THE CLAUSE

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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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BOARD OF GOVERNORS

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

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

EDITOR'S COLUMN

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 2002[1] 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 proponents[3] 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.

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[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, 204; 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

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[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

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[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,

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[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.

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[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 awarded[32] 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

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[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.