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President's Column
by
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I want to begin by thanking our past president. Jim McAleese for his outstanding leadership over the past year. Under Jim, the BCABA grew to new heights of prestige and influence. I hope that I can do as well.

There are several initiatives the BCABA will be pursuing this year. My goal is to maintain the BCABA's role as *the* public contract law forum in the country. Toward that end, the common element in the initiatives shown below is that they all point toward growth and modernization: I hope that we will be able to:

- increase membership;
- increase our Gold Medal firms;
- technology modernization; and
- update the BCABA Constitution and Bylaws.

To increase membership, I ask our membership for its assistance because the BCABA cannot rely on the efforts of its officers for new members. We are particularly interested in increasing the number of our government members. The Air Force has been helpful recently in this regard, while the Army has always been our real government stalwart In general, however, we need to get the word out that the BCABA is a very worthwhile and inexpensive organization to join.

Regarding the Gold Medal firms, we have already made a good start. We thank these firms for supporting the BCABA by contributing their entire Government Contracts groups into BCABA membership. However, we will continue to seek Gold Medal participation from additional law firms.

Technology modernization means that we will increase the utility of the BCABA website, a matter on which I will be working aggressively with our Web Site Coordinator, Ty Hughes. There are a number of no-cost or low-cost improvements that can be made, and it is merely a question of time before they are implemented. As one example, we intend to add a number of hyperlinks to other worthwhile web sites.

As for bringing the BCABA Constitution and Bylaws up-to-date (which is really a part of the modernization), we need to formalize several practices and policies that have developed over the years. In brief, how we actually operate is not always in step with how we say we are going to operate. To rectify this, I will be proposing a number of constitutional amendments to the Board of Governors for their approval, and subsequent ratification by the membership.

Finally, this is your organization. Let us hear from you.

EDITOR'S COLUMN

Let me say that I deeply appreciate the outstanding help I have received in putting out *The Clause* this year. We had so many fine articles that it was difficult to choose which ones to print, and even more difficult to choose which was the best one of the year. Finally with the help of a committee, we were able to decide that Susan Warshaw Ebner had submitted the best article with her incise and complete study of electronic filing at the Court of Claims. This very timely article, still available on our web site, discusses in some detail how the Court of Claims will handle the transition to electronic communications and presentations--video conferencing, video evidence presentations, electronic court reporting, and more. Susan did a superb job where others feared to tread.

Frank Carr, Chief Trial attorney of the Army Engineer Board of Contract Appeals, has really helped us out with his timely and effective article in this issue on the Sovereign Acts Doctrine and Homeland security, and the effect of the Winstar decision on that doctrine and government liability in the current crisis. Winstar may not be a complete indemnification for Government contractors, but it is wise for a government contracting officer to take it into account.

Major Chris Williams, of the United States Air Force, Ogden AFB, has contributed a superb article on requests for equitable adjustment, always a popular subject among contractors--and their opponents at the ASBCA. If government action or lack of action has caused your organization time and/or money on your government contract, you may be able to receive full compensation. Used for years by private industry, Requests for Equitable Adjustment (REA) are finding their way into government use. Government organizations need to become familiar with the REA process to stay competitive. Major Williams tells us how to do that.

Leigh Bradley, of Holland and Knight, has greatly increased our perception of mixed use of Federal property in her article on page 13.

Judge Watson has written another excellent article on electronic filing, a subject which is absolutely essential, but which most lawyers would rather be tortured than read about. Gentlepersons, learn now or learn another profession later.

Marcia Bachman of the Air Force General Counsel's office has written a great article on keeping government contractors out of combat activities. Sometime that is much easier said than done. In addition to her civilian job, Marcia is a Colonel (JAG) in the Air Force Reserve.

Marcia is not the only JAG Air Force Colonel in this issue. Colonel Cheryl Nilsson has contributed a fine article on the effectiveness of ADR as an alternative to full scale litigation. Colonel Nilsson is the head of the ADR section, United States Air Force. The ADR process has come in for unfair criticism of late. Colonel Nilsson sets the record straight.

Finally, as a lawyer for the Air Force, I am grateful for our recent victories in Afghanistan, and also that I am still alive.

THE SOVEREIGN ACTS DOCTRINE AND HOMELAND SECURITY

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US Army Corps of Engineers
Engineer Chief Trial Attorney

Recently, the Federal government has directed an increased level of security and heightened alert at military installations and civilian facilities caused by the terrorist attacks on the World Trade Center and the Pentagon. As part of these homeland security measures in reaction to the attacks, contractors performing work under government contracts on military installations and civilian facilities may find their access to work sites severely limited or completely denied for periods of time. When this situation occurs, the government could receive a claim from the contractor for the delays and costs incurred. In deciding the claim, government contracting officers and legal counsel will need to consider whether or not the "Sovereign Acts" doctrine is a defense to liability.

The U.S. Supreme Court in the recent case of U.S. v. Winstar Corp., 518 U.S. 839 (1996), considered the sovereign acts doctrine. The Supreme Court stated the sovereign acts doctrine as standing for the proposition that " 'whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.'" Horowitz v. United States, 267 U.S. at 461 (quoting Jones v. United States, 1 Ct. Cl. 383,384 (1865). In Winstar, the case concerned the enforceability of contracts between the Federal government and savings and loans. Although the Supreme Court did not find the sovereign acts doctrine applicable as a defense in this case, it recognized and affirmed the doctrine as a defense in appropriate situations.

At the Armed Services Board of Contract Appeals (ASBCA), the government has asserted the sovereign acts doctrine as a defense in several appeals involving security alerts. In the first such appeal, Empire Gas Engineering Company, ASBCA No.7190, 1962 BCA P3323, the contractor was ordered to suspend work for 16 days while the Strategic Air Command was on alert. The board stated that "(w)hether or not a specific act or order of the Government is a sovereign act or a contractual act frequently turns on whether the act or order was that of the contracting officer...the fact that the act was that of the contracting agency is regarded as evidence that it was a contractual act. In no case has an order issued by the contracting officer directly to the contractor been held to be a sovereign act." The Board went on to hold that the "Government cannot escape contractual liability for the suspension of work it ordered on the ground that such suspension of work was necessary to implement a military alert which was necessary to national security." The sovereign acts doctrine as a defense was denied.

In two later cases involving security alerts, the ASBCA again considered the sovereign acts doctrine. The appeal of Woo Lim Construction Company, Ltd., ASBCA No. 13887, 70-2 BCA P8451 involved a building alteration contract in South Korea just south of the DMZ. The Board denied the contractor's claim for additional costs due to increased security restrictions. It held that "since the Government's action was taken in its sovereign capacity by others than the

contracting officer or his representatives, and not under any clause within the contract, there is no contractual authority to grant the relief requested by appellant." The appeal of Federal Electric Corporation, ASBCA No.20490, 76-2 BCA P12,035 involved a contract for construction on an air traffic control facility at a naval airfield. During construction, the contractor was denied access to the control tower for two days during visits of foreign heads of state and filed a claim for the delay. In denying the access, the contracting officer had sent the contractor a telegram stating that access was restricted due to station operations. The Board denied the government's defense that its action barring the contractor's access was a general and public act of the sovereign.

In an appeal concerning the sovereign acts doctrine but not involving a security alert situation, the Agriculture Board of Contract Appeals (AGBCA) disagreed with the rational of the ASBCA in Empire. The AGBCA held in Goodfellow Bros., Inc., AGBCA No. 75-140, 77-1 BCA P12,336 that "We do not believe the suspension of work order issued by the Contracting Officer for the purpose of stopping the running of contract time converts the fire closure sovereign act into a contractual act. To the extent that (Empire) may be construed to mean that a contracting officer's action, absent a contractual agreement to compensate for a sovereign act, makes such act compensible, we do not agree."

Under circumstances where the contracting officer does not communicate in writing directing or informing the contractor to stop work because of a security alert, a contractor could assert a "constructive" suspension of work. In the appeal of Durocher Dock & Dredge, Inc., ENGBCA No. 5768, 91-3 BCA P24,145 the Engineer Board stated that "a constructive suspension of work occurs when there is no order to suspend work by a Contracting Officer but the work is stopped and the Government is responsible for the stoppage." Although a constructive suspension of work was not considered in Woo Lim discussed above, contractors will probably assert this claim today.

Another factor a board or court could consider is the amount of discretion that government officials, military or civilian, possess in implementing the security alert. In the appeal of DWS, Inc., ASBCA No. 33245, 87-3 BCA P19,960 the Board considered the sovereign acts doctrine as a defense to a contract action wherein the government reduced work because of the Gramm-Rudman Act. In rejecting the Government's sovereign acts argument, the Board stated that "retention by the Army of discretion as to how to allocate its remaining funds convinces us that the reduction of funds in this contract was not a sovereign act of Congress, but a contractual action of the Government." Also, consider the appeal of Home Entertainment, Inc., ASBCA No.50791, 99-2 BCA P30,550. In this case, the Board held that a default termination of an AAFES contractor during the Panama/Noriega crisis was not a sovereign act, but rather it was a contractual action directed exclusively at one contractor.

Finally, the Courts and Boards have held that the Federal government can agree in a contract to be liable for public acts performed in its sovereign capacity. See Hughes Communications Galaxy, Inc v. United States, 998 F.2d 953 (Fed. Cir. 1993); and Raytheon STX Corporation, GSBCA No. 14296-COM, 1999 GSBCA LEXIS 252. As far as contracts are concerned, the FAR does provide contractors in fixed price contracts relief for time but not costs. See the Default (Fixed Price Construction) clause at FAR 52.249-10(b)(1)(ii). The clause provides that contractors shall not be charged with damages if the delay in completing the work

is caused by the "Government in its sovereign or contractual capacity." Regarding cost-reimbursement contracts, the Energy Board of Contract Appeals in the appeal of Rockwell International Corporation, EBCA Nos. C-9509187, C-9509220, C-9509221, 99-1 BCA P30,345 stated that fixed price and cost-reimbursement contracts are "markedly different" and held that absent specific statutory or regulatory limitations, the Government can agree to reimburse contractors "for costs incurred due to sovereign acts."

The above cases reflect that there is no bright line in deciding whether the sovereign acts doctrine is a defense when government officials, military or civilian, deny work site access to contractors because of a security alert. Clearly, the ASBCA relying on its own precedent could easily decide that an act by a contracting officer notifying a contractor of restricted access is a contractual action irrespective of the underlying reason for such action. In this situation, the sovereign acts doctrine would not be a defense. However, less clear is what the ASBCA would decide should a contractor assert a constructive action by a contracting officer or how the ASBCA would view discretionary actions by government officials in implementing security alerts. Further, there is at least one other administrative board of contract appeals that disagrees with the ASBCA and there are no appellate court decisions directly addressing this specific factual situation.

In conclusion, the Federal government should anticipate claims for delay and costs caused by homeland security measures and contractors should be prepared for contracting officers to decide these claims differently. Unless Congress acts to give government contractors similar relief as provided to the airline industry or acquisition regulations are amended to waive the sovereign acts doctrine, litigation is sure to follow.

REQUESTS FOR EQUITABLE ADJUSTMENT

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If government action or lack of action has caused your organization time and/or money on your government contract, you may be able to receive full compensation. Used for years by private industry, Requests for Equitable Adjustment (REA) are finding their way into government use due to Public/Private Competition. Like their civilian counterparts, government organizations need to become familiar with the REA process to stay competitive.

Neither the Federal Acquisition Regulation (FAR) nor the Defense Federal Acquisition Regulation Supplement (DFARS) offers a definition for REA. Webster's Dictionary defines *equitable* as, "Having or exhibiting equity: dealing fairly and equally with all concerned." However, DFARS does address REAs. DFARS 243.205-72, Requests for Equitable Adjustment, states, "Use the clause at 252.243-7002 (Requests for Equitable Adjustment) in solicitations and contracts estimated to exceed the simplified acquisition threshold." Looking at DFARS 252.243-7002, it states, "The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed or that have been separately claimed. All indirect costs included in the request shall be properly allocable to the change in accordance with applicable acquisition regulations."

A good definition for REA might be, "A means to satisfy a change within the general scope of the contract, caused by the government, without relief, where an organization is not in a better or worse profit/schedule position on the unchanged work after the change was made than before the change."

WHEN TO USE AN REA

Delay or disruption caused by the government is an example of when to use an REA. Depending on the type of contract, an REA may be filed under FAR 52.243 (Contract Modifications Provisions and Clauses) or FAR 52.236-2 (Differing Site Conditions). In determining what clause to use, refer back to what the contract says.

Recognizing what constitutes an REA is one of the first steps in the REA process. Examples of a possible REA are; adjustment to direct costs of added or deleted work, change in conditions surrounding contract overtime, unforeseen expenses such as bad government furnished property (GFE) or tech orders, GFE not available when needed, downtime of employees, lost production or revenue causing increased rates, the difference between purchase and shipping (if purchased), contractor acquired property (must have purchasing contracting officer (PCO) approval), items/events not considered

in bid development (excessive to what could be reasonably anticipated), and profit or fee affected by change. These REA examples are for cost relief only.

An REA may also be submitted for schedule relief. Any schedule slippage, caused by the government (not under your control), without relief, is a possible REA.

IS IT A CLAIM?

An REA may not be a claim. However, a claim is an REA. As stated above, an REA can be filed under the Changes Clause. An equitable adjustment is the means to satisfy a change to the contract, caused by the government, without relief. If an organization files an REA and the PCO agrees with the REA issue, then the claims process is avoided.

For an REA to become a claim, it must be filed under FAR 33.202 (Contract Disputes Act of 1978). According to FAR 33.201, a claim is, "A written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." Also, an organization may avoid the claims process by submitting the REA under FAR Part 50 (Extraordinary Contractual Actions) or FAR 33.205 (Relationship of the Act to Public Law 85-804).

In competitions awarded to public organizations, if the PCO doesn't agree with the REA issue, the REA might be submitted to higher authority (Headquarters) for resolution. Again, avoiding the claims process.

CERTIFICATION

Depending on the dollar amount, an REA may have to be certified. DFARS 243.204-70 (Certification of requests for equitable adjustment) states, "(a) A request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold may not be paid unless the contractor certifies the request in accordance with the clause at 252.243-7002. (b) The aggregate amount of both the increased and decreased costs shall be used in determining when the dollar threshold requiring certification is met."

In discussing an REA certification, DFARS 252.243-7002 (Requests for Equitable Adjustment) states,

> "In accordance with 10 U.S.C. 2410(a), any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold shall bear, at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor: I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief."

The certification in the above paragraph requires full disclosure of all relevant facts, including; (1) Cost or pricing data if required in accordance with subsection 15.403-4 of the Federal Acquisition Regulation (FAR) and (2) Information other than

cost or pricing data, in accordance with subsection 15.403-3 of the FAR, including actual cost data and data to support any estimated costs, even if cost or pricing data are not required. Further, the certification requirement in the paragraph does not apply to; (1) Requests for routine contract payments; for example, requests for payment for accepted supplies and services, routine vouchers under a cost-reimbursement type contract, or progress payment invoices or (2) Final adjustments under an incentive provision of the contract.

IPT APPROACH (Alpha Contracting)

The best approach to take when putting together an REA is for the government and the contractor to work together. However, to use this approach, both the government and the contractor have to be in agreement that an REA should be filed in order to make the contractor "whole." As defined in AFFARS 5301.9002, Integrated Product Team (IPT) pricing means,

> "The process of concurrent requirements refinement, proposal development, fact-finding, and preliminary agreement between the Government and contractor in a noncompetitive acquisition. In this process, the Government and contractor IPT members communicate in an on-going, structured manner, from early planning stages through interactive model contract development and review of related cost or pricing data."

The Air Force has taken this process one step further. An excerpt from AF Acquisition Executive Memo, *Subject: Open Communications with Industry*, dated 23 Jun 97 states,

> "In acquisitions where appropriate sole source approvals have been obtained, we fully expect: 1) Teaming of the Government and contractor in the Proposal and Model contract development. 2) Continuation of Government/Contractor IPT efforts leading to agreement on contractor effort and costs associated with the task(s)."

Also, when using the IPT approach, get DCAA and/or DCMA involved early. This will save time later on when these agencies are performing their evaluations.

TYPES OF REAs

The Reasonable Cost method is the best approach to use when filing an REA. Accurate, supportable data and information concerning cost and/or schedule relief must exist. Even if the contractor can't segregate, provide clear evidence, and/or suffers from lack of cost and/or schedule information, the contractor should file the REA as close to the Reasonable Cost method as possible. It should be very obvious to both sides that changes to the contract were caused by the government.

Another type of REA is the Total Cost method. This is the least preferred method and is only used when it is impractical to use another approach. The Total Cost value is the difference between the original contract price and the costs actually incurred in

contract performance. Again, the contractor must prove the changes to the contract were caused by the government.

DCAA Contract Audit Manual 12-807.4 - Total Cost, shows 4 elements that the contractor has to prove to use this method. The first is the nature of the delay/disruption makes it impracticable to determine actual delay costs with a reasonable degree of accuracy. The second is the bid was realistic. The third is the actual incurred costs were reasonable. Finally, the fourth is the government was responsible for the differences between bid and incurred costs.

"HOW-TO" NATURE

To perform an REA, an organization should first form its REA Team. This team should consist of personnel from contracting, cost, legal, and engineering. The team should identify as many REAs as possible. Team members should brainstorm, conduct interviews, and gather research to identify entitlement areas. If your organization kept solid, accurate records/data, this step can be a simple one. Otherwise, extensive fact finding and intensive negotiations with the PCO might have to take place. The team should be empowered to make decisions and resolve issues. However, a process needs to be in place to moderate issues the team can't resolve. Next, the team needs to standardize the REA format and start putting pen to paper.

In writing an REA, the first page can be a Cover Letter. This page should have the date of submittal, an introductory sentence, and an authorized signature. Depending on your company's review process, the second page can be an Executive Summary page. This page should identify the REA number and title, contain a brief overview, and identify any cost and/or schedule impact. The third page can be a table of contents showing a list of attachments. Remember, solid, accurate records and data can make the REA process simple. The forth page can be the certification. Finally, the remaining pages can contain the premise/basis for the REA.

The main thing to remember when doing an REA is documentation, documentation, and documentation. Get any agreed to changes in the contract in writing from the PCO. Having and using correct shred, charge, or exception codes will produce adequate, accurate, and timely data. Use timecards, letters (written and e-mail) from the PCO, actual cost and/or schedule data, dates from signed meeting minutes, and estimates of repair and impact on production to greatly strengthen the REA.

DISPUTES/ARBITRATION

There is no dispute/arbitration for an REA. In a private competition, the contractor submits an REA to the PCO. The PCO makes a determination. The contractor either accepts the PCO's determination or files the REA as a claim. If the contractor files the REA as a claim, the REA process ends and the claim's process begins. In a public competition, the negative perception of two government agencies disputing an REA issue will usually force higher headquarters to intervene and act as the referee.

Request for equitable adjustment is a useful contracting tool that public competition contracting personnel must become familiar with in order to stay competitive with the private sector. Recognizing what constitutes an REA and knowing the processes involved are the first steps taken by a contractor to gain possible cost and schedule relief. If the initial REA process fails, the contractor still maintains the right to file the dispute as a claim. Finally, keeping solid, accurate records and data will make the REA process simpler, saving both time and money. As in real estate where it's location, location, location, in the REA process it's documentation, documentation, documentation.

This article is the opinion of the author and does not reflect the opinion of the Air Force or Ogden Air Logistics Center.

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PRIVATIZATION ALTERNATIVE:
Enhanced-Use Leasing of Non-Excess Federal Property

By: Leigh A. Bradley
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Base closure, privatization, A-76 procurements and outsourcing have been the federal government's principal means to reduce infrastructure operating and maintenance costs during the last decade. Now Congress has provided federal property managers with a new tool to leverage underutilized property by authorizing the Department of Veterans Affairs (VA) and the Department of Defense (DoD) to lease real property and facilities under an innovative program called "enhanced-use leasing." This privatization alternative has produced a string of successful transactions at VA, and DoD officials are recommending its broad application within the Military Departments.

VA maintains an extensive portfolio of properties, including over 23,000 acres of land and more than 4,600 buildings at approximately 270 locations. A significant number of these properties are underutilized. In fact, the GAO estimated in 1999 that VA was spending as much as $35 million a year to maintain over five million square feet of vacant space. Acutely aware of VA's aging and underutilized capital infrastructure, Congress devised the ground-breaking enhanced-use leasing authority that allows VA to leverage its under performing capital assets to generate revenues, achieve operating cost reductions, and obtain private investment in VA programs, facilities or services.

Under the enhanced leasing authority, 38 U.S.C. §§ 8161-8169, VA may lease land or buildings to the private sector for up to 75 years. The leased property may be developed for non-VA uses, consistent with the mission of the VA. VA is not required to follow federal acquisition rules when selecting the enhanced-use lessee, although it must devise procedures that ensure selection process integrity. Furthermore, to maximize the program's flexibility, Congress chose to exempt the enhanced leasing authority from an array of restrictive federal statutes, including the Competition in Contracting Act, the Federal Property and Administrative Services Act of 1949, and the Stewart B McKinney Act. VA however, must abide by all federal environmental laws, e.g., the National Environmental Policy Act (NEPA) and the National Historic Preservation Act.

Unlike traditional government leasing, which offers little more than a revenue return in proportion to the depletion of the leased asset, the enhanced-use leasing program encourages innovative public/private partnerships. In return for the long-term lease, VA must obtain fair consideration, either monetary or in-kind. However, funds received as consideration do not have to be returned to the Treasury, but may be kept by VA. By allowing revenues to come back to the agency, the authority provides the incentive necessary to encourage government property managers to be creative and aggressively pursue opportunities to partner with the private sector. At the same time, the long-term lease provides the private developer (lessee) with the property interest necessary to secure financing through the capital markets and amortize any capital investment made in the property or facility.

A key component of the enhanced-use leasing program is close coordination with and reliance on the local government and community as full partners in the development process. For example, VA must hold a public hearing at the location of any proposed enhanced-use lease to obtain veteran and local community input. It must also provide two notices to its Congressional oversight committees prior to entering into an enhanced lease. Close integration with community leaders and interested stakeholders enables VA to address concerns early in the planning and development process.

VA has completed a variety of projects since enactment of the enhanced leasing statute, including several office buildings, parking facilities, child development centers, a community nursing home, homeless shelter, low-cost senior housing, and a co-generation plant. Agency property management officials estimate that the agency's enhanced-use leasing authority has produced over $200 million of private investment in VA property and facilities in the past five years.

Less than a year ago, Congress modified the Department of Defense leasing authority, 10 U.S.C. § 2667. While not identical to VA's enhanced-use leasing authority, DoD's revised leasing statute greatly improves its ability to leverage underutilized (but not excess) properties. The new authority permits construction or acquisition of new facilities with cash proceeds earned from leased DoD property and clarifies that in-kind consideration received from leases can be used for construction of new facilities. The legislation also allows the in-kind consideration to be accepted at any military facility, not just at the site of the leased property.

DoD officials have stated that these enhancements provide the Military Services an exceptional tool to maximize the utility and value of underused real property assets. The ability of its property managers to spend cash consideration on a greatly expanded list of base operating support functions, including construction, and the ability to accept a greater array of in-kind services, creates practically limitless out-leasing opportunities. Examples of these opportunities include: the creation of new or joint-use office space, warehouses, hotel/temporary quarters, vehicle test tracks, wind tunnels, energy generation plants, recreational playgrounds, sports venues, etc.

Without question, in the coming months, there will be considerable interest in and scrutiny of these groundbreaking leasing authorities. And, as other federal agencies evaluate a need for similar authority, the enhanced-use leasing initiative should gain the recognition and publicity needed to showcase its versatility, flexibility, and overall effectiveness in converting under-performing federal properties into productive assets. For a more in-depth discussion of enhanced-use leasing, see the Summer 2001 edition of the *Public Contract Law Journal* article entitled "A Privatization Alternative: The Department of Veterans Affairs' Enhanced-Use Leasing Program" by Leigh A. Bradley and David P. Metzger, partners in the Government Contracts Practice Group at Holland & Knight LLP.

THE DISTRICT OF COLUMBIA BOARD ENTERS A NEW WORLD OF ELECTRONIC FILING

Matthew S. Watson
Administrative Judge
District of Columbia Contract Appeals Board

Within view of the offices of the District of Columbia Contract Appeals Board is the hitching post used by Abraham Lincoln when he came by horse the two blocks from the White House to the New York Avenue Presbyterian Church. Up until October 9th of this year, Lincoln, as an experienced 19th century contract litigator,[1] would not have found the procedure for filing pleadings with our Board unfamiliar. Very little has changed with regard to filing pleadings since Lincoln's day, except possibly that messengers bringing pleadings now use bicycles instead of horses.

It became increasingly apparent to the Board that our filing procedures were not consistent with the best law office practice. Although we now use computerized research tools, and word processing has replaced typewriters, our method of filing pleadings remained in the 19th century. As a result, pleadings that are created and stored electronically within law offices, rather than being sent to us in their electronic form, are printed on paper and then individually delivered to our offices by a messenger or mail carrier. Not having full confidence in the filing process, many attorneys further requested that a hand-stamped copy be returned to their office as proof of filing. The paper documents which were delivered to us can be read visually and filed in pasteboard folders, but their text is not readily searchable, nor is it accessible for use to prepare future documents unless the text is reentered into our own word processing systems. This is the case notwithstanding the fact that the documents are prepared on equipment and software identical to that in our offices. As a result, for example, although we require that litigants accompany motions with proposed orders, if the judge does not adopt the exact order submitted, it is necessary to either entirely retype the order, or to handwrite annotations in our often imperfect handwriting. No serious party would submit a pleading with handwritten corrections, yet we regularly issue orders with handwritten changes.

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[1] Before being elected President, Lincoln was on retainer to, among others, the Illinois Central Railroad where he was involved in major construction contract matters.