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TABLE OF CONTENTS

1. President's Column <i>Peter A McDonald</i>	Page 3
2. Editor's Column <i>Clarence D. "Hugh" Long, III</i>	Page 4
3. The "Sovereign Acts" Doctrine and Homeland Security <i>Frank Carr</i>	Page 5
4. Requests for Equitable Adjustment <i>Major Chris Williams, USAF</i>	Page 8
5. Privatization Alternative: Enhanced-Use Leasing of Non-Excess Federal Property <i>Leigh A. Bradley</i>	Page 13
6. The District of Columbia Board Enters A New World of Electronic Filing <i>Matthew S. Watson</i>	Page 15
7. ADR in Government Contract Disputes – An Opportunity <i>Colonel Cheryl Nilsson USAF</i>	Page 26
8. Avoiding Contractor Combat Activities <i>Marcia Bachman, [Colonel, USAFR]</i>	Page 29
9. Treasurer's Report	Page 33
10. Membership Application	Page 34

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President's Column
by
Peter A. McDonald
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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 incisive 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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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 rationale 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 compensable, 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 fourth 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.

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.

Our previous filing procedures made little sense in an age when banks transfer hundreds of millions of dollars electronically and most databases are maintained on computers. Many of the procurements which we review were conducted in an electronic format. Indeed, electronic commerce is the favored means of procurement. Congress has mandated that Federal agencies expand their use of electronic commerce.² The Federal Acquisition Regulation provides that “[t]he Federal Government shall use electronic commerce whenever practicable or cost-effective.”³ The Commerce Business Daily is now on the internet through a number of commercial services, see e.g. <http://cbd.savvy.com/> and <http://cbd.cos.com/>, offering sophisticated electronic searching and retrieval never remotely possible with paper editions.

Electronic contract formation is not limited to government procurement. Congress, in adopting the Electronic Signatures in Global and National Commerce Act last year, PL. 106-229, provided that “(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.”⁴

BUDGETARY CONCERNS

Initially, although our Board was interested in electronic filing, we had serious concerns as to the cost, including equipment, services and staff resources, both to the Board itself and to litigants before the Board. A filing system for any adjudicator must be nearly 100% reliable and virtually error free.⁵ We initially believed that we would need additional appropriations to purchase software and electronic storage equipment, as well continuing annual budgets to hire personnel or contractors to maintain the system on an ongoing basis. Securing additional funding would be difficult and would require considerable time. Although we feared that it might make proceeding with electronic filing impossible, we initially determined that if we were to expeditiously modernize our filing system, the implementation should not require the Board to make any expenditures for equipment, should not impose on the Board any responsibilities or costs for maintenance, and should be usable by staff with only minimal training. Similarly, to be accepted by the procurement bar, the system should not require any expenditures by firms

² 41 U.S.C. 426

(a) The head of each executive agency, after consulting with the Administrator, shall establish, maintain, and use, to the maximum extent that is practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of its procurement system.

³ §4.502(a).

⁴ 15 U.S.C. §7001(a)

⁵ We must acknowledge that even our traditional filing system has been known to misplace records and that our offices have not been open for physical filing during normal hours due to weather and other emergencies.

appearing before the Board for equipment or training, and that ongoing services should be priced so as not to be more expensive than existing copying and delivery costs. We assumed that all litigants before the Board had available personal computers using word processing software and Internet access, as does the Board. In addition, we further desired the system be fully compatible with the test of electronic filing being conducted by the Superior Court of the District of Columbia for major civil cases, so that it would ultimately be possible that appeal records could be electronically transmitted to the District of Columbia Court of Appeals which has jurisdiction over appeals from our Board as well as appeals from the Superior Court.

THE E-FILING SYSTEM CHOSEN

To our pleasant surprise, we were able to meet all of our no cost requirements with a commercial, off-the-shelf service. Although we had initially been concerned that we would have to acquire equipment dedicated to our Board to receive and store filings, we had not considered use of the Internet. CourtLink Corporation,⁶ through its JusticeLink system, with which our Superior Court was already working, operates as a service bureau to receive, store and retrieve filings on behalf of the Board through the Internet. CourtLink owns and maintains all of the equipment and software at its facilities in the State of Washington which is now used in common by 90 court systems throughout the country with over 1 million pages of pleadings electronically filed and served per month. Access to the system is made through the Internet World Wide Web. After answering screen questions as to the name of the case, type and title of the document, party filing, parties to be served or given notice of the filing, and the attorney authorizing the filing, the document is sent as an attachment to the filing information. Upon receipt of the filing, the filing service automatically gives notice to each of the parties served and returns a receipt showing transmission of the document. At present, the only restriction on filing documents through CourtLink are documents filed under seal. Since the Board already has Internet access, we were in a position to immediately utilize the system without any expenditure on equipment or software.⁷

In exchange for the Board designating CourtLink as its agent for receiving filings, CourtLink makes no charges to the Board for filing Board documents or receiving and downloading documents filed by others. Charges are only made for filings made by litigants. Litigants pay at the rate of 10¢ per page filed or served with a minimum of \$2 per filing. This fee is almost always cheaper than the cost of copying the original and two copies of pleadings previously required to be filed with the Board, without even considering the cost of postage or delivery. A party, either the appellant or the government, transmitting up to a 20 pages to be filed with the Board and served on a single opposing party, would have a total electronic filing and service cost of \$4, certainly nominal by any standard. Even should a party wish to file a 1,000 page transcript, the filing cost would only be \$100. A litigant can view and download

⁶ On October 31, 2001, a definitive agreement was signed for LexisNexis to acquire CourtLink.

⁷ For its convenience, the Board determined to replace its 5 year old analog copier with a digital copier to enhance its high-speed printing and copying capability and to provide high speed scanning of documents.

documents served upon it without charge. Nonparties, and persons other than to whom the document has been served, may view any document without charge, but are charged 10¢ per page to download and print a document. Training is free, either on the Internet or in person, and training time is minimal. We have found that anyone, even a judge, who is capable of sending an e-mail with an attachment has the skills necessary to file and retrieve documents electronically and can be proficient in using the system in under an hour. We have been told by counsel appearing before us that they have successfully filed documents without training by merely following the on-screen instructions.

DUE DILIGENCE

The financial terms clearly met the requirements of the Board, that the Board could adopt e-filing without any additions to its budget. Nevertheless, the Board needed to exercise due diligence that the system would otherwise meet our standards and requirements. We had to be assured that electronic records would not only qualify as a public records, but that the e-filing system adopted would securely receive filed documents and safely store the documents without an unreasonable risk of tampering or loss. We also considered whether we could dispense with manual signatures.

QUALIFICATION AS PUBLIC RECORDS

Electronic records have been statutorily recognized as public records by the District of Columbia Council.⁸ This is consistent with Federal policy expressed by Congress.⁹ Congress has, in fact, mandated that Federal agencies maintain computerized records¹⁰ and specifically authorized the Comptroller General to use electronic filing in receiving protests.¹¹

⁸ D.C. Code §2-1701(13)

"Public record" means any document, book, photographic image, electronic data recording, paper, sound recording, or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of public business by any officer or employee of the District.

⁹ 5 U.S.C. §552(a)(3)(C)

In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

¹⁰ 41 U.S.C. §417

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include--
(1) with respect to each procurement carried out using competitive procedures--

SECURE TRANSMISSION AND STORAGE

In many ways e-filing has fewer concerns as to secure transmission than many transactions currently made on the Internet. Since documents under seal will not, at least at present, be filed electronically, there is no concern with privacy. All documents filed with the Board, other than sealed documents subject to protective orders, are public, and thus there is no concern with encryption or other protection from interception during transmission. Documents may be submitted in the most commonly used formats,¹² making it unnecessary for the Board or attorneys to purchase or be trained in any other equipment or programs than they are already using.

There is, however, a theoretical concern that the stored documents will be subject to tampering. This concern is met by the system locking-in the documents as a single image in Adobe portable document format (".pdf") as soon as transmitted. Thus, although documents are generally transmitted in an editable form (*i.e.* Word Perfect or Word), the system immediately saves a copy of the document in a read-only format. The document is saved in the sequential order received.¹³ The pdf form makes the archival document uneditable. Should a party desire, the original document need not be sent in editable form, but may be sent directly in an uneditable image form. The Board does not encourage the uneditable transmissions, however, since when a document is sent in a wordprocessing format, the system saves and makes the document available in both the original format as transmitted and the converted uneditable copy. This allows the Board to retrieve the document in the original word processing format to use as the basis of its own

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- (A) the date of contract award;
 - (B) information identifying the source to whom the contract was awarded;
 - (C) the property or services obtained by the Government under the procurement; and
 - (D) the total cost of the procurement;
 - (2) with respect to each procurement carried out using procedures other than competitive procedures--
 - (A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);
 - (B) the reason under section 253(c) of this title or section 2304(c) of Title 10, as the case may be, for the use of such procedures; and
 - (C) the identity of the organization or activity which conducted the procurement.

¹¹ 31 U.S.C. 3555(c)

The Comptroller General may prescribe procedures for the electronic filing and dissemination of documents and information required under this subchapter. In prescribing such procedures, the Comptroller General shall consider the ability of all parties to achieve electronic access to such documents and records.

¹² Text formats: Microsoft Word (*.doc), Word Perfect (*.wpd), Text (*.txt), Rich Text Format (*.rtf), Portable Document Format (*.pdf) Graphics formats: TIF (*.tif), BMP (*.bmp), and JPEG (*.jpg).

¹³ Once transmitted, a document cannot be withdrawn. In the event that a party sends an erroneous document, such as an early draft, the Board may direct that the erroneous document be deleted from the electronic docket, and, thus, although it is not removed from the records, is effectively "hidden" from the Board and other parties.

document, such as to prepare a final order from a party-submitted proposed order. Even if the document is transmitted in image format, the Board can electronically “read” the document with an optical character reading program and convert the document to wordprocessing formats. Documents only available in hard copy, such as drawings or photographs, may be scanned and transmitted in image form.

A further concern was also that the system’s computer records might be compromised or lost. Back-ups are regularly made and saved by the system at multiple locations and can be additionally downloaded nightly to the Board.¹⁴ If an intruder were to “hack” the service-provider’s system, the .pdf format cannot be edited and if attempt were made to replace a document image in its entirety, it would have to be replaced in several locations. Further, copies of important documents as originally submitted would be likely to have been downloaded and saved outside the e-file system by other parties and the Board. The e-filing system offers at least as much protection as our paper filing, since it is likely that it is more difficult to successfully hack into the electronic file than it would be to physically break into our offices and alter a paper record, or to alter an original document made available for public inspection. Our current paper files are also vulnerable to the very real possibility of loss through negligent handling, fire or water damage, risks which are significantly minimized by electronic filing systems redundant storage at several locations.

MANUAL SIGNATURES

We also considered the risk of documents not being authenticated by manual signatures. First we must put this concern into perspective. A review of our recent paper filings indicate that a majority of them have at least one signature which is not the personal signature of the person it purports to be. Paper documents are regularly signed by associates, cocounsel, secretaries or other office personnel. Most paper documents are filed with the Board by messengers or appear in our mailbox with no guarantee of their source. The Board has never attempted, nor does it have the means, to authenticate signatures on paper filed documents.

Electronic filing, if anything, will give a better indication of the source of a document than paper filings. Electronic filing identifies the originator of a filing. When an attorney or other representative of a party registers with the filing agent, he or she is given a username and password. When an electronically filed case is initiated, a “case profile” is created which identifies the representatives of the parties, essentially an electronic notice of appearance. Unless an additional appearance is filed with the Board, only those indicated on the original case profile can file documents in the case, using the confidential password, similar to making bank transactions. Use of the password

¹⁴ The Board has not chosen to receive bulk back-up files. Instead, the Board is downloading individual documents as they are received to specific case folders on our own internal network. For a number of years the Board established on its own server a folder for each case into which was saved any documents produced by the Board for the particular case. The Board is continuing this procedure and is now saving documents filed electronically from the outside in those same server folders together with the internally produced documents. Thus the Board has an electronic copy of every document independent of the outside system.

generally gives a better identification of the source of the document than the Board has ever had with paper filed documents.

There is a question, however, with regard to documents not signed by counsel, such as affidavits or discovery responses. Since the documents will usually be transmitted by counsel, this does not appear to be a serious problem. We consider that the submission of a document by an attorney is a warranty that, to the best of the attorney's knowledge, the document is genuine. An attorney who transmitted a false document with knowledge would be sanctioned by the Board and the bar.¹⁵ In addition, similar to requirements that original discovery requests not be filed but be maintained by counsel and not filed,¹⁶ the rules adopted by the Board for electronic filing require that a signed original of any document electronically filed be maintained in the attorney's files and required to be produced in the event a question of genuineness is ever raised.¹⁷

The maintenance of the counsel list also permits one of the major efficiencies of e-filing for both the Board and parties. Parties are relieved of the burden of serving pleadings and the Board is relieved of the burden of serving orders and decisions. All service of electronically filed documents is made automatically by Courtlink. This service is made even if a litigant receiving service does not participate with the electronic filing program. Courtlink will either fax or mail a copy of the electronically filed pleading. Board staff will save considerable time through electronic service.

TECHNICAL DIFFICULTIES

Lastly, the Board was concerned with the possibility of delay in receipt of documents due to technical difficulties. Sadly, current events have made this seem of much less of a concern, in fact, even with the possibility of technical difficulties, electronic filing may be the most reliable means of receiving documents. At the time that this article is being written, over 1 million pieces of mail are quarantined at the Brentwood Post Office, the main mail sorting facility for many Government agencies in Washington, DC, including the Board. Postal service to the Board is erratic and for a number of days private express delivery services did not function.

The Board has made the CourtLink its agent for receipt of pleadings,¹⁸ thus filing, for timelines purposes is complete when the document is received by CourtLink

¹⁵ See Rule 11, Federal Rules of Civil Procedure; Board Rule 127.

¹⁶ See Rule 5(d), Fed. R. C. Proc.

¹⁷ Rule 404. Maintenance of Original Document

Unless otherwise ordered by the Board, an original of all documents filed electronically, including original signatures, shall be maintained by the party filing the document and shall be made available, upon reasonable notice, for inspection by other counsel or the Board. From time to time, it may be necessary to provide the Board with a hard copy of an electronically filed document.

¹⁸ Rule 401

electronically. To resolve any issue as to delay by the e-filing system, the Board has further provided that

“if the electronic filing is not filed with the Board because of (1) an error in the transmission of the document to the Vendor which was unknown to the sending party, (2) a failure to process the electronic filing when received by the Vendor, or (3) other technical problems experienced by the filer, the Board may upon satisfactory proof enter an order permitting the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically.”¹⁹

An advantage of the electronic filing is that the Board now is never closed for filing. Thus, a document can be filed through 11:59 pm on the day that it is due, compared to 5 pm for paper filings. Since actual electronic service would occur immediately, the Board’s mailing rule adding 3 days for responses²⁰ would not come into play. The Board was concerned, however, that filing late at night or on weekends would reduce the other party’s actual time to respond. In order to avoid any possible abuse, the Board has adopted a rule that provides that “for the purpose of computing time for any other party to respond, any document filed on a day or at a time when the Board is not open for business shall be deemed to have been filed on the day and at the time of the next opening of the Board for business.”²¹

Notwithstanding that the analysis of electronic filing showed that it met all of our concerns, we still did not want to cut all ties to our old ways. We therefore chose not to make use of the system mandatory for any case. The policy differs from those of most courts which, in beginning tests of electronic filing, make e-filing mandatory, but limit e-filing to certain divisions of the court, or to particular types of cases. We chose to immediately permit e-filing for all of our cases, but not make it mandatory in any case. We also are encouraging ongoing e-filing of pleadings in cases which were initially paper filed. Although we have not required electronic filing, no party has yet opted out of e-filing.²²

¹⁹ Rule 406

²⁰ Rule 122.3

²¹ Rule 405

²² Some counsel not fully trusting e-filing have followed their e-filings with paper copies of the pleadings.

INITIAL EXPERIENCE

When we initially considered electronic filing, we believed that a major advantage to the Board of electronic records would be the ability to utilize portions of records in our opinions without having to reenter the text or other data into our drafts. We still believe it to be so, but with just a month of experience, it is too early to evaluate these benefits. We have found, however, that we are achieving significant efficiencies in handling minor administrative matters in case processing. The handling of a simple consent motion for an extension of time to respond to discovery is illustrative.

With a paper filing, the attorney seeking the extension would prepare, or request staff to prepare, the motion on a computer word processor and print the motion documents, including a proposed order. When the motion is completed, the attorney would sign the motion and return it to staff to copy the signed motion papers, address envelopes to the Board and other party for service, stuff and place the envelopes with a messenger, or mail the envelopes to the Board and other party. A staff member at the Board would receive the documents and stamp the time of receipt, locate the case docket, enter the documents into the case docket, locate the case, file the original motion in the case file and route the motion and proposed order to the proper judge for signature. After review and signing the proposed order, the judge would route the papers back to staff to enter the order on the docket, make copies of the signed order, place the signed order in the file and address envelopes to mail the copies of the signed order to the parties, or possibly, if requested, fax the order to the parties.

With electronic filing, the word processing file containing the motion and proposed order in the requesting attorney's office is electronically attached to the filing message on the CourtLink website and, upon release by the attorney, the documents will be received by CourtLink, converted to an image file and filed and an electronic receipt would be returned to the filing attorney. An e-mail message is simultaneously sent to the Board recorder and assigned judge, as well as served on the other party, stating that the motion has been filed. The judge can immediately view the motion and proposed order on his or her computer screen, or print it out, without the need for the staff receiving the motion at the Board to physically carry the papers to the judge's desk.²³ Whether or not the clerk's office has yet opened the e-mail message, receipt of the motion has already been entered on the case docket and the motion is available at the judges desk. Upon review of the motion, the judge may electronically sign the proposed order, as submitted, or enter revisions without the necessity of retyping unchanged material. With a few mouse clicks, the final order may then be electronically attached to a filing message on the system website and, upon release by the judge, the order will be immediately filed, docketed and notice of its issuance sent to all parties without any intervention of other Board staff. The final order is immediately available to the parties on the CourtLink website.

²³ Although the filing is sent directly to the Judge, it is still subject to review by the clerk and may be rejected if improperly filed.

Use of the system also is proving worthwhile in telephone scheduling conferences. It is now possible for counsel to submit proposed schedules minutes before a telephone conference. The schedules can be before both counsel and the judge when the conference begins. Since the text is editable, the judge can make adjustments to the proposed schedule as the conference proceeds and can deliver a final scheduling order to counsel before the telephone call is completed.

We also believe that e-filing is making our decisions of more value to the public. Discussion in our opinions is regularly supported by citations to portions of the record. While this may be useful to the parties to a case or an appeals court reviewing our decisions, the references often are of no value to anyone else researching our decisions. With e-filing, each pleading document is given a "filing ID number" when it is transmitted. When citing electronically filed pleadings, our decisions now indicate the document's ID number permitting any attorney or member of the public to access the underlying document.

Electronic filing is changing our routines. Mad scrambles to locate a file are becoming a thing of the past. It is also not necessary to expedite delivery within the Board's office of documents filed shortly before a hearing. It is now possible for judges to call up documents as soon as they are filed without physically obtaining the file. Indeed, not only can judges immediately access pleadings at their desks, they can do so from home or any Internet-connected computer anywhere in the world. The same is true for counsel in a case, or for that matter, anyone following the proceeding. I am now notified immediately by e-mail when any pleading is filed. By logging onto the CourtLink Internet site, I immediately have a detailed listing of pleadings filed, including a notation of each document requiring my signature. I can also check whether a pleading has been filed by its due date without searching a stack of incoming filings waiting to be docketed and can transmit and serve my own orders without waiting for envelopes to be typed and mailings to be made.

In adopting electronic filing, we kept all of our rules and forms identical to paper filings. Captions and formats have remained in their customary form. When electronically filed documents are printed out, they are indistinguishable from paper filed documents. We may in the future consider changes in our rules to reflect the advantages of e-filing. Since volume and space are not considerations for e-filing, we may determine to require that interrogatories and answers be filed in the record. This would permit more expeditious handling of motions to compel more complete answers since motions could then merely cite to the record, rather attaching extensive extracts. Transcripts of depositions and hearings, which are already available in electronic formats, may also be filed.

The Board adopted electronic filing to reduce time and expense in handling pleadings and orders, as well as to provide more useful access to the text of documents. It did not adopt e-filing to save paper. For those of us who are more comfortable reading paper documents, and record our thoughts in marginal notes, hard copy of any document in the system is only a click away. We are finding that, just as with editing of word processed documents, we print out working copies of the more important pleadings.

The immediate electronic access to pleadings, however, eliminates the need to physically move paper. Thus, a laptop computer can replace the pile of files brought to the bench for trial. The electronic docket maintained by the e-file service gives the nature, title, and date of filing for each document thus permitting immediate access to the document itself by merely clicking on the docket entry rather than trying to locate the item in multiple paper files. Of greater value is that the document, even in its protected Adobe image form, is word searchable, saving lengthy delays while a particular passage is located.

We are hoping that in the future we will be able to integrate evidence and trial transcripts into the e-file system. Having a complete electronic record will permit additional efficiencies, including the electronic transmission of entire records to the Court of Appeals.

After just over a month, the e-file system is more than meeting our expectations. Although we have not required parties to e-file, we have yet to have a party which has not adopted it enthusiastically. We hope that by Abraham Lincoln's next birthday, when we have 5 months experience, we will be able to report on its use when we have cases with more extensive electronic pleadings and we begin to write opinions with the ability to electronically search and use pleading documents.

ADR in Government Contract Disputes—An Opportunity

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The term “ADR” today—whether a noun, verb or adjective is hated, loved, “not what you think”, and above all carries baggage. But once you get past the “jingoism,” ADR has great prospects in the government procurement and presents a valuable opportunity to take control of disputes, manage them, and resolve them - efficiently and equitably. ADR in Government contracts is more than mediation/arbitration—it is an approach, a mindset, a “techniques tool box” the parties cooperatively adopt to resolve the unsolvable. ADR is an alternative to giving up when the problem is “just too hard” to solve. The focus of ADR is often on process—but it is only in the combination of the process and the results that one can measure success in the ADR model for dispute resolution. Although significant disputes arise only in a small percentage of an agency’s total contract actions--when they linger and fester, they can be a tremendous drain on human and financial resources. Stewart Levine in his book *Getting to Resolution* outlines some of the costs as follows:

- Direct Costs: Fees of lawyers and other professionals
- Productivity Costs: Value of lost time/opportunity cost of productive capacity engaged in the dispute
- Continuity Costs: Loss of on-going relationships
- Emotional Costs: The price of the “pain” of discord

ADR in government contracts with a focus on cooperation, commitment, and communication, blended with existing rules of fundamental fairness, allows the parties to choose the minimum amount of process necessary to achieve the maximum results. Those of us, who have experienced ADR at its best, see over and over again what the “three C’s” can do to reduce costs and enhance results.

In the past 2 years, the Air Force has put ADR theory to the test and made a firm commitment to its defense contractors to resolve disputes cooperatively and efficiently. The Air Force then offered the opportunity to use ADR forums and techniques in over 80% of the disputes then being litigated. 35% of those contractors accepted the offer. In the last eighteen months, 57 appeals (over \$180M in claims) were resolved using various ADR forums and techniques, and many others settled once cooperation and communication were injected into the process—overall, an astounding 97% success rate.

The 2000/2001 ADRs included construction, service, and systems contract disputes of wide ranging complexity, spanning the full length of the resolution time-line (disputes within months of impasse to cases already years in litigation). Only sixty percent of the cases ultimately required the assistance of a neutral and, in about a third of those cases, the parties required a decision by the neutral for resolution. Each process

was uniquely tailored to the challenge, but every one centered on an agreed resolution plan. Typically, the plan outlined the issues, timing, schedule, basic format for the proceeding, a cooperative "discovery" process, and deadlines. With only two exceptions, deadlines were met. The stress, anxiety, work and re-work that typically accompany the inevitable delays associated with litigation became a thing of the past. Resolving disputes took on the same discipline as the rest of the procurement business—an intense focus on cost, schedule and performance. When the parties made the commitment, set the schedule and continued to cooperate, the proceedings were carried out as planned. Often the parties adopted a "step" approach that started with disciplined unassisted negotiations/fact-finding, with additional "process" agreed to in advance if the early steps failed to achieve resolution. Until the time the parties through up their hands and asked the neutral to make a decision for them,—the solution was theirs to fashion.

Cases on the litigation track, converted to ADR processes, shaved anywhere from one to three (or more) years off the process. As a result, in CY 00 the Air Force conservatively estimated that it saved nearly \$4 million in non-attorney staff time and interest. There were also significant cost savings in cases where ADR was selected at the outset. Immeasurable, but significant costs were saved when the parties applied ADR techniques as soon as a Request for Equitable Adjustment (REA) or other request for payment appeared to reach impasse. Those cases, irrespective of the amount in controversy or complexity, were consistently resolved in a four to nine month time frame (in contrast to the three to five year litigation timeline).

Cases that can be resolved on schedule, within a year, and close in time to the origin of the dispute result in dramatic efficiencies, especially in the Government where key officials and players are constantly "on the move." Resolution can be realistically accomplished during the tenure of the attorneys, contracting officers, program managers, and engineers who were there at the inception of the contract and completely understand the issues, facts and challenges. All issues/"claims" brewing on the contract can be resolved in one proceeding or in the context of one plan. "Global" solutions, though complex, are "do-able".

ADR is certainly more efficient—but what kind of a premium did the Air Force pay for those efficiencies? None that we can detect. The Air Force ADR "pay outs" range from "0" dollars to 80% of the amount claimed and, on the average, hover right at our historical litigation/settlement averages. This is what should be expected. The process doesn't change the facts, the law, the interests of the parties or the equities. All play a part in the result, regardless of whether the parties choose to use ADR forums and techniques, traditional litigation or traditional settlement methods to resolve their differences. The unexpected benefit ADR had on the results was the creativity of the solutions—yes, creative solutions even with all the fiscal and regulatory constraints of government contracting. Quoting one of the participants at the close of an ADR—"the results were terrific, the process, frosting on the cake. "

In a recent dispute in an on-going \$385 million development contract for a bomber computer systems upgrade, there was a significant contract interpretation problem involving parts obsolescence/technology turnover due to diminishing

manufacturing sources (“DMS”). It was anticipated that this was merely the first of many DMS disputes the parties would have to deal with throughout contract performance. The \$1.5M “claim” had great potential of growing to tens of millions of dollars. The parties recognized they needed a “programmatic” solution and an efficient mechanism to break the impasse. With an ADR agreement in place, senior leadership on both sides committed to resolution, and a neutral was made available to assist if called upon—a really tough case was resolved in four months. Using a simple but elegant process, the parties crafted what both considered a win-win process and arrived at a creative solution. The Air Force did not pay the contractor \$1.5M, but agreed to modify and clarify the problematic clause and give the contractor the opportunity to earn more than \$1.5M in the next six months for developing creative management solution for dealing with “DMS”. It should surprise no one that, with that agreement in place, the contractor went on to earn that \$1.5M.

In another \$9M dollar dispute (involving government and contractor claims) that was preventing close-out of a completed fighter contract, the contractor seized upon ADR as an opportunity to package and resolve all the outstanding, long disputed issues on the program—and with a concerted and cooperative effort from contracting, fiscal, and legal experts, the parties were able to find a mutually acceptable “O” pay-out solution.

Most recently, the Air Force and a major defense contractor resolved a \$120 million, incredibly complex dispute involving maintenance on one of the Air Force’s most critical strategic air lifters. Stakeholders in the dispute included senior leadership at Air Force and Air Force Materiel Command Headquarters, and three major Air Force systems and logistics centers. Commitment to resolution, a plan, willingness to explore the full range of alternative processes and potential solutions, and effective cooperation in “discovery,” led directly to a solution that included a blend of dollars and a contract restructuring that was specifically designed to include, among other things, built-in dispute prevention mechanisms.

These are just a few of many situations in the Government contract disputes arena where ADR processes and techniques presented real opportunities. When the contract dispute at hand is just “too hard” to resolve—dust off one of those many ADR references, figure out what needs to be accomplished and then commit, cooperate and communicate—you’ll be amazed to find “ADR” is “not what you think!”

CONTRACTORS IN MILITARY THEATER OPERATIONS BEWARE!

AVOIDING COMBAT ACTIVITIES AFTER 9/11

by Marcia Jane Bachman

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America is at war. As her military deploys in response to the terrorist attacks of September 11, 2001, civilian defense contractor employees are going along into overseas theaters where military operations may occur. Do contractor employees understand the limits on what they can do to support the military in a foreign theater? For example, can a contractor employee carry a gun and defend himself against enemy fire? At what point does a contractor cross the line into combat activities, and why is that a problem? This article will explore some of the most current documents expressing guidelines contractors may want to consider in negotiating and performing their contracts.

I. Context

Today's military forces rely on contractors for more supplies and services than perhaps at any time in the past. A decade of downsizing, rightsizing, outsourcing and privatization means contractors perform a higher proportion of support jobs ("commercial activities"), freeing the active military and reserve forces to perform combat activities. During a time of relative peace, this made sense. In the aftermath of the 9/11 attacks, contractors may want to check the terms of their contracts to ensure the military performs the combat and the contractor performs only the commercial activities.

Contractors often perform commercial activities such as transportation, logistics, repair, maintenance, lodging and food service. Additionally, contractors support the high technology aspects of modern American warfighting, such as satellite and electronic information capabilities. In many cases, contractors operate and maintain sophisticated systems, with no backup military expertise in the event the contractors become unable to perform. Because these activities are integral to the day-to-day support of military personnel, more contractor employees are accompanying the military forces closer to the areas in which combat occurs.

In a cleverly titled article referring to the packing up of backpacks and rucksacks, an Army judge advocate provided an introduction to many of the basic legal issues

associated with the presence of contractor employees in battlefield environments.ⁱ The article pointed out that military commanders have no command authority over civilian contractor employees, described gaps in criminal jurisdiction over contractor employees overseas, and described circumstances when contractors could lose their status as prisoners of war if they are captured after engaging in combat activities against enemy forces. The article also presented a useful discussion of the pros and cons of hiring contractors to support the military. That discussion will not be repeated here.

Since then, the rules have been clarified.

II. Joint Chiefs of Staff Doctrine

In early 2000, the Joint Chiefs issued Joint Publication 4-0, Doctrine for Logistic Support of Joint Operations.ⁱⁱ This document represents an important compilation of policy and doctrine updated since the end of the Cold War, Gulf War and base closures.

Chapter V, Contractors in the Theater, contains the overarching doctrine regarding contractors who accompany the armed forces overseas. This chapter starts with a general statement of the historic use and value of contractors to support logistics needs. Next the chapter describes broad categories of contractor support and how such support is obtained. Then the chapter instructs commanders on the need for integrated planning and visibility to manage contractors, including short sections on deployment and arrival in theater. Commanders are challenged by the lack of military control over contractor employees and the need to plan for contingencies if the contractor becomes unavailable during hostilities.

The bulk of Chapter V covers legal issues. Commanders are advised to consult their judge advocates regarding the applicability of international, host nation and United States law. The chapter explains that contractors must comply with the host nation law even though it may not apply to the armed forces.

Perhaps some of the most significant statements appear in the section explaining the Law of War status of contractor personnel. Ordinarily, contractor personnel who accompany the armed forces will be afforded prisoner of war status if they are captured by an enemy force. The contractor employee may lose his protected status if he engages in combatant activities. Generally contractors should not be issued and should not wear military uniforms. Additionally, contractors accompanying the forces should not be armed and they cannot use force to defend themselves against the enemy. There is rarely any justification or authority for a commander to issue arms to contractor employees or to allow them to carry their own arms.

Instead, commanders need to think about how they will provide force protection for contractor employees and contractor equipment. Commanders also need to think about how they will arrange for evacuation if necessary to remove a contractor employee from a combat area. The doctrine suggests the details must be stated in individual contracts.

III. Continuing Essential Services

Department of Defense Instruction 3020.37, Continuation of Essential DoD Contractor Services during Crises, has not yet been updated. The nuances of this instruction are crucial to understanding some of the more recent guidelines.

Most importantly, this instruction does not define who is an “essential contractor.” Instead, the instruction talks only about “essential services.” The link can only be made via contract documents. The instruction does not explain how this link is to be made.

Commanders are responsible to determine what services are “essential” and must be performed during hostilities. Then the commander must decide which services would become combatant activities and inappropriate for contractor performance. Commanders need to think through how they will obtain performance if contractors become unavailable. Commanders need to communicate to the contracting officers those services that are essential but not combatant activities, generating a requirement for the contract to identify the contractor’s responsibilities to continue performance in emergencies.

For services that may fall into a combatant category, or where there may be concern that the contractor would become unavailable (e.g., captured), DoDI 3020.37 imposes on the theater commander the responsibility to develop and implement a plan to continue performance through military sources. The plan might include a contract requirement during peacetime for the contractor to train military members to be able to take over performance in the event of contractor incapacitation during a crisis.

IV. United States Air Force (USAF) Interim Policy

On February 8, 2001, the Secretary of the Air Force issued policy guidance regarding the use of Contractors in the Military Theater.ⁱⁱⁱ This guidance cites Joint Publication 4-0 and DoDI 3020.37. The Secretary’s memorandum states, “It is USAF policy to integrate increased commercial participation in the Total Force while preserving our core AF competencies.”

The guidance also states, “Our international obligations are clear: civilian contractor personnel accompanying Air Force forces are not combatants and must not be allowed to act as combatants during Air Force operations.”

Commanders are advised to minimize the risk associated with contractor performance of essential services in developing operational plans and contract requirements. Commanders are expected to maintain a uniformed capability to provide essential services if the operational environment precludes the use of contractors. Upon determining what services contractors perform that are essential, the commanders and requiring activity will submit requirements to the contracting officer for inclusion of appropriate information in a contract

Air Force commanders are instructed not to issue firearms or military garments to contractor personnel. Commanders are not to allow contractors to carry their own weapons. Even though some contractor personnel may be retired or Reserve military members, Air Force commanders must make it clear that when they are working for a contractor, these personnel are not in any military status.

When Air Force people have legal questions about specific tasks a contractor performs or might perform, they ordinarily will consult their judge advocates. Contractor employees

are not entitled to military legal assistance and should get their legal advice through their employer's (the contractor's) legal counsel.

V. Criminal Jurisdiction over Contractor Employees

The Military Extra-territorial Jurisdiction Act of 2000^{iv} expanded military criminal jurisdiction overseas. The statute applies to persons who are employed by or are accompanying the Armed Forces outside of the United States and person who are members of the Armed Forces. The expanded jurisdiction covers conduct that is a felony offense (punishable by imprisonment for one year or more) under United States law in special maritime and territorial jurisdiction.

Additionally, the international war crimes tribunal might assert jurisdiction to review actions of civilian contractor employees with respect to the enemy.

VI. Antiterrorism Training

Ordinarily, a contractor is responsible to provide everything its employees need to perform, including training and legal support. DoD Instruction 2000.16, DoD Antiterrorism Standards (June 14, 2001)^v updates policy, assigns responsibilities and prescribes procedures for protecting personnel and assets from acts of terrorism at overseas locations. The Instruction implements several other policy instruments including memoranda of understanding between the Department of Defense and Department of State. The standards are imposed on contractors through the Defense Supplement to the Federal Acquisition Regulation (DFARS) clause 252.225-7043.

VII. Conclusion

In the aftermath of the September 11, 2001, attacks it is important for contractors and their legal counsel to understand the rules, think about the consequences and be sure their contracts correctly identify which emergency services the contractor will perform in the event of military operations that may involve combat activities. Contractor employees are not military forces and must not be allowed to engage in combatant activities. Contractors will be held accountable for the actions of their employees. In some settings, such as before a war crimes tribunal, the contractor employee's beliefs about the commander's expectations may not be a defense. Contractors and contracting officers need to negotiate with clarity what is the true contract requirement without crossing the line to civilians engaging in combat activities.

ⁱ Lt Col Michael Davidson, "Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield," *Public Contract Law Journal*, Winter 2000, Volume 29, Number 2, pages 233-267.

ⁱⁱ Available at www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf

ⁱⁱⁱ Available at www.il.hq.af.mil/ilx/ilxs/AFCIT_policy.pdf

^{iv} Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Public Law 106-523 (November 22, 2000), codified at 18 U.S.C. 3261.

^v Available at www.dtic.mil/whs/directives/corres/ins1.html

TREASURER'S SUMMARY REPORT
Richard A. Gallivan
BCA Bar Association

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For the Period Ending November 15, 2001

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