

THE CLAUSE

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of the Boards of
Contract Appeals

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PRESIDENT'S MESSAGE

We just completed a very productive quarter and have a good game plan to finish out the year. Here are the highlights:

Executive Policy Forum: Dave Metzger and Michele Brown did a great job in organizing our Executive Policy Forum. The Forum provided our members with a unique opportunity to have a full and frank discussion with key members of the various Boards of Contract Appeals regarding issues of mutual concern.

Letter to Congress: The past president's of the BCABA sent a letter to Congress expressing a number of concerns regarding legislation that contemplates the consolidation of the Boards of Contract Appeals. Because the Administration supports this legislation, Board Judges and Government employees expressly recused themselves from participation in the letter and took no part in preparing it.

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PRESIDENT'S MESSAGE (Cont.)

Annual Trial Practice Symposium: As you know, this is a free program aimed at providing BCABA members, in particular younger practitioners, with BCA Judges' views as to best practices when litigating before the Boards. Mike Littlejohn of Wickwire Gavin will Chair the Trial Practice Committee this year and the program is scheduled for Wednesday, September 21, 2005 between Noon and 2 P.M.

BCABA 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. The price to attend this event will be \$125. If you take a moment to review the text below, you will see that we have put together a truly first-class program that is well worth the price of admission.

The first panel, the "*Judges' Panel*," will be moderated by Jim McCullough, a partner at Fried Frank. The panel will consist of:

- **Hon. Stephen M. Daniels**, GSBCA;
- **Hon. Carroll C. Dicus, Jr.**, ASBCA;
- **Hon. Gary J. Krump**, VABCA; and
- **Hon. Howard Pollack**, AGBCA.

The second panel will be on "*Industry Perspectives: Services, Funding Constraints and Increased Demands on Contractors*." This panel will be moderated by Dave Metzger, a Partner with Holland & Knight LLP, and the panelists will be:

- **Michael Mutek**, Vice President and General Counsel, Raytheon Intelligence and Information Systems;

- **Stan Soloway**, President, Professional Services Council; and
- **Sheila C. Cheston**, Corporate Vice President and General Counsel, BAE

The third panel will be on "*Ethics in Government Contracting*" and will be moderated by Chris Yukins, Associate Professor of Government Contracts Law, The George Washington University Law School. The panelists will be:

- **Steve Epstein**, Director of Standards of Conduct, Office of the General Counsel, Department of Defense;
- **Maryanne Lavan**, Vice President, Ethics & Business Conduct, Lockheed Martin Corporation; and
- **Richard J. Bednar**, Senior Counsel, Crowell & Moring.

The fourth panel will address "*The Use and Abuse of the GSA Schedules*" and will be moderated by Carl Vacketta, Partner and Chair of the Government Contracts Group, DLA Piper Rudnick Gray Cary US LLP. The panelists will be:

- **Joseph A Neurauter**, Assistant Deputy Associate Administrator for Acquisition Policy, Office of Governmentwide Policy, U.S. General Services Administration;
- **Jonathan Spear**, Vice President, Law and Public Policy, MCI, Inc.; and
- **Carolyn Alston**, General Counsel, Washington Management Group (formerly a high official with the GSA).

With regard to new business, the Officers and Board of Directors agree that the Directory requires updating, so that the

EDITOR'S COLUMN

addresses/phone numbers/e-mail addresses are accurate. We will engage the services of an individual – possibly a law student – for a few hundred dollars to do such an update. In addition, we will post the directory on the BCABA Website, albeit with password protected access. Again, we will spend a few hundred dollars to have the Website contractor mount the Directory and create password protection for access to it. Once accomplished, notice of the availability of the Directory online will be included in The Clause.

Finally, please note that it is that time of year again. We need you to renew your BCABA membership and we will be sending out notices for the BCABA annual dues during the first week of August. *Please note that our dues statements this year will include your authorization for the BCABA to post your personal information on the password protected BCABA online Directory.*

Finally, I again want to extend my personal thanks to Judge Walters for continuing to craft the best minutes ever kept by a BCABA Secretary, and for continuing to accomplish tasks large and small in support of the Officers and Directors of the BCABA.

Joe McDade

Your editor has now had the remarkable good fortune to be able to turn out three consecutive issues using purely original articles. This is primarily due to the help of lawyers in the Air Force Contract Litigation office (AFLSA/JACN) and the George Washington University Law School and Chris Yukins, who is now a professor there. We are moving along in a number of ways. Our articles have increasing breadth, depth and timeliness. They range from bankruptcy to alternative dispute resolution to savings share determinations to agency bid protests. All of them are well done. I disagree with the article on agency bid protests, however, where it recommends back-to-back automatic stays. We have a tough enough time getting things done as it is.

Under the “Never trust your government” rubric is an extremely interesting short article by Cathleen Garman, on who will be paying for the new stadium. Basically, it will be anybody who does a substantial amount of business in DC, wherever located. This will come as a surprise to many of you, and to your clients. It came as a surprise to me. On reflection, however, I should have known. This is the kind of thing well intentioned people do. Ms. Garman is new to these pages. Glad she showed up.

Immediately following my column is a brief biography of Karl Ellcessor, who recently retired from the Army. Karl and I were associated in a major bid protest some years ago. We won, and got our 15 minutes of fame as a result. I am sorry to see him go, as is everyone who knows him, although I am reliably advised he will be staying in the area.

Clarence D. Long, III

COL KARL ELLCESSOR

COL Karl Ellcessor is a military attorney with the Army Judge Advocate General's Corps. He is currently assigned as the Army's Chief Trial Attorney and the Chief, Contract Appeals Division, U.S. Army Legal Services Agency, located in Arlington, Virginia. In this capacity, COL Ellcessor is responsible for the litigation of contract disputes docketed with the Armed Services Board of Contract Appeals and defending the Army against bid protests filed at the Government Accountability Office and the Court of Federal Claims. He is also responsible for overseeing the disposition of procurement fraud cases involving Army contracts, including suspensions and debarments. He was previously assigned to the Acquisition Law Section within the Army's Office of the General Counsel.

From 2000-02, COL Ellcessor was the Staff Judge Advocate at Fort Huachuca, Arizona, where he provided legal counsel and support for the U.S. Army Intelligence Center and the U.S. Army Signal Command. From 1998-2000, COL Ellcessor was the Staff Judge Advocate for White Sands Missile Range, New Mexico, which is America's largest in-land missile range.

From 1994-98, COL Ellcessor served as a Professor, Vice-Chair, and the Chair of the Contract and Fiscal Law Department at the Army's Judge Advocate General's School, located in Charlottesville, Virginia. The Contract Law Department is the Department of Defense flagship activity responsible for federal acquisition law and fiscal law.

From 1991-94, he was assigned to the Army's Contract Appeals Division as a trial attorney and a deputy trial team chief. There he litigated bid protests and contract appeals before the General Accounting Office, the General Services Administration Board of Contract Appeals, and the Armed

Services Board of Contract Appeals.

From 1986-90, COL Ellcessor was stationed at Fort Lewis, Washington where he served consecutively as trial counsel, senior trial counsel, and Chief, International and Operational Law Division for I Corps.

COL Ellcessor entered active duty in 1979 as a Quartermaster Officer. His first assignment was with the 13th Corps Support Command at Fort Hood, Texas.

COL Ellcessor graduated from the University of Virginia School of Law in 1986. He received his Master of Law from The Judge Advocate General's School in 1991. He has a Bachelor/Master of Arts in economics from George Mason University.

COL Ellcessor is married and has three children. His wife, Barbara, is a registered nurse. He has two daughters and a son, all of whom are officers in the U.S. Air Force.

In his free time, he likes to run short distance races non-competitively (very non-competitively) and play an occasional round of golf.

TREASURER'S REPORT

The current balance for the BCABA is \$25,003.22.

NOTICE: BCABA Dues Procedures

- Dues notices will be emailed on or about **August 1st**.
- Annual dues are **\$30** for government employees, and **\$45** for all others.
- Dues payments are due NLT **September 30th**.

- There are no second notices.
- Gold Medal firms are those that have all their government contract practitioners as members.
- BCA judges are exempt from paying dues, but are invited to do so.
- Members who fail to pay their dues by September 30th do not appear in the Directory.
- Annual Directories are distributed in October.

The BCABA Constitution and By-laws
are posted on our web site:
www.BCABAR.org

**Pebbles on the Pond: Writings in Procurement Reform
from The George Washington University Law School**

With this issue of *The Clause*, we launch our "Pebbles in the Pond" series, with important pieces on procurement reform from The George Washington University Law School. The accompanying papers, by masters students Eric Troff and Aubrey (Mike) Mitchell, reflect the wide variety of research and writing being done in procurement reform in GW's government contracts program. Eric Troff's piece, a careful assessment of agency-level bid protests, will, I think, help guide future reform in that area. Mike Mitchell's piece tackles difficult issues in share-in-savings, and offers a way forward in what is, in fact, one of the most important and controversial areas of reform in federal procurement. I am proud of their accomplishments as students, and I am delighted that our program can contribute to *The Clause*.

Christopher Yukins
Associate Professor of Government Contract Law
The George Washington University Law School
June 2005

SHARE IN SAVINGS CONTRACTING

BY AUBREY F. "MIKE" MITCHELL, III

LL.M. Student

The George Washington University Law School

Share-in-savings contracting for information technology was authorized by the E-Government Act of 2002¹ and is being implemented by regulations proposed by the Civilian Agency Acquisition and the Defense Acquisition Regulations Councils.² Value Engineering Change Proposals (VECP) on the other hand have been around since World War II. Both are based on the concept that the contractor and the government share in any savings derived from contractor proposals that reduce costs to the government. While VECPs are proposed and performed by an incumbent contractor, share-in-savings contracts are based on a contractor's proposal for a new contract to improve processes being performed by others. In either case the government has the option to accept or reject the proposal. The share-in-savings concept has both strong proponents³ and opponents,⁴ while the value engineering program is not subject to the same attacks and criticism that share-in-savings receives from its critics. Why is one so well received and the other coming under attack?

The first step to understanding the criticism of share-in-savings contracts is to analyze the proposed share-in-savings regulations against the backdrop of critics' complaints, and then contrast these new regulations with those for VECPs. The first section of this article will provide an insight to share-in-savings contracting based on the proposed FAR regulations and the comments of both proponents and opponents. The second section will describe value engineering and compare its regulatory requirements to those of share-in-savings.

¹ E-Government Act of 2002, Pub. L. No. 103-347, § 210, 116 Stat. 2936 (2002).

² Federal Acquisition Regulation; Share-in-Savings Contracting; Proposed Rule, 69 Fed. Reg. 40514 (Jul. 2, 2004)(to be codified at 48 C.F.R. pt. 16 and 39).

³ See Davis: Acquisition Reforms Need to Go Further, Washington Technology, Kerry Gildea, June 4, 2001, at <http://www.washingtontechnology.com>; Share-in-savings comments sought: Authorities granted under E-Government Act expire in 2005, Michael Hardy, FCW.COM, October 6, 2003, viewed at <http://www.fcw.com/print/asp> on Sep 30, 2004; E-Government: Lawmaker, Officials Promote 'Share In Savings' Contracting, Ted Leventhal, National Journal's Technology Daily, PM Edition, January 22, 2004.

⁴ See Statement by Bobby L. Harnage, Sr. National President, American Federation of Government Employees, AFL-CIO before the Subcommittee on Technology and Procurement Policy, House Government Reform Committee on the Service Acquisition Reform Act, November 1, 2001, viewed at http://afge.org/Index.cfm?Page=CongressionalTestimony&File=1_110101.htm&PR on October 26, 2004; Angela B. Styles, Share-in-Savings Contracting: The Big Lie, 40 PROCUREMENT LAWYER 1, 1 (Fall 2004); Letter to the House Government Reform Committee urging them to oppose Share-in-Savings and the Digital Tech Corps Act, Danielle Brian, October 11, 2002, page 2, viewed at <http://pogo.org/p/contracts/co-021001-reform.html> on Sept 30, 2004;

I. SHARE-IN-SAVINGS; A Look at the Proposed Regulations

*The Bush administration is encouraging cash strapped government agencies to fund expensive technology upgrades essentially by handing out IOUs: Consulting companies agree to build computer systems now, and the agencies promise to pay later with the money they save by using modern systems. If an agency does not save any money, it does not pay. It is a good deal for government and a risky, but potentially lucrative, bet for technology companies.*⁵

Share-in-savings contracts were initially authorized for use in Fiscal Year 2004, but the implementing regulations have not yet been approved, and no contracts were awarded in 2004. An initial revision was proposed on October 1, 2003.⁶ Based on industry comments, a second set of proposed regulations was published in July 2004.⁷ The proposed changes to the FAR will incorporate share-in-savings contracts into Part 39 – Acquisition of Information Technology, a new sub-part 39.3 – Share-in-Savings Contracting.⁸ As presently authorized by the E-Government Act and proposed for incorporation into the FAR, share-in-savings contracts only pertain to information technology; however, Congressional and industry proponents are encouraging its use be expanded to include a much broader spectrum of procurements.⁹ I will limit my discussion on share-in-savings to the currently authorized area of information technology and the proposed regulations.

The concept entails paying the contractor from savings the government achieves as a result of the contractor providing a solution “for improving an agency’s mission-related or administrative processes for accelerating the achievement of agency missions.”¹⁰ In other words the contractor will make a current government process more efficient and less expensive, and it will be paid from the savings its improvements generate. In order to enter into share-in-savings contract, “[t]here must be a net difference between the current and projected baselines to result in a benefit pool large enough to ensure reasonable savings to the Government and to cover contractor costs and incentives commensurate with risk.”¹¹ One of the controversies surrounding the use of

⁵ Anitha Reddy, *Sharing Savings, and Risk: Special Contracts Appeal to Cash-Strapped Agencies*, WASH POST, Feb 16, 2004, at E01, available at <http://washingtonpost.com/ac2/wp-dyn/A44259-2004Feb15?language=printer> on Sept 30, 2004.

⁶ Federal Acquisition Regulation; Share-in-Savings Contracting; Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 56,613 (Oct. 1, 2003).

⁷ Federal Acquisition Regulation; Share-in-Savings Contracting; Proposed Rule, 69 Fed. Reg. 40,514 (Jul. 2, 2004)(to be codified at 48 C.F.R. pt. 16 and 39).

⁸ *Id.*

⁹ Michael Hardy, *Rule Seeks to Jump-start Share-in-savings Buys*, FEDERAL COMPUTER WEEK, Jul. 12, 2004, <http://www.fcw.com>.

¹⁰ 48 CFR 39.301.

¹¹ 48 CFR 39.306-2(d).

share-in-savings contracts is how both the current and projected baselines are defined and what the definitions really include.¹²

The current baseline is defined as: “the estimated total cost to the Government to implement an information technology project through other than a Share-in-Savings contract. It includes all costs of ownership, including procurement, management, operation, maintenance, and administration.”¹³ Curiously, the proposed regulations do not link the current baseline to an existing information technology project, which leaves open the possibility of using the estimated costs associated with a proposed new project under an other than share-in-savings contract that has not yet been procured. That does not appear to have been an intended consequence when the concept was proposed and will not be addressed in this discussion.

The definition for the projected baseline is, on first glance, perhaps even more nebulous as it is defined as “the estimated total cost to the Government to implement an information technology project through a Share-in-Savings contract.”¹⁴ Unlike the definition of the current baseline, the definition of the projected baseline does not include a list of cost elements. However, under the “Development of the Business Case” section, FAR 39.306-2, the elements of the projected baseline are identified as the same elements as those of the current baseline, but with the added element for both of “[t]he costs associated with the Government personnel assigned to the project.”¹⁵ With the combining of information, we have a consistent definition for both baselines that incorporates the same elements of cost for both.

Comparing the existing total of the baseline costs being incurred under existing contracts to those described in a contractor’s proposal is relatively simple. The problem lies in the accuracy of each estimate. GSA has developed business case tools that are published on its web site to facilitate the development of the current baseline.¹⁶ However, until the government gains experience with their use as share-in-savings contracts are awarded and performed, no one will know how accurate they are in developing the current baseline costs. Additionally, there is no guarantee that the contractor’s estimate or the government’s evaluation of the projected baseline estimate will match execution. What happens if the contractor and the government agree on the baselines, the contractor implements its proposed improvements, but there are no savings? Proponents argue that the risk is all on the contractor to support his proposal through performance and without any actual savings, it does not get paid.¹⁷ Opponents

¹² *Business as Unusual: Moving Targets & Shifting Risks*, Professional Services Council, 2004 PSC Procurement Policy Survey, 2004 at 11.

¹³ 48 CFR 39.301.

¹⁴ 48 CFR 39.301.

¹⁵ 48 CFR 39.306-3(c)(2).

¹⁶ See GSA’s web site at <http://www.gsa.gov/share-in-savings>.

¹⁷ Reddy, *supra* note 5.

argue that regardless of whether or not there are any savings, the contractor will get paid and the government is a loser.¹⁸ Who is right?

At first glance it appears that the proponents are correct. The regulations state the “[s]hare-in-savings contracts shall include a clause containing a quantifiable baseline that is to be the basis upon which a saving share ratio is established to govern the amount of payment a contractor is to receive under a contract.”¹⁹ Although not clearly specified, what is apparently meant by “a quantifiable baseline” is the definition of a “benefit pool”: “Savings realized based on the net difference between the current baseline costs and the projected (new) baseline costs...”²⁰ If that is the case, then the contractor can only invoice for the savings, i.e., if there is a difference between the two baselines. But the issue faces a further complication when we consider the FAR definition of savings.

Under a share-in-savings contract savings may be monetary – the difference between the current and projected baseline costs for procurement, management, operation, maintenance, administration and the costs of government personnel assigned to the program or project – but they can also include “savings in time or other quantifiable benefits realized by the agency, including enhanced revenue.”²¹ This implies that the definition of “all costs of ownership” includes more than just procurement, management, operation, maintenance, administration, and personnel costs. However, there is no prescribed method for identifying or quantifying the benefits of time savings or other unidentified, but quantifiable, benefits.

We do not know what those savings are; they are left to the identification and definition of the contractor and the contracting officer. However, they have to be “quantifiable” in dollars and cents. And quantifying them is where the opponents contend a major problem lies.²² Not only do the contractor and contracting officer quantify the savings during the contract formation process, but they are also responsible for quantifying them once the contract is executed to determine the level of payment the contractor will receive. This has the potential to create circumstances where there might not actually be any real dollar savings achieved from which to pay the contractor. If there are not, that could mean that the new project or program actually costs more in real dollars than the current project or program. The concern is that the contracting officer and the contractor will both want the contract to be awarded and may artificially create and quantify non-cost related benefits. With no real dollar savings, and payments required to be made from cost savings that include the non-cost related benefits, agencies may find themselves without adequate funding to continue the project and be forced to cancel it. Cancellation costs could prove to be an even bigger problem discussed later. But the question of whether the contractor can get paid if there are no real dollar savings,

¹⁸ Angela B. Styles, *Share-in-Savings Contracting: The Big Lie*, 40 *PROCUREMENT LAWYER* 1, 16 (Fall 2004).

¹⁹ 48 CFR 39.309(a)(1).

²⁰ 48 CFR 30.301.

²¹ 48 C.F.R. 39.306-2(c)(2).

²² Styles, *supra* note 18, at 16.

but only “quantifiable” savings from time savings or other quantifiable benefits is not clear.

A key argument of proponents is that share-in-savings contracts allow the government to improve processes related to programs and projects without having to fund the project up-front.²³ They argue that this is especially important in a time of shrinking budgets and rising deficits.²⁴ Opponents argue that there is really a significant cost increase under a share-in-savings contract that the government and the taxpayer should not have to bear.²⁵ Their argument centers on the much larger financing costs a private contractor will have to pay then the government would have to pay, as well as the much higher total payments that will be made to the contractor than would be required if a non-share-in-savings contract had been used.²⁶

While contractor financing will be higher in the short run, there is a level of government financing which could result in similarly higher interest rates being paid by the government. The cost of financing is typically proportional to the willingness of lenders to accept the risk that the borrowers might default, and in the government’s case, the value of the dollar against foreign currencies. At some level, government financing for new programs and projects will have an adverse impact on the national deficit as spending will increase at an even greater rate than tax revenue. It follows logically that as the deficit increases, the value of the dollar will decrease and the interest rate will increase. Of course, the government could always choose to increase taxes to cover the additional expenditures or print more money. However, raising taxes is seldom a popular solution and printing more money is tantamount to creating unacceptable levels of inflation that would be political suicide and adversely affect the value of the dollar.

Another issue that opponents raised concerns the potential duration of the share-in-savings contract which directly affects the price paid by the government to the contractor. Their concern reflects their fear that longer the contract lives, the greater the increase in the cost of the program or project.²⁷ The current version of the implementing regulations limits the share-in-savings contract to a period of not more than five years,²⁸ or if it meets certain specified criteria, ten years.²⁹ Obviously the longer the contractor receives payments, even though they are from savings generated by the contractor’s performance, the more expensive the share-in-savings contract becomes. But the corollary to the increased costs is the increased savings that the government enjoys.

²³ Jason Miller, *Councils propose share-in-savings regulations*, Newsbytes, POST-NEWSWEEK BUSINESS INFORMATION, INC., July 1, 2004, at <http://www.gcn.com>.

²⁴ The Council for Excellence in Government and the Federal Technology Service by Acquisition Solutions, Inc. and Mary Beaulieu, *Share in Savings Summary of Interviews and Comparison to Federal Agencies’ Missions*, Dec. 22, 2000, at 29.

²⁵ Styles, *supra* note 18, at 14.

²⁶ *Id.* At 16.

²⁷ *Id.* At 14.

²⁸ 48 CFR 39.305(a).

²⁹ 48 CFR 39.305(b)(1).

A better question might be: how long before the program or project improvement costs would be included in the agency's budget appropriation if share-in-savings contracts were not available? A corollary to that question is how much will the price increase by waiting several years to award the contract? The answers to both questions would be highly speculative. Agencies have to make trade offs between programs and projects when creating their budgets. As more and more essential services are added to their missions, the ability to fund improvement projects through a smaller or similar size budget becomes less and less. As the cost of homeland security and national defense increases, there is less and less of the federal budget available for new programs and projects, particularly improvement projects, and the potential for agencies to have their budgets decreased become greater. The share-in-savings proponents believe that this type of contracting is the solution to budget shortfalls that now exist and may get worse over time.³⁰ The incentive to accept contractor financing and not wait for budget approval and funding is only increased by the uncertainty of future costs.

While the government's savings are not completely overlooked by the share-in-savings opponents, they concentrate their comments on the what-if costs that the government would have paid if it had financed the improvement itself rather than having used private financing provided by the contractor.³¹ But that issue is predicated on Congress being willing to raise the national deficit through a deficit budget in order to fund projects and programs for which the current revenues will not cover. This seems rather problematic and in all probability leaves the agencies in the same position they were in before the advent of the share-in-savings contract – insufficient funding to improve their efficiency and effectiveness to meet their mission. Congress, when it passed the E-Government Act, apparently thought agencies should be given the opportunity to improve their efficiency and effectiveness without having to increase taxes or the national deficit. But Congress was unsure enough of the unforeseen costs of such contracts that they limited the number that could be awarded³² and the period of time during which they could be awarded.³³

Opponents of the concept have voiced other congressional concerns: specifically, that share-in-savings contracting bypasses the constitutional requirement that Congress approve all appropriations.³⁴ That issue actually concerns the product of share-in-savings contracts – the savings. Under the proposed regulations, agencies may retain their portion of the savings not attributable to a decrease in the number of civilian employees and utilize them for future information technology procurements without further action by the Congress.³⁵ However, the funds remain in the same appropriation or fund to which they were originally appropriated and must only be used for information

³⁰ The Council for Excellence in Government and the Federal Technology Service by Acquisition Solutions, Inc. and Mary Beaulieu, *Share in Savings Summary of Interviews and Comparison to Federal Agencies' Missions*, Dec. 22, 2000, at 29.

³¹ Styles, *supra* note 18, at 16.

³² 48 CFR 39.307-2(b)(2)

³³ 48 CFR 39.305.

³⁴ Styles, *supra* note 18, at 17.

³⁵ 48 CFR 39.306-6.

technology.³⁶ That may mean that the specific project that they will be used for will not be approved by the Congress. However, it does not mean that the agency will be able to spend them cavalierly on any information technology program or project that they so desire.

These future programs or projects are not exempt from the acquisition planning requirements of FAR 7.1 or the acquisition strategy requirements of FAR 39.101(b).³⁷ And if they are considered major information technology acquisitions, they are still subject to OMB Circular A-11, Part 7, "Planning, budgeting, Acquisitions and Management of Capital Assets."³⁸ The agencies will gain some additional flexibility in funding new programs or projects quicker as a result of the funds being already available and not having to wait for new Congressional appropriations, but that does not mean that the Congress did not appropriate the funds for the type of project that they will be used for, i.e., information technology. While technically this objection has some merit, agencies still have to be sensitive to Congress' concerns as it could effectively cancel the program or project in the following fiscal year by not allowing any funds to be used for any congressionally unapproved program or project.³⁹ Obviously there is a cost associated with that cancellation, but most, if not all, of the cancellation costs will be covered by the next year's savings on the contract(s) that generated the savings used to execute the cancelled contract. While it is always a concern when projects or programs are cancelled and funds unnecessarily expended, the problem does not appear to be as significant as the opponents believe.

The broader issue of unfunded termination or cancellation costs is perhaps the strongest argument against the use of share-in-savings contracts.⁴⁰ Under normal circumstances, the costs associated with cancellations or terminations are covered by the contract price at time of execution. Under share-in-savings contracts, the head of an agency may authorize their award without sufficient funds to cover these costs.⁴¹ But even here there are limits to that authority. The termination or cancellation costs can only be unfunded if "[t]he amount of unfunded liability does not exceed the lesser of 25 percent of the estimated costs of a cancellation or termination, or \$5,000,000."⁴² Arguably \$5,000,000 is not an insignificant sum, and as 10 share-in-savings contracts are currently authorized,⁴³ that could mean as much as \$50,000,000 in unfunded contract costs in Fiscal Year 2005. However, funds must be available to cover contractual payments during the first year⁴⁴ and termination and cancellation costs "may be paid out of – (1) Appropriations available for the performance of the contract; (2) Appropriations available for acquisition of the information technology procured under the contract, and

³⁶ 48 CFR 39.306-6(b).

³⁷ 48 CFR 39.304(b).

³⁸ 48 CFR 39.304(c).

³⁹ *Share-in-savings Contracts: An Update*, 18 THE NASH & CIBINIC REPORT 43 (Oct. 2004).

⁴⁰ Styles, *supra* note 18, at 17.

⁴¹ 48 CFR 39.307-2(b).

⁴² 48 CFR 39.307-2(b)(iii)(A).

⁴³ 48 CFR 39.307-2(b)(2).

⁴⁴ 48 CFR 39.307-2(b)(1)(ii).

not otherwise obligated; or (3) Funds subsequently appropriated for payments of costs of cancellation or termination.”⁴⁵

Only in the worse case scenario would the unfunded liability for cancellation or termination costs reach \$50,000,000. All ten authorized contracts would have to be awarded and either terminated or cancelled. Each award would have to have the maximum unfunded cancellation or termination liability approved by the head of each authorizing contracting agency. There would have to be no savings from any of share-in-savings contracts within the agency, and the agency would have had to have obligated all of its other information technology appropriations. It’s very doubtful that all of these conditions would ever be met. The political fall-out from such failure would, in all probability, end the career of each head of a contract agency whose contract was terminated or cancelled under such conditions. These individuals tend to be conservative in their approach to new contract types and, without sufficient pressure from the White House, they will tend to minimize their exposure to negative publicity. Particularly in light of the President’s statement to agencies that they must ensure that “these contracts are operated according to sound fiscal policy and limit authorized waivers for funding of potential termination costs to appropriate circumstances, so as to minimize the financial risk to the Government,”⁴⁶ it is extremely doubtful that heads of agencies would be willing to accept that risk. So although the theoretical potential for the worse case scenario exists, if Las Vegas were to offer odds for it happening, they would probably approximate those for the NBA team with the worse won-lost percentage halfway through the season winning the championship. But then the implications are no worse than those for a program or project that fails to live up to expectations.

The Navy-Marine Corps Intranet program has not met expectations and both the contractor and the government have lost.⁴⁷ That does not mean there was collusion between the contractor and the government or that there was an abuse of discretion or that the type of contract was responsible for the losses. It means there was a programmatic failure to accurately estimate the requirement and a contractor failure to accurately estimate the costs. No matter how much planning is done or how good the planning is, failures will happen. There will be a share-in-savings contract that will fail; we have to accept that fact. The key is to minimize the potential for failure and ensure the risk is allocated to the proper party. Under the Navy-Marine Corps Intranet contract, the contractor is projected to lose hundreds of millions of dollars and the government still does not have the system it desired.⁴⁸ Here the risk is allocated to the contractor who accepted that risk when it accepted the contract award. Had the government’s risk awarded a design specification for the contract, the government would have assumed the risk and would have had to pay the higher price.⁴⁹

⁴⁵ 48 CFR 39.307-1

⁴⁶ Press Release, President George W. Bush, President Signs E-Government Act, Dec. 17, 2002 at <http://www.whitehouse.gov/news/releases/2002/12/20021217-5.html>.

⁴⁷ Reddy, *supra* note 5.

⁴⁸ *Id.*

⁴⁹ Reddy, *supra* note 5.

Another question that unfunded termination or cancellation costs raised involves the potential for an Anti-Deficiency Act violation. By amending Title III of the Federal Property Act, as codified in 41 U.S.C. § 266a(b)(3), Congress clarified that an agency can enter into a contract without funds, “made specifically available for the full costs of cancellation or termination of the contract.”⁵⁰ As such, any lingering doubts about violation of the Anti-Deficiency Act were satisfactorily addressed.”⁵¹

Opponents have pointed to the language in FAR 39.307-1(a) which requires that the government negotiate the amount payable in the event of cancellation or termination to jump to the conclusion that the contract might be executed without agreement on the amount of the government’s termination and cancellation liability. However that eventuality is precluded by the requirement to include a clause “that describes, at a minimum, the cancellation amounts, the basis for those amounts, and the periods during which the Government may cancel the contract. The clause shall contain the amount that the Contractor and the Government have agreed will be the maximum amount of Government liability under the contract in the event of cancellation.”⁵² Similarly, any termination for convenience clause “shall contain the amount that the contractor and Government have agreed will be the maximum amount of Government liability under the contract in the event of termination for convenience.”⁵³ And if there is a termination for default, the contractor absorbs the cost of failure.

The argument continues with the question, what happens if the Government and the contractor do not agree on maximum liability before contract award? Based on the language of the regulation, the requirements for entering into the contract would not have been met, the contracting officer will have exceeded his authority, and the liability, if any, will have to be determined by the courts. One of the contractor’s arguments will be that it provided equipment, and perhaps services, that were requested, accepted and utilized by the government, therefore it should be paid the reasonable price for what it provided. But that is no different than any other contract. So while the opponents argue that the contractor will get paid for whatever he delivers regardless of whether the contract is terminated or there are no savings, if the contract is structured according to the regulations that cost will already be built into the cancellation and termination clauses and does not represent an increased risk to the government.

Obviously there are unanswered questions concerning the viability of share-in-savings contracts. However, they are not sufficient to terminate the program before its merits have been tested and the regulations revised as necessary to address actual problems that develop. Value engineering is a long standing program that was once a new program under which contractors shared in savings they generated for the government. It has been a very successful program generating considerable savings for the government.

⁵⁰ Kenneth J. Buck, *Share-in-Savings as a Performance-Based Contracting Tool*, 39 S.P.G. PROCUREMENT LAW 3 (Spring 2004).

⁵¹ *Id.*

⁵² 48 CFR 39.309(b).

⁵³ 48 CFR 39.309(c).

II. VALUE ENGINEERING: A Comparison to Share-in-Savings

Value engineering has been an accepted method for the government and contractors to share savings since World War II.⁵⁴ The regulations regarding value engineering are very detailed and carefully explained in various manuals including DOD publication 4245.8H.⁵⁵ Share-in-savings contracting, on the other hand, as a separately identifiable contract type, is still an evolving concept with untested definitions and procedures. The basic concepts whereby both the government and the contractor share the savings provided by the contractor are identical, however the actual implementation may not be identically defined.

Value engineering is a technique whereby contractors offer alternative methods for performing tasks more economically with regards to acquisition, operation, or supports costs without impairing essential functions or characteristics and providing the contractor with the opportunity to share in any resulting savings from their accepted Value Engineering Change Proposal (VECP).⁵⁶ In a voluntary value engineering program, the contractor absorbs all costs associated with the development of the VECP, but is reimbursed for those costs if the proposal is accepted.⁵⁷ On the other hand the government may mandate that the contractor participate in a value engineering program and pay for their program in accordance with the scope and level of effort dictated by the contract without regard to whether any VECPs are generated or accepted.⁵⁸ VECPs are submitted by the incumbent contractor on an instant contract, although the proposal may affect concurrent and future contracts awarded to other contractors.

The definition of value engineering is not that much different than the definition of share-in-savings. As discussed earlier, share-in-savings contracting is a procurement method whereby a contractor provides "solutions for improving the agency's mission-related or administrative processes or accelerating the achievement of agency missions,"⁵⁹ and where it is paid "a portion of the quantifiable saving derived by the agency from..."⁶⁰ the improvements in the processes or acceleration of the mission.⁶¹ As conceived, a share-in-savings contract will not involve the incumbent contractor(s), but is a competitive contract⁶² awarded on best value basis⁶³ under a performance based contract⁶⁴ to a third party contractor. No mention is made in the proposed regulations for directly funding the contractor's development or implementation costs. That difference would appear to make share-in-savings contracts more attractive to the government.

⁵⁴ DOD Value Engineering Program, *available at* <http://ve.ida.org/vc/ve.html#1>

⁵⁵ Value Engineering, DOD 4245.8-H (Mar. 1986)

⁵⁶ 48 CFR 48.101

⁵⁷ *Id.*

⁵⁸ FAR 48.101

⁵⁹ 48 CFR 39.301

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 48 C.F.R. 39.306-4(a).

⁶³ 48 C.F.R. 39.306-5.

⁶⁴ 48 C.F.R. 39.306-3.

Under either a VECP or a share-in-savings contract, the contractor shares the savings that its proposal actually provides to the government. Under value engineering, the FAR term for savings, acquisition savings, is defined as those “savings resulting from the application of a value engineering change proposal...”⁶⁵ While under a share-in-savings contract, the FAR term for savings, benefit pool, is defined as the “savings realized based on the net difference between the current baseline costs and the projected (new) baseline costs derived from the implementation of the new project or program.”⁶⁶ Both require the contractor to do something that reduces the cost to the government, and that reduction is defined as a savings. But the before and after costs that are used to calculate the savings are not arrived at in the same manner.

There are three distinct types of savings under a VECP. First, savings can occur under the instant contract and are measured by multiplying the number of units affected by the VECP under the instant contract times the unit cost reduction, minus any allowable development and implementation costs.⁶⁷ Second, savings can occur under concurrent contracts where there are net cost reductions under contracts other than the instant contract “that are definitized and ongoing at the time the VECP is accepted.”⁶⁸ The third savings in which the contractor may share are those from future contracts that are defined as “the product of the future [unit] cost reduction multiplied by the number of future contract units in the sharing base.”⁶⁹

Savings under share-in-savings contracts are limited to only those derived from the performance of the contemplated contract. The savings are calculated by subtracting the projected baseline costs from the current baseline costs.⁷⁰ There is no discussion in the proposed share-in-savings regulations to directly reimburse the contractor for its development costs or the price of the equipment it provides. By application of its definitions, VECPs are much less of a risk to the contractor than share-in-savings contracts since they can be paid for their development costs, and yet there may be a potential for the contractor to receive a larger payment under a VECP than a share-in-savings contract. Normally we expect lower risk to the contractor to be associated with lower prices.

If we consider only the current contract savings under a VECP and compare those to the savings under a share-in-savings contract, the VECP has the potential to produce a larger benefit for the contractor by reimbursing it for the cost of developing the VECP. Whereas under the share-in-savings contract, the contractor is not directly reimbursed for proposal development costs and the government shares in the additional cost savings that would cover them under a VECP. The added benefit to the contractor has even greater potential if it can successfully negotiate inclusion of concurrent and future contracts savings. Neither of these types of savings is addressed under share-in-savings contracts.

⁶⁵ 48 C.F.R. 39.301

⁶⁶ 18 CFR 39.301

⁶⁷ 48 CFR 48.001

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 48 CFR 39.301

In a share-in-savings environment, the government would have to request a new proposal or the contractor have to submit an unsolicited proposal to cover other similar contracts.

So why do the share-in-savings opponents take such offense to the level of benefit that might flow to a share-in-savings contractor but not a VECP contractor? One of arguments of the share-in-savings opponents centers on what happens to the government's share of the savings generated by a share-in-savings contract. FAR 39.306-6 allows agencies to retain any savings in excess of those paid to the contractor and, without further appropriation by the Congress, to retain those savings until expended, i.e., they are not subject to Congressional control but can be spent without identifying the intended project to Congress. Opponents contend that these actions effectively violate "the single most important constitutional curb on presidential power – that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress."⁷¹ While the real issue here is not whether the money was appropriated, but rather what it was appropriated for specifically.

Under a VECP, the savings are funds that are not obligated and spent. Unlike the savings in share-in-savings contracts, they remain with the agency and the program for which they were appropriated only for the life of the appropriation from which they were derived, to be used for procurements involving that particular program unless they are specifically earmarked for particular project.⁷² This differs from the share-in-savings program by the limiting the length of time the agency has to commit the funds before they revert back to the treasury. Under a typical VECP, the agency would only have one year or less to commit the funds before they revert back to the treasury.⁷³ Commitment of the VECP savings is limited to the particular program from which they were derived, effectively the same limitation applied to the share-in-savings program where savings can only be used for information technology.

The argument is made by share-in-savings opponents that Congress no longer has control over the share-in-savings funds because they did not dictate or approve the specific project for which they will be used. However, under a VECP, they have no more control, and perhaps even less.

If we consider a scenario where an agency enters into several share-in-savings contracts over the course of several years, it could theoretically combine all the saved funds into one new large project that Congress was never given the opportunity to approve. But the reality is that there is a limit on what types of projects the funds can be used for.

Interestingly, programs supported by the savings generated by share-in-savings contract will be financed by the government rather than depending on contractor funding.

⁷¹ Styles, note 18, at 1, *citing* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

⁷² Value Engineering, DOD 4245.8-H, Cpt. 1, sec. Benefits of VE (Mar. 17, 1986)

⁷³ See GAO-04-261SP, Appropriations Law—Vol. I, Cpt. 5, at 5-3 (Jan. 2004) (An appropriation is typically only made available for a fixed period of time during which funds may be obligated. Where the appropriation is for one year, the funds are only available during that one year.).

This means that the imperfect procurement method savings may allow the agency to engage in a more perfect procurement method for future procurements.

But what is so different from the VEC? Theoretically, a program within an agency could engage in multiple VECs which would allow them to combine their savings to make a future procurement that fell within the guidelines of their approved program projects,⁷⁴ not unlike the share-in-savings scenario where savings could be combined but commitments limited to procurements for information technology. Information technology or the same program – there may be a difference, but it appears to be one of perception.

III. CONCLUSION

Each agency that is using VECs has promulgated manuals to describe how the program will work within that agency. The manuals are very detailed and address methods for dealing with problems that have developed over the course of three decades. This program has saved the government billions of dollars and is still widely used and agencies are being encouraged to expand its use. Share-in-savings has the potential to be as effective a tool for saving the government money as VECs. There will be a learning curve, but the rewards are such that we must be willing to accept the risks, to mitigate them as best as they can be, and provide more detailed guidance as lessons are learned.

⁷⁴ Value Engineering, DOD 4245.8-H, Cpt. 1, Benefits of VE (Mar. 1986).

AGENCY-LEVEL BID PROTEST REFORM: TIME FOR A LITTLE *LESS* EFFICIENCY?

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I. INTRODUCTION

The agency-level bid protest mechanism of FAR 33.103¹ has been a formal part of the government procurement landscape for about eight years now. In large part, the forum has delivered the benefits its architects envisioned. Bid protests to agencies are inexpensive, procedurally simple, and expeditiously resolved. The option's informal and non-adversarial character, which distinguishes it from the other protest fora,² has provided incentive for agencies and contractors to openly exchange information and flexibly resolve problems.³ And yet, for all of its apparent advantages, the agency-level protest option has seen declining use in recent years⁴ and still sits squarely in the shadow of the Government Accountability Office's (GAO) bid protest forum.

¹ 48 C.F.R. (Federal Acquisition Regulation (FAR)) § 33.103 [hereinafter FAR].

² Government contractors may also bring their protests to the Government Accountability Office (GAO), whose jurisdictional statute is 31 U.S.C. § 3551 et. seq., or the United States Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. § 1491(b).

³ By way of example, the Army Material Command (AMC) bid protest program takes "corrective action" in 15% of agency-level bid protest cases – although very few of these cases result in what might be considered sustained protests. Interview with Vera Meza, Chief, Protest/Litigation Branch, Office of Command Counsel, AMC, at Fort Belvoir, Va. (Nov. 8, 2004) [hereinafter Meza Interview]. The Office of Command Counsel is the focal point for bid protests in AMC.

⁴ Few agencies track their agency-level bid protests statistics. AMC and the US Army Corps of Engineers (USACE) are among the exceptions. The average number of protests filed at AMC has declined from 68 per year during the period from FY1992 to FY 1997 to 29 per year for the period since FY1997. The number of GAO and agency-level protests filed "against" AMC and USACE in recent years is as follows:

FY	AMC		USACE	
	GAO	Agency	GAO	Agency
1999	73	23	80	77
2000	75	28	69	62
2001	86	42	59	56
2002	57	21	55	56
2003	49	34	59	59
2004	69	20	61	38

Meza interview, *supra* note 3. Telephonic interview with Karen D. Thornton, Assistant Counsel for Procurement, HQ, US Army Corps of Engineers (Dec. 9, 2004) [hereinafter Thornton Interview]. The decline in numbers may indicate contractor dissatisfaction with the forum or may just as well reflect the overall trend of decreased litigation in both the bid protest and contract claims venues. For example, bid protest filings at the GAO declined from a high of 3,377 in 1993 to 1,352 in 2003. Similarly, the number of appeals docketed at the various boards of contract appeals have declined dramatically since the early 1990s. The Armed Services Board of Contract Appeals saw 2,218 appeals docketed in 1990 and only 435 in 2002. See Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 Pub. Cont. L.J. 505 at 531 (Spring 2004).

From the time of the forum's inception, observers have maintained it would be more attractive and, hence, see greater use, if the playing field were tilted a bit more toward contractors⁵ – for example, by guaranteeing contractors a “stay” of award or performance of protested procurements until their protests are resolved, whether at agency level or in subsequent proceedings at the GAO;⁶ by designating high-level agency personnel as protest decision-makers in order to increase the likelihood of independence in decision-making; or by providing some form of limited discovery.⁷ In practice, however, many, if not most, agencies have developed programs that appear to strike a workable balance between efficiency (high speed, low cost) and fairness (just decisions and meaningful relief)⁸ such that contractors are annually bringing hundreds of protests to them – suggesting that the system is already adequately inviting.

So where does that leave us? Measured against the efficiency-based goal of reducing the number of litigated protests, the agency-level bid protest system has undoubtedly achieved positive results – it *is* working. The more decisive questions, which this Article examines, are whether the system is working as well as it should and whether the changes to the system proposed by government procurement reformers on Capitol Hill are appropriately tailored to bring about true and lasting improvement.⁹ The discussion below proceeds in three parts. Part II provides background on the agency-level bid protest forum. Part III discusses the agency-level bid protest procedures set out in FAR 33.103 as well as some of the supplemental procedures adopted by various

⁵ See generally *Bid Protests: FAR Rule on Agency-Level Protests Provides Little Guidance Beyond Executive Order*, 8/5/96 Fed. Cont. Daily (BNA) (members of private bar highly critical of the interim version of FAR 33.103 for its failure to, among other things, require agencies to vest bid protest decision-making authority in agency officials insulated from the contracting officer or provide a mechanism for some form of discovery). The private bar's concerns remain largely unchanged today. Attorneys practicing in the government contracts arena still express reservations about the agency-level system's fairness to contractors – with the result that they recommend bringing only the most clear cut protests to the agencies for resolution. Interview with John Pachter and Jonathan Shaffer, Smith Pachter McWhorter & Allen PLC, at Vienna, Va. (Jan. 4, 2005) [hereinafter Pachter/Shaffer Interview].

⁶ See *infra* notes 35-44 and accompanying text for a discussion of the current “stay” rules under FAR 33.103(f)(4).

⁷ In 1995, Steven Kelman, then-Administrator of the Office of Federal Procurement Policy, asked the Federal Bar Association's Government Contracts Practice Area group to draft a proposed FAR rule on agency-level protest procedures. The group's draft included a mechanism for limited discovery, providing three alternatives: an agency report, a meeting of the parties, and the provision of documents. See Melanie I. Dooley, *Bid Protests: Controversy Surrounds Draft FAR Rule on Agency-Level Protest Procedures*, 65 Fed. Cont. Rep. (BNA) 6 d3 (February 12, 1996). This proposal was ultimately not adopted.

⁸ For example, AMC resolves protests in an average of 17 working days and sees very few of its decisions “appealed” to the other protest fora – arguably indicating that its protest decision makers are making sound judgment calls. Of the 633 decisions in agency-level protests at AMC between 1991 and 2004, only 57 have been “appealed” and only 4 of those protests have been sustained. Meza Interview, *supra* note 3. The USACE program has a similar record. In the past 5 years, the GAO has “overturned” only a handful of the USACE's agency-level decisions. Thornton Interview, *supra* note 4.

⁹ In 2004, the House of Representatives Government Reform Committee considered the Acquisition System Improvement Act (ASIA), H.R. 4228, 108th Congress, 2nd Sess. §§ 104, 303N (2004). The bill included a provision aimed at reforming the agency-level bid protest system. See *infra* notes 74-80 and accompanying text for a discussion of the relevant ASIA language.

federal agencies.

Part IV discusses the current system's effectiveness and the expected viability of the proposed reforms. The Part concludes that although the agency-level forum falls short of its potential for reducing litigation and adversarialism in the bid protest arena, the proposed reforms fail to appreciate the true nature of the system's intrinsic trade-offs and, in the end, offer incomplete and potentially counterproductive solutions. The Part presents a critique of the specific legislative reform proposals and offers potential solutions that may serve to bring the agency-level bid protest forum closer to center stage in the bid protest arena.

II. SHORT HISTORY OF THE AGENCY-LEVEL BID PROTEST FORUM

Although the practice of contractors bringing their bid protests to contracting officers has longstanding precedent,¹⁰ the formal protest structure currently embodied in FAR 33.103 was "born" out of former-Vice President Al Gore's "Reinventing Government" initiative¹¹ during the Clinton Administration. In the late 1980s and early 1990s, many within government and industry expressed concerns that the bid protest arena was becoming too confrontational and expensive.¹² Anecdotal evidence from the time suggests that contracting officers, out of fear of protracted litigated protests, were cutting back their communications with contractors to avoid giving them potential "protest material," and shifting their focus away from getting the best products and services and toward building thoroughly-papered, "protest-proof" award files.¹³ The result was inefficiency, expense, and a stagnancy in the procurement system brought on primarily by the stunted exchanges of information.¹⁴

The first significant effort to establish an alternate, agency-based protest forum came from the Army Materiel Command (AMC). Concerned about its growing number of increasingly judicialized and costly protests at the existing protest fora, AMC initiated a one-year agency-level protest test program in mid-1991.¹⁵ At the end of the year, AMC

¹⁰ See e.g., John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts 1484 (3d ed. 1998).

¹¹ The initiative was formally known as the National Performance Review. Its stated purpose was to "move from red tape to results to create a government that works better and costs less."

¹² See generally the National Performance Review Report, "Reinventing Federal Procurement" (September 14, 1993), available at <http://govinfo.library.unt.edu/npr/library/nprpt/annrpt/sysrpt93/reinven.html>.

¹³ *Id.* ("People in industry and government believe that communication during the procurement process has been curtailed because of the fear that a statement by a government official will be misunderstood and will inadvertently trigger a protest. This causes inadequate debriefings of offerors, which in turn creates suspicion...."). Congress also sought to address the information sharing problem by beefing up the pre- and post-award debriefing requirements with passage of the Federal Acquisition Streamlining Act of 1994 and the Clinger-Cohen Act of 1996.

¹⁴ *Id.*

¹⁵ AMC's stated mission was to design a simple and flexible program that could resolve contractor concerns in a non-adversarial manner without the delays, increased administrative costs, and adverse mission impacts associated with litigation at the existing bid protest fora. Meza Interview, *supra* note 3.

personnel found they had resolved bid protests in an average of 16 working days (compared to the GAO's 76 day average)¹⁶ and had significantly reduced protestor costs.¹⁷ AMC made the program permanent in 1993.¹⁸ In 1995, the Office of Federal Procurement Policy (OFPP) identified the AMC protest program as one of the ten best practices in the federal government.¹⁹ Later that year, the Clinton Administration incorporated the agency-level bid protest mechanism into its "Reinvention" agenda when President Clinton issued an executive order on agency protests.²⁰ The order directed federal agencies to "establish administrative procedures for the resolution of protests... as an alternate to protests in fora outside of the procuring agencies."²¹

The language of the executive order largely reflected the philosophy of the AMC program, culling its principles of open communication, efficiency, flexibility, and fairness into the following key themes:

- All parties to the procurement must use their best efforts to resolve protests with agency contracting officers.
- Protest procedures should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests – including the use of alternative dispute resolution techniques.
- Decisional review of protests should be provided at a level above the contracting officer whose decision or action allegedly violated a statute or regulation and prejudiced the protestor.
- The award or performance of contracts should be held in abeyance while a timely-filed protest is pending before the agency, unless urgent and compelling reasons or the best interests of the Government would require immediate contract award or performance.²²

The order also directed that the FAR be amended to further the purposes of the order. FAR 33.103 was the result.²³

¹⁶ *Id.*

¹⁷ AMC estimated that it cost one-half as much or less to protest to AMC HQ as it did to protest to the GAO. See Dooley, *supra* note 7.

¹⁸ Meza Interview, *supra* note 3.

¹⁹ *Id.* The administration's general view of all types of protests, often enunciated by then-OFPP Administrator Steven Kelman, was that they were inefficient and "un-businesslike" in that they unduly delayed the procurement process, cost too much, and fostered adversarialism between contractors and their government customers. See generally Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (good discussion of Kelman's views). As such, it is not surprising the administration embraced the agency-level bid protest mechanism and its offered efficiencies.

²⁰ Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

²¹ *Id.*

²² *Id.*

²³ The Civilian Agency Acquisition Council and Defense Acquisitions Regulations Council issued the final rule on January 2, 1997. 62 Fed. Reg. 270 (1997).

III. AGENCY-LEVEL PROTEST FUNDAMENTALS

A. FAR 33.103

From a mechanical perspective, agency-level bid protests are brought in much the same manner as protests at the other protest fora. An agency-level protest must be filed in writing with the contracting officer or other designated official²⁴ by an interested party²⁵ and concern (1) the terms of a solicitation, (2) the cancellation of a solicitation, (3) the award or proposed award of a contract, or (4) the termination or cancellation of an award of a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.²⁶

In the post-filing setting, however, the agency-level forum's distinctives are quite apparent, informed primarily by the express purpose of its existence, i.e., that of providing a non-confrontational and economical alternative to the other protest fora (with the further aim of reducing the number of protests to those fora).²⁷ Consistent with this purpose, the language of FAR 33.103 is characterized by an emphasis on efficiency, open communication between the parties, and flexibility.

With efficiency as its primary objective, FAR 33.103 substitutes open and informal communication between the parties for the formal litigation-type practices that slow the protest process in the other protest fora. Four provisions specifically encourage or provide opportunity for inter-party communications. First, FAR 33.103(b) calls for "open and frank discussions" between the parties at the very earliest stage of the process – even before the protest is submitted. The FAR drafters understood that the agency-level system would work best, producing the desired efficiencies and equitable results, if the agencies and their contractors worked collaboratively to resolve problems from the very start. Second, FAR 33.103(c) recommends the use of alternative dispute resolution techniques and third-party neutrals to resolve protests. Again, the emphasis is on face-to-face, non-confrontational communication.²⁸ Third, FAR 33.103(g) provides that "to the extent permitted by law and regulation, the parties may exchange relevant information." This is the agency-level system's discovery equivalent – but its permissive language ("may") is telling. Standard litigation-style discovery practices, such as the use of depositions and interrogatories, are not a part of the agency-level system. However, agencies have broad leeway to share information in a manner and form appropriate to the

²⁴ FAR 33.103(d)(3).

²⁵ FAR 33.101 ("Interested party" is defined as "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract"). This mirrors the definition established through GAO opinions.

²⁶ FAR 33.101 (defining "protest").

²⁷ See FAR 33.103(d) ("the following [agency-level bid protest] procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency").

²⁸ In practice, many agencies have merged their agency-level bid protest programs into their larger, agency-wide alternative dispute resolution (ADR) programs.

circumstances of each protest. Fourth, FAR 33.103(h) requires that agencies provide contractors with well-reasoned, written explanations for their decisions.

While the open and informal exchange of information is a hallmark of the agency-level system (and the foundation of its efficiencies), from the perspective of the participants, the measure of the system's effectiveness is found in its capacity to balance the competing demands of efficiency and fairness. The time provided for processing agency-level protests is about one-third of the 100-day GAO decision requirement. As such, the system is built on a series of compromises between speed and thoroughness.

The agency-level rules of FAR 33.103 promote efficiency in several ways. First, the protest filing procedures are simple and straightforward. FAR 33.103(d)(2) succinctly and precisely spells out exactly what information the protesting contractor must present to the agency.²⁹ Second, the system does *not* incorporate formal discovery procedures which could otherwise drastically increase the time and expense of protests. Correspondingly, the forum does not follow standard litigation procedures – there are no pleadings, briefs, or motions. As a result, contractors can, and very often do, bring their protests without the assistance of legal counsel. Third, FAR 33.103(e) requires contractors to file their protests expeditiously. Protests based on apparent solicitation improprieties must be filed before bid opening or the closing date for the receipt of proposals.³⁰ In all other cases, contractors must file protests no later than 10 days after the basis for the protest is known or should have been known.³¹ Finally, FAR 33.103(g) sets a 35 day goal for protest resolution.³²

Two key elements of the agency-level system provide the due process protections that promote just outcomes. First, agencies are required to provide contractors an opportunity for an “independent review” of their protests at a “level above the contracting officer.”³³ Agencies must “designate the official(s) who are to conduct this independent review” (who may or may not be in the contracting officer's supervisory chain) and to see to it, “when practicable,” that these officials have not had previous involvement in the

²⁹ The provision states that protests shall include the following:

- (i) Name, address, and fax and telephone numbers of the protestor.
- (ii) Solicitation or contract number.
- (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor.
- (iv) Copies of relevant documents.
- (v) Request for a ruling by the agency.
- (vi) Statement as to the form of relief requested.
- (vii) All information establishing that the protestor is an interested party for the purpose of filing a protest.
- (viii) All information establishing the timeliness of the protest.

³⁰ FAR 33.103(e).

³¹ *Id.* As originally written, the rule gave protesters 14 days to file. This was reduced to 10 days in early 1997. The current filing rules closely resemble the GAO rules. *See generally* 4 C.F.R. § 21.1.

³² More specifically, the provision states that agencies shall “make their best efforts” to resolve protests within 35 days after the protest is filed.

³³ FAR 33.103(d)(4) (providing that “in accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer”).

procurement.³⁴ The obvious expectation is that a decision-maker coming to the protest with a blank slate and no personal stake in the outcome will be more likely to act independently and, as a result, more willing to decide against her own agency and provide a contractor with meaningful relief when such relief is warranted.

The second fairness-promoting element of the agency-level protest system is the “stay” and “stop work order” mandate of FAR 33.103(f).³⁵ Under this provision, a contractor who files a timely protest³⁶ is assured that the procurement he is protesting will be put on hold until his protest is resolved – preserving his right to a meaningful remedy.³⁷ The stay pertains to pre-award protests. It requires that the agency refrain from awarding the contract while the protest is pending.³⁸ The stop work order requirement arises in the context of post-award protests. It requires that the agency halt performance on the contract while the protest is pending.³⁹ Although the stay and stop work order are mandatory,⁴⁰ agencies can override them when there is a written determination, approved at a level above the contracting officer, that pressing on with contract award or performance is necessitated by either urgent and compelling reasons or the best interest of the Government.⁴¹ While clearly a necessary element of the system, the agency’s ability to override the stay or stop work order is a potentially powerful tool that could, if misused, upset the forum’s efficiency/fairness balance.⁴² However, agencies rarely use their override authority – probably because most protests are resolved quickly enough that they moot the override issue.⁴³ Pursuing an agency protest does not

³⁴ *Id.* For a good discussion on the topic of how agencies might go about selecting their independent reviewing officials, see Jeffrey I. Kessler, *Tips for Agencies in Establishing Protest Procedures, and Factors Potential Protestors Should Consider in Selecting a Forum*, *The Government Contractor*, February, 19, 1997, ¶ 81 at 3-4. The author notes that, “as a practical matter, officials one step above the CO [Contracting Officer] will normally be precluded from being the designated agency official.”

³⁵ FAR 33.103(f) does not actually use the terms “stay” and “stop work order.”

³⁶ In order to gain entitlement to a “stop work order,” a contractor must file a post-award protest within 10 days after contract award or within 5 days after a debriefing. This rule differs from the general timeliness rule of FAR 33.103(e) for the filing of protests. FAR 33.103(f)(3).

³⁷ The same holds true for bid protests filed with the GAO. The GAO bid protest regulations provide, in pertinent part, that “where a protest is filed with the GAO, the contracting agency may be required to withhold award and to suspend contract performance.” 4 CFR § 21.6. The regulation is grounded in 31 U.S.C. § 3553 (c) and (d), which provides a mandatory stay/stop work order once the agency has received notice of a protest filed with the GAO.

³⁸ FAR 33.103(f).

³⁹ *Id.*

⁴⁰ Government contracts attorneys in the private bar contend that, despite the FAR’s mandatory language, agencies are inconsistent in enforcing stays and stop work orders. Pachter/Shaffer Interview, *supra* note 5.

⁴¹ FAR 33.103(f)(1), (3). Stays/stop work orders issued in GAO cases are also subject to potential override. 31 U.S.C. § 3553(c) and (d) provide that the “head of the procuring authority” may authorize award or performance of the contract, notwithstanding the protest, upon a determination that compelling circumstances so warrant.

⁴² See Kessler, *supra* note 34 at 5 (“reality dictates that [contractors] will hesitate to use [the agency-level bid protest] forums if those forums routinely issue overrides prior to decisions on the merits”).

⁴³ This conclusion is based on the limited available data. AMC has never overridden a stay or stop work order stemming from a protest brought to the agency-level forum. Meza interview, *supra* note 3. It also comports with the data for GAO protests, which shows that agencies use their override authority relatively infrequently. In FY2002, agencies exercised their override authority in 71 cases (6 pre-award, and 65 post-

extend the time period in which a contractor may obtain a stay or stop work order at the GAO.⁴⁴

Finally, the agency-level protest forum's broad range of available remedies also promotes fair outcomes. FAR 33.102(b)(1) empowers agencies to take any action or grant any remedy that could be recommended by the Comptroller General if the protest were to be filed with the GAO. With this language, the FAR is referencing 4 C.F.R. § 21.8(b) which lists the recommendations, or combinations thereof, that the GAO may make regarding corrective action. The list of available remedies includes termination of the contract, re-competing the contract, or issuing a new solicitation.⁴⁵ Additionally, FAR 33.102(b)(2) provides that agencies may pay protest costs under the same standards that costs are payable to a prevailing party in a GAO protest.

B. Agency Procedures

As discussed above, Executive Order 12979 directed all federal agencies to establish procedures for the resolution of protests. By and large, FAR 33.103 serves that purpose. However, the FAR drafters deferred some discretion to agencies to regulate their own programs, and thus most agencies have issued supplemental regulations to address these discretionary matters – in varying degrees of depth and detail.⁴⁶ At the baseline, agencies have virtually unfettered discretion in determining what level of agency resources will be devoted to actually resolving protests. Although FAR 33.103 requires that agencies provide some in-house mechanism for resolving protests, it does not compel them to choose a mechanism that will actually attract contractor participation by fairly balancing efficiency and due process considerations.

Apart from the initial resource allocation issue, three significant matters are left to agency discretion. First, agencies are permitted to determine the structure of their agency-level forum's independent review mechanism.⁴⁷ As a starting point, all agencies allow contractors to file their protests directly with the contracting officers.⁴⁸ This accords with precedent of much longer-standing than Executive Order 12979 or FAR 33.103.⁴⁹ Overlaying that, agencies can structure the independent review mechanism in one of two ways. They may provide the independent review either as an alternative to

award) out of a total of 1,204 bid protests filed at GAO. The GAO ultimately sustained the underlying protests in only 8 of these cases. See GAO Bid Protest Annual Report to the Congress for FY2002, B-158766, January 29, 2003.

⁴⁴ FAR 33.103(f)(4). Agencies may, however, voluntarily extend the stay – although no agency has made this a regular practice.

⁴⁵ See 4 C.F.R. § 21.8(b).

⁴⁶ For example, the Department of State's supplement (48 C.F.R. § 633.103) comes in at just one sentence while the Department of Veterans Affairs supplement (48 C.F.R. § 833.103) covers multiple pages.

⁴⁷ See FAR 33.103(d)(4).

⁴⁸ See FAR 33.104(d)(3) (providing that "all protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests").

⁴⁹ See *supra* note 10.

bringing the protest to the contracting officer⁵⁰ or as an appeal of a contracting officer's decision.⁵¹

Second, agencies have broad discretion in determining who will fill the role of the independent protest decision authority.⁵² This is probably the most important determination agencies make relating to their agency-level programs. The perceived expertise, independence, and influence of an agency's decision-making authority may very well determine the success of its bid protest system.⁵³ Agencies have taken diverse approaches in assigning protest decision-making authority. At one end of the spectrum, the Air Force strongly encourages contractors to file their protests with the contracting officers and provides the independent review at the lowest level above the contracting officer where independence can be achieved.⁵⁴ At NASA, on the other hand, the independent review function is centralized at the relatively high level of the Office of the Assistant Administrator for Procurement.⁵⁵ A number of other agencies have placed their protest decision authority in the hands of the "Head of the Contracting Activity" (HCA).⁵⁶

⁵⁰ The National Aeronautics and Space Administration (NASA), Department of Justice, and Department of Labor are among the agencies that use this approach. See 48 C.F.R. §§ 1833.103(c) (NASA), 2833.103(d) (Justice), and 2933.103(a)(2) (Labor). Solicitations must advise potential bidders and offerors of the existence of the independent review mechanism and whether it is available as an alternative to consideration by the contracting officer or as an appeal of a contracting officer's decision. FAR 33.103(d)(4).

⁵¹ The Department of the Air Force uses this approach. See 48 C.F.R. § 5333.103-90(b).

⁵² See FAR 33.103(d)(4) ("Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be in the contracting officer's supervisory chain.").

⁵³ See Kessler, *supra* note 35 at 4.

Whoever acts as the protest decision authority must not only have experience in the field of government contracting ... and knowledge of the FAR, but also a knowledge of how the most recent case law interprets the FAR. The decisions of the protest decision authority will be reviewed by these forums, and under their legal standards. The protest decision authority must be aware that his decision is quasi-judicial in nature, and is not a management-type decision, which is the mode in which this person typically acts... No matter who is selected as the protest decision authority, the bottom line is this: that person must wield sufficient clout within the bureaucracy to be able to sustain a meritorious protest, an action which is likely to be resisted by the CO and his chain.

⁵⁴ See 48 C.F.R. § 5333.103-90(a) ("Offerors are encouraged to file at the lowest level to resolve the issues concerned." "When an agency protest is denied, an offeror may request an independent review at a level above the contracting officer.").

⁵⁵ See 48 C.F.R. § 1833.103(c). The Department of Veterans Affairs takes much the same approach, providing the independent review as an alternative to a protest to the contracting officer and identifying several high level offices as the protest decision authorities. See 48 C.F.R. § 833.103(a).

⁵⁶ FAR 2.101 defines the "Head of the Contracting Activity (HCA)" as "the official who has overall responsibility for managing the contracting activity." The Department of Energy and Department of Agriculture are among the agencies that have taken this approach. See 48 C.F.R. §§ 933.103(f) (Energy) and 433.103(a) (Agriculture).

Finally, agencies have discretion in identifying who within the agency will make ‘stay’ override determinations.⁵⁷ The agencies have taken various approaches; however, most have designated the HCA to fill this role.

C. *The Army Material Command (AMC) Program*

When it comes to agency-level programs, AMC probably offers the most well-developed system.⁵⁸ The AMC system’s primary distinction is that it provides the independent review mechanism through its Office of Command Counsel, with the Command Counsel and Deputy Command Counsel designated as the primary and alternate protest decision authorities.⁵⁹ This approach offers two significant benefits. First, the Office of Command Counsel attorneys who evaluate the protest cases are outside of the contracting officer’s chain of command – and, for that matter, outside of the acquisition workforce.⁶⁰ As such, they arguably come to each protest with no personal stake in its outcome or in the outcome’s reflection on the AMC acquisition system and workforce. Second, the Command Counsel attorneys have substantial experience in the field of bid protests and are well-versed in the FAR and case law interpreting the FAR.⁶¹ They are the same attorneys who handle AMC’s GAO bid protest litigation.⁶²

The other unique feature of the AMC program is that it operates on a timeline stricter than that provided in FAR 33.103 for processing protests. AMC requires its contracting officers to provide the Office of Command Counsel with an administrative report responsive to a protest within 10 days after the protest is filed.⁶³ The Command Counsel must then issue a written decision within 20 working days after the protest is filed.⁶⁴ Over the years, AMC has resolved protests in an average of 17 working days.⁶⁵

⁵⁷ FAR 33.103(f) (the justification for an override “shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures”).

⁵⁸ See *supra* notes 15-19 and accompanying text. The AMC program won the 2003 Office of Federal Procurement Policy award for outstanding acquisition-related alternative dispute resolution programs.

⁵⁹ See the HQ, AMC-Level Protest Program Procedures, available at http://www.amc.army.mil/amc/command_counsel/protest/bidprotest.html. The Army Corps of Engineers and National Guard Bureau utilize similar approaches, designating their “Chief Counsels” as protest decision authorities. See *e.g.*, Engineer Federal Acquisition Regulation Supplement (EFARS) 33.103(d)(3)-100(1)(ii); National Guard Federal Acquisition Regulation Supplement (NGFARS) 33.103(c)(4)(s-100).

⁶⁰ Meza interview, *supra* note 3.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See HQ, AMC-Level Protest Program Procedures, *supra* note 59.

⁶⁴ *Id.*

⁶⁵ Meza interview, *supra* note 3.

IV. WHERE DO WE GO FROM HERE?

A. Review and Critique of Legislative Reform Proposals

In the past several years, the agency-level bid protest system has caught the attention of Representative Tom Davis, Chairman of the U.S. House of Representatives' Government Reform Committee.⁶⁶ Congressman Davis has made it his practice to annually introduce a broad-ranging bill aimed at reforming various aspects of the federal procurement system.⁶⁷ Each of his recent bills has included a provision⁶⁸ that would provide statutory authority for the agency-level bid protest process⁶⁹ and codify certain fundamental program elements – including some which vary considerably from the forum's current rules.⁷⁰

The proposed changes to the system have come at the urging of contractors and members of the private bar who are dissatisfied with the status quo.⁷¹ They like the forum's efficiencies but believe the various agency programs are not capable of producing fair and reasonable results in many protest cases, particularly the more complex ones.⁷² Accordingly, the stated objective of the reforms is to broaden the forum's appeal to contractors – with the greater goal being the reduction of litigation and adversarialism in the bid protest arena.⁷³

⁶⁶ The Committee has jurisdiction over “all matters relating to the overall efficiency and management of government operations,” which encompasses the regulatory aspects of government procurement.

⁶⁷ In 2002, his bill was entitled the Services Acquisition Reform Act (SARA). H.R. 3832, 107th Congress, 2nd Sess. (2002). The 2003 bill carried the same name. H.R. 3832, H.R. 1837, 108th Congress, 1st Sess. (2003). In 2004, the reform bill was called the Acquisition System Improvement Act (ASIA). See *supra* note 9.

⁶⁸ The bills' provision relating to agency-level bid protests has evolved over time. ASIA contains two provisions that were not in either version of SARA: a provision prohibiting judicial review of agency-level bid protest decisions, and a provision that prevents agency-level protestors from filing simultaneous actions with the U.S. Court of Federal Claims. Also, the first iteration of SARA envisioned a 10-day time frame for resolving protests. The time frame was increased to 20 days in the second SARA bill and remained at 20 days in ASIA.

⁶⁹ See H.R. 4228, 108th Congress, 2nd Sess. §§ 104, 303N (2004). The general language establishing the statutory authority for the agency-level system reads as follows: “An interested party may protest an acquisition of supplies or services by an agency based on an alleged violation of an acquisition law or regulation, and a decision regarding such alleged violation shall be made by the agency in accordance with this section.”

⁷⁰ The legislation would concurrently amend Title 10 of the United States Code by adding a new Section 2305(b), and Title 41 of the Code (the Federal Property and Administrative Services Act of 1949) by adding a new Section 303N.

⁷¹ See *supra* notes 5-7 and accompanying text.

⁷² For example, those involving “best value” decisions. Pachter/Shaffer Interview, *supra* note 5.

⁷³ See *Acquisition Reform: Rep. Davis Offers Bill to Consolidate Agency Boards of Contract Appeals*, 81 Fed. Cont. Rep. (BNA) 499 (May 4, 2004).

The following are the key elements of the most recent legislative proposal along with a summary of the existing pertinent FAR rules:

- Agency heads will act as protest decision authorities.⁷⁴ FAR 33.103(d)(4) currently gives agencies discretion in naming their protest decision authorities, providing only that the independent review of protests must be conducted at a “level above the contracting officer.”
- Agencies must render decisions on protests within 20 working days after the date of their submission.⁷⁵ FAR 33.103(g) currently provides that agencies “make their best efforts to resolve agency protests within 35 days.”
- Agencies must suspend protested procurements while protests are pending internally and during any subsequent protests of the same matter to the GAO – as long as the protest is filed at the GAO within 5 days after issuance of the agency decision.⁷⁶ FAR 33.103(f)(4) currently makes voluntary the practice of extending the suspension to subsequent GAO protests.
- “Heads of acquisition activities” will be responsible for determining whether to proceed with procurements in the face of protests.⁷⁷ FAR 33.103(f) currently provides that such determinations be approved “at a level above the contracting officer, or by another official pursuant to agency procedures.”
- Protest decisions would not be subject to judicial review.⁷⁸ FAR 33.103 does not currently contain any similar provision.

Although the objective of the reforms is laudable and probably universally acceptable,⁷⁹ the ultimate question is whether they will have their intended effect. On this point, the legislative record offers little insight. The record is remarkably sparse⁸⁰

⁷⁴ H.R. 4228, 108th Congress, 2nd Sess. §§ 104(a) and (b) (2004). By way of example, in the Department of Defense, “head of the agency” means the Secretary of Defense, Secretary of the Army, Secretary of the Navy, and the Secretary of the Air Force. 48 C.F.R. § 202.101 (Defense Federal Acquisition Regulation Supplement).

⁷⁵ *Id.*

⁷⁶ *Id.* at § 104(c).

⁷⁷ *Id.* at §§ 104(b)(2), 104(c)(2), 303N(b)(2), and 303N(c)(2).

⁷⁸ *Id.* at §§ 104(e) and 303N(e).

⁷⁹ Although some would accept the proposition that the goal of reducing litigation in the bid protest arena is paramount, others would require that the effort to reduce litigation not come at the expense of other procurement system objectives – such as competition and transparency.

⁸⁰ The House Government Reform Committee did not hold hearings on ASIA. It did hold hearings on the two SARA initiatives in 2002 and 2003. The great bulk of the testimony at those hearings addressed other reform topics. Testimony regarding the proposed reforms to the agency-level protest system was largely perfunctory. Following are the high points of that testimony: At a SARA hearing on April 30, 2003, Bruce Leinster, testifying on behalf of the Information Technology Association of America, opined that strengthening the forum’s ‘stay’ provision would reduce the number of protests to the other fora. Mr. Leinster’s testimony can be found at <http://www.ita.org/es/docs/030702saratestimony.doc>. Steven Kelman testified that contractors would be more likely to use the agency-level protest forum if they could

and fails to develop the particulars of how the reforms will produce and maintain greater contractor satisfaction with the forum. Two specific “record-building” deficiencies stand out.

First, the record lacks any empirical support for the proposition that agencies can, in fact, resolve protests in 20 days while still giving them a reasonable measure of thoughtful and deliberate review. While it is true that the AMC agency-level program has an established track record of resolving protests in under 20 days, it is not at all clear that other agencies have either the resources or the ability to work so quickly. In fact, the fair conclusion is that most agencies are currently taking much closer to 35 days to resolve protests.⁸¹ As such, they would have to drastically increase the pace at which they review bid protests if the 20-day requirement is adopted. Agencies would have to choose one of two paths to achieve the required results – they would either have to augment the resources currently devoted to resolving the protests (at some additional cost) or cut back on the thoroughness with which they consider them. In today’s world of fiscal constraints, agencies are more likely to take the latter approach.

Second, the record is bereft of consideration of the impact that giving protest decision-making authority to agency heads will have on the agencies’ ability to review protests in a timely manner. The immutable bureaucratic reality is that, if agency heads get involved, the bid protest review process will be burdened by the weight of multiple additional layers of administrative review. Agencies will then have less time to do the real substantive work of actually analyzing the protests.

In both instances, these reform proposals may well produce results contrary to those intended. In combination, they could be disastrous. With less time to review protests, agencies would have to be less thorough. The inevitable result would be a drop in the number of “sustained” protests or other outcomes favorable to contractors. With a reduction in favorable outcomes would come a corresponding decline in contractor willingness to bring anything but the simplest of protests to the forum.

The more pressing problem with the reform proposals, however, is that they reflect a lack of understanding of the nature of the systemic change necessary to achieve their ultimate objective. As things stand, the agency-level forum fills a modest niche. It primarily attracts those bid protests that contractors regard as candidates for efficient (i.e.,

be assured they wouldn’t lose out on their GAO stay. Mr. Kelman’s testimony is summarized at 77 Fed. Cont. Rep. (BNA) 271 (March 12, 2002), *Styles Voices Concerns About SARA Training Fund, Other Provisions*. Finally, William Woods from the GAO stated that requiring protests to be decided by the head of the agency “may help to mitigate longstanding concerns about a perceived lack of independence when decisions on agency-level protests are issued by officials closely connected with the decisions being protested.” His testimony is available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-802R>.

⁸¹ The US Army Corps of Engineers program, which is quite similar to the AMC program, resolves protests in an average of about 35 days. Some of the more complex protests require considerably more time. Thornton Interview, *supra* note 4. The Department of Commerce has specifically incorporated the FAR’s 35-day protest resolution time standard in its agency supplement to FAR 33.103. See 48 C.F.R. § 1333.103(b)(2).

prompt and inexpensive) resolution.⁸² These tend to be the less “information intense” protests, such as pre-award protests against solicitation terms and post-award protests relating to the timely receipt of bids, bid responsiveness, and mistakes in bids.⁸³ The forum occupies this limited field because its efficiencies are wedded to certain constraints, the chief constraint being the absence of formal discovery procedures.

Where the reformers have gone wrong is in concluding that adjustments to some of the forum’s lesser efficiency/due process trade-offs will provide the impetus to induce substantially greater contractor utilization of the forum. Simply put, while this approach may change a few contractor minds, it will do little in the long run to allay their reservations about the system’s capacity to handle a broader range of protest types – which reservations are ultimately grounded in the forum’s lack of transparency.

B. *Some Proposals*

In its eight-year history, the agency level bid protest forum has performed more or less as expected. By means of integrating various trade-offs in favor of efficiency, the forum was designed to provide contractors and agencies an economical and non-adversarial forum for resolving some (but certainly not all) bid protests. It has done so.⁸⁴ That said, the fact is that many in industry and the private bar still harbor discontent with the agency-level system.⁸⁵

As discussed above, industry’s discontent is ultimately grounded in its lack of access to information relating to agency decision-making in the bid protest process. Contractors are unwilling to place their entire trust in a system that often prevents them from seeing whether their protests are receiving full and fair agency consideration. Although the agency-level bid protest rules were not intended to create a complete barrier

⁸² Although the number of agency-level protests at AMC and the USACE have fallen off in recent years, the proportion of GAO protests to agency-level protests has remained roughly the same – averaging about 2.5 to 1 at AMC and about 1 to 1 at the USACE. See *supra* note 5. A fair conclusion is that contractors have developed a good sense for which protests to take to the agency-level forum and which to take to the GAO or COFC.

⁸³ Thornton Interview, *supra* note 4. These types of protests relate to agency decisions that are relatively objective in nature and do not involve factually-complex issues, extensive analysis, the evaluation of proposals, or comparisons between proposals. As such, these decisions are not based on and do not generate vast quantities of potentially discoverable information.

⁸⁴ This assumes, of course, that the forum, by its mere existence, has not simply generated protests that contractors would have otherwise forgone due to the expense of proceeding in the existing fora. Given the relative dearth of agency-level bid protest data from the agencies, there is no effective means for measuring whether protests filed at the agency level would have otherwise seen the light of day if the forum did not exist. The safe assumption is that at least some percentage of the protests brought to the agency level would have been filed with the GAO or COFC.

⁸⁵ The agency-level alternative clearly has its limits in our system – it will never be the forum of choice for every type of protest. For one thing, the GAO forum provides unmeasured “value added” with its bid protest reviews – particularly in terms of its forward looking, macro-level “where do we want to go from here with our government procurement system” vision. Nevertheless, widespread discontent generally signals a true shortcoming.

to contractor access to agency files,⁸⁶ in practice agencies have tended to be somewhat disinclined to share information.⁸⁷ In this regard, it appears the agency-level system has been captured, at least to some extent, by its own successes – or more precisely, by an agency preoccupation with efficiency at the expense of transparency and other potential procurement system objectives.⁸⁸

As a consequence, while the agencies speak with deserved pride about their efficient agency-level programs, they may perhaps not see that there is macro-level efficiency to be found in being somewhat less efficient on the micro level.⁸⁹ In other words, agencies would most likely find that if they took some modest steps toward being more open with contractors at the debriefing and bid protest stages and more considerate of contractor due process concerns they would see both fewer protests overall and a greater percentage of protests brought to the agency-level forum vice the other protest fora. Why? First, by ventilating their mistakes, agencies would be less likely to make similar “protestable” errors in future procurements. Second, upon seeing an increased willingness by agencies to share information in the spirit of achieving the mutual goal of a best value procurement, contractors would be more inclined to bring additional protests to the agency-level forum for resolution.

Unfortunately, institutional inertia will probably keep most agencies from changing their practices until they are prompted to do so. Following are some suggestions that may serve to produce the necessary changes in agency practice and advance other of the objectives of our system of government procurement – all while not substantially diminishing the forum’s efficiency, informality, flexibility, and responsiveness.

First and foremost, the agency-level rules should incorporate some form of *limited* discovery, whether in the form of an abbreviated agency report, a meeting between the parties, or the provision of some documents. Simply put, the system’s permissive rules

⁸⁶ In fact, as discussed *infra*, one of the hallmarks of the agency-level forum is its promotion of open communication between agencies and their contractors.

⁸⁷ To be sure, agencies are justified in wanting to keep the “discovery” to a minimum. By definition, with each incremental increase in discovery comes a concurrent decrease in efficiency. At some point, the efficiencies of the system are lost and it becomes a “GAO-lite.” However, the fact remains that there is still something of an institutional resistance on the part of some agency procurement personnel to the idea that it is all right to openly share non-privileged information with contractors or their attorneys – whether at the debriefing or protest resolution stages. Pachter/Shaffer Interview, *supra* note 5.

⁸⁸ See generally Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002).

⁸⁹ The best explanation for this lack of vision is that efficiency, at least in this facet of the procurement process, is of somewhat greater concern to agencies than it is to contractors. Agencies have to keep their procurements, and ultimately, their operations moving, and protests and litigation are a hindrance to that effort. Conversely, while contractors want efficiency, they also want to win contracts – so they invest effort in the undeniably inefficient practice of protesting agency decisions. Consequently, while agencies will invest to some degree in resolving protests via the informal mechanisms of the agency-level protest forum, they have insufficient incentive in most cases to look beyond the immediate process concerns to determine whether taking the extra time and effort to more openly communicate and share information with the contractor will benefit them in the long run by building greater contractor confidence in the system.

regarding the exchange of information have not enforced an adequate level of agency openness. However, the selected discovery mechanism should not go so far in requiring disclosure as to impose a necessity for protective orders.⁹⁰ This is an admittedly fine line. The point is that the discovery mechanism has to be balanced. It should create a definitive regulatory obligation for agencies to share information with contractors without dismantling the forum's efficiencies.⁹¹ This may be a hard sell for the agencies – but one selling point is that, by being more open with contractors, the agencies may well see greater competition in the procurement process and, ultimately, better products and services.⁹²

In order to encourage agency conformity with the discovery requirement (in the absence of a formal enforcement mechanism), the agency-level rules should provide more precise direction regarding who may act as an agency's protest decision-making authority. The current requirement that the independent review be conducted at "a level above the contracting officer" is simply too liberal. When agencies vest decision-making authority at low levels and within the contracting officer's supervisory chain, contractors have legitimate concerns that the decisions rendered may be biased – whether knowingly or unknowingly. Further, lower-level procurement personnel are less likely to be inclined to push the "pro-information sharing" agenda.

That said, the "one-size-fits-all" approach of vesting protest decision-making authority in agency heads is too inflexible and would significantly reduce the system's responsiveness. Federal agencies come in various sizes and organizational shapes and

⁹⁰ Protective orders are a regular part of bid protest practice at the GAO and COFC. They are a means of controlling documents that may contain information (relating to the protestor's competitors) that is privileged or the release of which may result in a competitive disadvantage. For example, the GAO rules provide that:

At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protestor through counsel, it is the responsibility of protestor's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

4 C.F.R. § 21.4

⁹¹ It may be necessary, in order to enforce adherence to the principle of efficiency, to specify (along the lines of the ASIA bill) that agency-level decisions would not be subject to judicial or administrative review. Although the GAO and COFC have accepted this principle in the past, the introduction of mandatory discovery language could well cause some to view discovery as an entitlement enforceable through litigation at other fora.

⁹² This could play out in several different ways. For example, contractors with better information regarding the reason for their non-selection for award or exclusion from the competitive range may be better positioned to compete in the next procurement. Or, by carrying on a more complete discussion with a contractor, an agency may find that it was wrong in excluding the contractor's proposal from the competitive range – and that contractor's product may turn out to provide the best value.

with varying levels of contracting activity and procurement experience. As such, the individual agencies are in the best position to determine where to vest decision-making authority. Moreover, a great strength of the current system is that the people making the bid protest decisions, although independent, are still near enough to the procurement process to recognize problems and craft intelligent, workable solutions. Nevertheless, the operating principle should be that decision-making authority be vested outside the contracting officer's supervisory chain and, if possible, outside of agency acquisition channels. The programs run by AMC and the U.S. Army Corps of Engineers offer excellent models.

Third, the rules should provide for some manner of systemic transparency – particularly if the agency-level forum attracts a greater percentage of bid protests as a result of the other rule changes discussed herein. Although the forum's informal, ADR-style protest resolution methods promote efficiency and flexibility, they also remove the protest decision-making process from public scrutiny. As the Darleen Druyun case demonstrates, efficient practices detached from meaningful external oversight can be a dangerous combination. The solution is to require agencies to publish their protest decisions. Not only would publicly available protest decisions provide systemic transparency and accountability, they would provide the ancillary benefit of offering contractors "future guidance" about how best to construct contract bids and proposals.

Finally, the rules should incorporate the strengthened "stay" provision promoted by the contracting community and included in the recent agency-level reform bills offered by Congressman Davis.⁹³ Simply put, agencies will be encouraged to openness if they know that the failure to resolve a protest may well result in their procurements being held up for as long as 3 or 4 months because of back-to-back "stays." Further, agencies will be more inclined to honor their "stays" and stop work orders because contractors will have immediate recourse to the GAO. At the same time, agency openness should result in fewer contractor follow-on protests to the GAO because contractors, having gotten better insight into the agency decision-making process, should have a greater degree of confidence that their disputes have been fairly considered by the agencies.

⁹³ See *supra* note 76 and accompanying text.



BANKRUPTCY PRIMER



AFLSA/JACN - BANKRUPTCY BRANCH DSN 426-9063 VOLUME 4, NUMBER 3,⁹⁴ May, 2005

WHAT IS THE LEGAL EFFECT OF A LEASE CLAUSE AGREEING THAT THE FILING OF A BANKRUPTCY IS A "DEFAULT" UNDER THE CONTRACT?

This type of clause is a standard clause recommended for inclusion in commercial leases and other contracts including privatization leases. The problem is that the clause is not enforceable and an attempt to utilize the filing of a bankruptcy as cause to terminate for default (T4D) could cause the Air Force to be sanctioned by a Bankruptcy Judge. This clause is also referred to as an *ipso facto* clause because it results in a breach solely due to the financial condition or the bankruptcy filing of a party.⁹⁵ These clauses are unenforceable during the bankruptcy⁹⁶ but can be enforced should the debtor's case be dismissed.⁹⁷ The bankruptcy code itself states in part:

notwithstanding a provision in an ... unexpired lease, An unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such ... lease may not be terminated or modified, at any time after the commencement of the [bankruptcy] case solely because of a provision in such Lease...⁹⁸

Using this code section the first circuit in the *Summit* case struck down a Massachusetts limited partnership act that purported to terminate a general partnership upon the filing of bankruptcy by the general partner.⁹⁹ Although this clause goes into the "good idea" bin, the courts look at it as an improper attempt to circumvent the Bankruptcy laws.

⁹⁴ This Bankruptcy Primer is by Christopher S. Cole, Chief of the bankruptcy section. Research for this article was conducted by Maj. Thomas USAFR.

⁹⁵ *Hayhoe v. Cole* (in re Cole) 226 B.R. 647, 653 (9th Cir B.A. P. 1998).

⁹⁶ *Bruder v. Peaches Records and Tapes, Inc.* (In re Peaches Records and Tapes, Inc.) 51 B.R. 583, 587 n.6 (9th Cir. BAP 1985).

⁹⁷ *Thomas American Stone & Building Inc. v White*, 142 Bankr. 449, 453 (D. Utah 1992).

⁹⁸ 11 USC 365(e)(1).

⁹⁹ *Summit Inv. & Dev. Corp. v. LeRoux*, 69 F.3d 608 (1st Cir. 1995).

Finally, any attempt to contract away the right to discharge a debt in bankruptcy has also failed. As the Ninth Circuit stated in the *Hayoe* case " exceptions to discharge are to be narrowly construed in favor of the debtor."¹⁰³

CONCLUSION

As you can see, placing of clauses in government contracts attempting to obtain an advantage in bankruptcy are problematic. It isn't that they don't work; it is more that they may encourage an inexperienced CO or JA to take action that might cause a violation of the automatic stay. This in turn could cost the Air Force money for contempt. Again, when the issue arises, call JACN. We are always ready to talk to you.

¹⁰³ 226 B.R. at 653

WHAT IS THE LEGAL EFFECT OF A CLAUSE INDICATING THE DEBTOR AGREES THAT THE AUTOMATIC STAY DOES NOT APPLY TO THE AIR FORCE?

Several courts have addressed the question of whether a pre-petition agreement to waive a benefit of bankruptcy, such as the automatic stay, is enforceable. The results of these cases are mixed. Some courts enforce the waivers, some treat the agreement as a factor to be considered, and some, for reasons of public policy, ignore the clause. All of them require the creditor to file a motion to lift the stay in the bankruptcy court and get court permission before enforcing the clause. Courts are unanimous in holdings that these clauses are not self-executing.¹⁰⁰ Waivers of the right to file bankruptcy have also consistently been found to be unenforceable.¹⁰¹

The majority of the cases in this area find that the waiver is neither enforceable *per se*, nor unenforceable. The courts start with the premise that a contractual waiver is a primary factor in determining whether relief from stay may be granted, but then go on to consider whether other grounds, such as bad faith in filing the bankruptcy, or lack of an ability to reorganize, justify the relief. One other important consideration is the other creditors. Such an agreement between the Air Force and a contractor is in effect a secret agreement, because no other creditors know about the clause or have any way of determining that it exists other than by asking the debtor. This could put them at a severe disadvantage. The asset involved may be a significant portion of the bankruptcy estate or may be all of the estate. All of the other creditors may be looking to the profit from that asset for their recovery in the bankruptcy. To have that suddenly disappear without warning appears to be inequitable to many judges. Since Bankruptcy is a court of Equity, the judges at a minimum feel obliged to let the other creditors have an opportunity to show up and voice their concerns. That is what the requirement to file a motion for relief from stay accomplishes. The Bankruptcy rules (BR 2004) require notice to all creditors when such a motion is filed.

The minority view is that a pre-petition waiver of the benefit of the automatic stay is unenforceable *per se* for several reasons.¹⁰² First, the post-petition debtor is a new entity, distinct from the "old" corporation and without any fiduciary duty to the creditors. Because it is a "new" entity it does not have the capacity to act on behalf of the debtor-in-possession. As a result the debtor cannot bind the estate. Second, enforcement of the waiver would run afoul of section 363(I) of the Bankruptcy Code, which allows the debtor to use property of the estate despite a contractual provision that limits the debtor's rights if the debtor is insolvent or petitions for relief. Third, enforcement of the waiver would allow a single creditor and the debtor to opt out of the "collective" remedy of bankruptcy to the detriment of the debtor's other creditors.

¹⁰⁰ *In re Darrell Creek Assoc. Limited Partnership*, 187 B.R. 908(Bankr. D. So. Car. 1995).

¹⁰¹ *Fallick v. Kehr*, 369 F. 2d 899 (2nd Cir. 1966).

¹⁰² *In re Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996).

DEFENSE LOGISTICS AGENCY ACQUISITION ADR PROGRAM¹

ADR has been a part of DLA for 15 years. ADR efforts in acquisition have produced impressive results, with \$10.4 million in estimated cost savings and a 77% success rate (85% partial success rate). DLA's acquisition ADR program is perhaps most notable for its broad scope (rare in small agencies like DLA), and a combination of centralized program management with a core of grass roots advocates. The acquisition ADR program helps DLA focus forward on customer support (providing goods and related services to the Military Services), rather than dwelling adversarially on yesterday's disputes and problems. DLA's ADR philosophy is that constructive, cooperative problem-solving is the best way to avoid and resolve disputes.

I. PROGRAM DESIGN

A. Program Goals and Objectives²

DLA's goal is to solve acquisition disputes as early, effectively, inexpensively, and amicably as possible, with the ultimate objective of saving the agency money, time, resources, and reputation.

DLA's Acquisition ADR program focuses on people and processes. People can commit to using ADR once they are exposed to the concept and understand its benefits. Process changes can capture ADR as part of the agency structure, keeping it from being dependent solely on individuals for growth. Both approaches combine to advance the agency goal.

B. Program Origin and Evolution

DLA's ADR program began in 1990, after passage of the ADR Act, with initial training for DLA lawyers. By 1992, DLA had formalized its recognition of ADR in DLA Regulation 5145.1, "Alternative Dispute Resolution Program." DLA's ADR regulation reflected DLA policy to encourage the use of ADR techniques whenever unassisted negotiations proved ineffective.

During 1994, DLA joined other federal agencies in signing an Office of Federal Procurement Policy pledge to expand use of ADR. At about the same time, DLA joined

¹ This narrative was submitted as part of the 2004 Office of Federal Procurement Policy Awards Program.

² Documents available electronically are linked in this narrative. Documents without an electronic link are not available electronically but are available upon request.

other Defense components under the leadership of the DOD General Counsel to form the DOD ADR Coordinating Committee.

In 1995, the DLA General Counsel developed the new position of an ADR Counsel whose role was to continue to develop the ADR program within DLA. In turn, the ADR Counsel established an ADR Practice Group made up of representatives from each field activity legal office.

ADR efforts in DLA increased again after passage of the ADR Act of 1996. The General Counsel required ADR training for all DLA lawyers, and the DLA ADR Regulation was revised to a Directive and updated to reflect the changes in the law and an increased emphasis on ADR in agency policy.

(<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications). This Directive established a preference for ADR, requiring justifications to proceed with litigation rather than ADR.

Today, the DLA Acquisition ADR program builds on the foundation of the past decade, and adjusts emphasis areas as needed.

C. Program Staffing and Design

The DLA General Counsel serves as the agency Dispute Resolution Specialist and issues general ADR guidance. Legal offices of field activities also have ADR Specialists; the ADR Specialist is responsible for advancing the ADR program locally and serving as a resource on ADR. The Chief Counsel at each field activity is also ultimately accountable overall for the ADR program at that location. A DLA Headquarters Associate General Counsel serves as the ADR advocate for acquisition ADR matters. The ADR Program Manager administers the program and serves as the chair of an ADR Practice Group composed of DLA lawyers from all field activities.

Although flexibility is allowed at the local level, DLA does have a DLA Office of Counsel Procurement/Contract ADR Program Design Implementation Plan that contains the basic elements for each field activity Acquisition ADR program. These elements include: policy, procedures, training, publicity, and data collection. All field activity ADR programs are expected to contain these elements.

Top management commitment, especially by the General Counsel, has helped ensure the program is adopted and advanced. ADR specialists at each activity can help advance the program with continued training, sharing of successes and lessons learned, and adaptation of ADR into local processes.

D. Program Scope (Disputes and Techniques)

The DLA Acquisition ADR program covers all types of acquisition and sales transactions, at any stage. Examples, discussed below in more detail, include: protests (contracting officer, Agency-level, and Government Accountability Office); dispute

avoidance and prevention; complaints filed with the Task and Delivery Order Ombudsman; matters raised in Congressional inquiries; pre-claim contract disputes that arise between DLA and contractors; contractor claims; and DLA claims against contractors, including fraud related matters.

DLA offers mediation on protests, both in person and through telephone conferences. Mediations have been held at the GAO with GAO personnel as the neutral, and at field activities in response to contracting officer and agency level protests with DLA personnel as the neutral. Telephone conferences have been held in response to local, agency and GAO protests, with a trained DLA attorney-mediator facilitating. DLA protest attorneys are also encouraged to request outcome prediction ADR from GAO in all cases that proceed on the merits. The agency level protest process adopts ADR elements; agency level protests are answered by the Chief of the Contracting Office who acts as a third party neutral, reviewing input from both sides in order to make an independent decision. One DLA field activity uses mediation for all its agency level protests, unless the protester opts otherwise.

For contract administration, DLA has initiatives to both avoid disputes entirely, and to resolve those that arise with ADR. Dispute avoidance initiatives include partnering agreements and ADR provisions in DLA strategic supplier alliances. A contract clause supporting ADR is required in all acquisitions unless the contractor objects. (<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Procurement Letter 01-09). DLA policy guidance states that post-award orientations should address the subject of dispute avoidance, early dispute resolution, and alternative dispute resolution. (<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Procurement Letter 01-07). All of these efforts illustrate DLA's efforts to broaden the concept of ADR to dispute avoidance.

When disputes do arise, DLA offers contractors the opportunity to resolve disputes before formal claims are presented. In-person and telephone conference mediations and facilitations have been used to address both contractor and Government concerns arising during the contract administration phase. DLA has also used the approach offered by the ASBCA to mediate cases before an appeal has been filed.

DLA uses a variety of ADR techniques to address a wide range of issues, including:

- issue escalation clauses;
- partnering to promote dispute avoidance and the use of informal dispute resolution processes between the parties;
- settlement judges when parties are in litigation or at an administrative proceeding;
- mediation by court judges, administrative judges, magistrates, private

individuals, GAO personnel, and DLA personnel, before or after a matter has been formally filed;

- facilitation to enhance communication and options for dispute resolution;
- ombudsmen who serve as facilitators, information gatherers, or decision-makers;
- telephone mediation/facilitation whereby a neutral facilitates one or more phone conversations between parties in dispute in order to exchange information and or reach settlement;
- a summary trial with a binding decision; and
- early neutral evaluation.

Of course, a blend of techniques may be best, especially if the case is so complex that a “one-step” ADR is not likely to resolve the dispute.

II. PROGRAM ADMINISTRATION

A. Program Staffing and Funding

The staffing structure for DLA’s Acquisition ADR program is discussed above (Section I C, Program Design). This section will address program funding.

The ADR Program Manager position is a full-time ADR position, funded by the agency. At DLA Headquarters, the DLA Acquisition ADR advocate performs her ADR functions as part of her assigned responsibilities as senior acquisition counsel; this enables her to address ADR not just as a separate program, but also as part of her overall responsibilities in acquisition law. She is rated on ADR as part of the annual appraisal process. Chief Counsel have “Dispute Resolution” as part of their critical elements on which they are evaluated. Their ADR specialists perform their ADR responsibilities as part of their assigned jobs, as do DLA lawyers who serve as neutrals.

The only direct cost associated with DLA in-house neutrals is travel costs. These are either shared by the parties, shouldered by the activity providing the neutral, or, more commonly, paid by the field activity asking for the neutral.

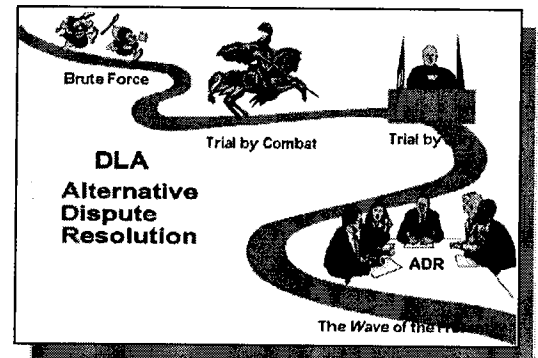
Costs for private sector neutrals are funded by the activity requesting the neutral, from that activity’s budget (fully, or shared with the opposing party).

B. Program Publicity

Publicity is a required element of DLA's Acquisition ADR Program. (DLA Office of General Counsel Procurement/Contract ADR Program Design Implementation Plan). Publicity for the Acquisition ADR program falls in 3 areas: a) publicity to clients, b) publicity to other lawyers, and c) publicity to the contracting community.

The ADR *Law Notes* publication, issued by the ADR Program Manager, includes articles about acquisition ADR cases, issues, and recent events. (See DLA's ADR Home Page, <http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Training). The *Law Notes* is distributed by email throughout DLA to DLA lawyers and clients. ADR is addressed at acquisition staff meetings, during regular ADR Practice Group and Senior Contracts Group teleconferences, and through ADR success stories, and articles (for example, in the *DLA Dimensions* (September/October 2000)). Publicity also flows from awards. The DLA Office of General Counsel has recognized attorneys active in ADR; one field activity has instituted its own awards program.

In addition to direct publicity, resources are available through many channels, particularly the DLA ADR Home Page, (<http://www.dsccl.dla.mil/Offices/legal/adr/adr.html>) The Home Page provides extensive ADR information to Government and contractor personnel such as laws, directives, ADR definitions, model documents, training modules, visual aids, and links to related sites. Field activity websites also provide ADR information. A variety of videos, brochures, and business cards that explain ADR and its benefits are available. Field activities have issued various policy statements to contractors announcing the preference for ADR, such as one posted on an electronic bulletin board for automated acquisitions. Similarly, internal policy statements, local messages of the day, and newspaper articles reinforce the idea of using ADR.



Publicity to the contracting community has included efforts on Government-private sector committees and task forces, speaking at conferences (such as the National Contract Management Association), and participating at vendor fairs and industry associations.

C. Processes for Implementing ADR

This section addresses the mechanics by which DLA ADR policies are implemented in the acquisition arena. (The scope of DLA's Acquisition ADR program and the techniques used are addressed above in Section I D).

For any type of acquisition issue, when unassisted negotiation does not resolve a matter, the deciding official must consider the use of ADR, and a decision not to use

ADR must be documented in writing by an official higher than the deciding official. DLA Directive 5145.1. (<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications). Field activities are responsible for ensuring compliance with this requirement. If ADR is appropriate, the deciding official will consult with legal personnel to work out process specifics.

For agency protests, the DLA Supplement to the FAR sets forth the requirement that an independent official - the Chief of the Contracting Office at each field activity - be the deciding official, with input from both sides. DLAD 4105.1, Sec. 33.103 (c) and (d) (<http://www.dla.mil/j-3/j-336>). Counsel advising the Chief of the Contracting Office are responsible for ensuring a neutral decision, with ADR incorporated if warranted.

For GAO protests, the DLA Bid Protest Manual requires that every protest be reviewed to see if it can be resolved by ADR. This policy is also contained in fax cover sheets from DLA Headquarters that transmit incoming GAO protests to field offices, and in attached sample ADR worksheets to document consideration of ADR and justification for rejection if ADR is not used. Although the protest process at DLA is decentralized, DLA retains oversight at headquarters. The DLA Acquisition ADR advocate also runs the Bid Protest Program. She reviews incoming protests with an eye to ADR, and for those where agency reports are filed, discusses ADR options with the field attorney handling the case.

For contract disputes, all DLA contracting officer final decisions must contain language offering the contractor ADR as one of the options to contest the decision (unless the field activity has determined in writing that ADR is inappropriate). (<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Procurement Letter 01-05). Of course, ADR should be considered before a final decision is issued, but this requirement ensures that ADR is raised as part of the dispute process itself, rather than having to rely on someone to suggest ADR.

Most recently, DLA has begun a process to better institutionalize ADR into the agency ASBCA litigation process. For ASBCA cases, contractors are notified after filing their appeal of the possibility for ADR, and later (after fuller review of the case) are offered ADR unless an official at a level above the contracting officer determines ADR to be inappropriate. Sample letters have been provided to the field lawyers for their use.

D. Neutrals

DLA primarily uses judges and DLA attorneys as neutrals. The judges primarily serve as mediators or settlement judges, whereas DLA attorneys typically serve as mediators or facilitators. Private individuals can also serve as neutrals, in a variety of capacities.

When a case is already at the ASBCA or a Federal Court, the judges typically serve as the neutral, following the forum's procedures for assignment. DLA also uses Board judges to serve as a neutral before a final decision and before an appeal. Parties to

a dispute also have the option of using DLA legal personnel as mediators or facilitators, in person or by phone. The ADR Program Manager, Headquarters ADR advocate, or local ADR Specialist helps identify the potential neutrals and arrange for their use.

Criteria for determining the qualifications for neutrals vary. When a case is at the ASBCA, the Board assigns the ADR judge. DLA lawyers serving as neutrals in acquisition disputes are required to have at least 24 hours of mediation training, co-mediate three cases before serving as a mediator or facilitator on their own, and have extensive acquisition expertise. DLA mediators are evaluated by their co-mediators, and at the option of the participants, are also evaluated by the participants. They are required to follow the DLA Standards of Conduct for Mediators, and have use of model documents and other reference material provided to them.

(<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications). Periodic advanced training is provided in-house, either through group in-person training sessions or group conference calls. Non-DLA neutrals are not trained by DLA, except to provide them facts about DLA that are necessary for the ADR process.

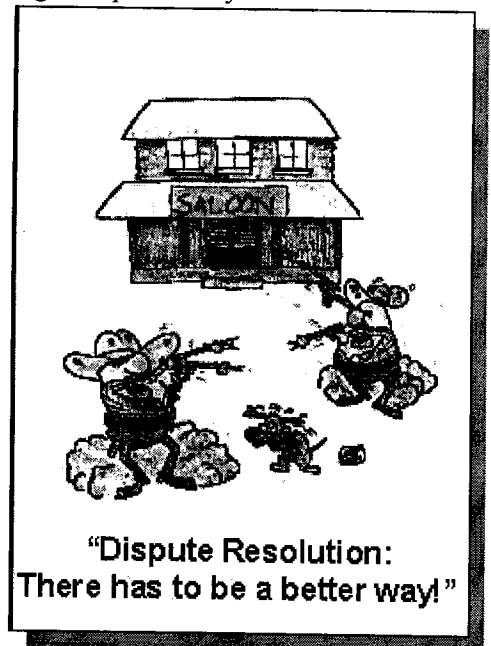
III. AWARENESS AND SKILLS TRAINING

A. Training Objectives, Participants, and Providers

DLA training objectives are: 1) to train all DLA lawyers in ADR, and 2) to ensure acquisition personnel receive at least ADR awareness training and preferably ADR user training as well.

All DLA lawyers are required to have a minimum of 24 hours ADR training, plus refresher training. Specific ADR training programs are provided within the Office of General Counsel, both as separate workshops and as part of established acquisition law conferences. The Acquisition ADR advocate also shares information about available ADR training with contracting personnel and ADR lawyers.

DLA contracting personnel receive ADR awareness training from the ADR specialists, or occasionally from outside sources, and will pursue more extensive user training if warranted. Training is provided through in-person presentations, video teleconferences, satellite broadcasts, videos, and paper products. DLA also prepared an on-line internet ADR training module (the first of its kind, to our knowledge) to supplement more interactive training and reach a wider group of employees. (<http://www.dscc.dla.mil/Offices/legal/adr/adr.html>, DLA Publications, Training). A combination of approaches has been used: for example, one training session involved showing a video about a business that was followed by an audience question and answer period concerning the application of ADR to the disputes



that arose in the business. Another in-person training session involved a mock mediation followed by questions and answers.

Aside from training specifically targeted for lawyers and contracting personnel, ADR is also included as an integral component of routine training provided to agency personnel in general. ADR is included as a topic at Commander's Conferences, senior level seminars, Acquisition Reform Days, Small Business seminars, and other internal and outreach programs.

Awareness and skills training is provided to DLA acquisition personnel by ADR Specialists, by the Headquarters ADR Advocate, by the ADR Program Manager, by personnel from other government agencies, and by private sources.

ADR training costs are usually borne by DLA, typically through the local field activity. The General Counsel supports funding for DLA lawyers to stay current in ADR.

B. Training Success and Benefits

The success of the ADR training program is judged by several factors.

- 1) How many employees are trained? Of course, training a large number of people does not mean that the training is effective, but it does show the extent to which the message is propounded in the agency.
- 2) How well do DLA employees understand ADR and recognize when to use it? Often, clients approach their ADR specialist shortly after receiving training, for help on issues that have recently arisen that may merit ADR.
- 3) Do existing litigation dockets reflect that a case is in ADR (or settlement negotiations) unless a reason exists why ADR is not appropriate in that case?
- 4) How many cases are resolved via ADR? These should be increasing unless, again, there is an explanation for why fewer disputes are being raised to begin with.
- 5) What percent of disputes are successfully resolved through ADR? Although success in ADR is never guaranteed, the more the parties have understood the process through effective training and preparation, the greater the likelihood of resolution.
- 6) What feedback has been received on the quality of the ADR training sessions?

Aside from advancing DLA ADR goals, DLA's ADR training is available to others outside the agency, or indeed outside the Government. DLA personnel who train regularly for DLA also serve as trainers for other organizations, such as the National Reconnaissance Office, and the Defense Finance Accounting Service. Similarly, DLA

lawyers give numerous ADR presentations such as at DOD ADR Conferences, National Contract Management Association meetings, and at other venues.

IV. PROGRAM EVALUATION AND RESULTS

A. Program Measurement

DLA uses an in-house database to help measure the effectiveness of the Acquisition ADR program. The primary data collected includes:

- the type of ADR used;
- whether the process ended in a complete, partial, or no settlement;
- the duration of the dispute before use of ADR;
- the duration of the ADR;
- the projected number of days needed to resolve the dispute without ADR;
- estimated days saved using ADR; and
- the costs saved or avoided with ADR.

The database also provides a link to other fields if the case was in another forum, such as GAO or the ASBCA, before ADR was used. The database is part of a larger, internal database called the "Case Management System" (CMS) that is maintained by the Office of General Counsel.

The screenshot shows a software window titled "ADH - ADR" with a menu bar containing "Close", "Print Screen", "Query", and "ADR Forum". Below the menu bar are tabs for "ADH", "Issues/History", "Disposition", and "Financial Data". The main form contains the following fields:

- Name: ABC Company
- Description: Contract
- Forum No: 20000
- PLFA: DG
- Date Initiated: 1/2/04
- Date Concluded: 1/9/04
- Counsel: PLFA: Sally Jones, Phone: [] - [] - []
- Opposing: [] - [] - []
- Neutral: Smith, Phone: (703)000-0000
- ADR Method: Mediation
- ADR Result: Complete Settlement, Partial Settlement, No Settlement
- Cost Savings / \$50,000.00
- Duration of Dispute: 100
- Duration of ADR: 6
- Days if ADR Not Used: 50

The Acquisition ADR advocate reviews the ADR statistics twice a year for accuracy and program management. The DLA General Counsel reports ADR statistics quarterly to the DLA Corporate Board and annually to DOD. Field activity legal offices use this data to report their ADR activity to their commands. The Acquisition ADR advocate also reviews litigation statistics (GAO, ASBCA and Court) to ensure that cases are either in ADR or settlement negotiations unless an exception is warranted.

The Acquisition ADR advocate also gets input each year from field activities on ADR initiatives, apart from individual cases or statistics. By experimenting with new ideas or pilot programs, the overall ADR program can evolve and better support agency goals and objectives. This input also helps in assessing the strength of each ADR program at the local level.

Program measurement is also done on a case-by-case basis. Feedback is obtained from individual ADRs through participant evaluation forms, which can be used to improve future efforts.

B. Program Results

As reflected in CMS, DLA's Acquisition ADR program has, since data was first captured in 1997, resulted in cost savings of approximately \$10.4 million. For the 188 cases involved during this time, this equates to an average savings of approximately \$55,000 per case. This figure is primarily comprised of avoiding the costs associated with traditional formal litigation, avoiding the risks of judgments against DLA, and savings from settlements reached by the parties.

Use of ADR has saved time, both in terms of the duration of the dispute and in terms of staff time saved. For example, for GAO protests for FY 04, a total of 17 protests went to decision on the merits (11) or were resolved through ADR (6). The protests handled via ADR (35%) were resolved in **half the time** than those that went to decision (40 days instead of 80 days). In addition, approximately 12 days of staff time were saved during this period using ADR; this figure is based on an assumption of 2 days of staff time saved per GAO protest resolved through ADR.

For ASBCA cases as well, ADR has saved time, both in resolving the dispute and in staff time involved. For example, for ASBCA cases closed in FY 04, approximately 10% were resolved through ADR. The ADR cases were resolved in an average of 131 days, versus 281 days for non-ADR cases. (This difference is even larger when statistics are adjusted to deduct 9 companion cases that were promptly dismissed; then the non-ADR cases averaged 536 days to resolution.) Staff time savings attributable to the ADR cases equate to an estimated 70 days, based on the assumption that 35 days of staff time are saved on an ASBCA case when it is resolved through ADR.

Resolution rates in the DLA Acquisition ADR program are excellent. For FY 04, 77% of acquisition matters for which ADR was used reached complete or partial resolution.

Other specific, positive effects, while not quantifiable, have surfaced as a result of DLA's ADR program. One example is improved relationships with contractors and an improved agency image. Contractors have written to agency officials involved in facilitated meetings, expressing appreciation for the idea of using facilitation and for the way the facilitations were handled. This contributes to a positive reputation for the agency in constructive problem-solving, and increases the likelihood that ADR will be used in the future.

Another example of positive effects has been in the reduction of exposure to adverse decisions in litigation. Through the GAO Outcome Prediction process, for example, several protests were resolved that would have been sustained had the protest continued to decision. This helps ensure appropriate agency action, and avoid becoming a "case study" for the contractor and the Government community alike on how *not* to conduct an acquisition.

CONCLUSION

The DLA Acquisition ADR program has been an effective, cost-efficient way to resolve disputes. As a result, DLA has increased its emphasis on resolving disputes using techniques such as mediation and facilitation, and relies less on traditional adversarial models. Further, using ADR for contract disputes has contributed to the view that contractors are partners, not adversaries; this in turn leads to continued cooperation and to the ultimate objective of better mission support.

Play Ball! – But, Who Pays for It?

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Washington, D.C. is again home to a major league baseball team – the Nationals. And fans are turning out in legions to cheer on their new team, which, currently, has slugged its way into a first place league standing! Most everyone in the District is genuinely excited about having a hometown baseball team to call its own after a 33 year hiatus. Well, almost everyone, that is... With the team's presence comes the accompanying need for a prestige-quality ballpark; but, on whose shoulders is the burden falling to pay for the Nationals' new home? And, to the point, should Federal government contractors even care?

The new stadium is center-stage to a hot debate on its community economic impact and attendant public policy ramifications. DC residents are split on whether or not the stadium should be built, with much of the citizenry believing that the money would be better spent on new hospitals and schools. All said, the DC City Council ultimately – and fractiously – voted to approve and fund the stadium with a narrow 7-6 final vote.³ Originally proposed to cost \$440 million, the estimated figure has progressively increased to a current \$581 million construction cost estimate, according to the DC Chief Financial Officer. Under the deal approved by the DC City Council, a portion of the stadium costs will be financed through a combination of a gross receipts tax on businesses, a utilities tax on businesses and Federal offices, a stadium concession tax, and an annual rental payment by the Nationals.⁴ And, as the team rounds the bases through its winning season, it is certain to make money – but, with none of those funds returned to those who have been taxed to pay for the stadium.

Why should Federal government contractors care about this debate – and the ultimate cost of the Nationals' new stadium? The answer becomes progressively clear through the District's imposition of a "ballpark fee" on certain "persons" having an income of "\$5,000,000 or more in annual District gross receipts."⁵ "Persons" in this context, are defined as those individuals or entities that are either are subject to filing franchise tax returns (whether Corporate or Unincorporated); or, are required to make unemployment insurance contributions on behalf of District-based employees."⁶ This

³ "Amended Deal on Stadium Approved, Council Seals Return Of Baseball to D.C"., *By David Nakamura and Thomas Heath* Washington Post Staff Writers, Wednesday, December 22, 2004; Page A01

⁴ Ballpark Omnibus Financing and Revenue Act of 2004 (Final version)

⁵ Government of the District of Columbia, Office of the Chief Financial Officer, Office of Tax and Revenue (OTR), OTR Notice 2005-02. Notice Regarding Electronic Filing Requirements for Professional Baseball Ballpark Fee.

⁶ Government of the District of Columbia, Office of the Chief Financial Officer, Office of Tax and Revenue (OTR), OTR Notice 2005-02. Notice Regarding Electronic Filing Requirements for Professional Baseball Ballpark Fee.

new fee applies to any person meeting the criteria, whether or not located in the District of Columbia. The notice was issued on May 26, with payment due just two weeks later on June 15! Admittedly, fast pace for all things DC government-related!

All of this raises an interesting, and potentially expensive, question – are companies who merely perform Federal government contracts in the District of Columbia legally obliged to pay the Ballpark tax, even if they are not domiciled here?

For example, one small government services company, incorporated and headquartered in Florida, and upon their unanticipated receipt of their ballpark assessment, raised several salient questions in a letter to the General Services Administration (GSA) with regard to a GSA-issued, DC-based contract initiative:

“This action by the D.C. Government will have two immediate impacts on your office. 1) in accordance with contract language incorporated in most GSA service contracts, this tax will likely cause the reopening of most fixed price contracts let by GSA for work inside of the District inasmuch as it is newly devised and heretofore would have been a firm fixed cost component of any contract calculation by any contractor, and 2) if prompt terms for payment of this new local tax cannot be made in the next seven working days, accommodations for interest and penalties will have to be negotiated. There are additional contractual consequences that should be considered: will GSA look to contractors under the \$5,000,000 threshold to avoid the additional expense? Will the tax limit competition?⁷”

In this starting line-up, allowable tax reimbursement costs under Federal government contracts, depends on the type of contract awarded and certain regulatory clauses. Under a cost type contract, reimbursement would be automatic as the tax is included in allowable cost. (FAR 31.205-41). Under fixed price and FPI contracts, reimbursement depends on whether the contract includes FAR 52.229-3 or -4 flow-down adjustment provisions. FAR 52.229-4 clearly provides for reimbursement, if the tax is Federal, state or local, and if the contract was non-competitive. FAR 52.229-3 provides for reimbursement only for increases in federal taxes and applies to competitive awarded contracts. (FAR 29.401-3). And, no doubt, questions will be appropriately raised as to the “Federal” nature of the District of Columbia taxing scheme and authority.

For some larger contractors, the Ballpark tax fee can probably be absorbed in their overhead costs for any DC-based locations, and may be a small enough “base hit” not to be compel an economic price adjustment. But, for smaller contractors, this unexpected

⁷ Letter to Ms. Emily Murphy, Chief Acquisition Officer, General Services Administration, June 6, 2005 (from private contractor)

added tax burden may represent a cash-flow hardship – especially given its limited play-by-play rollout.

As we've now come to determine late in the ninth inning of our honeymoon period with the Nationals, the funding mechanism for their new stadium is most novel. And it has come as a genuine surprise to many Federal government contractors, who may have thought that their principal contribution may have otherwise have been to purchase block tickets for their DC employees! The game is going to extra innings, but the best contractor recourse may not be to challenge the league umpire, but rather to contact their Government contracting officer for reimbursement interpretation and/or contract modification. Looking forward to those new sky boxes in 2008!

[DC's Office of Tax and Revenue has developed special web-based site to provide information on the baseball fees and related tax, and to facilitate payment.]⁸

Disclaimer: this article is intended to identify issues potentially affecting Federal government contractors; it is not a statement (pro or con) on the stadium or the new team; nor does it represent the views of the Contract Services Association.

⁸Office of Tax and Revenue, go to http://cfo.dc.gov/otr/cwp/view,a,1329,q,627770,otrNav_gid,1679,otrNav_|33280|33288|.asp