both civilian and military) for the entire Air Force. We all wished Joe congratulations and best of luck in this wonderful career opportunity.

No further business was raised or discussed. Joe adjourned the meeting at 1:00 P.M.

Respectfully submitted,

Richard C. Walters  
Secretary

**ALTERNATIVE DISPUTE RESOLUTION FOR AIR FORCE CONTRACTS: PRECISION  
GUIDED SOLUTIONS THAT ARE RIGHT ON TARGET**

By Karen L. Douglas, Major, USAF

About the Author: Major Karen Douglas is an Air Force JAG practicing alternate dispute resolution and contracts litigation at the Air Force Material Command Law Office's Directorate of Contract Dispute Resolution at Wright-Patterson Air Force Base in Dayton, Ohio.

Abstract: This article is an overview of the ADR techniques and procedures used by the Air Force to resolve contract disputes, and can be used as a quick reference to Air Force ADR policy and regulations. Six years have passed since the advent of the Air Force's "ADR First" policy, and the results show that Air Force contractors have much to benefit and nothing to lose by electing to use ADR.

**ALTERNATIVE DISPUTE RESOLUTION FOR AIR FORCE CONTRACTS: PRECISION  
GUIDED SOLUTIONS THAT ARE RIGHT ON TARGET**

"A successful lawsuit is the one worn by the policeman."  
-Robert Frost

"I was never ruined but twice: once when I lost a lawsuit,  
and once when I won."  
-Voltaire

With the advent of the "ADR First" policy in 1999, United States Air Force contract dispute strategy evolved into a creative quest for mutually agreeable solutions without litigation.<sup>i</sup> The desired effect of this strategic revolution was to foster better business relationships with contractors, increase remedy options beyond those available at trial, and substantially reduce the time necessary to resolve disputes.<sup>ii</sup> Six years later, the Air Force's "ADR First" policy has achieved all of those goals and more, making ADR the smart choice for contractors who are unhappy with a contracting officer's final decision. Never before have contractors enjoyed such an abundant variety of contract dispute resolution options that are geared towards achieving fair, expeditious and inexpensive business solutions.

In the "Pre-ADR First" days, once contract dispute negotiations failed, an Air Force contractor had but three choices: appeal the contracting officer's final decision to the Armed Services Board of Contracting Appeals, appeal the contracting officer's final decision to the Court of Federal Claims, or accept the contracting officer's final decision. Given the expense and time involved in litigation, a contractor could expend a small fortune during the many years necessary to reach a final decision at trial. Thus, it may have been a wiser business decision for a contractor to abandon a meritorious claim, rather than undergo litigation.

"ADR First" policy requires that the Air Force use ADR to the maximum extent practicable and appropriate to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level.<sup>iii</sup> Once an appeal has been docketed, the Air Force will send the contractor two letters, one upon receipt of the appeal and

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another sixty days later, informing the contractor of ADR options. Historically speaking, the Air Force offers ADR in over 75% of its contract appeal cases, and of those, more than 40% elect to use ADR.<sup>iv</sup>

The Air Force offers ADR for pre-litigation cases that meet published screening criteria,<sup>v</sup> and offers ADR to all litigating contractors unless one of the exceptions found in 5 U.S.C. 572(b) applies.<sup>vi</sup> An offer of ADR does not imply that the Air Force expects to win (or lose) the case, but instead indicates that the facts and issues surrounding the case by and large meet the ADR selection criteria and the case is of the type most likely to be resolved by ADR.

In circumstances where ADR is declined by either party, the Federal Acquisition Regulation ensures there will be no mystery about why ADR was rejected. If the contractor requests ADR and the Air Force declines, the contracting officer will explain in writing why ADR was declined, and will cite to one or more of the conditions in 5 U.S.C. 572(b) or other specific reasons why ADR procedures were inappropriate to resolve the dispute.<sup>vii</sup> Likewise, where a contractor rejects an Air Force offer of ADR, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.<sup>viii</sup>

### **What Types of ADR Does the Air Force Use?**

The types of ADR offered by the Air Force are limited only by creativity and agreement of the parties. Department of Defense<sup>ix</sup> and Air Force policy<sup>x</sup> encourage flexible use of ADR procedures, and specifically state that there are no limitations on what sort of ADR the parties can use.

Amongst the ADR modes that the Air Force employs are assisted negotiations at mediation and mini-trials, outcome prediction by early neutral evaluation and dispute review boards, non-binding arbitration, and binding arbitration by summary trial.<sup>xi</sup> The Armed Services Board of Contract Appeals offers settlement judges for mini-trials, summary trials with binding decisions, and other structured ADR modes that the Board and parties agree on.<sup>xii</sup>

### **Mediation**

An assisted negotiation by mediation is an ADR forum aided by a neutral third party who has no stake in the result. This type of ADR is effective when the parties have "room to settle," but have been unsuccessful with traditional negotiations. The neutral third party is called a mediator. The mediator is not authorized to impose a settlement upon the parties, but rather assists the parties in fashioning a mutually satisfactory solution to the controversy.

"Facilitative mediation" is the ADR technique in which the mediator simply facilitates discussions between or among the parties, without providing any form of evaluation of the merits of their respective positions.

"Outcome prediction" and "evaluative mediation" are ADR modes in which the mediator provides the parties with his/her views as to the strengths and weaknesses of their respective positions, opines as to potential outcome if the case were litigated, and endeavors to help the parties fashion a mutually acceptable resolution to the controversy.

Mediation is one of the most widely used ADR techniques in the private sector because the flexibility and informality make it useful for a wide variety of matters.<sup>xiii</sup> In addition, mediation

parties never surrender control of the ultimate resolution of their conflict. Contractors who are reluctant to lose control over the outcome of the disputed matter should be especially attracted to ADR by mediation.

The mediation process is completely flexible, and can be designed in a manner that meets the needs of the parties. Typically it begins with all parties meeting in a joint session to share their respective interests and positions. The process often includes a private session between the each of the parties and the mediator to allow further discussion of the case. At times, particularly when emotions run high, the mediator may choose to keep the parties separated and conduct "shuttle diplomacy." The mediator will work with the parties to identify common interests and to narrow the gap between the parties' respective positions.

The mediator serves to structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and assesses the positions taken by the parties during the course of the negotiations. In some cases, the mediator may propose specific suggestions for settlement. In other cases the mediator may guide the parties to generate more creative settlement proposals amongst themselves. During mediation, the parties retain the power to resolve the issues through an informal, voluntary process. If a mutually agreeable settlement is possible, the mediator's role is to bring the parties to closure.

#### Early Neutral Evaluation

Early neutral evaluation (also referred to as "outcome prediction" or the "settlement judge" approach) has many of the same features as mediation. But outcome prediction adds the neutral's review of the parties' positions and the information they provide. Furthermore, the neutral discloses his/her evaluation of the relative strengths and weaknesses of each party's position. These evaluations can be given to the parties individually or jointly. The early neutral evaluation/outcome prediction mode of ADR is a non-binding process. The parties generally select a neutral with subject matter expertise whose opinion they respect, and frequently turn to the ASBCA judges to perform this function.

#### Mini-Trial

Despite the name, a mini-trial is not a small trial, but is instead a more structured process that includes the use of each of the party's senior principals. Mini-trials permit the parties to present their case (or an agreed upon portion of the case) to their principals, who have authority to settle the issue in controversy. Often these presentations are made with the assistance of a third-party neutral advisor, who might meet with the principals after the mini-trial to attempt to mediate a settlement. The neutral may also issue a formal written non-binding advisory opinion. The parties' ADR agreement can also provide for limits on discovery for the proceeding.

The mini-trial presentation itself may be a summary or abbreviated hearing with or without oral testimony. After the presentation, the principals often begin negotiations with the aid of the neutral as mediator or facilitator. The neutral's role is pre-defined by the written ADR Agreement. The neutral generally presides at the presentation of the case, sets the ground rules, and as in other ADR actions, sees that the proceeding is conducted according to the ADR Agreement. The neutral often has expertise in the federal rules of evidence and substantive law and may be called upon for advisory rulings on questions likely to arise if the matter proceeds to litigation. If the neutral has subject matter expertise then the ADR agreement may also permit the

Neutral to question presenters and witnesses. The neutral's learned questions can frequently focus the parties' attention on critical issues.

Because of the neutral's evidentiary rule and substantive law expertise, the mini-trial ADR mechanism is excellent for resolving factual issues or mixed questions of law and fact. Further, this ADR technique highlights the strengths and weaknesses of the case. Settlement authority for mini-trials is the same as for negotiated settlements. At the conclusion of the mini-trial presentation the decision-making principals usually adjourn to negotiate the matter. The neutral may be called upon to act as advisor, mediator or fact-finder in this subsequent session depending upon the terms of the ADR agreement and the desires of the parties.

### Arbitration

Arbitration is an issue resolution process whereby a neutral third party is empowered by agreement of the parties to issue a decision on the controversy. In this process the neutral is called an arbitrator. Arbitration is commonly used in the private sector, and the decision can be either binding or non-binding, according to the ADR agreement.<sup>xiv</sup> A binding ADR would be one in which the proceeding results in a decision that is final and conclusive, and may not be appealed or set aside absent a showing of fraud.<sup>xv</sup>

There are significant legal restrictions on the use of binding ADR<sup>xvi</sup> within the Department of Defense. The only binding ADR method available to the Air Force is summary trial before an ASBCA judge. The Department of Defense is not authorized to use binding ADR proceedings unless the arbitrator is an ASBCA judge.

### Summary Trial with Binding Decision

A summary trial with a binding decision permits the parties to expedite the appeal schedule and to try their appeal informally before an administrative judge or panel of judges. The greatest distinguishing feature between an ASBCA trial and an ADR summary trial before the ASBCA is that in a summary trial the parties design the trial process (format, timing, rules, etc.), with the assistance of a judge who is often selected by the parties. Generally, the parties elect to have one judge decide the case, submit pre-hearing position papers (instead of post hearing briefs) and opt for more streamlined evidentiary presentations. The judge(s) will issue a verbal "bench" decision shortly after conclusion of the proceeding, followed by a summary written decision later.

Under most circumstances, the nearly immediate decision upon conclusion of the trial is one of the greatest advantages of the ADR summary trial process. By comparison, a traditional ASBCA trial judgment is rendered only after the parties submit post-trial and reply briefs, the two other judges review the trial record and briefs, and the three judges then agree on a written decision. It is difficult to determine how long this process will take, but it customarily exceeds a year. Furthermore, under traditional ASBCA trials, the trial decision can still be appealed, thus delaying certainty on the matter for years. The decision by an ASBCA judge in a binding summary trial is rendered almost immediately upon trial's conclusion, and can not be appealed, thus providing expeditious finality to the controversy.

## **The Parties Make the Rules**

One of the great benefits of selecting ADR is the parties' ability to set the parameters of the proceedings to suit their goals. The ADR agreement can encompass a great variety of issues and results in a tailor-made resolution plan. At the parties' agreement, ADR ranges from utterly informal meetings, to formal procedures modeled on actual trial. Discovery rules are drafted by the parties and set within their comfort levels. The location of the ADR proceeding, opportunity for ex-parte communications, and use of evidence is up to the decision of the parties. ADR results are not binding precedent, and if the parties wish, there are no written transcripts of the proceedings to influence future dealings amongst the parties. Because ADR is so flexible, these proceedings lend themselves to a wide variety of presentation technology, including teleconferencing and virtual courtroom videoconferencing. The distribution of ADR costs is negotiable in an ADR agreement, as well as Equal Access to Justice Act<sup>xvii</sup> lawyer's fees for those qualifying contractors whose ADR results in an order of settlement.<sup>xviii</sup> Issue resolution by ADR isn't an all-or-nothing proposition. The parties may decide to resolve only a portion of a claim by ADR and litigate the other issues,<sup>xix</sup> or may decide to resolve multiple claims all in one ADR. And, perhaps best of all, ADR almost always resolves both entitlement and quantum awards at the same time.

## **If ADR Fails, You're No Worse Off**

A contractor's right to appeal a decision to the ASBCA is not compromised by attempting ADR, unless of course the parties agree to this as a term of the ADR agreement. If an appeal is pending before the ASBCA, and the parties elect to try conflict resolution by ADR, then the ASBCA grants a suspension of the proceedings for ADR resolution.<sup>xx</sup> If a non-binding ADR proceeding fails to resolve the dispute, then the ASBCA simply restores the appeal to the active docket.<sup>xxi</sup> And, there are no strategic reasons for a party to avoid ADR in order to protect their case. The ASBCA's rules are promulgated to promote candid participation by the parties, since neutral advisors and settlement judges who participated in an ADR that failed to settle are ordinarily recused from participation in a trial on that same matter unless the parties specifically request otherwise, and the ASBCA Chairman approves the request.<sup>xxii</sup> Likewise, the ASBCA neutral may not discuss the ADR case with any other board personnel.<sup>xxiii</sup> Furthermore, most ADR agreements include a confidentiality clause which prevents any matters submitted at an ADR from coming back to haunt the parties at subsequent trial. Under such confidentiality clauses and applicable law, any written material prepared specifically for ADR, any oral presentations made at an ADR proceeding and any discussions between the parties during ADR are inadmissible in any future board proceeding.<sup>xxiv</sup> Conversely, the parties aren't faced with the dilemma of if-you-use-it-then-you-lose-it since evidence otherwise admissible at trial is not rendered inadmissible because of its use at an ADR proceeding.<sup>xxv</sup>

## **The Biggest Contractors Use ADR First**

The top Air Force suppliers have a standing ADR corporate agreement with the Air Force. Further, the Air Force's biggest programs, known as Acquisition Category I and II Programs for items such as the B-2 Stealth Bomber, C-17 Globemaster III airlift plane, C-5 Galaxy airlift plane, F-15 Eagle fighter jet, F-16 Fighting Falcon, Predator Unmanned Aerial Vehicle, and the Space-Based Infrared Systems, all have similar ADR agreements with the Air Force.<sup>xxvi</sup> Because ADR is offered to any Air Force contractor whose dispute fits the ADR criteria, the time and money saving benefits achieved through ADR are equally available to both the Davids and the Goliaths of the Air Force contractors.



## The Results are In, and You Don't Want Be Left Out

In rough numbers, for the five years prior to 1999's inception of the Air Force's "ADR First" policy, \$1 billion in contract claims were resolved at trial.<sup>xxvii</sup> A survey of the contract claims made in the five years since inauguration of the "ADR First" policy shows that approximately \$1 billion in contract claims were made during this period.<sup>xxviii</sup> Curiously, both before and after ADR, the dollar amount of claims filed were approximately the same, and the average settlement percentages remained steady. However, despite the fact that the dollar amounts paid were within 1% of each other, the results couldn't be more different since the time necessary to resolve ADR cases was dramatically shortened from years to months.<sup>xxix</sup> Though it's clear that ADR doesn't work as an "ATM" for claiming contractors, it certainly is a money saving time machine that speeds up resolution by years and consistently reaches fair results.

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<sup>i</sup> Air Force Policy Directive 51-12, *Alternative Dispute Resolution*, para. 2, 9 January 2003.

<sup>ii</sup> *Id.*

<sup>iii</sup> *Id.* at para. 3.

<sup>iv</sup> Report to the Secretary of the Air Force on the Air Force ADR Program, FY 2004, available at [http://www.adr.af.mil/afadr/secaf/SECAF\\_Report\\_2004.pdf](http://www.adr.af.mil/afadr/secaf/SECAF_Report_2004.pdf).

<sup>v</sup> Air Force ADR Program, *Air Force Alternative Dispute Resolution Reference Book*, available at <http://www.adr.af.mil/acquisition/factors.html#2Section>, last visited 22 June 2005.

<sup>vi</sup> U.S. DEP'T OF THE AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP., PART 5333.090 (2002).

<sup>vii</sup> U.S. FEDERAL ACQUISITION REG., PART 33-214(b) (Jun. 2005) [hereinafter FAR].

<sup>viii</sup> *Id.*

<sup>ix</sup> Department of Defense Doctrine (DODD) 5145.5, *Alternative Dispute Resolution (ADR)*, April 22, 1996, ch. 3, para. 3.1, defines ADR as "Any procedure that the parties agree to use, instead of formal adjudication, to resolve issues in controversy, including, *but not limited to*, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or any combination thereof. (emphasis added).

<sup>x</sup> Air Force Policy Directive (AFPD) 51-12, *Alternative Dispute Resolution*, 9 January 2004, page 4, Attachment 1, defines ADR as "Any procedure in which the parties agree to use a third party neutral to resolve issues in controversy, *including but not limited to*, facilitation, mediation, factfinding, minitrials, arbitration or use of ombudsmen, or any combination thereof."

<sup>xi</sup> *Air Force Alternative Dispute Resolution Reference Book*, *supra*, note 6, available at <http://www.adr.af.mil/acquisition/choosing.html>, last visited 26 June 2005.

<sup>xii</sup> Armed Service Board of Contracting Appeals, *ASBCA Notice Regarding Alternative Methods of Dispute Resolution*, available at <http://www.law.gwu.edu/ASBCA/rule.htm#dispute>, last visited 22 June 2005.

<sup>xiii</sup> Don Arnava, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS, 8 (2004).

<sup>xiv</sup> Binding arbitration is rare amongst federal agencies since its use requires approval from the head of the agency and the Attorney General. 5 U.S.C. § 575(c).

<sup>xv</sup> American Bar Association Special Committee on Alternate Dispute Resolution Section of Public Contract Law, ALTERNATIVE DISPUTE RESOLUTION: A PRACTICAL GUIDE FOR RESOLVING GOVERNMENT CONTRACT CONTROVERSIES 18 (1999).

<sup>xvi</sup> FAR 33.214(g).

<sup>xvii</sup> 5 U.S.C. § 504 (2005). EAJA has two effects: (1) it waives the immunity of the United States to claims for attorney fees in situations in which other civil litigants would be subject to such fees, and, (2) it applies fees to the United States when they would not ordinarily apply if the individual opposed to the United States meets certain income criteria defined by the Act.

<sup>xviii</sup> 5 U.S.C. § 504(b).

<sup>xix</sup> FAR 33.214(c).

<sup>xx</sup> ASBCA Rule 30.

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<sup>xxi</sup> ASBCA Notice, *supra* note 13.

<sup>xxii</sup> *Id.*

<sup>xxiii</sup> *Id.*

<sup>xxiv</sup> 5 U.S.C. § 574 (2005), as implemented by FAR 33.214(e).

<sup>xxv</sup> ASBCA Notice, *supra* note 13.

<sup>xxvi</sup> If visited from a military networked computer, a sample of an Air Force ADR Corporate Agreement is available at <https://www.safaq.hq.af.mil/contracting/toolkit/adr/corpagree/SampleCorpAgree2.rtf>, a list of Air Force ADR corporate Agreements is available at <https://www.safaq.hq.af.mil/contracting/toolkit/adr/corpagree/index.html>, and a list of Air Force Program ADR Agreements is available at [https://www.safaq.hq.af.mil/contracting/toolkit/adr/adr\\_docs/MOA.html](https://www.safaq.hq.af.mil/contracting/toolkit/adr/adr_docs/MOA.html), (last visited on 26 June 2005).

<sup>xxvii</sup> Interview with Mr. Joseph McDade, U.S. Air Force Deputy General Counsel (20 June 2005).

<sup>xxviii</sup> *Id.*

<sup>xxix</sup> From docketing to resolution, cases resolved by ADR average 18 months, while litigated cases average 38 months. FY 2004 ADR Program Report to the Secretary of the Air Force, n.4 above.

## USPS'S NEW PURCHASING REGULATIONS AND POLICIES

by David P. Hendel, Wickwire Gavin, PC

Exempted from many bedrock federal purchasing laws by the Postal Reorganization Act, the Postal Service has issued its own procurement regulations since 1971. *See* 39 USC § 410. Initially, USPS's purchasing rules were similar to the Armed Services Procurement Regulation (ASPR), but starting in 1987 the Postal Service began taking greater advantage of its purchasing flexibility. The Postal Service prided itself in developing procurement rules that combined the best aspects of public and commercial sector buying practices.

But on May 19, 2005, the Postal Service changed direction and sought to free itself entirely from binding purchasing regulations. The Postal Service thus abolished its most recent set of procurement regulations -- the 500+ page *USPS Purchasing Manual, Issue 3* (December 2004) -- and replaced it with just six pages of new regulations. 70 Fed. Reg. 20291 (April 19, 2005). These terse new regulations are silent on how USPS intends to conduct its purchases. For the most part, the regulations address ancillary issues (debarment, protests, CDA claims). The regulations are silent on key purchasing policies such as: (1) purchase planning, (2) use of competition; (3) publicizing procurement opportunities; (4) purchasing techniques; (5) evaluation of proposals; (6) award of contracts; (7) cost principles; and (8) contract administration. While the regulations that previously addressed these topics were abolished, a new document stepped in to fill the void: the *Interim Internal Purchasing Guidelines*.

While the name of this document is new, the policies set out in the *Interim Internal Purchasing Guidelines* are not. In fact, the *Guidelines* are nearly identical to the former set of regulations, the *USPS Purchasing Manual*. The major difference is the intended function of the two documents. The *USPS Purchasing Manual* was incorporated in the Code of Federal Regulations as binding regulations, and had the force and effect of law. *See DeMatteo Constr. Co. v. U.S.*, 600 F.2d 1384, 1391 (Ct. Cl. 1979); *Modern Sys. Technology Corp. v. U.S.*, 24 Cl. Ct. 360 (1991). But the *Guidelines* were purposely not issued as regulations, with the hope that they would be considered non-binding and advisory guidance only. *Guidelines*, ¶ 1.1.1. The author argues in another article that the *Guidelines* represent the *de facto* purchasing policies of the Postal Service, and as

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such, will eventually be held to be binding on the agency. “New USPS Procurement Rules – Are the Guidelines Really Non-Binding?” 47 Gov Con. ¶ 313 (July 20, 2005).

### **Highlights of the new regulations**

The purpose of this article is to describe what is new in both the new USPS purchasing regulations and in the *Guidelines*. We start with the new purchasing regulations.

#### **Declining to accept or consider proposals**

The regulations create a new method of disqualifying offerors from bidding on postal procurements under a section entitled *Declining to accept or consider proposals*. 39 CFR § 601.106. This section allows the Postal Service to reject proposals submitted by a contractor that “does not meet reasonable business expectations or does not provide a high level of confidence about current or future business relations.” Unacceptable business practices include:

- (1) Marginal or dilatory contract performance;
- (2) Failure to deliver on promises made in the course of dealings with the Postal Service;
- (3) Providing false or misleading information as to financial condition, ability to perform, or other material matters, including any aspect of performance on a contract; and
- (4) Engaging in other questionable or unprofessional conduct or business practices.

The Postal Service must give written notice that it is taking such action, and the contractor may contest the action under the new Ombudsman procedure (see below). *Id.*

Because this provision is unprecedented in public contracting, it is not clear whether it would withstand a court challenge. Disqualification from public contracting is a serious matter, and courts have held that contractors have a Constitutionally protected liberty interest under the Due Process Clause to be free of stigmatizing governmental defamation having an immediate and tangible effect on their ability to do business. See *Sloan v. HUD*, 231 F.3d 10, 17 (D.C. Cir. 2000); *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d. Since indefinite disqualification is tantamount to a debarment, a reviewing court will likely look to see whether the Postal Service’s disqualification procedures provide contractors the same type of due process rights that are required to justify a debarment.

#### **Initial disagreement resolution**

The new regulations implement a new administrative procedure for resolving bid protests under a section entitled *Initial disagreement resolution*. 39 CFR § 601.107. This section replaces the Postal Service’s former administrative method of resolving bid protests, in which the Postal Service’s Law Department was the ultimate arbiter of administrative bid protests. That procedure has now been abolished and replaced by the new two-step procedure described below.

Under the new regulation, protests and now called “disagreements” and this term is defined to include “all disputes, protests, claims, disagreements, or demands of whatsoever nature . . . against the Postal Service arising in connection with the purchasing process.” 39 CFR § 601.107. To be timely, a disagreement must be lodged with the responsible contracting officer within 10

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days of the date the disagreement arose. *Id.* This is the first step in the new procedure. If the matter is not resolved to the contractor's satisfaction within 10 days, the supplier may take the next step and lodge the disagreement with the USPS Ombudsman – a brand new position for the agency. Alternative dispute resolution procedures may be used in this process, but it is hard to imagine this could be accomplished in 10 days.

The definition of “disagreement” is potentially broad enough to include pre-claims and disputes concerning requests for equitable price adjustments. While conceivably this process could be used to resolve such issues, the procedure is designed to replace the administrative bid protest function, not the claims process. The regulations also make clear that this process is not to be used for claims that are filed pursuant to the Contract Disputes Act. 39 CFR § 601.107.

### **Ombudsman disagreement resolution**

The second step in the new disagreement resolution procedure is lodging the matter with the newly created USPS Ombudsman. This may be done if the disagreement is not resolved by the contracting officer, to the contractor's satisfaction, after the matter has been pending before the contracting officer for 10 days. 39 CFR § 601.108. Once the disagreement is received, the Ombudsman will notify the contracting officer and allow other interested parties to submit comments as well. The contractor bringing the disagreement will be given a chance to submit additional materials to the Ombudsman. The Ombudsman may meet with each party separately and may ask the contracting officer to provide pertinent documents. Confidential material will not be provided to outside parties, but will be available to the Ombudsman. The Ombudsman should issue a written decision within 30 days after the disagreement is lodged with her. *Id.*

The USPS Ombudsman is Juanda J. Barclay, who also serves as Manager of Supply Management Infrastructure in USPS's Supply Management group. Her alternate is Craig Partridge. The mailing address is: Ombudsman, U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW, Room 4110, Washington, DC 20260-6200 and the phone number is (202) 268-5903.

What standard will the Ombudsman use in deciding disagreements? The regulations themselves are silent on this point, but the commentary section of the regulations states that the Ombudsman “will focus on the best value considerations and business decisions made by the contracting officer.” 70 Fed. Reg. 20292. This focus is potentially a much wider scope of review than was allowed under the internal bid protest process, which is now no longer available. Time will tell whether the Ombudsman's focus will be an independent assessment of the best value decision, or will afford wide discretion to the contracting officer.

According to the regulations, this two-step procedure is the “sole and exclusive procedure” for resolving disagreements arising in connection with the purchasing process. 39 CFR § 601.108(b). In addition, the regulations state that the Ombudsman's decision is final, and may not be reviewed by a court, except on the grounds that the decision was “procured by fraud” or “obtained in violation of the regulations ...or an applicable public law.” 39 CFR § 601.108(h). But federal courts have long held that they have jurisdiction to review the propriety of USPS purchasing decisions, with no requirement that an entity first exhaust its administrative remedies. *See Emery Worldwide Airlines, Inc. v. U.S.*, 49 Fed. Cl. 211, *aff'd* 264 F.3d 1071 (2001). And it seems unlikely that a federal court would agree that it could not independently review the merits of a protest challenge simply because the agency's Ombudsman rejected it.



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### **Highlights of the *Interim Internal Purchasing Guidelines***

Similar to what the pirate king told his captive in the movie “Pirates of the Caribbean,” USPS’s new set of purchasing rules “is more a set of what you’d call ‘guidelines’ than actual rules.” And the *Guidelines* make this point in several places. The *Guidelines* state that they are “not binding,” “for internal use only,” and “do not create any right . . . enforceable against the Postal Service.” *Guidelines* ¶ 1.1.1.2. Whether the *Guidelines* are indeed as non-binding as the *Pirate Code* is a question we leave for another day.

Surprisingly, the features (described above) that were implemented in the new regulations are not described or addressed in the *Guidelines*, other than references to the regulations themselves. The *Guidelines* are thus strikingly similar to the most recent version of the *USPS Purchasing Manual*. Whole sections remain exactly the same as before. The key substantive differences from the previous set of purchasing policies are limited to the three following changes:

#### **Eliminating fairness requirements**

The single biggest change between the *Purchasing Manual* (PM) and the *Guidelines* is that the Postal Service has deleted essentially all statements in the PM that had required the agency to treat suppliers “fairly.” This rampage against fairness starts with an innocent statement under PM ¶ 1.6.1, in which the Postal Service had stated an “obligation to be fair in . . . its actions.” That does not appear to be an extraordinary statement or controversial policy, but the *Guidelines* eliminated that requirement to treat suppliers fairly. Instead of stating an obligation to be “fair” in its actions, the *Guidelines* change this to an obligation to be “business-like” in its actions. *Guidelines* ¶ 1.6.1.

The grim reaper’s next victim was the statement in PM 3.1.1, which had required the contracting officer to “ensure that all suppliers are treated fairly.” In the new *Guidelines*, however, that has been replaced with a statement that contracting officers must ensure that “business and competitive objectives are met or exceeded.” *Guidelines* ¶ 3.1.1. Also joining Davy Jones’s locker was language that had: ensured that “all suppliers are treated fairly and objectively” during the prequalification process (PM 3.5.2.e.3); required that procurement information be “disseminated fairly” (PM 4.2.2.k.1); stated that “all suppliers must be treated fairly” during discussions (PM 4.2.5.c.3(c)), and; required that USPS “act fairly” in withholding progress payments (PM 6.4.5.d.4.). The “fairness” language in each of these provisions was eliminated.

Interestingly, in the U.S. Senate postal reform bill, S. 622, the Senate has added language that would require USPS to add the “fairness” back in to its procurement considerations. The bill states that “the Postal Service should . . . ensure the fair and consistent treatment of suppliers and contractors in its current purchasing policies.” S.622, § 1004. This would put the “fairness” requirement back in to postal purchasing as a matter of law.

While USPS has eliminated the explicit “fairness” statements in its purchasing policies, it could be argued that the agency still has an implied obligation to treat suppliers honestly and fairly. Or going to the other extreme, it could be argued that since USPS has renounced its commitment to

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fairness, the Postal Service is no longer entitled to the presumption that its procurement officials have acted in good faith.

### **Extra evaluation credit**

When USPS is soliciting proposals for new work, extra evaluation credit may now be available for suppliers who propose “more effective technical solutions” than set out in the Postal Service’s solicitation. *Guidelines* ¶ 2.1.7.b.3. Extra credit for such outside-the-box thinking, however, is only available if the solicitation specifically states that extra credit will be awarded in such cases.

### **Termination on notice**

The Postal Service typically has three types of contract termination clauses: (1) Termination for Default – based on the contractor’s failure to perform ; (2) Termination for Convenience – taken for USPS’s convenience and allowing the contractor to recover termination costs; and (3) Termination on Notice – a no cost termination after advance notice is given. The *Guidelines* state that in some cases, a Termination on Notice clause may be substituted for a Termination for Convenience clause. *Guidelines*, ¶ 6.9.4. The major difference between these clauses is that under a Termination on Notice clause, the Postal Service is not liable to the contractor for any early termination costs. Thus, we may see more instances where USPS uses a Termination on Notice clause instead of a liability-creating Termination for Convenience clause. The *Guidelines* state, however, that a Termination on Notice clause is only appropriate in cases where termination claims would not otherwise be likely.

### **Conclusion**

Those are the substantive changes between the Postal Service’s former and current set of purchasing regulations and policies. Although the changes were much heralded by the Postal Service as eliminating inflexibilities in the purchasing process and implementing new commercial sector buying practices, none of that actually came to pass. No “inflexible” purchasing processes were identified or eliminated, and no new purchasing methods were described or implemented. Instead, new ways were created to disqualify offerors from participating in the purchasing process, a new method was created to funnel contractor complaints that arise during the purchasing process to an Ombudsman, and all references to treat contractors “fairly” were eliminated from USPS’s only remaining procurement policy manual.

Another round of new USPS purchasing policies are right around the corner. While no new regulations are expected, the Postal Service intends to announce early next year a brand new purchasing manual to replace the “interim” *Guidelines*. Unlike the *Guidelines*, the new manual – to be called the *Supplying Principles and Practices* -- is expected to contain major substantive changes.

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June 28, 2005

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**Re: Consolidation of the Boards of Contract Appeals as now included  
in the Defense Authorization Act for Fiscal Year 2006 (H.R. 1815)**

Dear Senators:

The Boards of Contract Appeals Bar Association ("BCABA") would like to take this opportunity to comment on the consolidation of the Boards of Contract Appeals as provided for in H.R. 2067, and now included in the National Defense Authorization Act for Fiscal Year 2006, H.R. 1815 (the "Act"). The House of Representatives passed the Act, which proposes the creation of a Civilian Board of Contract Appeals and a Defense Board of Contract Appeals, on May 25, 2005.

The BCABA is a bar association consisting of members from the three major components of the federal procurement community: Boards of Contract Appeals ("BCA") judges,<sup>xxix</sup> federal government attorneys,<sup>xxix</sup> and private sector government contracting practitioners. The purpose of the BCABA is to promote effective advocacy before the BCAs and to promote the BCAs as an effective source of dispute resolution for government contracts-related disputes.

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The issue of consolidation of the BCAs is a complex subject that is worthy of careful and thoughtful deliberation. We are concerned that the House passed this portion of the Defense Authorization Act without adequate public comment for alternative courses of action. Further, while economies and efficiencies this proposed legislation seeks to achieve are laudable, we are nonetheless concerned about the current form of the Act and whether those savings are real. At the same time, we are concerned about the unintended consequences of the legislation.

## **I. Background on the Boards of Contract Appeals**

The Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. §§ 601-13, authorized and established the BCAs. Pursuant to the CDA, the BCA judges perform a uniform and very specialized judicial function. They decide government contracts disputes between government agencies and government contractors of considerable complexity and magnitude. The CDA created the BCAs to "function with the independence of trial courts." H.R. Rep. No. 1556, 95<sup>th</sup> Cong., 2d Sess. 22 (1978). The BCAs perform functions similar to the federal trial courts, administering discovery, disposing of motions, conducting hearings, and issuing decisions based upon a hearing record and precedent. Their decisions are appealable only to the United States Court of Appeals for the Federal Circuit, except for maritime cases which are appealed to district courts. 41 U.S.C. § 603, 607(g). They also resolve disputes through alternative dispute resolution ("ADR"). These claims are sometimes valued in the billions of dollars.

## **II. Consolidation of the BCAs**

Under the proposed language of the Act, the current functions of existing Boards are not being transferred; instead the jurisdiction of each of the new Boards that would be recognized – essentially the existing General Services Board of Contract Appeals ("GSBCA") renamed the Civilian Board, and the Armed Services Board of Contract Appeals ("ASBCA") renamed the Defense Board – would be limited to disputes under the CDA from named agencies. Of great concern to the procurement community that are members of the BCABA represents is a potential loss of a great asset – the current role of the BCAs in dispute resolution. The proposed legislation would eliminate any case or matter that is not specifically covered by the CDA. To confine the consolidated BCAs to the jurisdictional boundaries of the CDA would do a disservice to the many constituencies who have come to rely upon the valuable contributions of the BCAs in resolving disputes.

The skills of the BCA judges in federal procurement and in resolution of contract disputes are highly developed and widely regarded. The BCAs have also led the way in developing and implementing alternative dispute resolution ("ADR"), which has resulted in significant cost savings for government contractors, and is especially important to small businesses. In fact, Board mediation is sometimes incorporated into government contracts and subcontracts. The BCAs have also undertaken "pre-decisional" ADR of disputes before a contracting officer has issued a final decision and triggered the CDA. Great care must be taken with any reform to ensure the continuity of this important development and contribution to the federal government contracting community. This is a real cost savings of the BCAs, and the value of any changes must be measured against this contribution to preserve it.

Likewise, the Act would not preserve any of the myriad of other non-CDA functions currently performed by the BCAs. For instance, the ASBCA exercises jurisdiction over non-appropriated fund contracts that contain a clause providing for an appeal of disputes over such issues to the Board. In addition, the ASBCA has exercised jurisdiction over certain NATO contracts, in



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accordance with agreements between the parties, as well as appeals arising from contracts issued by the Iraq Coalition Provisional Authority.

Similarly, many of the various civilian agency Boards also provide other dispute resolution services for their agencies with respect to activities that are not specifically covered by the CDA. These additional functions include debarments, suspensions, federal crop insurance disputes, Indian self-determination contracts, travel claims and federal debt recovery actions. If the consolidation envisioned in the Act were to be implemented, the agencies would no longer have BCA judges available to perform such functions. The agencies involved still would have the same needs, but would be forced to perform these functions with a substantial loss of experience and expertise. Creation of separate dispute settlement procedures and forums for these non-CDA functions would almost certainly negate the limited cost savings apparently envisioned by the Act's sponsors.

We also have many technical concerns with this legislation. To begin with, we note that the CDA currently provides the statutory jurisdiction for the BCAs. However, the Act provides membership, organization, and structure for the proposed consolidated Boards of Contract Appeals by amendments to the Office of Federal Procurement Policy ("OFPP") Act. We recommend that the OFPP Act provisions be placed in the CDA, so that the organic provisions concerning the Boards will be located in the same chapter of the United States Code. We see no benefit to government contractors, large and small, nor to their legal representatives, to have to search for relevant statutory authority about the Boards in the United States Code.

Additionally, we are concerned about any role of the OFPP beyond its current limited function to perform occasional workload studies of the BCAs. To have OFPP involved in rule making for both the Civilian and Defense Boards, as well as the appointment of the Chairman of the Civilian Board and hiring of Civilian Board judges, as currently provided by the Act, raises significant concerns regarding independence of the Boards.

Moreover, Section 1441 of H.R. 1815 contemplates performance "ratings" of judges. While the language of this provision is not explicit on this point, it provides authority for the promulgation of regulations and envisions reductions in force through the use of performance appraisals. It is unclear what specific performance standards would apply and who would decide any such performance standards. Rating judges could politicize the internal workings of the system and create the appearance of an impermissible conflict of interest. To the extent that the role of OFPP extends to this as well, including possible actions against judges deemed not to have performed in accordance with as yet undefined standards, we are very concerned that the Act raises concerns regarding the CDA mandated independence of the BCAs. Furthermore, it is a fundamental concept of our system of government that those charged with adjudicating disputes do so unencumbered by influence from the executive or legislative branches.

Moreover, because the consolidation aspect of the Act would involve only approximately 27 judges,<sup>xxix</sup> the cost savings and efficiencies gained by this process will likely be minimal, at best. The much greater concern is the unintended consequences of the Act as written, including the loss of skilled Board services for pre-decisional and non-CDA dispute resolution.

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### III. Recommendation

In lieu of this legislative approach, we would like to propose a process that would consider all of these complexities, that would invite the informed views of the procurement community and preserve the current valuable role of the BCA in both CDA and non-CDA dispute resolution. We propose legislation that would authorize a Blue Ribbon Panel on the role of the Boards of Contract Appeals in dispute resolution. Notably, because the issues described (including CDA and non-CDA matters, such as Indian self-determination contracts and non-appropriated fund contracts) cross jurisdictional lines in both the Senate and House, a Blue Ribbon Panel, as suggested here, would be valuable.

The legislation should require a study process similar to the Commercial Activities Panel ("CAP") that studied the challenging subject of outsourcing and public-private competitions in the federal government. The Blue Ribbon Panel should hold public hearings and issue a report to the Congress on the most appropriate role and efficient use of the BCAs. The OFPP Administrator should chair this Blue Ribbon Panel. The Senate and House should then reconsider this provision of the Act. In the meantime, until the Blue Ribbon Panel process or one like it is complete, the Senate should withhold action on this provision of the Act.

We would appreciate an opportunity to provide our views at a hearing on this legislation, and look forward to future discussions with you on this matter.

Sincerely,

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Past President, BCABA

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