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PRESIDENT'S COLUMN

Developments and Upcoming Activities

As Spring closes and the Summer season begins, two issues are of importance. First, I am pleased to announce that the Board of Contract Appeals Judges' Association (BCAJA) and our Board of Contract Appeals Bar Association (BCABA) recently took the first steps to strengthen our respective visions on the various Boards of Contract Appeals (BCAs) and other professional issues. Specifically, it was a pleasure to co-chair an ad hoc meeting of various BCAJA Judges and BCABA Members in late March, 2001 to better coordinate our professional agendas for the next year. A strong commendation must go to John Pachter, of Smith Pachter, for his enormous personal initiative to delicately facilitate that first ad hoc luncheon. Additionally, my personal thanks to David Metzger, of Holland & Knight, for allowing the use of his main boardroom in Washington, DC.

That ad hoc meeting between several of the BCAJA Judges, and this year's BCABA Officers and Members of the Board of Governors, was fruitful. Obviously, all of the Judges of the various BCAs are automatically included as Honorary Members of the BCABA. However, for some such as myself, it was the first opportunity to glean insight into the collegial issues that bind together the BCAJA Judicial Membership. But for all, it was a true opportunity to candidly reflect about the professional challenges that have been of past importance to the Judges of the various BCAs, and to discuss potential future challenges that might arise. All present were struck by the various inputs from ASBCA Judge Paul Williams; GSBCA Judge Steve Daniels; and AGBCA Judge Ed Houry, among others. The consensus was that both organizations do indeed share many of the same interests in maintaining the health of a strong series of BCAs and in sustaining the level of professionalism before the BCAs. It was particularly important to note that the BCA Judges present voiced genuine appreciation for the strong public support by the BCABA on past issues that impacted the Judges from time to time.

That clear arm's-length relationship -- of the BCABA publicly advocating for the health of the Boards and various issues of professionalism -- was constantly reiterated by those present, and must not be lost. At the end of the meeting there was strong support to continue to grow the discussions via an ad hoc inter-BCAJA/BCABA working group. Specifically, several Members of both BCAJA and BCABA, such as Judge Williams, Judge Daniels, Judge Hyatt, Judge Fennessey, and Judge Houry expressed strong interest in supporting that informal working group. It was agreed that steps would be taken to increase the e-mail contact between the various members of the ad hoc working group, and to host the next informal meeting at our BCABA Executive Policy Forum later this summer. There also appeared to be strong sentiment to formally create a working committee within the BCABA, possibly to be known as the Judges' Committee, to continue to develop that future vision.

Second, I am pleased to announce that we will continue the strong tradition

of the annual Executive Policy Forum, which provides an invaluable opportunity for Judges, Government Attorneys, and representatives of Gold Medal Firms to participate in a candid, off-the-record discussion of practice issues before the various BCAs. A short letter of invitation will be forthcoming shortly to all Judges, all Government Attorneys who are members of the BCABA, and to the Gold Medal Firms. It is vital that the Executive Policy Forum be candid and informal. Consequently, those letters of invitation will invite the various Judges that wish to attend, all of the Government Attorneys who are members of the BCABA, and one member from each of the various Gold Medal Firms. Those letters of invitation will be issued shortly. As we move into the Summer months under the new Administration, I look forward to continuing to support the BCABA and the interest of the various BCAs and professional issues before us. As always, I remain,

Yours in service,

James McAleese

EDITOR'S COLUMN

We have a number of fine articles this month. They include an article on agency protests by Joan Fiorino and Stephen Feldman, an article on Electronic filing at the COFC by Susan Warshaw Ebner, a short note on electronic filing in California, an article on on-line legal research by David Simms, and an article on digital signatures also by David Simms.

With this issue, we intend to try mailing out the paper issues by 4th class mail. I would appreciate it if some of you would let me know when your copy is received.

Clarence D. Long, III

ANNUAL MEETING NOTICE

The BCABA Annual Meeting will be held on October 24th at the Crystal Gateway Marriott. Please mark your calendars and plan to attend.

2002 ANNUAL DUES

The 2002 BCABA annual dues notices will be mailed this summer. Please complete the form neatly and return it promptly. As always, the information in these forms will be used to compile the BCABA Directory. **In a change of policy, this year the 2002 BCABA Directories will be published in October and will be distributed to attendees at the Annual Meeting on October 24th. Accordingly, it is important to pay your dues before September 30th.**

Going Electronic At The COFC

by

Susan Warshaw Ebner¹

Whether you are a full-fledged webmaster or wedded to doing things manually, if you practice before the United States Court of Federal Claims (COFC) prepare yourself to litigate millennium-style. The reason: Federal Courts including the COFC will be adding even greater electronic capabilities in the next few years. Courtroom renovations will enable the Court and the Bar to engage in electronic communications and presentations -- videoconferencing, video evidence presentations, electronic court reporting and more. In addition, the Court may be transitioning to some or all modules of a new electronic case management/case filing system (CM/ECF), courtesy of the Administrative Office of the United States Courts (AO), sometime between now and the year 2005. Exactly when all this will occur at the COFC, how it will be done and what it will mean for COFC litigants can't be answered completely by this article; decisions still need to be made. However, to see where the Court is right now and what you can do to help the Court plan for the future, read on.

1. Past as Prologue

More than five years ago, the Federal Judiciary began to focus on the potential for using computer technology to reduce its reliance on paper records and to assist it in operating more effectively and cost efficiently.² A top priority of the Federal Judiciary

¹ The author is Special Counsel to Convergys Corporation. This article reflects the author's own personal views. The author obtained some of the information for this article from a session regarding electronic filing at which members of the U.S. Court of Federal Claims participated: February 22, 2001 D.C. Bar Government Contracts and Litigation Section Brown Bag seminar, *Going Electronic (herein Brown Bag)*.

² See, e.g., Administrative Office of the U.S. Courts, Judiciary Makes the Most of Resources Now and for the Millennium (News Release, February 9, 1999); Administrative Office of the U.S. Courts, Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead (Discussion Draft, March 1997)(*herein March 1997 Discussion Draft*).

was to proceed toward development and implementation of electronic case files (ECF). To that end, the AO (the organization responsible for overseeing the administrative and budgetary aspects of the Federal Judiciary including the COFC) undertook a study and subsequent pilot program to develop and proceed with implementation of a CM/ECF system. At least five federal district courts (for civil cases) and five bankruptcy courts have successfully deployed some version of the AO's CM/ECF system. The district courts currently using the AO version of CM/ECF include: Eastern District of New York; Western District of Missouri; Northern District of Ohio³; and Oregon and Maryland.⁴ Two appellate courts have also begun to use the AO's CM/ECF system.⁵ The CM/ECF system developed and in use in the AO's pilot program contains several different modules. Some or all of these modules were available for selection and implementation by these courts.

2. What Is CM/ECF And What Could It Mean For The COFC?

CM/ECF stands for Case Management/Electronic Case Filing. Version 1 of the AO's CM/ECF system includes the following capabilities: case opening; docketing; case management reports; national statistical reports; public access; online help; data security; and data replication. The current CM/ECF system user requirements include: Windows95/98/NT; Word Perfect or Word; Adobe Acrobat PDF writer; a scanner; ISP line; Netscape Navigator 3.0+ or Internet Explorer 4.0+; and a modem. In addition, the

³ The Northern District of Ohio is an example of how CM/ECF is being used to help manage cases with a national scope:

Using an ECF system developed by the Administrative Office of the United States Courts, the Northern District of Ohio began receiving electronic filings in maritime asbestos cases via the Internet in January 1996. Their system now manages over 5,000 such cases and has saved the court from handling over 100,000 paper documents. Nearly 50 attorneys from around the country have not only submitted those documents in electronic form, but also simultaneously and automatically created the court's official docket entries. A similar Internet-based system began operation, with Administrative Office assistance, in the Southern District of New York (Bankruptcy) in November 1996,

March 1997 Discussion Draft.

⁴ See March 1997 Discussion Draft. See, also, Brown Bag at Orgovan ("CM/ECF Presentation").

⁵ *Id.*

ECF portion of the CM/ECF system permits authorized individuals immediate access to filed documents from anywhere -- chambers, home, divisional offices -- at any time. More than one individual can access the same document at the same time. Documents can be electronically searched and files can be preserved electronically.

The AO program at present is allowing the federal courts to decide among the various options for whether, how and when to implement a CM/ECF system. Thus, a federal court can opt to implement only CM -- the module covering only electronic docket entries and paper documents. It can opt to implement CM with the capability to put documents in electronic form through scanning by court staff. Or it can opt to implement CM with documents filed and sent electronically over the Internet or Data Control Network (DCN). It also has the option of passing up the opportunity to implement one or more modules of the AO's CM/ECF system.

The AO's current plans include implementing some or all modules of the CM/ECF system throughout the bankruptcy courts, federal district and appellate courts. The COFC will be included in the federal district court implementation pool. The AO hopes to have this implementation completed by 2005.⁶ The AO will permit the courts to choose which modules they will implement and whether they prefer to be in the beginning, middle or end of the implementation cycle. At present, the plan is to roll out CM/ECF throughout the bankruptcy courts first, starting in the beginning of 2001, and then roll out the system in the federal district courts and COFC, sometime after January 2002. Appellate courts will roll out after that.

In order to participate, each court will have to fill out a decision package advising the AO as to which CM/ECF modules it will install and when it would like to have the system rolled out. Those courts that opt for early roll out may get a system with some glitches. Later rollouts will have fewer glitches, a smoother rollout, and newly added

⁶ Administrative Office of the U.S. Courts, Judiciary to hold Public Hearing on Internet Access to Court Documents, (News Release, February 16, 2001).

features, but they will have to manage under their current systems for the immediate future.

The COFC's present docketing system includes electronic components -- the COFC uses Unify, an ICMS database. However, according to the COFC Systems Manager, Joseph Orgovan, this system is getting increasingly difficult to maintain and has limited capabilities.⁷

The AO's CM/ECF system being piloted for implementation and use by the Federal Judiciary is an electronic system that could enable the COFC to do much more than its present system. If the COFC implements all modules of the AO's CM/ECF system, the COFC could store, retrieve, send and use electronic case files for its cases. These electronic case files could include court documents (including case filings) in electronic form. The CM/ECF system could be enabled to permit authorized personnel different levels of access and use of these electronic documents. Thus, the COFC could employ the CM/ECF system to: 1) permit members of the public to access reported cases and other publicly available court information and documentation; 2) permit counsel to a particular case to access and use, but not change, electronic documents filed in the case; 3) permit judges and other court personnel to access and use not only the documents filed in a case, but also to create, access and use their own personal files for a case; and 4) provide users with automatic notice of filings.⁸

3. COFC's Progress To Date

The COFC is making great strides improving its electronic handling of court documents and its physical plant.

⁷ Brown Bag at Orgovan.

⁸ *Id.*

Electronic Handling of Court Documents

As stated above, the Clerk's Office has some electronic docketing in place now. Its Unify system permits the COFC to maintain an electronic docket. The Court participates in the ACER system -- an electronic federal judicial information system available only to members of the judiciary. In light of these electronic communication capabilities, the Court is acting to ensure that its information remains secure. The Court has installed a firewall and other protections to prevent unauthorized intrusion into its system. Even greater security precautions are also in line.

Formal steps for the electronic filing and management of all cases have not yet been taken. However, individual judges and special masters at the COFC are taking steps to engage in some trial forms of electronic case management and filing. This work is done at the request of the parties and/or if the judge determines it to be appropriate, on a case by case basis. For example, the Special Master at the Court has been engaged in a pilot program to try out electronic document handling in certain vaccine cases. Under this pilot, attempts are being made to place the administrative record and seminal cases for the designated case on CD ROM so that it can be copied and used by the parties and the Court throughout the proceedings. In still other cases, some of the COFC Judges have permitted discovery and the submission of case documents using CD ROM and other electronic technology. This capability is not available for case filings, however. Each of these activities is building a body of knowledge and experience that the Bench and Bar can use to develop rules and procedures for handling electronic matters.

Rules On Electronic Matters Are Anticipated.

In addition to trying out different portions of electronic case management and document handling, the COFC is currently engaged in a review of its existing rules and appendices. If some form of electronic filing is adopted, the Court will need to modify its rules to provide for electronic case filing and management and possibly electronic discovery. Procedures to deal with electronic evidence presentation are also anticipated.

The nature and extent of the rules to be instituted depends very much on precisely which modules of the AO's CM/ECF system the Court opts to install.

As someone who has been involved in discussions with the Court's Technology and Rules Committees, I anticipate that the Court will want to consider addressing the myriad implications of going electronic, one step at a time. Issues that the Court will likely tackle if it goes electronic are electronic filings, digital signature, electronic discovery, videoconferencing, electronic evidence presentations, real-time court reporting, electronic records⁹, PKI (Public Key Infrastructure)¹⁰, handling of classified and protected information, differing levels of access by Court, Bar and Public, and privacy protections. Whatever its plans, the Court continues to assure its practitioners that those unable to use electronic means to handle their cases may continue to use paper means to file and handle their cases.¹¹

Improvements In Access To COFC Information

Besides its internal activities to permit electronic communications, case and document handling, the Court has engaged in activities to make its court rules and

⁹ The Court is likely to have to address this issue in the short term since -- in the Federal sector -- judicial, executive and congressional directives are placing more and more governmental activities in electronic form. Examples include:

A. Electronic Signatures In Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000)(Providing for acceptance of digital signatures in commercial contracts).

B. Government Paperwork Elimination Act, Pub. L. No. 105-277, Sec. 1701 (1998) (Requiring government to increase use of electronic communications and storage mechanisms in the performance of government functions).

C. Creation and use of Government websites to conduct government activities –

- Court websites may be used to disseminate and obtain information on proposed and current rules, current members of the judiciary and opinions, e.g., <<http://www.uscourts.gov/rules/proposed021501.htm>>; <www.uscourts.gov>; <www.contracts.doc.gov>.

- Executive Branch websites may be used to publish proposed and actual rules, current and archival press releases, job vacancies, and may even be used to conduct government procurements, e.g., <www.whitehouse.gov>, <www.gsa.gov>, <www.navy.mil>.

- Congressional websites may provide information on current representatives, their committees, draft bills, government publications, and other events on the Hill, e.g., <www.house.gov>, <www.senate.gov>; <<http://lcweb.loc.gov/global/legislative/congress.html>>.

- The locator for government websites is <www.fedworld.gov/gils/index.htm>.

¹⁰ See, e.g., <<http://csrc.nist.gov/pki/>> for information on PKI.

¹¹ Brown Bag at Judge Allegra and Chief Judge Lawrence Baskir.

opinions more accessible to the Public and Bar. The Court is a participant in the Federal PACER system -- an electronic communications systems that makes the Court's opinions, rules and docketing information accessible to the public and the practitioner for a fee.¹² Even more significant, there is now web-based access to information about the COFC, its judges, special masters, rules, general orders, opinions, announcements, and bar activities. *See, e.g.*, <www.gwu@edu/fedcl>; <www.contracts.ogc.doc.gov/fedcl>.¹³ And plans are in the works for improving the Court's websites to include more information on a more timely basis. Thus, if you have access to a telephone or the Internet, you can access information specific to the COFC and its Bar with greater ease.

Improvements In The COFC's Physical Plant.

Over the past few years much work has been done to physically modernize the COFC to make it better able to handle real electronic capabilities in the Clerk's Office, Judges' Chambers and the courtrooms themselves. Indeed, the Court permitted the installation and use of electronic capabilities in recent cases to make those matters run more smoothly. Thus, in appropriate cases, for example, the Court permitted the parties to use real time reporting capabilities and/or electronic document display systems. The use of this equipment demonstrated that benefits could be achieved from electronic capabilities, but it also made clear that the Court's current courtroom configuration would be inadequate for future electronic needs. The courtrooms needed to be renovated to better accommodate the siting, wiring, lighting and ventilation needs for using these types of electronic equipment.

Actions taken by the Court in the past year are moving to alleviate these types of problems. The Court has established a Technology Committee to consider Court and case needs in the technological arena. Members of the committee include Judge Francis

¹² When the COFC first joined PACER, the fee for use was \$.60/minute. The price has since gone down.

¹³ There are plans for initiation of a new Court of Federal Claims website; the address and scheduled opening date have not yet been announced.

Allegra (chair), Judge Marian Horn, Judge Edward Damich, Judge Nancy Firestone, Chief Special Master Gary Golkiewiez, Clerk Margaret Earnest, COFC Systems Manager Joseph Orgovan, and Court Librarian Patricia McDermott. This committee, in conjunction with Chief Judge Lawrence Baskir, is working very hard to accomplish technological innovations at the Court. In the author's opinion, probably the most visible significant accomplishment to date involves their work to accomplish the renovation of at least two COFC courtrooms in order to facilitate greater electronic courtroom activities.

The COFC courtroom renovation has commenced, and it looks like the work will benefit both the Bench and the Bar. The author and other members of the Technology Committee of the Advisory Council of the U.S. Court of Federal Claims were privileged to tour the Court's renovations in conjunction with a joint meeting with the Court's Technology Committee. This recent tour revealed that one of the courtrooms is almost finished. The newly renovated courtroom contains a raised floor to enable easy and unobtrusive installation and movement of cable and wiring for electronic equipment to be used by the Court and the parties. In addition, courtroom lighting and ventilation have been beefed up significantly. The courtroom now can be cooled to accommodate the heat generated by electronic equipment. And, the courtroom lighting can now be raised or dimmed as necessary to permit the Court and parties to view evidence (physical or electronic) more easily. The judge's bench, witness box and counsel tables have been redesigned to accommodate an ergonomic installation of video display screens, including flat screen monitors that will fold down when not in use. The planned installation should ensure that electronic presentations may be seen when needed and cleared away to ensure unobstructed views when they are not in use. Areas for installation and wiring of cameras have been created to enable the Court and parties to view evidence and conduct video-conferencing and video-testimony in the courtroom. Although all these changes to the COFC courtroom are significant, the effect is not overly noticeable. The courtroom still looks like a regular courtroom.

Although work is still in progress and much remains to be done, these are clear signs that the Court is moving forward with all due deliberate speed to improve the practice of law at the Court.

4. Where To Go -- The COFC Needs Your Input

In anticipation of its preparation of the decision package for the AO, the Court is engaging in a dialog with the Bar to determine exactly what needs to be done and when. In conjunction with the COFC Advisory Council, the Court has authorized the issuance of a survey to determine the Court's current and future electronic needs, as well practitioners' current and future capabilities. The Court is seeking input on this matter from all potential or actual parties and practitioners. If you have not already done so, you are encouraged to pull the survey off the Court's website, complete and forward it by regular mail to the address identified at the end of the survey. Alternatively, you can electronically e-mail your completed survey to the author of this article at [<sdwebner@aol.com>](mailto:sdwebner@aol.com).¹⁴ The survey can be found at [<www.gwu.edu/fedcl>](http://www.gwu.edu/fedcl) and [<www.contracts.ogc.doc.gov/fedcl>](http://www.contracts.ogc.doc.gov/fedcl). Once in the website, click on the section dealing with "Announcements" and then click on "Electronic Filing and Case Management Survey." You can follow instructions from there to download and complete the survey. The COFC Advisory Council's Technology Committee will be compiling completed survey responses and reviewing them with the Court's Technology Committee. The committee hopes to provide a consolidated listing of the responses received once all surveys are reviewed and tabulated.

In addition to participating in the survey, the COFC is sending out its members to discuss its plans and anticipated needs in informal settings. Recently, Chief Judge Baskir, Judge Francis Allegra, COFC Clerk Margaret Earnest and the Court's MIS guru

¹⁴ The author chairs the Technology Committee of the Advisory Council of the U.S. Court of Federal Claims and will be working with members of that committee to review the completed questionnaires.

Joseph Orgovan spoke at the D.C. Bar Government Contracts and Litigation brown bag on February 22, 2001, "Going Electronic." At the brown bag, they candidly discussed the Court's plans and current activities and solicited input on what attendees thought the Court ought to do. Throughout the meeting the Court's message was clear - the COFC is moving into the 21st century and wants to do it the right way. The COFC encouraged practitioners to complete and send in their survey responses so that no practitioner is left behind.

The COFC Advisory Council also plans to coordinate with the Court and Bar to conduct focus groups that will identify and flesh out the kinds of cases and electronic issues that may arise at the COFC, both now and in the future.¹⁵ Issues that are likely to be addressed at these meetings include: 1) privacy issues; 2) protection of proprietary and classified information; 3) what would be an appropriate standard technology for the Court and Bar; 4) the possible mechanics of electronic filing and presentations at the Court; 5) document authentication and digital signatures; 6) what rules need to be added, revised or deleted and how to handle the new technology capabilities; 7) determining what the Court and Bar might do to keep pace with changing technology; 8) identifying and resolving security issues; and 9) identifying special needs of litigants.

Last, it is anticipated that the Court will conduct a seminar or conference in the Fall of 2001 to acclimate members of the Bar to the new courtroom technology. In this

¹⁵ The COFC is not alone in its quest to hear from members of the public on these very important issues. The AO is addressing these issues as well. Recently, on March 16, 2001, the AO conducted a hearing on privacy issues relating to use of the Internet for Court CM/ECF. Going onto the Internet poses new concerns for not only members of the Bench and Bar, but the parties themselves. Information that was once filed only in hard copy with the Court was relatively obscure to the public. It was only accessible to those that went to the Court. It will now be accessible with the touch of a finger. Capabilities on the Internet now exist that permit anyone with the right tools to mine information from individual court documentation and compile that information in a way that creates new and potentially useful/harmful information. Social security numbers, details of an individual's private life, contractual information, all may be accessed and available for dissemination if the Court decides to make its documentation accessible on-line. These sorts of issues need to be explored before widespread access to court documentation is allowed. *See, e.g.*, Glasner, J., "Courts Face Privacy Conundrum," **WIRED NEWS** (February 26, 2001). Other hearings on these sorts of issues will follow. *Id.*

seminar or conference, members of the Bar will be able to view the newly renovated courtrooms and hopefully have the opportunity for hands-on practice.

5. Conclusion

The COFC is proceeding with its modernization plans. However, you can help make sure that the steps it takes are the right ones. Participate in the survey, attend Bar meetings and focus groups to make your particular concerns known to the Court, the Advisory Council and the Bar. Electronics done the right way will benefit not only the Court, but also its litigants.

Bill Hamilton

Beginning April 2, the Northern District of California will begin the laborious switch to a more efficient form of case management -- electronic filing. At first, all judges and magistrates in San Jose and four on either side of the Bay Bridge -- Judges Vaughn Walker, Claudia Wilken, Charles Breyer and Magistrate Bernard Zimmerman -- will be the court's guinea pigs. With few exceptions, all civil cases assigned to them after April 2 will be filed and briefed over the Internet.

According to the court, systems requirements are minimal and inexpensive. All that is needed is a personal computer (PC clones and Apple Macintosh computers work fine), an Internet connection, the Netscape Navigator browser (version 4.08 or higher) and Adobe Acrobat Exchange 3.0 or higher. In addition, attorneys may need a scanner for imaging documents to be filed electronically that are not available in electronic format. Unfortunately for those who might otherwise prefer Microsoft Internet Explorer as their Internet browser, that software does not work with the electronic filing system and is unsupported at this time.

Court officials have set up a Web site complete with an electronic filing manual at www.ecf.cand.uscourts.gov.

THE AGENCY-LEVEL PROTEST: AN IDEA WHOSE TIME HAS COME

by

Joan K. Fiorino* & Steven W. Feldman**

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I. INTRODUCTION

Sometimes, a government contractor has a legitimate complaint about either a government solicitation for offers -- such as an invitation for bids or a request for proposals -- or an award or selection decision. For example, the solicitation might prejudicially violate law or regulation, or an award decision could be based on a proposal that deviated from mandatory solicitation requirements. Increasingly, aggrieved contractors are looking for more meaningful, informal and less costly means of resolving such pre-contract disputes with the agency short of becoming embroiled in a formal protests. For similar reasons, government procuring agencies should be open to suggest and promote these means. Such means can include, for example, sending written questions to the contracting officer about the solicitation before the closing date, or raising concerns about a task order award decision with an agency ombudsman.¹ Occasionally, such appeals succeed, but often they are unavailing. What is the contractor's next step?

One of the most difficult decisions for any government contractor is whether to protest a government procurement action. This decision raises closely balanced concerns. On one hand, no reasonable business person relishes suing a current or prospective customer. On the other hand, a contractor that believes it has been treated unfairly and prejudicially by a federal agency must protect its legitimate business interests.

The single most important aspect for attorneys in representing government contractors is to create a setting in which informed decisions can be made. By illuminating the legal issues underlying a problem, counsel can empower government contractors to make the best possible legal and business decision. Thus, the contractor's counsel can bring legal information to the attention of the client in order to assist in deciding whether to protest.

This article will focus on an underutilized protest forum, the agency level protest. First, the article will compare the benefits and drawbacks of the alternative protest

forums. Second, it will discuss the procedural rules pertaining to agency protests, and how protesters can best use those procedures. Third, the article will consider the relationship between the agency protest forum and the other protest tribunals. Throughout, the article will rely on analogous General Accounting Office (GAO) or court precedents to interpret various technical terms in the regulations on agency level protests.

II. ALTERNATIVE TRIBUNALS

The aggrieved government contractor (the term is used to refer both to actual and prospective contractors) has various tribunals for protest. The most common administrative forum is the GAO (headed by the Comptroller General), whose jurisdictional statutes are 31 U.S.C. §3551 et seq. The sole judicial forum is the United States Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. §1491(b). Perhaps the chief benefit of GAO and COFC protest is that both forums allow for *protective orders* under which only counsel for the protester-or a consultant (but not the protester)-can obtain confidential access to agency source selection documents and even to the proposals of the protester's competitor(s).² Access to this information is often crucial for establishing or validating grounds for protest. The agency protest process typically does not have these advantages, except in the rare instance where the agency and other offerors would agree to an informal protective order.

On the other hand, the COFC and GAO have their disadvantages. First, they follow standard litigation procedures, although the GAO is somewhat less formal. This means that these two forums commonly involve the complexities and expense of litigation. Pleadings, briefs, motions, discovery, and hearings are common in GAO or COFC cases (although hearings are relatively rare at the GAO). Second, these proceedings are usually relatively protracted. By statute, 31 U.S.C. §3554(a)(1), GAO has up to 100 days to decide a protest, and no time limit exists on COFC cases. Third, GAO or COFC litigation can be expensive; where the protester prevails, and the case is complex, GAO or COFC attorney fee decisions exceeding \$25,000 are not uncommon. Accordingly, a GAO or COFC protest is not always the best decision for any business, especially for a small business concern that either wants a speedy decision or has limited resources.

If the contractor believes that the agency will provide an informed, impartial protest tribunal, and no strong reason exists for a protective order, the agency protest forum could be the ideal choice. In addition, an agency-level protest is *less confrontational* than a GAO or judicial protest, which means that the agency might be more willing to compromise or settle. Agency-level protests are less public than a GAO or COFC protest, which the agency knows will result in a widely-distributed decision that could reflect poorly on the agency if the challenge is sustained.

III. EXECUTIVE ORDER 12,979

Executive Order 12,979, 60 Fed. Reg. 55,171 (Oct. 25, 1995), announced federal policy on agency-level protests. The stated objective was "to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the

award of federal procurement contracts.” The executive order contains the following key policies:

- 1) All parties should use their best efforts in resolving the matter with agency contracting officers;
- 2) Agencies are to provide, to the maximum extent practicable, inexpensive, informal, procedurally simple and expeditious resolution of protests, including possible use of alternate dispute resolution techniques, third party neutrals and other agency personnel;
- 3) Decisional review at a level above the contracting officer whose alleged statutory or regulatory violation has prejudiced the protester; and
- 4) A prohibition on the award or performance of a contract while a timely-filed protest is pending before the agency.

The executive order further required that the Federal Acquisition Regulation (FAR) be amended to further the purposes of the order. FAR §33.103 now embodies the legal requirements on agency-level protests.

By itself, the executive order confers no potential grounds for an agency “protest” as defined in FAR §33.101. For a protest, the latter regulation requires an objection to a solicitation, proposed award, award, or termination/cancellation of an award. The executive order pertains to the protest process and the resolution of procurement complaints, not to the FAR §33.101 “protest” categories. Further, case law holds that no private right of action generally exists to enforce obligations imposed upon executive officials through executive orders.³

IV. AGENCY-LEVEL PROTESTS – REQUIREMENTS FOR STAY OF AWARD/PERFORMANCE

One possible reason for selecting an agency protest forum is that it incorporates one of the primary benefits of a GAO protest – the *mandatory stay* of contract award or performance, as stated in FAR §33.103(f).⁴ This stay is critical from the protester’s perspective; formerly, agencies sometimes would rush to award a contract upon notice of a protest, and then argue that it would be unfair to sustain the protest given the extent of performance.⁵ Thus, the stay preserves the protester’s right to a meaningful remedy, and ensures that agencies abide by the procurement statutes and regulations through full consideration of a protest on the merits.⁶

If the agency receives a protest before award, FAR §33.104(f)(1) forbids the award of a contract pending agency resolution of the protest, unless an authorized official determines in writing that an award is justified for urgent and compelling reasons, or is in

the best interest of the government. In some agencies, local officials lack this stay override authority; thus, in the United States Army Corps of Engineers, the requisite authorizing official for Corps district offices is the Head of the Contracting Activity, who is the Chief of Engineers at Corps Headquarters in Washington, D.C., per Engineer Federal Acquisition Regulation Supplement §§2.101, 33.103(f)(3).

A parallel rule for stays of contract performance resulting from timely post-award protests exists in FAR §33.103(f)(3). In most agencies, the same official authorized to override the stay in preaward protests will be authorized to make a similar decision for postaward protests.

Perhaps the key strategic requirement for practitioners is to make a timely filing of a protest for stay purposes, which is not necessarily the same as filing a timely agency protest, as discussed in Section VI below. Under FAR §33.103(f)(3), a timely protest for stay purposes must be filed within 10 days after contract award, or within five days after a debriefing date is offered to the protester after the protester has made a timely debriefing request, whichever is later. A protest could be timely for protest purposes under FAR §33.103(e) when made within 10 days after a debriefing, but it would be untimely for stay purposes under FAR §33.103(f)(3) when made more than 10 days after contract award, or more than five days after a debriefing date has been offered to the protester making a timely debriefing request, whichever is later. Thus, to obtain the benefits of the automatic stay of performance, practitioners must ensure that the agency-level protest is filed within the time frame of FAR §33.103(f)(3).

The COFC has indicated that if an agency violates the automatic stay or award or performance requirements of FAR §33.103(f), such violation creates independent grounds for protest under 28 U.S.C. §1491(b)(1).⁷

One potential downside exists to using the agency protest route. Where the firm receives an adverse agency decision and later decides to pursue a GAO protest, FAR §33.103(f)(4) advises that *pursuit of an agency protest does not toll the time for obtaining a similar stay of an award or performance in a GAO protest.*

V. AGENCY LEVEL PROTESTS – REQUIREMENTS FOR INFORMATION

EXCHANGE

The hallmark of the agency protest process is the exchange of relevant information. There are essentially four opportunities for such exchanges in this process.

1. *Open Discussions.* First, FAR §33.103(b) states in pertinent part:

Prior to the submission of an agency protest, all parties *shall* use their best efforts to resolve concerns raised by an interested party at the contracting officer level *through open and frank discussions.* [Emphasis added.]

The foregoing paragraph requires use of mutual best efforts to resolve concerns through “open and frank discussions” before a protest is submitted. Thus, the first opportunity to obtain information is through these discussions. Counsel could facilitate

such an encounter by advising his or her client of its rights and then by advising the Government of its duty in this regard. Practically speaking, if all parties use their “best efforts” to resolve concerns and the concerns are resolved, there is no need for an agency-level protest.

2. *ADR*. Second, FAR §33.103(c) provides:

The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of *alternative dispute resolution [ADR] techniques*, third party neutrals, and another agency’s personnel are acceptable protest resolution methods. [Emphasis added.]

If ADR is appropriate, the contractor’s counsel should attempt to persuade the agency to perform an outcome prediction approach -- sometimes used by GAO -- as an ADR techniques. This process could occur in a face-to-face meeting or a telephone conference call. In this way, an agency-level protest could be resolved even more quickly than the 35 day goal for issuance of a decision in FAR §33.103(g).

3. *Exchange of Information*. Third, FAR §33.103(g) states:

To the extent permitted by law and regulation, *the parties may exchange relevant information*. [Emphasis added.]

An agency is clearly authorized to address a contractor’s position on a possible solicitation defect or a problematic award. Another key point is that the agency is likely restricted from disclosing certain documents or information. For example, agencies are prohibited from releasing contractor bid or proposal information or agency source selection information under the Procurement Integrity Act, 41 U.S.C. §423, and its implementing regulation, FAR §3.104.⁸ If information release is discretionary with an agency, the contractor should seek to convince the agency of the propriety of the disclosure, in the spirit of Executive Order 12,979 and FAR §33.103(g).

4. *Reasoned Decision*. Assuming the agency renders a protest decision, the fourth vehicle for information exchange is the reasoned decision, per FAR§ 33.103(h). According to the regulation, the decision must shed light on the agency’s procurement rationale as follows:

Agency protest decisions shall be well-reasoned, and *explain the agency position* . . . [Emphasis added.]

In this manner, the protester will fully understand the agency’s viewpoint, and can determine whether a further protest to the GAO or COFC is viable.

5. *Decisionmakers*. As stated in FAR §33.103(d)(4), interested parties may request an independent review of the protest at a level above the contracting officer. The decisionmaker need not be in the contracting officer’s supervisory chain, but should lack previous personal involvement in the protested procurement. Another option, recognized

in FAR §33.103(d)(4), is for the protester to seek appellate review within the agency from a decision by the contracting officer. Agency procedures or solicitations are required to advise potential offerors of the various avenues of independent review within the agency.

6. *Agency regulations.* Protesters must review any agency regulations supplementing FAR §33.103 to ensure full knowledge of the agency protest process. Frequently, agencies have special guidance regarding the decisionmaker. For example, Army FAR Supplement §33.103(d)(4) states that when the protester requests a review above the contracting officer, and the agency is the Army Materiel Command, the protest will be decided by Headquarters, Army Materiel Command. In another pertinent agency procedure, U.S. Defense Logistics Agency (DLA) Directive 4105.1, implemented by standard DLA Contract Clause §52.233-9000, provides that DLA has adopted the bifurcated protest system of FAR §33.103(d)(4): a protester may file either a contracting officer protest or a protest requesting a decision at a higher level.

VI. AGENCY PROTESTS – PROCEDURAL REQUIREMENTS

Under FAR §33.103(d), the agency protest process is meant to (1) enable effective resolution of protests, (2) build confidence in the Government’s acquisition system, and (3) reduce protests outside the agency. For a protester to use the system effectively, however, it must comply strictly with the procedural requirements of FAR §33.103(d). Although agency protests are informal, there are some pre-requisites that, if violated, could justify agency dismissal without consideration of the merits.

1. *FAR Prerequisites.* Pursuant to FAR §§33.101, 33.103(d), an agency protest must be in writing, be filed by an interested party, and concern either: 1) terms of a solicitation; 2) cancellation of the solicitation; 3) an award or proposed award of the contract; or 4) the termination or cancellation of an award, provided that the last written objection is based at least on improprieties in the original award decision. This definition of a “protest” closely resembles the same concept in the Competition in Contracting Act, 31 U.S.C. §3551(1), which is GAO’s bid protest enabling authority. Consequently, GAO case law interpreting parallel terms should be highly persuasive authority in agency-level protests.

2. *Interested Party.* Under FAR §33.101, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award, or failure to award, a contract. The GAO frequently has interpreted similar language in 31 U.S.C. §3551(2), as explained below.

The Comptroller General has ruled that determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit of relief sought by the protester, and the party’s status in relation to the procurement.⁹ Accordingly, the GAO has observed:

1) Only prospective prime contractors, and not subcontractors¹⁰ or suppliers,¹¹ are interested parties;

2) Associations or organizations that do not offer on government solicitations are not interested parties;¹²

3) A protester is not an interested party if it would not be in line for award if its protest were sustained;¹³

4) A protester will be an interested party if it contends that its offer was improperly evaluated and that a proper evaluation would place it in line for award;¹⁴

5) A protester challenging the evaluation of the awardee, but not of its own offer, must challenge the evaluation of the awardee and all proposals higher ranked than the protester;¹⁵ and

6) A firm ineligible for award, such as a debarred company, is not an interested party.¹⁶

3. *Pleading Requirements.* Under FAR §33.103(d)(2), an agency-level protest must address various issues; the substantial failure to do so may be grounds for dismissal, as stated in FAR§ 33.103(d)(1).

Agency protests shall include the following information:

- 1) Name, address, and facsimile and telephone numbers of the protester;
- 2) Solicitation or contract number;
- 3) Detailed statement of the legal and factual grounds for the protest, including the resulting prejudice to the protester;
- 4) Copies of relevant documents;
- 5) Request for an agency ruling;
- 6) Statement as to the requested relief;
- 7) All information establishing that the protester is an interested party; and
- 8) All information establishing the timeliness of the protest.

Perhaps the most important pleading rule in FAR §33.103(d)(2), which closely resembles the GAO's bid protest regulation (4 C.F.R. §21.1(c)(4)& (e)), is the

requirement for legally sufficient grounds for complaint. Bare allegations, speculation, inference, self-serving statements, or suppositions will not support a valid protest.¹⁷ At a minimum, the protester must provide either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action, including some specific and factually-based explanation of the protester's concerns.¹⁸ Thus, the protester must establish a prima facie case of agency impropriety along with a violation of law or regulation.¹⁹

Another pleading requirement is that the protester establish competitive prejudice. GAO case law holds that to meet this standard, the protester must show that, but for the agency's alleged error, it would have had a substantial chance of receiving the award.²⁰ In this manner, the GAO avoids hypothetical or academic disputes between protesters and agencies.

A final essential pleading rule is the requirement for establishing a timely protest, which is discussed below.

4. *Timeliness.* FAR §33.103(e) contains two rules for timely protests, one for apparent solicitation improprieties, and the second for other protests. Both rules closely resemble the GAO's bid protest regulation on timeliness, 4 C.F.R. §21.2(a).

For apparent solicitation improprieties, the protest must be filed before the bid opening in sealed bidding under FAR Part 14, or the closing date for receipt of proposals in negotiated procurement under FAR Part 15. For all other procurement protests, FAR §33.103(e) mandates that the protest be filed "no later than 10 days after the basis of protest is known or should have been known, whichever is earlier." The concept "days" under FAR §33.101 essentially means a calendar day, unless the last day for filing is a non-business day, in which case the computation will include the next business day. The concept of "filed" under FAR §33.101 means the complete receipt of the document at the agency before the close of business, which is presumed to be 4:30 p.m., local time, unless otherwise stated. An exception to both timeliness rules, rarely invoked, is where the agency determines that an otherwise untimely protest raises issues significant to the procurement system, as stated in FAR §33.103(e).

GAO frequently has applied its regulation on apparent solicitation defects, 4 C.F.R. §21.2(a)(1). The policy is to enable agencies to take corrective action, if the circumstances warrant, at the most practicable time to do so, and before the agency and other offerors expend extensive effort.²¹ The protester's actual, subjective unawareness of the solicitation deficiency will not be controlling.²² Instead, the analysis is based on an objective test: was the alleged deficiency observable from the face of the solicitation from the perspective of the reasonable, competent offeror acquainted with the surrounding circumstances?²³ Any reasonable doubt, however, will be resolved in the protester's favor.²⁴

GAO frequently has applied the parallel 10 day rule for other protests in 4 C.F.R. §21.2(a)(2). GAO will assess whether the protester had actual or constructive notice of the grounds for protest based on the objective circumstances, and from the point of view of the reasonably diligent protester in the aggrieved firm's position.²⁵ The protester's actual appreciation of the potential protest grounds at the time they are ascertained will not be controlling.²⁶ Moreover, if the agency conveys its intention to follow a course of action that is adverse to the protester's interests, this event starts the 10-day clock, even if the protester has some reason to believe that the matter is still under agency consideration.²⁷

5. *Remedies.* If the agency decides that the protest is meritorious, the agency most likely will take corrective action without issuing a formal decision discussing the merits. In this regard, FAR §33.102(b)(1) empowers the agency head (or a designee) to take any action that the Comptroller General could recommend had the protest been filed with GAO. The FAR, in turn, is referencing 4 C.F.R. §21.8(a), which lists the recommendations, or combinations thereof, that GAO may make regarding corrective actions. Examples of such remedies include termination of the contract, recompeting the contract, or issuing a new solicitation. 4 C.F.R. §21.8(b) lists the equitable considerations GAO applies in recommending a proper remedy, which should be equally appropriate for agency protests. Examples of these factors include the seriousness of the procurement deficiency, the agency's good faith, and the degree of prejudice to other parties.

Another important provision in FAR §33.102(b)(2) is that agencies may pay appropriate protest costs under the same standards that costs are payable to a prevailing party in a GAO protest, as detailed in FAR §33.104(h). One key element of GAO case law on remedies is that the protestor is entitled to costs where the agency unduly delays taking corrective action in a clearly meritorious protest.²⁸ The usual time frame for this action is whether the agency acted by the due date for the filing of the agency protest report to GAO, which is generally 30 days from the date the agency received telephonic notice of the protest from the GAO.²⁹ No such report due date exists in agency-level protests; the closest analogy is the goal in FAR §33.103(g) for a decision within 35 days after the protest filing. Thus, a strong argument exists that if the agency, in response to an agency level protest, fails to take corrective action within this 35-day time frame, the protester can be entitled to a cost remedy under FAR §33.102(b)(2). This right to recover costs in an agency protest forum could make this remedy just as attractive as filing with the GAO or the COFC, which also permit cost recovery.³⁰

VII. AGENCY PROTESTS – RELATION TO OTHER PROTEST TRIBUNALS

1. *GAO.* If a protester receives an adverse agency protest decision, it may bring the same protest at GAO. Both 31 U.S.C. §3556 and FAR §33.103(d) and (f) clearly indicate that GAO protests may be filed after an agency-level protest on the same procurement. The regulations indicate some possible pitfalls, though. As stated in 4

C.F.R. §21.2(a)(3), where a timely agency-level protest was previously filed, the GAO will consider a subsequent protest when filed within 10 days of actual or constructive notice of initial adverse agency action on the protest. This 10 day rule closely resembles the rule in 4 C.F.R. §21.2(a)(2) for other procurement protests, explained in Section VI above. In considering whether the initial agency protest was timely, the GAO will apply its own rules in 4 C.F.R. §21.2(a), or the agency's more stringent time periods, whichever is shorter. If the agency-level protest concerns solicitation terms, the GAO will consider a follow-on protest, even though the GAO protest comes after the solicitation closing time or date.

2. *COFC*. The second option is to continue pursuit of the protest at the COFC. Nothing in 28 U.S.C. §1491(b) precludes COFC jurisdiction with a prior agency protest. Unlike the GAO route, however, no follow-on timeliness rules exist in 28 U.S.C. §1491(b) for later judicial actions. When the COFC reviews an agency-level protest decision, 28 U.S.C. §1491(b)(4) states that COFC will apply the review standards of the Administrative Procedure Act (APA), 5 U.S.C. §701 *et seq.* Under the APA, the court must determine whether an agency's administrative decision was:

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or (D) without observance of procedure required by law.³¹

3. *Inadvertent protests?* Aggrieved prospective contractors sometimes send letters of complaint to agencies on their procurements. If the letter manifests an expression of dissatisfaction and requests (implicitly or explicitly) corrective action, the agency may justifiably (and should) consider the letter to be a protest, absent further clarification with the vendor.³² A party may effectively file an agency protest without any requirement to use the word "protest."³³ By comparison, vendor suggestions or requests for clarifications, without more, are not "protests."³⁴ The danger for contractors submitting such letters is that they might inadvertently lose the ability to make a timely follow-on protest to the GAO if the agency denies or ignores the request and the protester waits more than 10 days to file the GAO protest. As stated in 4 C.F.R. §21.2(a)(3), any subsequent filing to GAO must occur within 10 days of actual or constructive knowledge of initial adverse agency action on the protest. The agency's disagreement with such a letter of complaint, or even the failure to respond after a reasonable period, would qualify as "adverse agency action" on the inadvertent agency protest, as this term is defined in 4

C.F.R. §21.0(f).³⁵ Therefore, if a vendor has no intention of filing an agency protest, it should clearly state this fact in any written complaints to the procuring activity.

VIII. CONCLUSION

The agency protest avenue is not always the best selection, but neither is the GAO or COFC. Government contractors and their counsel must carefully assess all relevant factual and legal considerations in deciding whether to seek an agency, GAO, or COFC protest remedy. Counsel for government contractors should evaluate the various protest strategies for their clients.

ENDNOTES

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The views expressed in this article are the authors' personal views and do not represent the positions of any federal agency or clients. This article is not a substitute for obtaining legal advice, as each case has its own unique factual setting that warrants individual analysis.

¹ Agencies are required to designate an ombudsman to consider complaints regarding the issuance of orders under multiple award, task or delivery order contracts. FAR §16.505(b)(6).

² See U.S. Court of Federal Claims Gen. Order No. 38, www.law.gwu.edu/fedcl (COFC procedure); 4 C.F.R. §21.4 (GAO procedure).

³ *Facchiano Const. Co., Inc. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993).

⁴ Compare 31 U.S.C. §3553(c) &(d) (parallel rules for award/performance stays in GAO protests). Voluntary stays are proper, but rare.

⁵ See *Lear Sielger, Inc. v. Energy Products Division v. Lehman*, 842 F.2d 1101, 1111-12 (9th Cir. 1988); *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370, 1377-78 (E.D. Va. 1993).

⁶ See *Pacific Lighting Energy System*, B-219573.2, 85-2 CPD ¶ 381.

⁷ See *ES-KO, Inc. v. United States*, 44 Fed. Cl. 429, 435 (1999) (“[T]he automatic stay of FAR §33.103(f)(3) applies to contracting officer protests.”) However, GAO has yet to decide whether such a violation creates grounds for complaint. Compare *VGS, Inc.*, Comp. Gen. B-233116, 89-1 CPD ¶ 83 (leaving issue open).

⁸ For an explanation of the quoted concepts, see FAR § 3.104-5.

9 *Meridian Management Corp.*, B-271557, 96-2 CPD ¶ 64.

10 *U.S. Polycon Corp.*, B-254655.3, 94-2 CPD ¶ 53

11 *Id.*

12 *American Federation of Government Employees, AFL-CIO*, B-282904.2, 2000 CPD ¶ 87.

13 *ECS Composites, Inc.*, B-235849.2, 90-1 CPD ¶ 7.

14 *Pan Am World Services, Inc.*, B-231840, 88-2 CPD ¶ 446.

15 *Government Technology Servs., Inc.*, B-258082.2, 94-2 CPD ¶ 93.

16 *S.A.F.E. Export Corp.*, B-215022, 84-2 CPD ¶ 58.

17 *Executive Security & Engineering Technologies, Inc.*, B-270518, 96-1 CPD ¶ 156; *Versar, Inc.*, B-254464.3, 94-1 CPD ¶ 230; *Marine Animal Productions International, Inc.*, B-247150.2, 92-2 CPD ¶ 16.

18 *E.g., U.A Anderson Const. Co.*, B-244711, 91-2 CPD ¶ 339; *State Mach. Products*, B-245427.2, 91-2 CPD ¶ 272; *Federal Computer International Corp.—Reconsideration*, B-257618.2, 94-2 CPD ¶ 24.

19 *See Science Applications International Corp.*, B-265607, 95-2 CPD ¶ 99; *TEAC America Corp.*, B-259831, 95-1 CPD ¶ 273.

20 *E.g., McDonald-Bradley*, B-270126, 96-1 CPD ¶ 54, *Marwais Steel Co.*, B-254242.2, 94-1 CPD ¶ 291.

21 *TEAC America Corp.*, B-259831, 95-1 CPD ¶ 273; *Rainier Welding, Inc.*, B-245849, 91-2 CPD ¶ 532.

22 *See Curtis Center Ltd. Partnership-Reconsideration*, B-257863.3, 95-1 CPD ¶ 147.

23 *Id.*

24 *Complere, Inc.*, B-257946, 94-2 CPD ¶ 207.

25 *See Digicom Research Corp.*, B-262139, 95-2 CPD ¶ 246.

26 *See ConCeCo Engineering, Inc.*, B-250666, 93-1 CPD ¶ 98 (protester unaware that agency telephone conversation created grounds for protest).

27 *Valenzuela Engineering, Inc.*, B-248790, 98-1 CPD ¶ 51. GAO will give the protester the benefit of a reasonable doubt on timeliness. *See Social Security Administration-Reconsideration*, B-261226.2, 95-2 CPD ¶ 245.

28 *Baxter Healthcare Corp.—Entitlement to Costs*, B-259811.3, 95-2 CPD ¶ 174.

29 4 C.F.R. §21.3(c), (f); *VSE Corp.—Reconsideration and Entitlement to Costs*, B-258204.3, 94-2 CPD ¶ 260; *Pulse Electronics, Inc.—Claim for Costs*, B-243828.2, 91-2 CPD ¶ 164 (noting some exceptions).

30 *See* 4 C.F.R. §21.8(d)(GAO); 28 U.S.C. §1491(b)(2)(COFC)(bid or proposal preparation costs). Protest costs are excluded before the COFC, *Dubinsky v. United States*, 44 Fed. Cl. 509, 512 (1999), except where such recovery is permitted under the Equal Access to Justice Act, 28 U.S.C. §2412(d). *See California Marine Cleaning, Inc. v. United States*, 43 Fed. Cl. 724 (1999).

31 *Myers Investigative and Security Services v. United States*, 47 Fed.Cl. 605, 614 (2000)(citing 5 U.S.C. §706(2)).

³² *See Tucson Mobilephone, Inc.—Reconsideration*, B-259776.2, 95-1 CPD 134; *Tower Corp.*, B-254761.3, 94-1 CPD ¶ 186

³³ *Tucson Mobilephone, Inc.—Reconsideration*, B-259776.2, 95-1 CPD ¶ 134, at 1: “It is true that an actual or prospective offeror may effectively file a bid protest without using the term “protest” GAO employs this loose two part standard even though its

regulation, 4 C.F.R. §21.1(c), has eight mandatory items for a valid protest. Similarly, FAR §33.103 has eight mandatory items for agency protests. Therefore, the agencies would be justified in employing GAO's case law standard for identifying an agency protest.

³⁴ *Constantine N. Polites & Co.—Reconsideration*, B-233935.2, 89-1 CPD ¶ 173.

³⁵ The regulation states: “Adverse agency action is any action or inaction by a contracting agency which is prejudicial to the position taken in a protest filed with the agency . . .”

ON LINE LEGAL RESEARCH

by
David Simms*

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State Court web sites from all across the country are available from the links found at the National Center for State Courts. The web address is www.ncsc.dni.us/COURT/SITES/Courts.htm and on that page the user will see an alphabetical listing of all the states—plus the District of Columbia—with links to that state's courts. The Courts maintain their own content and therefore, one should not expect to see any consistency in the layout and/or content of the various Court pages. Beneath the listing for state courts, this page also offers a listing of Federal Court related web sites and International Court web sites.

Looking to learn more about efilings? It's coming to a court near you and probably sooner rather than later—if it hasn't already. Visit www.courtlink.com/main/index.html to

stay abreast of how law will be practiced in the future. Make that, "in the present," for the courts which have already embraced e-filing and are leading the way to a more cost-efficient, time-saving way to practice law.

Need an expert? ExpertPages.com is designed to help you locate your expert witness for free. If you're unable to find just the expert you're looking for using their web site, you may send them an email describing what you're after and they'll try to find what you're looking for. If you should be an expert, you may want to take a moment to visit their site to learn what it takes to get listed with them. A second expert witness directory is available at www.expertlaw.com. ExpertLaw also has a few more features in addition to just its expert witness directory. Not the least of which is an archive of lawyer jokes. (Most are clean with the off-color jokes being grouped apart from the rest.)

While not legal research sites, the following two web sites could prove very beneficial to you. First, CLE credit may now be acquired in the comfort of your own home or office without having to commute anywhere other than your own computer. Go to www.cleonline.com to see how you may quickly become a registered user of CLEonline.com and begin taking courses without the hassle of operating on someone else's schedule or having to reschedule client appointments because of your training courses.

Technolawyer.com is a mailing list which enables you to communicate and share valuable ideas with your fellow professionals. Subscribe to the list and you'll have the privilege of exchanging your professional experiences with other like-minded professionals. I've seen several mailing lists which make subscribing as simple as falling off a log and then it's virtually impossible to get unsubscribed without a major production. In the event this service is not all you had hoped it would be, Technolawyer.com makes unsubscribing no more complicated than when initially subscribing.

And last but not least, don't forget to check out www.dcbbar.org. Most of the legal resource sites mentioned in this article are found under the Legal Resource Sites drop-down menu on our lawlinks page found at www.dcbbar.org/lawlinks/index.html. There are many more legal resource sites available there in addition to an abundance of other content relevant to the D.C. Bar member.

* David Simms is the Web editor for the District of Columbia Bar. He can be reached at dsimms@dcbbar.org.

DIGITAL SIGNATURES

by
David Simms*

Ready or not, here they come! Digital signatures are fast becoming more and more commonplace in the new economy and in a document- laden profession such as the practice of law, they're sure to see widespread use very soon—especially when one considers the cost benefits of using them.

There is however some confusion about precisely what is—and what isn't—a digital signature. You may have seen a person's handwritten signature along the bottom of an electronic document—as you would see on a signed document that's been faxed. This is *not* a digital signature. This is merely a digitized image of a person's handwritten signature.

A true digital signature uses what's called an asymmetric cryptosystem to generate two keys which are used in the secure transfer of electronic documents. The two keys are the *private key* and the *public key*. The public key is used to encrypt outgoing emails and their attachments, and the private key is used by the recipient to decrypt those emails and their attachments making them once again intelligible.

Here's how it works. Suppose I create a document I want to share with a colleague in Florida. Because it contains sensitive information, I'm not comfortable just attaching it to email and sending it in the traditional fashion for fear that it may be intercepted along the way by someone with ill intent. Therefore, I wish to encrypt it so that in the event it should be intercepted, it will appear as meaningless gibberish to the interceptor. To do this, I must have the public key that matches my colleague's private key. This, he must have first sent to me in a previous email and I'm able to add it to my address book which I'll describe how to do below. I then create an email in the normal fashion and attach that document to the email. I'm using Outlook 2000 as my email program, so before I click the *Send* button, I click the *Options* button. In the window that appears, I select the checkbox to the left of *Encrypt message contents and attachments* and the checkbox to the left of *Add digital signature to outgoing Message* and click close. I may now click send after which I'm prompted for the password for my digital certificate and off goes the message.

Now, upon attempting to open that document, my colleague will be prompted for the password for his private key. He enters it which decrypts the message and the message—with its attachments—opens in the normal fashion. To give a person my public key, I must first have first sent an email signed—but not encrypted—with my digital signature. When they receive that email, they may rightclick on my name in the *From* field and select *Add to contacts* from the context-sensitive menu that appears. Upon doing so, a window will appear in which they may enter some optional information about me and the n click *Save and close*. They now have them matching public key to my private key installed on their computer and are able to encrypt any emails and their

attachments they send to me. The above-described scenario is contingent upon my having a digital certificate installed on my computer. Without that certificate, I'm unable to digitally sign and/or encrypt any outgoing messages. The certificates—which may be purchased by trusted vendors like Verisign or Entrust for around \$15 to \$30 per year—enable someone to positively identify themselves as being who they claim to be. When you purchase your digital certificate, you will choose a password for it. As secure as the asymmetric cryptosystem is from a technological standpoint, your digital certificate will only be as secure as you keep your password, so it is extremely important to keep this password a secret.

To add an additional layer of security to a system that's already more secure than traditional handwritten signatures, you may interject what is generically referred to as a *hard token* into the signing process. A hard token is any piece of hardware which needs to be inserted into the computer before the act of digitally signing something may be completed. An example of one of these hard tokens would be a smart card which must be inserted into a computer's USB port before the signing process may be finished. Should person A somehow learn person B's password, they would still be unable to "forge" person B's digital signature since without the hard token, they can not complete the signing process.

I hope this brief introduction has served to lessen any hesitations you may have had about using digital signatures in your profession. While they certainly are fast on their way to becoming commonplace in the world of business, few professions stand to benefit as much from using them as does the practice of law. There are many resources on the Internet where you may learn more and I encourage you to visit the following web sites for further information:

www.abanet.org/scitech/ec/isc/dsg-tutorial.html; www.verisign.com/securemail/guide

And for a link to information regarding digital signatures and their direct relevance to the profession of law, visit www.ilumin.com/channels/legal.

* David Simms is the Web editor for the District of Columbia Bar. He can be reached at dsimms@dcbar.org.

TREASURER'S REPORT
BCA Bar Association
Statement of Financial Condition
For the Period Ending May 15, 2001

Beginning Balance as of 4/6/01		\$15290.15
Fund Income:		
	Annual Dues	\$75.00
Total Fund Income:		<u>\$75.00</u>
Subtotal		\$15,365.15
Fund Disbursements (none)		
Ending Cash Balance		\$15,365.15

Richard A. Gallivan
Treasurer

Board of Contract Appeals Bar Association

FY 2001 Membership Application

Please make your checks payable to: BCABA

(Please print NEATLY as the information provided below is used for the annual BCABA Directory.)

Name: _____

Firm/Agency: _____

Address: _____

City/State: _____ Zip: _____

Telephone: _____ Fax: _____

eMail: _____

Employment: Firm _____ Corporation _____ Government _____

Judge _____ Other _____

NOTE: Paper copies of our quarterly publication, *The Clause*, will only be mailed to members who request them. Otherwise, copies will be posted to the BCABA website (www.bcabar.org), and members will receive an email when the issues are available.

_____ Yes, I wish to receive a paper copy of *The Clause*.

_____ No, I will get my copy off the BCABA website.

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