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The President's Column J. Michael Littlejohn

Dear BCABA Members:

My thanks go out once again to Pete McDonald for pulling together another great edition of The Clause for our membership. I know that Pete works tirelessly searching for timely, well-written and interesting articles. He has again found articles of interest to the government contracts bar for this edition. We appreciate Pete's work as well as the hard work and long hours of research contributed by the authors of these pieces.

In an effort to help Pete (and his successor, if ever there comes that day), to continue to improve the quality and stature of The Clause, and to support continuing legal education on topics of interest in government contracts law, the Board of Governors has approved the start of a new Young Attorney Writing Award program. Anne Donohue has been working since our Annual Meeting to develop the program and promote this idea to law schools, firms, and government agencies. She has done a superb job. As a result, I am proud to announce that we are now actively searching for articles from young attorneys (law students or lawyers who submit their article to The Clause within 3 years of passing the bar exam) to be considered for the inaugural BCABA Young Attorney Writing Award. The winner will be recognized at our 2008 Annual Meeting, will be presented with a stunning **BCABA Young Attorney Writing Award** plaque, and will receive a **\$500 cash prize**. The winner will be chosen by a panel of past BCABA Writing Award winners and the Editor of The Clause.

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Boards of Contract Appeals Bar Association Officers

President:

J. Michael Littlejohn
Akerman Senterfitt Wickwire Gavin
8100 Boone Boulevard
Vienna, VA 22182
(w): 703-790-8750

Secretary:

Robert J. Brown
Dep't of Housing & Urban Development
751 7th Street, SW
Washington, DC 20410
(w): 202-708-0622, x2223

Vice President:

David M. Nadler
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006
(w): 202-420-2281

Treasurer:

Thomas Gourlay
Army Corps of Engineers
441 G Street, NW
Washington, DC
(w): 202-761-8542

Boards of Contract Appeals Board of Governors

Frederick (Rick) W. Claybrook, Jr. (2007-2009)
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

John A. Dietrich (2006-2008)
Department of the Navy
Office of the General Counsel
720 Kennon Street, SE
Washington Navy Yard, DC 20374

Susan Warshaw Ebner (2006-2008)
Buchanan Ingersoll, PC
1776 K Street, NW
Washington, DC 20006

Anne M. Donohue (2007-2009)
SRA International, Inc.
4300 Fair Lakes Court
Fairfax, VA 22033

Shelly L. Ewald (2007-2009)
Watt, Tieder, Hoffar & Fitzgerald, LLP
8405 Greensboro Drive, Suite 100
McLean, VA 22102

Lynda Troutman O'Sullivan (2006-2008)
Department of the Air Force
Office of General Counsel
1777 Kent Street, Suite 11500
Roslyn, VA 22209

Francis E. "Chip" Purcell, Jr. (2008-2011)
Williams Mullen
8270 Greensboro Drive, Ste. 700
McLean, VA 22102

Jennifer S. Zucker (2006-2008)
Patton Boggs
2550 M Street, NW
Washington, DC 20037-1350

John A. Howell (2007-2009)
McKenna Long & Aldridge, LLP
1900 K Street, NW
Washington, DC 20006

President's Column (cont'd):

We hope that this writing competition will encourage new government contracts lawyers to delve into an issue of interest to them and add to their understanding of the law. At the same time, we hope that this program will benefit the government contracts bar as a whole by encouraging young lawyers to participate, write, and add to the discussion of important issues in our practice. The competition is open to law students, government lawyers, interns, summer associates, or associates in law firms. We believe this will be a great opportunity for law clerks, summer associates, and interns to show their bosses or potential employers their writing abilities and also expand their own understanding of our special practice area of government contracts.

We will accept articles at any time during the year for publication in The Clause. The articles should be of the type and quality typically accepted by The Clause for publication. Interested individuals may contact Anne Donohue (anne_donohue@sra.com), Pete McDonald (pete.mcdonald@rsmi.com), or me for more details. In order to be considered for this year's inaugural award, individuals must submit their articles in final form to Pete McDonald no later than September 1, 2008 for publication before the Annual Meeting.

The BCABA has many other plans for 2008. Announcements regarding our annual Trial Practice Seminar and Colloquium programs are coming soon. And, we are looking forward to our best Annual Meeting to date. If you have any questions about membership or BCABA events please do not hesitate to give me a call at 703-790-8750 or email me at michael.littlejohn@akerman.com. As always, I am open to suggestions on how to make the BCABA a better bar association.

Best Regards,

J. Michael Littlejohn
President

Notice of Upcoming Events

- The 2008 Boards of Contract Appeals Judges Association (BCAJA) Annual Seminar will be held all day on **Tuesday, April 8, 2008** at the Hilton Alexandria Mark Center, 5000 Seminary Road, Alexandria, Virginia. A program agenda and registration form can be obtained by contacting Judge Walters at richard.walters@gsa.gov.
- The BCABA Annual Colloquium on Government Contracts is scheduled for **late April** at the GWU Law School. The colloquium will cover contractor ethics issues. Details will follow.
- All members wishing to obtain the new user name and password for the member portion of the BCABA website can contact Mike Littlejohn at Michael.Littlejohn@akerman.com.
- The BCABA Annual Meeting will be held on **October 16, 2008** at the M Street Hotel in Washington, D.C. Details will follow. Those members with ideas for topics of discussion should contact Dave Nadler at 202-420-2281.

Bored of Contract Appeals (a.k.a. The Editor's Column)

by

Peter A. McDonald

C.P.A., Esq.

(A nice guy . . . basically.)

In this issue, Jim Nagle and Bryan Kelley insightfully discuss the different dispute resolution forums for government contracts. On a recent development, Dave Nadler and Justin Chiarodo point out the serious shortcomings in the new Contractor Compliance and Integrity Reporting rules. Yours truly teams up with Tony Steadman to discuss the ASBCA's recent *Tecom* decision concerning the allowability of legal costs. Finally, Sarah McWilliams presents a comprehensive methodology to avoid organizational conflicts of interest.

The Clause is not copyrighted and will reprint, with permission, previously published and copyrighted articles that warrant further exposure. We are receptive to original articles that may be of interest to government contracts practitioners. Remember people: Don't take all this government contract stuff too seriously. We again received some articles that simply were not suitable for publication, such as: "*GQ Magazine Signs Pete!*"; "*Is Pete Client No. 8?*"; and "*Salaries for Government Contract Attorneys Hit New Highs!!!*"

Exploring the Federal Forums for Government Contracts

by

James F. Nagle and Bryan A. Kelley*
Oles Morrison Rinker & Baker LLP

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People who like this sort of thing will find this the sort of thing they like.
Abraham Lincoln

I. Introduction

As a discipline, Construction Law encompasses issues that range from the simple (the theory that one who performs work retains a property interest until paid) to the complex (the economic loss rule or illusive definition of cardinal change). Disputes often present different manifestations of the same or similar issues, but it is predictable, if not outright certain, that a time will come when the reader's State law is silent on a particular topic. Naturally, practitioners then will look to other jurisdictions for guidance, and often "upward" to federal precedent.

In that regard, construction lawyers are fortunate to have an extensive body of decisions issued by federal forums largely, although not exclusively, devoted to their area of practice. Most of us are familiar with decisions from the United States Court of Claims, United States Claims Court, United States Court of Federal Claims, United States Court of Appeals for the Federal Circuit, or various Boards of Contract Appeal and other administrative forums. However, few may know how these forums relate to one another or, perhaps more important, their order of precedent.

With this in mind, the following briefly explains the federal forums devoted largely to construction law and federal procurement. Admittedly, the topic can get quite complicated and a full recitation of each forum and its respective history could fill a book much less one short article. Here, the intention is quite different. The following might best be conceived of as a primer – an executive level summary providing a rundown of the various forums and their relationships. And, if reading this article helps the reader to better understand the difference between "Ct. Cl." and "Cl. Ct.", it will have served some purpose.

II. A Brief Overview of Federal Contract Law Forums

A. Article III Court versus Article I Court

When examining federal procurement law, a preliminary question should be: "*Where does the particular forum draw its decision-making power from?*" Generally, there are two options – the particular forum either draws its power from Article III of the Constitution, which
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Exploring the Federal Forums for Government Contracts (cont'd):

establishes the powers of the “Judicial Branch,”¹ or Article I, which establishes the powers of the “Legislative Branch.”²

An Article III forum might best be conceived of as the traditional “court” at the state or federal courthouse. To complicate matters, Article I forums also are referred to as “courts,”³ but have been designated “forums” in this article to avoid confusion. For purposes herein, an Article I forum might best be thought of as a subset of a particular administrative agency that hears and decides appeals from decisions of agency contracting officers. The division of power between branches of the Federal Government is not an exact science, and the meandering line between Article III courts and Article I forums follows the “checks and balances” separating branches of government (executive, legislative, judicial).

Article III of the Constitution creates the exclusive powers held by the Judicial Branch⁴ and it generally holds that only Article III courts can render final decisions in cases involving life, liberty, and private property rights.⁵ In addition, because Article III judges serve lifetime terms during good health and behavior and are immune from Congressional salary decreases, theoretically, Article III courts are not subject to political concerns or pressures.⁶

For purposes of this article, the relevant Article III “courts” determining Federal contract law cases include the U.S. Supreme Court, U.S. Court of Appeals for the Federal Circuit, and the U.S. Court of Claims.

Article I of the Constitution creates the Federal Government’s Legislative Branch. Although court-like in many respects, Article I forums are administrative entities and, accordingly, their judges are known as “administrative law judges” or simply “administrative judges.” The primary distinction is that an ALJ must take an examination⁷ while an “administrative judge” can serve based on distinguished service and experience with the Government contracts. The jurisdiction of these Article I judges is limited to “public rights” and “involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue.”⁸

Unlike Article III judges, Article I judges serve limited terms and Congress can adjust their salaries. Because Article I empowers the legislative branch, this would appear a relatively straightforward extension of congressional power over administrative agencies.

For purposes herein, the relevant Article I forums include the U.S. Claims Court (now U.S. Court of Federal Claims) and various Boards of Contract Appeals. At one time, the U.S. Court of Claims also was said to be an Article I forum, but that holding was later reversed when Congress converted the Court of Claims to an Article III court in the mid-1950’s.⁹

Things get interesting when Article III courts and Article I forums meet. For example,

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in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*,¹⁰ the U.S. Supreme Court examined a new system of bankruptcy courts created by the Bankruptcy Reform Act of 1978. Ultimately, the Court held the new court system violated Article III of the Constitution.¹¹ It reasoned that by creating administrative forums that could hear and decide upon “all civil proceedings arising under title 11 or arising in or related to cases under title 11,”¹² Congress impinged on the exclusive jurisdiction of the Judicial Branch.¹³ While the bankruptcy judges were not appointed to lifetime terms, and were subject to Congressional salary adjustment (indisputably characteristics of Article I administrative law judges),¹⁴ the Act gave them too much power. To wit, in the *Northern Pipeline* case, the new bankruptcy court created by the Bankruptcy Act of 1978 had entertained and ruled upon a suit for breach of contract, breach of warranty, coercion and duress, simply because these claims were brought by a debtor against a creditor in the context of a Chapter 11 reorganization proceeding. The Supreme Court held that such broad jurisdiction for an Article I forum exceeded the limited power of Legislature and encroached upon the exclusive rights of the Judiciary.

The Court first explained that Article I forums are only appropriate when limited to a particular territory, court martial, or as an element of an administrative agency determining executive or legislative issues involving public rights – none of which were satisfied by creating a nationwide system of bankruptcy courts that could entertain contract disputes between private parties. Second, the Court held that, although Article I forums can serve as adjunct fact finders, they must remain “subject to sufficient control by an Article III district court.”¹⁵

In *Northern Pipeline*, the new system of bankruptcy courts had such a broad mission statement as to allow them to adjudicate private rights not created by Congress – those traditionally handled by the judicial branch – in a manner that improperly wielded “the essential attributes of the judicial power.”¹⁶

Therefore, the general rule is that Article I forums have the power to issue decisions limited to their particular area of agency involvement and so long as not usurping exclusive powers held by the Judicial Branch. Article I forums are thus commonly said to be “adjunct fact finders”; their fact findings are comparable in weight to that of a trial-level court, and their legal analysis is reviewable *de novo* by Article III courts.¹⁷ Their jurisdiction is limited to “public rights” and “involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue.”¹⁸

B. Court of Claims (1855-1982)

The grandfather of the Federal forums is the Court of Claims (later renamed “United States Court of Claims”), established in 1855. It was created to hear non-tort monetary claims against the Federal Government concerning laws, regulations, or federal contracts.¹⁹ Prior to 1855, such claims were submitted directly to Congress by petition, a process that ultimately proved unworkable.

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The Court of Claims sought to reduce Congress' workload by providing a better mechanism to resolve claims against the Federal Government. Initially, the Court could not issue binding decisions but served as a threshold, reviewing cases, recommending findings and preparing bills for congressional approval. This system would also prove inefficient and unworkable due in large part to the onset of the American Civil War, a national emergency that impaired Congress' ability to handle routine administrative matters.

Ultimately, Congress granted the Court of Claims its own decision-making authority. Scholars attribute the call precipitating this change to an 1861 Annual Address to Congress, wherein President Abraham Lincoln stated:

It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department. Besides, it is apparent that the attention of Congress will be more than usually engaged for some time to come with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the halls of Congress: but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final.²⁰

Congress eventually agreed and, in 1863, granted the Court of Claims power to issue binding decisions.²¹ Thereafter, Congress passed legislation to the effect that Court of Claims' decisions were subject to review by the U.S. Supreme Court, not Congress. This change reflects one event in a rather drawn-out process of eliminating congressional involvement and converting the Court of Claims from an administrative forum into a judicial entity.

Procedurally, the Court of Claims has used commissioners and judges. Initially, the Court had three judges. In 1925, it added seven commissioners to make findings and recommendations that "had to be reviewed, appellate-style, by Court of Claims judges".²² In this manner, the Court of Claims possessed what might be conceived of as a two-tiered system. As will be discussed below, several decades later, these two tiers eventually would become separate entities.

Over the years, the court's particularized nature has caused confusion as to whether it draws power from Article III or Article I. The origins of the Court hail from the Legislative Branch, but its decisions were later made reviewable by the U.S. Supreme Court. In 1933, the U.S. Supreme Court held that the Court of Claims was an Article I forum and that Congress had the right to reduce the salaries of its staff.²³ However, twenty years later, Congress converted

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the Court of Claims to an Article III court.²⁴ So, whether the Court of Claims was an Article I forum or Article III court depends on the time – conceivably, one could answer “both” and be correct.

From 1855 on, Court of Claims decisions were published in the *United States Court of Claims Reports*, published by the Government Printing Office (“GPO”) and designated by abbreviation “Ct. Cl.”. Court of Claims decisions also can be found in the first and second series of West’s Federal Reporter (“F.”; “F.2d”) and Federal Supplement (“F. Supp.”). This ended in 1982, when Congress abolished the Court of Claims in favor of a two-court system.

C. U.S. Claims Court (1982-1992)

In 1982, Congress passed the Federal Courts Improvement Act.²⁵ The Act merged the U.S. Court of Customs and the U.S. Court of Claims and created two new courts: (1) the U.S. Claims Court, and (2) the U.S. Court of Appeals for the Federal Circuit. In concept, this two-court system reflected the dual functions carried out by the Court of Claims at its commissioner and judicial levels. However, the new system made several significant improvements.²⁶

First, the Claims Court (although going by a name easily confused with the above-mentioned Court of Claims) used significantly more decision makers – 16 judges compared to just 3 for its predecessor. Second, Claims Court judges, unlike Court of Claims commissioners, could render final decisions as opposed to making recommendations to judges. Final decisions issued by the Claims Court could be appealed to the Federal Circuit.²⁷

Unlike the latest interpretation of the Court of Claims (Article III), the Claims Court was an Article I forum. Its judges were nominated by the President and confirmed by Congress to 15-year terms.

U.S. Claims Court decisions were reported in West’s *United States Claims Court Reporter*, and abbreviated “Cl. Ct.”. In 1992, because of the confusion caused by its similarity to the predecessor Court of Claims, the name of the U.S. Claims Court was changed to the “U.S. Court of Federal Claims.”²⁸ Therefore, Claims Court decisions (“Cl. Ct.”) were published between 1983 and 1992.

D. U.S. Court of Federal Claims (1992-present)

As stated above, the Federal Courts Administration Act of 1992²⁹ changed the name of the U.S. Claims Court to the “United States Court of Federal Claims”. In essence, the Claims Court and the Court of Federal Claims are identical entities. Despite its name change, the Court of Federal Claims remained an Article I forum.³⁰

The Court of Federal Claims can hear contract disputes and bid protests. Due to fairly recent legislation, the Court of Federal Claims now has exclusive jurisdiction over the latter.
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Traditionally, concurrent jurisdiction rested with both the Court of Federal Claims and district courts pursuant to *Scanwell Labs., Inc. v. Shaffer*.³¹ The Administrative Dispute Resolution Act of 1996³² contained a “sunset provision” that terminated the jurisdiction of the district courts to hear bid protests of Government procurement decisions on January 1, 2001.

Decisions by the U.S. Court of Federal Claims are reported in the *United States Court of Federal Claims Reporter*, abbreviated “Fed. Cl.”

E. U.S. Court of Appeals for the Federal Circuit (1982-present)

Returning to the 1982 conversion of the single Court of Claims into a two-court system, Claims Court/Court of Federal Claims decisions are appealable to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit represents a merger of the U.S. Court of Customs and Patent Appeals with the lower, judicial level of the Court of Claims.³³

Unlike the U.S. Court of Federal Claims, the Federal Circuit is an Article III Court.³⁴ It hears appeals from all federal district courts and certain administrative agencies, including the various Boards of Contract Appeals. Being an Article III entity, the Federal Circuit maintains a panel of twelve judges appointed by the President for lifetime tenures.

Appeals are heard by a panel of three randomly selected judges. Federal Circuit decisions (“Fed. Cir.”) occur from 1982 through the date of this article, published in West’s Federal Reporter. Decisions rendered by the Federal Circuit are appealable to the U.S. Supreme Court.

F. Summary of Federal Contract Courts

In summary, the Federal contract “courts” started with the Court of Claims (Ct. Cl.) in 1855. In 1982, the Court of Claims became the Claims Court (Cl. Ct.) and the Court of Appeals for the Federal Circuit (Fed. Cir.). In 1992, the name of the Claims Court was changed to the Court of Federal Claims (Fed. Cl.). Both the Court of Federal Claims (lower level) and Court of Appeals for the Federal Circuit (appellate level) continue to exist through the date of this article.

G. Boards of Contract Appeals

Although the Federal contract law courts can get much attention, due in large part to the fact that their decisions have precedential value, “[t]he lion’s share of Government contract litigation takes place before the agency Boards of Contract Appeals.”³⁵ Generally, boards of contract appeals are created when an agency charters an administrative forum to hear and determine appeals from the procurement contract decisions of contracting officers within its

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department.

The Armed Services Board of Contract Appeals (ASBCA) is likely the best known such forum. Other familiar boards of contract appeals have served the Department of Agriculture (AGBCA), Department of Transportation (DOTCAB), Department of Energy (EBCA), Corps of Engineers (ENGBCA), General Services Administration (GSBCA), Department of Housing & Urban Development (HUDBCA), Department of Labor (LBCA), National Aeronautics and Space Administration (NASA), Department of the Interior (IBCA), Postal Service (PSBCA), and Department of Veterans Affairs (VABCA).

Board decisions are published by CCH in their own reporter, a Wolters Kluwer publication entitled “Board of Contract Appeals Decisions”. Generally, BCA decisions are cited by reference to the particular board and case number (e.g., ASBCA No. 12345) and the BCA Reporter volume and paragraph number (e.g., 07-1 BCA ¶1,234).

In a development discussed at greater length below, Congress recently consolidated most Boards of Contract Appeals into a new, single entity called the Civilian Board of Contract Appeals (CBCA). Now, there are three major Boards of Contract Appeals – the CBCA, ASBCA and the Postal Service Board of Contract Appeals (PSBCA). The Tennessee Valley Authority,³⁶ a federal corporation providing navigation, flood control, electricity generation services in the southeast region, also maintains a separate Board of Contract Appeals, as well as the Government Printing Office.

Before discussing the creation of the new CBCA, we briefly examine the prototypical Board of Contract Appeals, the ASBCA, as an example of how Boards of Contract Appeals traditionally operate.

1. The Armed Services Board of Contract Appeals (1962-Present)

The ASBCA is based in Falls Church, Virginia. The ASBCA Charter states that it is created to hear contractor appeals from decisions of contracting officers for the Department of Defense, Army, Navy, or Air Force. It is based in Falls Church, Virginia. The ASBCA also hears appeals from decisions of NASA, the CIA, and Corps of Engineers.

As with most other boards of contract appeal, the ASBCA’s primary source of jurisdiction is the Contract Disputes Act. To that effect, its Charter states as the first basis for contractor appeals, “the Contract Disputes Act of 1978 (41 U.S.C. Sect. 601, et seq.).”³⁷ The ASBCA commonly hears appeals from contracting officer decisions on matters including termination for default, termination for convenience, changes, differing site conditions, and Government imposition of liquidated damages.³⁸

The ASBCA consists of attorneys known as “administrative judges”. A chairman (Hon. Paul Williams) and two or more vice-chairmen (currently Hon. Mark Stempler and Hon. Eunice
(continued on next page)

Exploring the Federal Forums for Government Contracts (cont'd):

Thomas) are appointed by the Under Secretary of Defense and the Assistant Secretaries of the Military Departments responsible for procurement to two-year terms. There are approximately 28 judges serving on the ASBCA.³⁹

The chairman is responsible for assigning appeals to the divisions within the ASBCA for decision so that they be heard in “the most effective and expeditious” manner.⁴⁰ A division consists of one or more Board members and each division has a head member. The chairman, vice-chairmen, and division heads constitute the senior deciding group of the Board to hear appeals of unusual difficulty, significant precedential importance, or serious dispute.

The Board receives funding for its administration from the Department of the Army. The Departments of the Army, Navy, Air Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis and to the extent determined by the Assistant Secretary of Defense (Comptroller). The cost of processing appeals for departments and agencies other than those in the Department of Defense will be reimbursed.

Written notice of appeal from a contracting officer decision must be mailed “or otherwise furnished to the Board” within 90 days from the date of the contractor’s receipt of the decision, or, in some circumstances, when the contracting office fails to issue a decision within the prescribed timeframe.⁴¹ A notice of appeal should identify the contract by number, the procuring department or agency, the decision being appealed, and the amount in controversy if known. The notice is then docketed by the ASBCA.

Within 30 days of notice that its appeal has been docketed, the contractor is to submit a complaint containing a “simple, direct and concise statements of each of its claims”⁴² and, although no particular form is required, a sample standardized pleading template accompanies the 2007 ASBCA Rules. The Government has 30 days to submit its Answer. In the meantime, both the contractor and the Government are to submit the case file and other relevant documents to the Board. The contracting officer is to transmit the case file to the Board within 30 days after notice that an appeal has been taken. The contractor has 30 days after receipt of the contracting officer’s file to supplement the information provided to the Board with any additional material deemed relevant.⁴³

The parties may elect to have a hearing, or, alternatively, to have the case submitted on the pleadings. Should the parties elect to have a hearing, pre-hearing briefs, unless expressly requested by the Board, are not required. Should the parties elect to waive the hearing, the ASBCA Rule 11 states that: “Submission of a case without hearing does not relieve the parties from the necessity of proving facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record.”

Pre-hearing discovery is allowed and generally dictated by the mutual agreement of the parties, subject to the ASBCA’s power to issue and/or quash subpoenae, resolve discovery
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disputes and impose sanctions. An ASBCA hearing is scheduled at a time that the Board determines is in the best interests of the parties and “shall be as informal as may be reasonable and appropriate under the circumstances.”⁴⁴ The Board has worldwide jurisdiction; it is not unusual for the ASBCA to convene and hear disputes in foreign countries. The admissibility of evidence is governed by the Federal Rules of Evidence, and the discretion of the presiding division. Traditionally, a verbatim transcript of the proceeding is taken, which the parties may obtain post-hearing. The parties then generally submit post-hearing briefs (and reply briefs) based on the documentary and testimonial evidence.

There is no mandate for the ASBCA’s time for decision. Motions for reconsideration are allowed. ASBCA findings of fact are generally held to be final and conclusive, much as those of a typical trial court, unless the decision is “fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.”⁴⁵

However, the ASBCA’s legal conclusions do not constitute binding precedent, and will be reviewed *de novo* on appeal. Cases resolved by the ASBCA are appealable to the Court of Appeals for the Federal Circuit.⁴⁶

The ASBCA also maintains a fast-track procedure for small claims requiring decisions, when possible, for controversies of less than \$50,000 in 120 days, or for those less than \$100,000 in 180 days.

2. Consolidation of the Civilian Boards of Contract Appeals

The National Defense Authorization Act for Fiscal Year 2006 consolidated the eight existing Civilian Boards of Contract Appeals (the General Services Administration Board of Contract Appeals, the Department of Transportation Board of Contract Appeals, the Department of Agriculture Board of Contract Appeals, the Department of Veterans Affairs Board of Contract Appeals, the Department of Energy Board of Contract Appeals, the Department of Interior Board of Contract Appeals, the Department of Housing and Urban Development Board of Contract Appeals, the Department of Labor Board of Contract Appeals) into a new Civilian Board of Contract Appeals (CBCA). The CBCA will not hear matters from the Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, or the National Aeronautics and Space Administration (NASA).

The Act gave the CBCA jurisdiction over contract appeals from non-defense agencies and ensured that the Board could, with the concurrence of the heads of affected agencies, assume responsibility for any other functions previously performed by other boards of contract appeals for civilian agencies. Effective January 6, 2007, all of the consolidated Boards terminated and their cases, judges and staff transferred to the new Civilian Board.⁴⁷ Cases that were previously filed, for example at the Agriculture Board or the Department of Veterans Administration Board simply transferred to the new board and processed thereafter.
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Exploring the Federal Forums for Government Contracts (cont'd):

As stated above, the consolidation provisions of the Act did not apply to the Boards of Appeals for the Tennessee Valley Authority, the Postal Service Board of Contract Appeals, and the General Printing Office Board of Contract Appeals. Those boards will not terminate and their members will not be transferred to the new Civilian Board.

So, as of January 7, 2007, there are two multi-agency Boards of Contract Appeals, the Armed Services Board of Contract Appeals and the new Civilian Agency Board of Contract Appeals.

The CBCA is part of the General Services Administration (GSA). Its office is located at 1800 M Street NW, Sixth Floor, Washington D.C. 20036. The mailing address of the CBCA is 1800 F Street (sic), NW, Washington D.C. 20405. The phone number of the Office of the Clerk of the Board is 202-606-8800; the facsimile number is 202-606-0019. The internet address of the Civilian Board website is www.cbca.gsa.gov.

Judge Stephen Daniels, formerly the chairman of the GSBCA, has been designated the chairman of the new Civilian Board of Contract Appeals. Prior to the consolidation, there were twenty-three judges on the eight boards. Eighteen of the judges transferred to the new Civilian Board of Contract Appeals.⁴⁸ Judges originally assigned to an appeal before one of the eight boards will be retained as the lead judge on the case as it progresses through the Civilian Board of Contract Appeals. In the first decision of the new Board, the full Board held “that the holdings of our predecessor boards shall be binding as precedent in this Board.”⁴⁹

H. The Comptroller General: General Accounting/Government Accountability Office

The Comptroller General of the United States heads the office presently known as the Government Accountability Office (GAO). The GAO was established with the Budget and Accounting Act of 1921. From 1921 until 2004, it was called the General Accounting Office. It changed its name that year to Government Accountability Office to more accurately reflect its true role.

The GAO is an arm of Congress. While it issues reports, especially in response to Congressional directives, and it can provide advance opinions to government officials on whether it would consider certain payments to be lawful, its most important role in government contracting is as a bid protest forum.

GAO has been hearing bid protests since approximately 1925. It has still the largest bid protest jurisdiction (compared to the United States Court of Federal Claims) and because they have been doing it now for seven decades, its body of law is comprehensive.

When a bid protest is filed at the GAO, it is docketed and given a “B” number of six digits currently; for example, B-277582. Prior to 1939, the decisions were preceded by an A.

(continued on next page)

Exploring the Federal Forums for Government Contracts (cont'd):

The decision, once issued, will be published either officially or unofficially. If the Comptroller General decides that the decision is of enough value, it will be officially published in annual bound volumes "Decisions of the Comptroller General." This has represented only about 10 percent of all the opinions. The other decisions, officially unpublished, but still just as valid as the precedent were more difficult to acquire until 1974. In 1974, Federal Publications Inc. began issuing Comptroller Procurement Decisions, cited as CPD. Comptroller Procurement Decisions are published monthly and reproduced every single bid protest and other procurement ruling issued by the Comptroller General of the United States. Two loose-leaf volumes are published each year with new cases added soon after they are issued.

Commerce Clearing House (CCH) also reproduces these decisions. Its citing format is B-___ C.Gen. ____.

It is important to note that decisions of the GAO are not binding on the procuring agencies. There are a number of instances in which the GAO has sustained a protest, only to see the agency refuse to follow the recommendations contained in the decision. If the agency decides not to follow the GAO's recommendations, it must report that decision to the GAO within 60 days of the GAO decision. *See* 31 U.S.C. §3554(c). The GAO then must advise certain Congressional committees of the agency's failure to implement the GAO's recommendations.

There is no formalized appeal process from a GAO decision to the Court of Appeals for the Federal Circuit. A protestor that loses its protest before GAO, or one who wins its protest but finds that the agency declines to follow the GAO's recommendation, can then attempt to seek relief before the U. S. Court of Federal Claims.

I. Contract Adjustment Boards

Contract Adjustment Boards were created by Congressional statute in 1958⁵⁰ to carry out the dictates of that statute by providing extraordinary contract relief to contractors who merit it. Copies of decisions may be obtained from the Boards themselves, but the best source is the Extraordinary Contractual Relief Reporter by Federal Publications. It reports all decisions: Volume One covers 1958-1965; Volume Two covers 1966-1973; Volume Three covers 1974-1980; and a loose leaf binder starting in 1981. In 2007, West announced that it had acquired Federal Publications, and that the former Federal Publications editorial team would be known henceforth as "DC West Editorial".⁵¹

Proceedings before the Contract Adjustment Boards are not typically litigation. Essentially, the contractor is coming to the government as a supplicant asking that it be granted relief that is outside the bounds of the contract. Reviewing the previous decisions of the Boards can give the contractor an idea as to what has prevailed in the past.

(continued on next page)

Exploring the Federal Forums for Government Contracts (cont'd):

J. Office of Hearings & Appeals of the Small Business Administration

The Office of Hearings and Appeals (OHA) is a specialized forum within the Small Business Administration (SBA). It hears appeals from decisions by the SBA regions determining whether a business is or is not a small business.

For example, a procurement is set aside solely for small businesses. ABC Corporation is awarded the contract. A competitor, XYZ, files a Small Business Size Protest alleging that ABC is not a small business. Because either it has grown beyond the applicable standard or it is affiliated with a larger company. While the region that is local to the protested corporation makes the initial decision, either party, ABC or XYZ can then appeal that to the Office of Hearings and Appeals. OHA is an independent office of the SBA established in 1983 to provide an independent quasi-judicial appeal of certain SBA program decisions. While size appeals are its most common matter, other issues can involve whether the appropriate small business classification has been used or whether a firm has been improperly or incorrectly determined to be ineligible for participation in the 8(a) program. The rules of procedure governing cases before OHA are set forth at Title 13 of the Code of Federal Regulations, Part 134. Its decisions are searchable through Westlaw and LEXIS, and its citing format differs depending on the type of appeal.⁵²

There is no formal appeal from the OHA, but parties who feel aggrieved by OHA action typically will take the matter to Federal District Court under the Federal Administrative Procedures Act.⁵³

K. Order of Precedent

In summary, From 1855 to 1982, the Court of Claims (“Ct. Cl.”) issued decisions subject to review by the U.S. Supreme Court. From 1982 to 1992, the U.S. Claims Court (“Cl. Ct.”) issued decisions subject to review by the Federal Circuit. This rule continues despite the fact that the Claims Court changed its name to the “U.S. Court of Federal Claims” (“Fed. Cl.”) in 1992.

From 1982 on, the U.S. Court of Appeals for the Federal Circuit (“Fed. Cir.”) issues decisions appealable to the U.S. Supreme Court. It is like any other Federal Court of Appeals, but its jurisdiction is determined by subject matter and is therefore national as opposed to geographical.

The Boards of Contract Appeals, Comptroller General, and OHA are Article I administrative law forums and their decisions are appealable to Article III courts. As for precedential value, their decisions – technically – are not binding on the Judicial Branch, but there is a general understanding that administrative forums possess particular expertise in their subject matter and therefore can provide a helpful source of advice. To that effect, board decisions can be used as a highly persuasive authority depending on the similarity to the case at bar. In *United Pac. Ins. Co. v. Roche*, the U.S. Court of Appeals for the Federal Circuit (*continued on next page*)

Exploring the Federal Forums for Government Contracts (cont'd):

explained:

We review questions of law *de novo*. ‘Contract interpretation is a question of law; therefore, the [ASBCA’s] decisions regarding this matter are not binding.’ ‘Because the board has considerable experience and expertise in interpreting government contracts’, however, ‘its interpretation is given careful consideration and great respect.’⁵⁶

While a lower board decision can be “helpful” to a reviewing court, even if not “compelling” precedent,⁵⁷ one should be careful to remember that the court, ultimately, can take or leave the advice. In *Corrigan v. United States*,⁵⁸ the Court of Federal Claims rejected the proposed GSBICA authority for how it should approach and decide certain travel claims, stating: “It is the duty of this court to apply the statutes and regulations to the facts of the case. This court is not bound by GSBICA’s approach to the evaluation of personal convenience travel expense claims.”

III. Conclusion

In conclusion, legal practitioners in the Federal arena are most fortunate to have such a wide array of forums dedicated to Government contracts, and, in particular, involving construction law issues. Each of us has a story about an ASBCA decision that saved or undermined an important case. Exploring the federal forums, and understanding their creation, roles, and decision making powers, the construction lawyer can better utilize this vast and ever-increasing wealth of knowledge.

- James F. Nagle is a partner in the firm of Oles Morrison Rinker & Baker LLP in Seattle, Washington. He is a former BCABA President, and coauthor of “Nash, Cibinic and Nagle, *Administration of Government Contracts*, Fourth Edition,” (2006), and “Whelan & Nagle, *Cases and Materials on Federal Government Contracts*, Third Edition” (Foundation Press 2007). Bryan A. Kelley is an Associate at Oles Morrison Rinker & Baker LLP.

Endnotes

1 - See U.S. CONST. Art. III, §1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”).

2 - See U.S. CONST. Art. I, §1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). Article I, Section 8 empowers Congress: “To constitute Tribunals inferior to the supreme court [sic]”.

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Exploring the Federal Forums for Government Contracts (cont'd):

Endnotes (cont'd)

3 - BLACK'S LAW DICTIONARY states within its definition of "court": "*Article I courts: See* Legislative courts." "*Article III courts: See* Constitutional court." BLACK'S LAW DICTIONARY 247 (6th ed. 1991). BLACK'S defines "Legislative Courts" as: "Courts created by legislature (*e.g.*, Art. I, Sec. 8, Cl. 9 of U.S. Const.) in contrast to those created by constitution (*e.g.* Art. III of U.S. Const.)." *Id.* at 624. In circular fashion, it defines "Constitutional court" as: "A court named or described and expressly protected by Constitution, or recognized by name or definite description in Constitution (*e.g.*, Supreme Court, as provided for in Art. III, Sec. 1 of U.S. Const.) in contrast to legislatively created courts (*see e.g.*, Art. I, Sec. 8, cl. 9 of U.S. Const.)." *Id.* at 215.

4 - *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 103 S.Ct. 199, 73 L.Ed.2d 598 (1982) ("A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch." (quoting *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980))).

5 - *See Northern Pipeline*, 458 U.S. at 81 ("[U]nder the congressional scheme '[t]he authority – and the responsibility – to make an informed, final determination . . . remains with the judge.'" (quoting *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980))).

6 - *Id.* at 60 ("Next to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" (quoting THE FEDERALIST NO. 79, at 491 (Alexander Hamilton) (H. Lodge ed. 1888) (emphasis in original))).

7 - *See* 5 U.S.C. § 3301, *et seq.* (2006).

8 - *Northern Pipeline*, 458 U.S. at 66. In *Northern Pipeline*, the United States argued that its new system of Article I bankruptcy were analogous to the non-Article III "territorial" courts in Washington, D.C., or forums that entertain court martial, or legislative courts or "administrative agencies created by Congress to adjudicate cases involving 'public rights.'" *Id.* at 66-67. The Court distinguished the proposed bankruptcy courts (which, theoretically, could hear and decide private disputes so long as "arising in or related to" actions started under the Bankruptcy Code).

9 - *See* Act of July 28, 1953, 83 Pub. L. No. 158, ch. 253, 67 Stat. 226 (amending 28 U.S.C. § 171); *see also* Note, *The Constitutional Status of the Court of Claims*, 68 HARV. L. REV. 527, 527 (Jan. 1955) ("Congress has recently attempted to reverse the result of the *Williams [v. United States]*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933)] case by enacting a statute which declares that the Court of Claims is 'established under Article III of the Constitution of the United States.' If the declaration is effective, the result will be the same as if the Court of Claims had been established originally under Article III; and Congress will be constitutionally without the power to reduce the salaries of the judges of the court and to remove those judges except by impeachment.").

10 - 458 U.S. 50, 103 S.Ct. 199, 73 L.Ed.2d 598 (1982).

11 - *Id.* at 87.

12 - *Id.* at 85 (emphasis added in part; citation omitted).

13 - *Id.* at 77, 87-88.

14 - *Id.* at 61.

15 - *See id.* at 78-79 ("But this Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights – so long as those adjuncts were subject to sufficient control by an Art. III district court.").

16 - *Id.* at 87 ("We conclude that 28 U.S.C. § 1471 . . . has impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct.). The quoted language ("essential attributes of the judicial power") hails from *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). *Crowell*, a case that factors heavily into the *Northern Pipeline* decision, involved an attempt to enjoin a decision of the Deputy Commissioner of the U.S. Employee's Compensation Commission (Benson) pursuant to the Longshoremen's and Harbor Worker's Compensation Act based, in part, on the argument that the Act violated Article III of the Constitution. *Id.* at 37. Finding that the question presented was "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency – in this instance a single deputy commissioner – for the
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Exploring the Federal Forums for Government Contracts (cont'd):

Endnotes (cont'd)

final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend.” *Id.* at 56-57. The Court found that the proper limitations were in place to make the Deputy Commissioner’s role not violative of Article III, including the condition precedent that the claimant be an “employee” suing an “employer” as defined by the Act, a Federal court could set aside any compensation order thus precluding any element of finality in the Deputy Commissioner’s award, and that any terms of the Act that violated the Constitution are to be deemed invalid. *Id.* at 62-63.

17 - *Northern Pipeline*, 458 U.S. at 81 (“[T]he functions of the adjunct must be limited in such a way that the ‘essential attributes’ of judicial power are retained in the Art. III court.”).

18 - *Id.* at 66.

19 - See FEDERAL JUDICIAL CENTER, COURT OF CLAIMS, 1855-1892, http://www.fjc.gov/history/home.nsf/page/coc_bdy (last visited March 6, 2007) (“In an act of February 25, 1855 (10 Stat. 612), Congress established a Court of Claims, with jurisdiction to hear and determine all monetary claims based upon a congressional statute, an executive branch regulation, or a contract with the United States government.”).

20 - See Pres. Abraham Lincoln, President’s Annual Message to Congress (Dec. 3 1861), in JOHN T. WOOLLEY AND GERHARD PETERS, THE AMERICAN PRESIDENCY PROJECT [ONLINE], available at <http://www.presidency.ucsb.edu/ws/?pid=29502> (last visited July 27, 2007), at ¶39. Later in his address, President Lincoln again stressed the importance of the Legislature, stating: “The war continues. In considering the policy to be adopted for suppressing the insurrection I have been anxious and careful that the inevitable conflict for this purpose shall not degenerate into a violent and remorseless revolutionary struggle. I have therefore in every case thought it proper to keep the integrity of the Union prominent as the primary object of the contest on our pan, leaving all questions which are not of vital military importance to the more deliberate action of the Legislature.” *Id.* at ¶ 61.

21 - See COURT OF CLAIMS, *supra* n.19 (“Congress in 1863 granted the Court of Claims the authority to issue its own decisions rather than report to the legislature”).

22 - Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 544, 545 (2003). Seamon offers an enlightening discussion of the Court of Claims maintaining an internal lower court and appellate court system, which ultimately became two separate courts – the Claims Court and the Court of Appeals for the Federal Circuit.

23 - *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933). Despite holding that the “Court of Claims, undoubtedly, in entertaining and deciding these controversies, exercises judicial power” that, “the conclusion is inevitable that the Court of Claims receives no authority and its judges no rights from the judicial article of the Constitution, but ... from the acts of Congress passed in pursuance of other and distinct constitutional provisions.”

24 - See *supra* n.9.

25 - Pub. L. No. 97-164, 96 Stat. 25. See FEDERAL JUDICIAL CENTER, HISTORICAL NOTE: ESTABLISHMENT OF THE FEDERAL CIRCUIT, http://www.fjc.gov/history/home.nsf/page/22a_bdy (last visited July 12, 2007) (“[T]o promote greater uniformity in certain areas of federal jurisdiction and relieve the pressure on the dockets of the Supreme Court and the courts of appeals for the regional circuits, the Congress in 1982 established what is now the only U.S. court of appeals defined exclusively by its jurisdiction rather than geographical boundaries [the Federal Circuit].... The act of 1982 also established a U.S. Claims Court (now the U.S. Court of Federal Claims).”).

26 - For a more detailed discussion, see Seamon, *supra* n.22, at 545.

27 - General Order No. 1 of the United States Claims Court (October 7, 1982) provided, in pertinent part, that: (1) the Claims Court inherited substantially all jurisdiction and caseload of the Court of Claims and all published decisions were binding precedent for the Claims Court, unless and until modified by decisions of the Federal Circuit or U.S. Supreme Court; (2) that every order entered by the Court of Claims in cases pending before the Claims Court were adopted in their entirety.

28 - See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4516.

29 - *Id.*; see also Claims Court General Order No. 33 (Dec. 4, 1992) (“On October 29, 1992, the Federal Courts Administration Act of 1992 ... became effective. Pursuant to Title IX, the United States Claims Court is renamed the United States Court of Federal Claims. For all purposes the new name may be substituted for the previous name. It shall have the identical legal consequences. All documents, motions, orders, forms, or other written

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Exploring the Federal Forums for Government Contracts (cont'd):

Endnotes (cont'd)

instruments shall apply to the new name as they did to the previous name....”).

30 - 28 U.S.C. §171(a) (Supp. IV 1992) (“The court is declared to be a court established under article I of the Constitution of the United States.”).

31 - 424 F.2d 859 (D.C. Cir. 1970) (permitting district court review of “legal questions” raised by contracting office decision in lieu of appealing decision to GAO); *see* *PGBA, LLC v. United States*, 389 F.3d 1219, 1225 n.5 (Fed. Cir. 2004) (“In [*Scanwell*] the Court of Appeals for the District of Columbia Circuit held that the APA provides for review of agency procurement decisions in federal district court.”).

32 - *See* Pub. L. No. 104-320, 110 Stat. 3870. Section 12(d) states: “The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.”

33 - *See* U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, ABOUT THE COURT, <http://fedcir.gov/about.html> (visited March 6, 2007).

34 - *Id.* (“The United States Court of Appeals for the Federal Circuit was established under Article III of the Constitution on October 1, 1982.”).

35 - *See* PETER S. LATHAM, *GOVERNMENT CONTRACT DISPUTES* §10-2 (2d. ed. 1986).

36 - *See* Tennessee Valley Authority Home Page <http://www.tva.gov/> (visited July 11, 2007) (“TVA is the nation’s largest public power company, with 33,000 megawatts of dependable generating capacity. Through 158 locally owned distributors, TVA provides power to about 8.7 million residents of the Tennessee Valley.”).

37 - *See* ASBCA Charter (as revised July 1979), <http://docs.law.gwu.edu/asbca/charter.htm> (last visited July 10, 2007). The ASBCA Charter also states that appeals may be taken when authorized by the disputes provisions of defense or military procurement contracts, or by directive of the Secretary of Defense or any other Secretary of another branch of the military.

38 - *See* Latham, *supra* n.35, at §10-3.

39 - *See* ASBCA, ASBCA PERSONNEL BIOGRAPHIES, <http://docs.law.gwu.edu/asbca/biog.htm> (last visited July 12, 2007).

40 - *See* ASBCA Charter, *supra* n.37, at Subsection 4.

41 - *See* RULES OF THE ASBCA, Rule 1, at 1 (April 1, 2007), *available at* <http://docs.law.gwu.edu/asbca/info/pdf/ASBCA%20RULES%202007.pdf>

42 - *See id.*, Rule 6(a).

43 - *See id.*, Rule 4(b).

44 - *See id.*, Rule 20(a).

45 - *See* Latham, *supra* n.35, at §10-31 (*citing* Contract Disputes Act, 41 U.S.C. §609(b)).

46 - If the contractor wishes to skip the ASBCA, subject to the Contract Disputes Act, it can elect to proceed to the Court of Federal Claims.

47 - *See* Notice of the Establishment of The Civilian Board of Contract Appeals and the Termination of The Boards of Contract Appeals of the General Services Administration and the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs, 71 Fed. Reg. 65825-01 (November 9, 2006).

48 - *See, e.g.*, Michael J. Schaengold & Robert S. Brams, *A Guide to the Civilian Board of Contract Appeals*, Briefing Papers No. 07-8 (July 2007) at 3.

49 - *Business Mgmt. Research Assocs., Inc. v. General Servs. Admin.*, CBCA 464, 07-1 BCA ¶33,486 (Jan. 18, 2007).

50 - *See* Act of August 28, 1958, Pub. L. No. 85-804, § 1, 72 Stat. 972 (codified at 50 U.S.C. §§1431-35).

51 - *See* West DC Editorial, <http://west.thomson.com/dceditorial/> (last visited July 23, 2007). A telephone call by the authors to West confirmed that West no longer publishes the *Extraordinary Contractual Relief Reporter*.

52 - Citation formats are variable depending on the type of appeal. For example an appeal from a size determination would be cited *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), a North American (*continued on next page*)

Exploring the Federal Forums for Government Contracts (cont'd):

Endnotes (cont'd)

Industry Classification System appeal would be cited *NAICS Appeal of Commodore Advanced Sciences, Inc.*, SBA No. NAICS-4816 (2006), a business development plan appeal would be cited *Matter of Environmental Technology, Inc.*, SBA No. BDP-232 (2006), a debt collection would be cited *Edward L. Brumby v. SBA*, SBA No. DBT-614 (1998), and a small disadvantaged business appeal would be cited *Matter of Trisha Koch & Associates*, No. SDBA-113 (1999).

53 - See *Red River Serv. Corp. v. United States*, 60 Fed. Cl. 532 (2004).

54 - In *Federal Mgmt. Sys., Inc. v. United States*, 61 Fed. Cl. 364, 367 n.3 (2004), the Federal Court of Claims explained that: "Decisions from the GAO may be cited by either party as persuasive, albeit non-binding authority." Another decision, *CSE Constr. Co., Inc. v. United States*, 58 Fed. Cl. 230, 256 n. 15 (2003) holds: "Although not binding on this court, GAO decisions are of interest to the court and are often referred to by the court as persuasive authority 'in recognition of GAO's expertise in resolving contested procurement decisions.'" See also *Metcalf Constr. Co., Inc. v. United States*, 53 Fed. Cl. 617, 640 (2002) (following Comptroller General analysis, stating, "there is a dearth of binding authority on this issue, but there are several persuasive administrative decisions that are precisely on point") *XTRA Lease, Inc. v. United States*, 50 Fed. Cl. 612 (2001).

55 - 401 F.3d 1362 (Fed. Cir. 2005).

56 - *Id.* at 1365 (citing *Eastman Kodak Co. v. Rumsfeld*, 317 F.3d 1377 (Fed. Cir. 2003) and *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203 (Fed. Cir. 2004)).

57 - See, e.g., *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 727 (Fed. Cir. 1997); *U.S. West Comm. Servs., Inc. v. United States*, 940 F.2d 622, 625 (Fed. Cir. 1991).

58 - 70 Fed. Cl. 665, 675 (2006).

Tecom: Another Perspective

by
Anthony Steadman
and
Peter A. McDonald*

[Note: © Thomson-West *Government Contract Costs, Pricing & Accounting Report*, Vol. 3, Issue No. 2, March 2008. Reprinted with permission.]

The Armed Services Board of Contract Appeals clarified the standard for determining allowability of legal costs in its recent decision in *Tecom, Inc.*, ASBCA Nos. 53884, 54461, 07-2 BCA ¶33674.

At issue were the allowability of both legal costs and settlement costs. The contractor incurred these costs in defending a sexual harassment suit brought by a former employee who worked on its government contract for military housing maintenance at Fort Hood, Texas. The employee's lawsuit was subsequently settled by an agreement that included confidentiality and nondisclosure provisions. In that agreement, Tecom did not admit to any wrongdoing.

The legal fees for defending the suit were subsequently allocated to the general and administrative (G&A) cost pool, and settlement costs were charged directly to the contract. In its request for reimbursement, Tecom asserted the accusation was false and that it simply made a prudent business decision to settle the case. The contracting officer denied payment of the settlement costs, but thereafter refused to issue a final decision. Tecom eventually appealed to the ASBCA the CO's failure to issue a final decision on the settlement costs. The CO did issue a final decision demanding repayment of the legal fees, and Tecom submitted its appeal to the Court of Federal Claims. That appeal was later transferred to the ASBCA and consolidated with Tecom's appeal on the settlement costs.

The government relied on the decision by the Court of Appeals for the Federal Circuit in *Boeing North American v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002). In *Boeing*, the court established a "likelihood of success" test to determine the allowability of legal fees and settlement costs, i.e., the allowability of the costs in question depended on Boeing's likelihood of success of their case had it gone to trial. The case was remanded to the ASBCA's for its determination. Applying the same standard to the instant case, the Government argued that Tecom's costs were unallowable unless Tecom could show that it likely would have prevailed if the sexual harassment lawsuit had gone to trial. Alternatively, the Government maintained that the costs should not be allowable because they were "similar or related" to penalties for wrongdoing under FAR 31.205-15, "Fines, penalties, and mischarging costs".

Tecom responded that the "likelihood of success" test applies only to lawsuits involving fraud or false claim allegations under FAR 31.205-47, "Costs related to legal and other Proceedings". Here, there were no allegations of fraud, so arguments based on FAR 31.205-47 had no bearing. Tecom also asserted that the Government's argument would effectively require litigation of an employment suit that had already settled.

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New Standard for Allowability of Legal Costs (cont'd):

After thoroughly reviewing the undisputed facts in detail, the ASBCA decided to sustain Tecom's motion for summary judgment. The Board found as a matter of law that the *Boeing* "likelihood of success" test was not applicable unless the contractor had engaged in fraudulent or other similar misconduct. Thus, recovery of legal costs in defending the allegations of sexual harassment was not barred by FAR 31.205-47.

Regarding the Government's alternative argument about the settlement costs being unallowable because they were "related" to a fine or penalty under FAR 31.205-15, the ASBCA found otherwise, essentially concluding that the settlement of a civil case for a private harm was not "related" to a fine or penalty assessed by a Government agency.

The *Tecom* case clarifies the questions of allowability of legal costs, and answers many of the questions left unaddressed by the *Boeing* decision.

* - Anthony (Tony) L. Steadman is Of Counsel at Perkins Coie LLP and Peter A. McDonald is a Director at RSM McGladrey, Inc.

**The Proposed Rule On
Contractor Compliance Program and Integrity Reporting –
An Ill-Conceived Overreaction to Recent Procurement Scandals**

by
David M. Nadler and
Justin A. Chiarodo*

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The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council recently issued a proposed rule (72 Fed. Reg. 64019, Nov. 14, 2007) that revisits and expands a recently published final rule regarding contractor codes of ethics and business conduct. *See* 49 GC No. 14 (April 11, 2007). The proposed rule addresses several Justice Department proposals to strengthen the code of ethics and business conduct rule. Most notably, the proposed rule adds “contractor integrity reporting” requirements that contractors notify the Government without delay of suspected violations of Federal criminal law related to the award or performance of a Government contract.

Among other changes, the new proposed rule would: (1) require that a contractor’s record of integrity and business ethics be considered as part of determinations of a contractor’s responsibility and past performance, including the contractor’s compliance with the requirements for a contractor code of ethics and business conduct; (2) modify and strengthen the earlier rule regarding contractor compliance efforts so that they more closely match the U.S. Sentencing Guidelines regarding compliance and ethics programs; (3) require reporting of Federal criminal law violations in connection with the award or performance of a Government contract or subcontract; (4) add a new basis for debarment or suspension where a contractor knowingly fails to timely disclose an overpayment on a Government contract or violation of Federal criminal law in connection with the award or performance of any Government contractor performed by the contractor or any subcontract thereunder; (5) clarify and streamline the application of the contractor code of ethics requirements as they relate to small business concerns and commercial item acquisitions (for example, by exempting small businesses from the mandatory requirements for a formal ethics awareness program and internal control system). The proposed rule also includes a requirement that an internal control system must require “full cooperation” with any Government agencies responsible for audit, investigation, or corrective actions. This last requirement will not be included in the final rule, in order to allow further analysis and public comment and an “analysis of the relationship to waiver of the attorney-client privilege.” The comment period for the proposed rule closes January 14, 2008.

The decision to revisit and strengthen the original code of ethics and business conduct rule signals the significant concern of Congress and the Justice Department about the perceived increase in procurement fraud and war profiteering. While the proposed rule may be well intended, it is ill-conceived and overreaching. Some provisions of the proposed rule, such as those limiting the application of compliance program requirements to small businesses and reiterating the exception for commercial item acquisitions, strike a balance between promoting

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Contractor Compliance Program and Integrity Reporting (cont'd):

compliance without creating an undue burden on industry. However, other provisions, notably those requiring that contractors self-report suspected violations of criminal law, raise significant concerns about the reach of the Government's efforts to promote compliance, particularly given that existing programs and regulations provide more detailed and equitable frameworks for the disclosure of misconduct. The proposed rule contains significant ambiguities regarding when and what information must be disclosed, and how disclosed information will be protected and evaluated by investigating agencies. At a minimum, contractors should be given clear direction regarding these aspects of any disclosure program, particularly when that disclosure is involuntary and may result in significant sanctions, including criminal convictions, fines, and suspension or debarment.

The proposed rule would impose a clause in most contracts in excess of \$5 million with a performance period of 120 days or more to require federal contractors to notify, in writing, the agency Office of Inspector General and the Contracting Officer whenever a contractor has "reasonable grounds" to believe that a violation of criminal law has been committed in connection with the award or performance of a contract or subcontract. According to the Justice Department, this involuntary disclosure requirement is necessary because few companies voluntarily disclose suspected instances of criminal law violations. Regardless of whether this involuntary disclosure clause is included in a contract or subcontract, the "knowing" failure to timely report a suspected criminal law violation, or contract overpayment, would be a new basis for suspension or debarment under FAR 9.4. This provision would effectively extend the reach of the disclosure requirement to all federal contractors.

Among several defects, the involuntary disclosure clause does not provide sufficient detail regarding what triggers the disclosure obligation, such as what, specifically, constitutes "reasonable grounds" to believe that a violation of criminal law has been committed. There is no guidance as to the applicable standard. Are "reasonable grounds" present where a contractor has a mere suspicion of a suspected violation? Or, does the standard require a heightened level of knowledge, such as clear evidence of suspected violation? This ambiguous disclosure standard places contractors in the uncertain position of having to guess at whether the disclosure of information is required with profound consequences if they guess wrong. Moreover, the requirement also places contractors in the difficult position of determining whether the underlying conduct itself constitutes a violation of Federal criminal law. Contractors may feel compelled to disclose a legitimate contract interpretation issue or other good faith dispute based on uncertainty regarding about whether the matter is covered by the proposed disclosure rules. Greater clarity regarding the triggering event for disclosure is, at a minimum, a necessary step given the significant consequences contractors face under the proposed rule for failing to report a violation of criminal law.

An equally troubling ambiguity is the provision adding the "knowing" failure to timely report a suspected criminal law violation (or contract overpayment) as a basis for suspension or debarment under FAR 9.4. The proposed rule does not define whether a "knowing" failure

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requires actual knowledge of a suspected criminal law violation (or contract overpayment), or some lesser threshold, such as reckless disregard. This omission is especially significant given that this provision applies to all contractors, regardless of size or contract type. Moreover, by tying the suspension and debarment penalties to the mere failure to report suspected violations of criminal law, contractors may be severely punished even where the underlying facts do not amount to criminal conduct. As with the involuntary disclosure contract clause, the ambiguity in the proposed suspension and debarment provision creates a significant uncertainty that requires clarification, particularly given that the proposed rule ties the “knowing” failure to timely report a suspected criminal law violation to the draconian penalties of suspension and debarment.

Beyond these ambiguities, the involuntary disclosure approach in the proposed rule also raises substantial questions about protecting the attorney-client privilege, which is likely to be implicated in company investigations of suspected criminal law violations. For instance, the proposed rule omits any reference to the principles in Justice Department guidance regarding the federal prosecution of business organizations (the “McNulty Memo”), which requires that prosecutors establish a legitimate need for protected information and specify the scope of any waiver sought. The failure to address these principles, or discuss how privileged information will be protected, may create a chilling effect on internal investigations and, thus, the effectiveness of the proposed rule on ferreting out misconduct by encouraging corporate investigations. Protecting the attorney-client privilege is essential to ensure that companies are able to engage counsel fully in what may involve significant issues that could impact the ability of a company to do business with the Government, or otherwise subject the company to significant fines, penalties, and other liabilities.

This failure to address privilege protections in connection with involuntary disclosures is confusing given that the Councils expressly referred to those concerns in the context of the proposal that a company’s internal control system must require “full cooperation” with any Government agencies responsible for audit, investigation, or corrective actions. The Councils stated that they are leaving the “full cooperation” requirement out of the final rule to allow an “analysis of the relationship to waiver of the attorney-client privilege.” A similar analysis should be made with regard to the involuntary disclosure requirement.

Similarly, the proposed rule also places contractors in the difficult position of potentially being forced to disclose sensitive business information that may be protected by non-disclosure or similar confidentiality agreements between a contractor and its subcontractors, teaming partners, or other entities. Requiring that contractors disclose sensitive information to comply with mandatory disclosure requirements, without appropriate protections, burdens contractors with the additional risk of liability for breaching confidentiality or similar agreements.

The ambiguous disclosure standards also materially increase the risk profile of public companies under the Sarbanes-Oxley Act, and require considerable additional resources to assess contract-related risks and whether disclosed conduct must be identified as part of a
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company's public disclosures. For example, it may be difficult to determine whether, and to what extent, suspected criminal misconduct might impact a company's financial performance. The proposed rule does not appear to consider the resources required by industry to comply with regulatory obligations, such as Sarbanes-Oxley, that might be brought into play as a result of the broad involuntary disclosure requirements. Beyond this regulatory concern, any company that involuntarily discloses suspected criminal misconduct may suffer damage to its reputation. The reputation impact could jeopardize the company's relationship with government customers and create a negative public perception that could affect the value of the company, all without regard to the severity of the underlying conduct. This concern is particularly acute for companies that are required to publicly report such events. Companies committed to compliance should not be subject to these adverse consequences and heightened risks where the underlying conduct only constitutes a minor violation of law, or does not constitute criminal conduct. Greater clarity and detail regarding the triggering events for disclosure, and how information will be handled in the disclosure process, are key steps to address these concerns.

Though the proposed rule states anecdotally that involuntary disclosures are necessary because "few companies have actually responded to the invitation of DoD that they report or voluntarily disclose suspected instance[s] of violations of Federal criminal law", it ventures no analysis of the reasons behind this apparent result. More importantly, it does not address how the selective focus on DoD's "invitation" for voluntary disclosures is representative of the effectiveness of existing statutes, regulations, and programs related to the disclosure of misconduct, many of which provide considerably more detail regarding the disclosure process than the proposed rule.

In fact, the FAR provisions governing suspension and debarment provide numerous incentives for contractors to be forthcoming regarding suspected misconduct. For example, debarment officials must consider a company's standards of conduct, internal control systems, voluntary disclosures of misconduct, and cooperation with government investigators when making debarment decisions. FAR 9.406-1. In addition, voluntary disclosures of conduct that may subject a contractor to liability under the False Claims Act may result in reduced statutory damages and penalties. *See* 31 U.S.C. §3729(a)(7)(A)-(C). The self-reporting contractor faces double, as opposed to treble, damages, and no penalties (which can amount to \$5,500 to \$11,000 per claim). In complex matters, these incentives could amount to millions of dollars in reduced damages and penalties.

Moreover, guidance regarding the federal prosecution of business organizations, such as the McNulty Memo, expressly provides that a corporation's timely and voluntary disclosure of wrongdoing, and its willingness to cooperate in the investigation of misconduct, are mandatory factors in determining whether to bring charges against companies, and in negotiating plea agreements. The McNulty Memo also provides that the adequacy and effectiveness of a company's existing compliance programs are key factors in determining the prosecution treatment of a corporate target. These provisions provide substantial incentives for companies
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to maintain a robust compliance environment, and voluntarily disclose misconduct to discourage corporate criminal prosecutions.

Beyond these statutory and regulatory provisions, existing voluntary disclosure programs, such as the Department of Defense Voluntary Disclosure Program and the Department of Health and Human Services Provider Self-Disclosure Protocol, provide detailed frameworks to encourage contractor disclosure. These programs include provisions describing how and what information must be disclosed and the extent to which good faith cooperation by contractors will be considered as a mitigating factor by investigating agencies. These detailed programs stand in stark contrast to the proposed involuntary disclosure provisions, which provide virtually no substantive detail about precisely when disclosures are required and how they will be handled.

Taken collectively, these existing measures not only provide material incentives for contractors to report misconduct, but also provide meaningful detail about the disclosure process, including how information, such as privileged information, will be handled as part of a voluntary disclosure. Regardless of how effective these voluntary disclosure provisions are perceived, the proposed rule does not go far enough to provide this meaningful detail, which is needed for both Government and industry to clearly understand their respective rights and duties related to a disclosure.

While the recent procurement scandals have undoubtedly changed the compliance landscape, the ambiguous and arguably unnecessary self-reporting requirement in the proposed rule is counter-productive, particularly in light of the substantial current measures designed to encourage voluntary self-reporting. The proposed rule should be reconsidered pending a thorough examination of the need for an involuntary approach. At a minimum, it should be revised to add significant additional detail regarding the circumstances triggering the disclosure requirement, as well as the procedures for disclosures, including appropriate protections for privileged and other sensitive information.

* - This feature comment was written for *The Government Contractor* by David M. Nadler, a partner with Dickstein Shapiro LLP specializing in Government contract matters, and Justin A. Chiarodo, an associate with Dickstein Shapiro LLP. Mr. Nadler may be contacted at NadlerD@dicksteinshapiro.com.

What Can Contractors Do to Prevent Organizational Conflicts of Interest From Becoming Last-Minute Showstoppers?

by
*Sarah M. McWilliams**

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Contractors, like Federal acquisition professionals, have a significant interest in surfacing latent Organizational Conflicts of Interest (OCIs) early in the procurement process, when alternatives for resolution are at their most flexible. No contractor, after investing substantial resources in a major proposal and negotiations, wants to have its proposal rejected on the basis of a tardily-identified OCI. Equally bad is the prospect of receiving a contract award and beginning performance, only to have the contract terminated when a protesting competitor surfaces previously-overlooked OCIs. By aggressively working to identify and assess OCIs up front, and proposing comprehensive and thoughtful mitigation strategies where feasible, contractors can dramatically reduce the odds of having a proposal rejected on OCI grounds.

- *Select business opportunities with an eye toward OCI issues.* The Government Accountability Office (GAO) still cleaves to the principle that some OCIs are simply too pervasive to be mitigated.¹ GAO also underscores that the Government's discretion in addressing OCIs is circumscribed only by the broad principle of "reasonableness,"² thus preserving the Government's option to deal with substantial OCIs simply by disqualifying the conflicted firm's offer.³ Accordingly, contractors are well advised to consider OCI potential in choosing solicitations to target; and to think twice before expending significant costs in proposing on solicitations whose performance would create pervasive OCIs.
- *Don't forget restrictive clauses included in earlier contracts.* Contractors should also be mindful of the Government's increasing use of restrictive clauses (such as those outlined in Federal Acquisition Regulation 9.507 and subparts); and understand that they may already have agreed, in earlier contracts, to forfeit the right to be considered for award of certain related efforts. Because these restrictive clauses can automatically bar a contractor from being considered for award of a later contract, contractors should keep careful track of these restrictions; and should institute reliable means of assuring they are duly considered as part of the process of selecting solicitations to pursue. Otherwise, the contractor may find itself in the unpleasant position of having incurred substantial costs in preparing a proposal that is never even read, much less evaluated, by the Government.
- *Openly acknowledge and address OCI issues in proposing on requirements with identified OCI potential.* Contractors have little to gain by glossing over known OCIs in

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hopes that those OCIs will remain undetected. Even in the event that OCIs are not fully detected by the Government in the evaluation and selection process, competing contractors are quick to make the connection and protest a suspect award. Further, even if an OCI remains undiscovered until well after award, it can trigger significant unanticipated costs and administrative burdens when it inevitably comes to light. In a worst-case scenario, unanticipated OCIs can seriously change the profit/loss assumptions attending a particular contract. Better instead to squarely and thoroughly identify OCIs in your proposal at the outset – and to couple that discussion with comprehensive strategies to avoid, prevent or mitigate each OCI identified. This will not only facilitate review, but will assist the Government in generating and documenting a defensible OCI analysis should your proposal be selected for award and subsequently protested.

- *Be proactive in supervising ongoing contracts which may create OCIs.* Contractors – especially those that have multiple divisions or affiliates – should monitor ongoing specific efforts supported under contracts for technical assistance and engineering support. Contractor employees who are embedded in a program office should be advised to be advised to coordinate with the contractor’s compliance officers BEFORE beginning work on new Government taskings to develop a specification, statement of work, source selection plan or other acquisition-related document pertaining to an upcoming competitive acquisition.
- *Include information regarding affiliates in your proposal.* Many OCIs are generated by corporate affiliations on the part of a contractor that are simply unknown to the Government. Therefore, contractors can help by assuring that proposals as submitted contain a current organization chart, identifying all corporate and other affiliates that share an identity of interests for OCI purposes. In the event affiliations change while an acquisition is pending, contractors should submit supplemental information describing the change and updating this portion of their proposals.
- *Avoid “one-size-fits-all” solutions for Bias-Type OCIs.* One of the biggest mistakes contractors make in addressing OCIs is relying solely on “firewall” arrangements providing for security of information within a contractor’s organization. It is well established that firewalls – while often adequate to mitigate Informational OCIs -- are “virtually irrelevant” to mitigation of Bias-Type OCIs.⁴ Where an acquisition presents a known Bias-Type OCI, contractors are well advised to conduct their analysis on a case-by-case basis; and formulate specifically-tailored mitigation procedures that provide for the contractor’s de facto⁵ or de jure⁶ recusal from the conflicted work.
- *Formulate and adopt a standard firewall protocol to address Informational OCIs.* While contractors often rely unduly on “canned” mitigation plans that do not fully address the specific OCI problems raised by a particular acquisition, standard plans are

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useful in one area: i.e., in addressing Informational OCIs. For these particular OCIs, use of standard “firewalls” to assure “organizational, physical and electronic separation”⁷ of OCI-sensitive information from the contractor’s overall organization is effective and moreover, economical. Once a comprehensive and effective firewall plan is established, it is highly portable to different contracts with a minimum of tailoring.

- *Consider and identify OCI implications of mergers and acquisitions.* For a Government contractor considering acquisition of a new subsidiary or affiliate, OCI implications are a critical ingredient of the business analysis. Consider the case of Company X, a defense hardware producer that is thinking of acquiring an engineering services affiliate. If the would-be affiliate is currently supporting testing and evaluation of Company X’s products under multiple Government contracts, the acquisition is likely to create OCIs that might interfere with performance on both ends, or be costly to mitigate. Contractors should realistically consider the hidden business and opportunity costs of OCIs before entering into affiliations. Further, OCI analysis – and proposed measures to avoid or mitigate the OCIs – should be detailed to the Government in seeking required consent to novation under FAR Subpart 42.12.

* - Sarah M. McWilliams is an Attorney-Advisor with the U.S. Army CECOM Life Cycle Management Command, Office of Chief Counsel (Fort Belvoir Division); and a member of the Virginia and District of Columbia Bars. She received her A.B. and J.D. degrees from the College of William and Mary, where she served on the editorial board of *The William and Mary Law Review*. Views expressed in this article are those of the author and do not necessarily represent the official position of the U.S. Army.

Endnotes

1 - *See, e.g., Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-276634.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, 95-2 CPD ¶ 129 at 33 (Jul. 27, 1995).

2 - *See Business Consulting Associates, LLC*, B-299758.2, ___ CPD Para. ___ at 20, 2007 Comp. Gen. LEXIS 133 at 9 (Aug. 1, 2007).

3 - Authority to withhold award on OCI grounds in appropriate cases is expressly addressed in Federal Acquisition Regulation (FAR) 9.504(e).

4 - *The LEADS Corp.*, B-292465, 2003 CPD ¶197 at 12 (Sep. 26, 2003); *see also Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-276634.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, 95-2 CPD ¶129 at 31 (Jul. 27, 1995) and *Jones-Hill Joint Venture*, B-286194.4, B-286194.5, B-286194.6, 2001 CPD ¶194 (Dec. 5, 2001), *aff'd on reconsideration, Department of the Navy – Reconsideration*, B-286194.7, 2002 CPD ¶76 (May 29, 2002).

5 - *See The LEADS Corp., supra*, 2003 CPD ¶197 at 12 (Sep. 26, 2003) (GAO upholds mitigation plan requiring contractor employees supporting federal acquisition functions to recuse themselves in advance from acquisitions in which their contractor employer had an interest).

6 - *See Deutsche Bank*, B-289111, 2001 CPD ¶210 (Dec. 12, 2001) at 2 (GAO approves use of “walled subcontractors” for performance of conflicted work, where prime contractor had a demonstrated Bias-type OCI).

7 - *See The LEADS Corp.*, B-292465, 2003 CPD ¶197 at 12 (Sep. 26, 2003).