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President's Column
by
Peter A. McDonald
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There are a number of significant initiatives to announce:

1. The Army's Contract Appeals Division (CAD) will be the organizational sponsor for this year's annual meeting in October.
2. Don Barnhill (Barnhill & Douglas) has agreed to chair the Nominations Committee. Please contact him if you are interested in serving on the BCABA Board of Governors or want to be an officer of the BCABA.
3. David Metzger (Holland & Knight) is hosting this year's Executive Policy Forum, which is tentatively scheduled for May 21st. This year's meeting will be one not to be missed.
4. David Fowler has agreed to chair the Trial Practice Committee. There will be two meetings of this Committee (one in June and one in September), the purpose of which is to permit younger practitioners to chat informally with judges about trial tactics – what works, what doesn't, etc.
5. The BCABA Technology Committee recently received welcome news about the GSBCA moving to efilings (more on this in the next issue of *The Clause*).

Please don't forget to make it to the BCAJA annual meeting on April 16th.

A lot is happening. Get involved!!

News About Dues

- Annual dues notices are mailed out in early August.
- The dues are \$30 for government employees, and \$45 for everyone else.
- Payments are due NLT September 30th.
- There are no second notices.
- Gold Medal firms are those who have all their government contract practitioners as members.
- Individuals who do not pay their dues by September 30th will not appear in the annual BCABA Directory.

About the BCABA

Membership in the BCABA is open to any attorney interested in the field of government contract law. The BCABA annual meeting is held in October, at which time the annual BCABA Directory is distributed. The BCABA's publication, *The Clause*, is published quarterly. At the annual meeting, the Writing Award is presented for the year's

best article, and the Life Service Award is presented to the individual who has done the most to further the goals of the BCABA.

The BCABA Constitution and By-laws are available at our website (www.bcabar.org).

By long-standing policy, the BCABA does not sell or give its mailing list to any external organization.

EDITOR'S COLUMN
Clarence D. "Hugh" Long, III

One of the pleasures of producing this magazine is that I do not have to do much work. It is all done for me by our highly competent member/readers. With some gentle prodding, our reader/members have contributed five articles to the 1st Quarter 2002 issue. First an interesting article by Dave Dempsey on the Service Contract Act and computer professionals, then an article by Steve Briggerman on the revocation of the contractor responsibility rules promulgated under the last administration. These rules would, in the opinion of many, have given virtual veto power to environmental groups and labor unions over the business continuation of government contractors.

Third, a review of the new book, "Sticks and Bricks." Jim Nagle, who is a fine attorney on the west coast, has written a good review of a good book about construction technology for lawyers. Jim may not be as well known in the Washington, DC area as others because he resides in Seattle, but he is an Adjunct Professor at Georgetown University and frequently flies in for classes. He is also a frequent litigator before the ASBCA and the GAO.

Dave Metzger and Pete McDonald have written "A Tale of Two Cases," a fine description of decisions in an obscure area of accounting, collaborative partnerships and pension funds. This type of analysis will become more important in the light of possible future Enron-type situations.

Elizabeth Fleming Wallace has written an excellent article on the criminalization of the regulatory process. The article is similar in theme to the article by Steve Briggerman, in that both concentrate on the increasingly heavy hand of government in commercial affairs.

Jim McCullough and Louis Victorino, of Fried Frank, have contributed a short but interesting article on the DPAS system, a Korean War era statutory priority system that most of us had forgotten about but which is now enjoying a new vogue.

I should note that, if the last Clause might be called the "Air Force" issue, with three articles by Air Force military attorneys, this Clause might be called the "US Army,

Retired,” issue, with three articles submitted by former Army JAGs, not to mention the efforts of your editor.

The Service Contract Act and Computer Professionals

by

David Dempsey, Partner
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Under the Service Contract Act, 41 U.S.C. §351, et. seq., executives, administrative personnel, and professionals usually are exempt from the minimum wage and fringe benefit determinations published by the Department of Labor. The Service Contract Act (SCA) operates in tandem with the Fair Labor Standards Act (FLSA), 20 U.S.C. §213(a)(1). If a service employee is exempt under the FLSA, that service employee will be exempt from the SCA. As a practical matter, this means that exempt personnel are not under the overtime provisions of the FLSA (*i.e.*, no "time and a half").

Persons working in computer-related occupations may be exempt from the SCA requirements because they fit within one of the categories discussed below.

Computer Professionals

Computer employees fall under the administrative or professional employee exemption if the employer can demonstrate that such employee exercises independent discretion and judgment, requires no, or only limited, supervision, etc. In order to be exempt from the FLSA (and thus from the SCA), the primary duties of a "computer professional" have to include one or more of the following:

- the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to users of system design specifications
- the design, documentation, testing, creation or modification of computer programs related to machine operating systems.

No academic degree is required for this exemption; a combination of education, training and experience is satisfactory. In other words, the "computer professional" exemption is not the "learned profession" exemption under 29 C.F.R. § 41.301(e)(1). Expressly excluded from the context of this exemption are those employees engaged in the operation of computers (key entry occupations) or in the repair or maintenance of "ADP" (automatic data processing) hardware and related equipment.

Computer-Related Occupations

Within the "professional employee" exemption, service employees in "computer-related occupations" (i.e., computer systems analysts, computer programmers, software engineers, and "other similarly skilled" computer personnel) have a special statutory exemption. This exemption results from a unique legislative and regulatory history, which is too involved to describe in this article. However, the result is that computer-related occupations are exempt from the overtime pay provisions of the FSLA if the workers are paid at least \$27.63 an hour. *See* Labor Department's Employment Standards Administration Fact Sheet No. 96-13.

Service Employees Engaged In the Repair and Maintenance of ADP Equipment, Scientific Equipment and Office Machines

Administrative exemptions from the SCA are authorized for the maintenance, calibration and/or repair of:

- automated data processing equipment and office information/word processing systems
- computer-based scientific equipment and medical apparatus or equipment
- office/business machines not otherwise exempt, where such services are performed by the manufacturer or supplier of the equipment.

For this exemption to apply, four specific tests must be satisfied. First, the equipment must be "commercial items that are used regularly for other than Government purposes, and are sold or traded by the contractor in substantial quantities to the general public in the normal course of business operations." Second, the maintenance or repair services must be furnished at prices that are, or be based on, an established catalog or market price. Third, the contractor must utilize the same compensation plan (*i.e.*, wages and fringe benefits) for the service employees performing work under the government contract as the contractor employs for equivalent employees servicing the same equipment of commercial customers. Fourth, the contractor must certify to the first three tests. *See* 29 C.F.R. §4.123(e)(2), FAR 22.1003-4(b)(4).

What contractors must realize is that the "ADP exemption" is completely unrelated to the "computer professional" and "computer-related occupation" exemptions discussed above. The three exemptions occur under different standards (*i.e.*, experience versus hourly wage versus commercial item) and have different tests. Each is available to a contractor, if the contractor can demonstrate (through job descriptions, payroll records, commercial item lists) that a service employee qualifies for the exemption.

Revocation of Federal “Contractor Responsibility Rules”

by

Steven Briggerman, Esq.
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Revocation of Federal “Contractor Responsibility Rules”

Acknowledging that they were the “most controversial” federal procurement regulations it had ever published, the FAR Council, on December 27, 2001, revoked the “Contractor Responsibility Rules.” Those regulations — which had taken effect on the last full day of the Clinton administration — linked eligibility for federal contracts to a company’s compliance with various non-procurement laws, including those related to labor and employment. Widely criticized by business groups, many members of Congress from both sides of the aisle, and even some within executive agencies as “giving unions and other third parties inappropriate influence over the process to advance their own institutional self-interests,” it came as no surprise that the Bush administration “stayed” the regulations shortly after taking office. The formal revocation of the rules thus ends, at least for the moment, a contentious debate that has lasted over four years.

The “Most Controversial” Regulations. What evolved into a bitter debate on the use of government contracts for political purposes started out simply enough. The government’s Contracting Officer is required, by statute, to award contracts only to a “responsible source.” 41 U.S.C. §253b and 10 U.S.C. §305. A “responsible source” is defined generally as a contractor who has adequate financial, technical and organizational resources to perform the contract and who has a record of satisfactory performance on previous contracts. 41 U.S.C. §403. In addition, the statute requires that the contractor must have “a satisfactory record of integrity and business ethics” to be eligible for award.

These statutory requirements are implemented in Subpart 9.1 of the Federal Acquisition Regulation (FAR). Basically, those regulations repeat the substance of the statute, and then provide guidance to the Contracting Officer as to how to apply and evaluate each of them when making the required “responsibility” determination.

The exception to this was the “integrity and business ethics” requirement. The regulations were silent as to what types of activity should be considered or what standards should be applied in determining whether the contractor’s record was “satisfactory.” From a rule-making perspective, the task was clear: draft some regulations to guide the Contracting Officer in carrying out his statutory responsibilities.

The problem was that from the outset it was evident that the driving force behind the regulations was politics. Vice President Al Gore first disclosed the administration's thinking at a meeting of the Executive Council of the AFL-CIO on February 18, 1997. There he outlined a plan to revise FAR to require companies bidding for government contracts to have a satisfactory record of labor relations and other employment practices. The plan also included changing the regulations to prohibit contractors from being reimbursed for the costs incurred in resisting unionization efforts. A government official familiar with the plan was quoted as saying the intent was to ensure that companies with a history of unfair labor practices under the National Labor Relations Act would not receive federal contracts.

With this as background, the Clinton administration developed a number of related regulations, collectively referred to as the Contractor Responsibility Rules, which defined "satisfactory record of integrity and business ethics" in terms of compliance with a variety of federal and state statutory and administrative law. Draft regulations were issued in July 1999 and in June 2000. They were issued in final form on December 20, 2000 and took effect on January 19, 2001.

Although the details had evolved since 1997, the basic thrust of the regulations remained unchanged. In summary the final rule provided that:

- A "satisfactory record of integrity and business ethics" included satisfactory compliance with tax, labor and employment, environmental, antitrust, and consumer protection laws;
- Potential contractors must certify regarding violations of these laws adjudicated with the past three years;
- Contracting Officers were to consider all relevant information in evaluating a contractor's record, ranging in descending order of importance from conviction or civil judgments for violation of those laws to the filing of a civil or administrative complaint by an agency if that action reflected an adjudicated determination by that agency;
- Contracting Officers were to promptly notify contractors if they were excluded from award based on a non-responsibility determination; and
- The "cost allowability" provisions of FAR Part 31 were changed to make "unallowable" any costs incurred in assisting, promoting, or deterring unionization or costs incurred in connection with a civil or administrative proceeding brought by a government where the contractor violated, or failed to comply with, a law or regulation.

Opposition From The Outset. Opposition to the regulations was vocal and immediate. Shortly after the Vice President's announcement, Sen. Warner proposed a non-binding Senate resolution urging that the administration abandon the plan. Business

groups also immediately joined the fray. Linda Chavez-Thompson, Executive Vice President of the AFL-CIO, offered this response: “If a company can’t play by the rules that Congress set for businesses in this country, why should it benefit from government business?” Thus, the stage was set for a repeat of the battle that had erupted over the administration’s ultimately unsuccessful efforts to bar federal contractors from permanently replacing legally striking workers.

Although the objections were many, three stood out. First, the regulations were profoundly different from the existing “responsibility” criteria because they allowed the government to withhold a contract for reasons that had nothing with the contractor’s ability to perform the work. Many felt that since the individual statutes already contained remedies and penalties for violations, adding another sanction in the form of withholding award of a federal contract was unfair and invaded the prerogative of Congress. Second, they were viewed as tipping the scales in favor of unions by giving them a powerful club in dealing with management. Thomas J. Donohue, president of the U.S. Chamber of Commerce, reportedly said the proposed rule “would politicize federal contracting and give unions and other third parties inappropriate influence over the process to advance their own institutional self-interests.” Finally, the regulations would not only authorize, but require, contracting officers to delve into complex issues in which they had no real expertise. This raised the possibility of erroneous or arbitrary decisions by a single contracting officer or conflicting decisions by different contracting officers reviewing the same matters for separate procurements. Critics also argued that the repeated exclusion of a contractor based on the same facts would amount to a “de facto debarment” from government contracting.

The administration tried to assure opponents that the rules would be applied evenhandedly, and that Contracting Officers would focus on repeated, pervasive and significant violations of law rather than a single, minor infractions, but opponents remained unconvinced. Not surprisingly, members of Congress continued to criticize the regulations. In addition, several major business groups joined forces in a U.S. District Court lawsuit to enjoin implementation of the final rules. This was apparently the first time opponents of new FAR regulations had resorted to court action, indicating just how controversial the whole matter had become. Even more embarrassing, shortly before the issuance of the final rules, the Defense Acquisition Regulation Council and segments within GSA and EPA publicly came out against the rules. Nonetheless, the administration issued the final rules on December 20, 2000 with an effective date of January 19, 2001.

The Battle Is Concluded. Actually, the rules were only effective for about 10 weeks. On April 3, 2001, the Bush administration “stayed” the regulations to allow further review and, at the same time, issued a proposed rule to revoke them in their entirety. On December 27, 2001, the FAR Council finalized the proposed revocation. 66 Fed. Reg. 66984.

Although the FAR Council agreed with the notion that “the government ought not do business with lawbreakers,” it acknowledged that much of the earlier criticism of the rules was justified. For example it noted regulations required Contracting Officers to

perform a function for which they lacked experience, resources and procedures to accomplish. What little guidance the regulations contained was inadequate to assure consistent application of the rules. Overall, the Council concluded, the existing debarment provisions in FAR Subpart 9.4 were the most appropriate way to exclude contractors who have an *unsatisfactory* “record of integrity and business ethics.”

The effect of the revocation was to reinstate the “responsibility,” certification and cost allowability rules as they existed before January 19, 2001. Thus, FAR 9.104-1 now states:

General standards.

To be determined responsible, a prospective contractor must—

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
- (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments;
- (c) Have a satisfactory performance record (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or non-responsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;
- (d) Have a satisfactory record of integrity and business ethics;
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)
- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and
- (g) Be otherwise qualified and eligible to received an award under applicable laws and regulations.

Implications For Government Contractors. The revocation the Contractor Responsibility Rules probably reduces the potential for disruption to a contractor’s operations in having to revisit its recent history of compliance with laws every time it is tentatively selected for award and the possibility for exposure to arbitrary or inconsistent decisions that could result from that process. However, it would be unwise to assume that there is no longer any linkage between eligibility for a government contract and the

contractor's past record of compliance with laws that appear totally unrelated to its ability to perform the government contract. Four points are worth noting.

First, although the Clinton administration rules have been revoked, the basic requirement that a contractor have "a satisfactory record of integrity and business ethics" still exists. At the time the rules were suspended, the FAR Council commented:

The requirement that contractors must be responsible is statutory, and this stay does not relieve offerors of the requirement to have a satisfactory record of integrity and business ethics.... Contracting officers will continue to have the authority and duty to make responsibility decisions and agency debarment officials will continue to have the authority and the duty to make determinations whether to suspend and debar a contractor.

Thus, the FAR Council left open the door for a Contracting Officer to consider a contractor's past record of compliance with various laws in making a responsibility determination, even in the absence of the Contractor Responsibility Rules. Given the revocation of the rules, it is unlikely that a Contracting Officer would find a contractor to be ineligible for award *solely* on the basis of non-compliance with laws that are unrelated to performance. However, there is no reason why this could not be considered along with the other factors in making an overall responsibility determination.

Second, the suspension and debarment provisions of FAR Subpart 9.4 will continue to be an effective tool for excluding contractors from eligibility for award for violating procurement and non-procurement statutes. Those provisions state that a contractor may be debarred or suspended for "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." The government has not hesitated is using the provisions to exclude companies from federal contracts for violations of most of the same laws identified in the Contractor Responsibility Rules. See Glenwood Patterson, HUDBCA 87-2306-D9, (Slip op., Oct. 22, 1987) where the Board upheld a suspension from eligibility, stating "Violation of income tax laws has been held to be conduct that indicates a lack of business integrity and honesty for purposes of debarment pursuant to 24 C.F.R., Part 24."

Third, various agencies charged with enforcing substantive laws have their own, independent authority to suspend or debar a company from eligibility for federal contracts for violations of those laws. For example, where the Department of Labor finds that a contractor violated the Service Contract Act by not paying service employees prevailing wages and benefits, it may place the contractor on an ineligibility list barring the company from future government contracts for a three year period. 41 U.S.C. §354(a); 29 CFR §4.188. Only under "unusual circumstances" may an offending contractor obtain relief from the debarment penalty. Likewise, firms found to have violated the Walsh-Healy Act provisions that apply to government supply contracts may be barred from future contract awards for three years. 41 U.S.C. §37.

Finally, executing one of the many certificates that is a routine part of the performance of a government contract can expose a contractor to unexpected consequences for non-compliance with statutes that have little relation to the contract. For example, contractors know they face potential liability under the False Claims statute, 31 U.S.C. §3729, if they request payment for supplying defective products under a government contract. However, they also risk this same exposure if they knowingly violate a statute, even though unrelated to performance, that they have agreed to comply with as part of their government contract. For example, in U.S. ex rel. Fallon v. Accudyne Corp., 880 F.Supp. 636 (W.D.Wis., 1995), the Army awarded a contract for electronic assemblies to Accudyne. The contract contained the typical provision requiring that all work be performed in accordance with applicable federal, state and local environmental laws and regulations. During the course of performance, the contractor knowingly violated the Clean Air and Clean Water Acts by improperly disposing of certain chemicals. When requesting monthly progress payments, the contractor certified that the work for which payment was being requested had been performed in accordance with the terms of the contract. In denying a motion to dismiss, the court found that compliance with the statutes was as much a part of performance as producing the electronic assemblies:

The complaint alleges that the contracts expressly required compliance with environmental regulations and that defendant knowingly failed to comply with such regulations and falsely certified that it had so complied in order to induce payments under the contracts. Such a claim is fundamentally no different than falsely representing that tests have been performed or falsely representing the results of product testing. See, e.g. Neal v. Honeywell Inc., 33 F.3d 860 (7th Cir.1994). Defendants' characterization of the claim as an attempt to sue for violations of environmental laws misses the point--it is not the violation of environmental laws that gives rise to an FCA claim but the false representations to the government that there has been compliance.

880 F.Supp. at 638.

In short, although the Clinton administration rules authorizing the Contracting Officer to exclude a contractor from federal projects for failing to comply with various statutes that have little to do with the contract are now history, the government has ample other tools at its disposal for accomplishing the same objectives and all signs indicate it will not hesitate to use them.

Sticks and Bricks: A Practical Guide to Construction Systems and Technology,¹

by

Christopher C. Whitney, Robert J. MacPherson and James Duffy O'Connor, editors

**Published by the Forum on the Construction Industry, American Bar Association,
2001**

Available through www.aba.net.org/abapubs.

Reviewed by James F. Nagle
Oles Morrison Rinker & Baker LLP

Normally I review law books written by lawyers for lawyers, dealing with substantive legal issues such as delay claims, differing site conditions, bonds, or the generic field of construction or public contract law. Such law books are useful but cases are often lost not on the law but on the facts. Inexperienced counsel simply do not know the difference between concrete and cement and therefore not only can't figure out the proper questions to ask on cross-examination, but can't figure out the proper questions to ask their own clients during trial preparation to identify weaknesses.

To remedy that problem, the Forum on the Construction Industry presented a program in the Fall of 1995 entitled *Sticks and Bricks: Construction Technology for Lawyers*. That successful program was reprised in the Fall of 1999. The programs and this book aim to describe and give an understanding of how buildings are constructed and how building systems operate after the construction is complete. While it is written *by* experts, it is not written *for* experts. Think of this as "Construction for Dummies" but no one should take offense. Many lawyers who are extremely knowledgeable, indeed, experts, in particular fields need to have a handy reference that can explain the properties of concrete or the design principles of curtain walls.

To be useful such a book must contain a detailed index so you can focus on exactly the matter of interest (shrinkage of concrete, for example); a glossary so that you can have a general idea of what "initial rate of absorption" means; and an easy, understandable text loaded with illustrations. The book has all three.

This paperback book has nine chapters: Foundations; Concrete Basics; Structural Steel Design and Construction; Masonry Basics – How Bricks and Blocks Stack Up to Support and Enclose Our Buildings; Curtain Wall Design Construction Basics; Heating, Ventilating and Air-Conditioning (HVAC) Systems; Electrical Systems; Plumbing; and Roofing Basics. Each chapter ends with a glossary and four of the nine chapters have a subsection that's a reference for further study. That marvelous organization allows people to go to the glossary section and get a quick definition of "tremie" and then go to

¹ Coincidentally, another reviewer of this book also used the same phrase. See Review by Lawrence C. Melton, *The Construction Lawyer*, Winter 2002 at page 38.

the references to find more specific and more technical information on such topics as "settlement from pile driving in sands." Another added benefit (which I am sure is intended) is that the referenced lists of books and articles also provide the reader with potential expert witnesses.

The editors, all very experienced construction lawyers, have assembled nine experts, eight of whom are engineers, to draft the nine chapters. All have a great deal of experience in construction, construction management, investigative research, analytical forensic review and have served as expert witnesses. Most of the chapters have numerous diagrams, charts and photographs to facilitate understanding. While the chapters on Concrete Basics and Plumbing do not have any illustrations, they have numerous charts and tables.

The book concludes with a 21-page index. Since the text of the book itself is only 283 pages, this is the most detailed index I've come across. This proves that the authors realized that this was to be used as a reference material. It is exactly the type of thing that a new construction lawyer or even an old, experienced hand needs to pull out and speed-read before meeting with the client.

**A Tale of Two Cases:
*Pratt & Whitney and Teledyne***

by
David P. Metzger, Esq.
and
Peter A. McDonald, C.P.A., Esq.²

Two recent cases, decided in different forums, have significant consequences for government contractors. Both cases -- *United Technologies Corporation/Pratt & Whitney*³ and *Teledyne, Inc. v. United States*⁴ -- reaffirm basic cost accounting principles and apply them to circumstances critical to government contractors.

United Technologies Corporation/Pratt & Whitney has significant implications for structuring collaborative federal contracting arrangements. It raises the troublesome question of how a systems integrator in a complex collaboration should treat revenues returned to collaborators – as subcontract costs or as pass-through revenues? The case characterized revenue distributions to collaborators more like distributions of a joint venture than like subcontractor costs. By requiring that such distributions be included in Pratt & Whitney’s total cost input bases⁵, the decision provides a revealing *tour de force* of basic accounting principles.

Teledyne, Inc. v. United States raises the question whether government contractors with over-funded pension plans that are contemplating a divestiture should establish a reserve against anticipated pension surpluses that might have to be refunded to the government. The issue in the case was whether Teledyne’s sale of two of its divisions constituted “segment closings” under the Cost Accounting Standards (CAS) applicable at the time of the sales.⁶ The Court of Federal Claims (COFC or the Court) determined that both sales were segment closings and that Teledyne was liable to the government for pension surpluses attributable to government pension contributions paid under both firm fixed-price and flexibly priced contracts.⁷

United Technologies Corporation/Pratt & Whitney

The *Pratt & Whitney* case involved revenue sharing payments to foreign collaborators. The Armed Services Board of Contract Appeals (“ASBCA”) had to decide whether these payments from Pratt & Whitney to its foreign collaborators constituted costs for parts. The Defense Contract Management Agency and the Defense Contract Audit Agency argued that such payments should have been included in Pratt & Whitney’s indirect cost allocation bases pursuant to CAS 410, 418, and 420.⁸ Pratt &

² David P. Metzger is a Partner in the Government Contracts Group of the law firm of Holland & Knight LLP; Peter A. McDonald is a Senior Manager in the Government Contracts practice of the accounting firm of KPMG LLP.

³ 01-2 BCA ¶ 31,592 (July 30, 2001).

⁴ 50 Fed. Cl. 155 (Aug. 9, 2001).

⁵ 01-2 BCA ¶ 31,592 at 45.

⁶ 50 Fed. Cl. 155 at 191.

⁷ *Id.*

⁸ 01-2 BCA ¶ 31,592 at 42

Whitney countered that the cost of collaborator-supplied parts were properly excluded from its total cost input allocation bases for General and Administrative (G&A) and Independent Research & Development (IR&D) expenses. In essence, Pratt & Whitney argued that such collaborator-supplied parts were not costs, but rather a “sharing or distribution of revenue”⁹ among joint venturers, not subcontractors. Under Generally Accepted Accounting Principles (GAAP), these revenue distributions would not be costs.¹⁰

The ASBCA searched in vain for an adequate definition of “cost” in accounting literature. CAS 410, which provides for allocation of G&A to a business unit’s final cost objectives, gave no help. CAS 418, which provides for allocation of direct and indirect costs, gave no definition of the term “cost.” CAS 420, the guidance for allocating IR&D and Bid & Proposal costs, also failed to define “costs.” Predictably, the seven experts split on the subject based on the party paying them. The two government experts viewed the collaborator arrangements as supply subcontracts, and the payments to them as subcontract costs.¹¹ Pratt & Whitney’s four testifying experts looked at the structure of the arrangements, risk sharing, title retention by the collaborators, and the pass-through nature of the payments.¹² Important to the Board, one Pratt & Whitney expert focused on Financial Accounting Statement No. 4’s advice that “accounting should reflect the economic substance of events in a consistent way.”¹³

None, however, pointed the Board to a conclusive definition of “cost.” Instead, after threading its way through the CAS, GAAP, Financial Accounting Standards Board (FASB) Statements and Interpretations, as well as other authoritative sources, the Board found that the arrangements were a “form of collaborative partnering.”¹⁴ The Board based its conclusion, in part, upon the “interrelated sharing of program risks and benefits,”¹⁵ as well as the fact that Pratt & Whitney did not incur costs in distributing these collaborator payments.¹⁶ The Board rejected the Government’s proposed reliance upon FASB Statement of Financial Accounting and Concepts No. 6 for a definition of cost.¹⁷ Instead, the ASBCA resorted to the more fundamental accounting principle that “economic substance” of a transaction should control, a principle that even one of the Government experts (Siegel) proposed.¹⁸

To take advantage of this decision, companies facing circumstances similar to those that occurred *Pratt & Whitney* should note the following attributes of the collaborator arrangements that found favor with the Board:

- The collaborator agreements differed significantly from Pratt & Whitney’s supplier or subcontract agreements;¹⁹

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 33-35.

¹² *Id.* at 36-42.

¹³ *Id.* at 11.

¹⁴ *Id.* at 47.

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 49.

¹⁷ *Id.*; FASB Statement No. 6 defines “cost” as “the sacrifice incurred in economic activities – that which is given up or foregone to consume, to save, to exchange, to produce...” *Id.* at 5.

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 21.

- Pratt & Whitney referred to the collaborators as “partners,” and treated them as such;²⁰
- Collaborators received their revenue shares only after Pratt & Whitney had been paid;²¹
- Pratt & Whitney accounted for the collaborator payments differently than subcontractor payments. Specifically,
 - since the end of 1996, Pratt & Whitney classified a participant’s share of revenue payments as a reduction of sales, not a cost of sales;²²
 - for such payments, Pratt & Whitney debited an “inventory consigned” account by one penny, and credited a “contra-inventory consigned” account by one penny;²³ and
 - no charge was made to work-in-process when collaboration material was moved into production because no cost or value of that collaboration material been recorded to Pratt Whitney’s inventory.²⁴
- Collaborators paid Program Entry Fees;²⁵
- Collaborators paid for a percentage of the production requirements, depending upon the size of their share;²⁶
- Pratt & Whitney gave collaborators access to its drawing, technical data, and experience necessary to manufacture the collaboration parts;²⁷
- Collaborators shared engine program expenses;²⁸
- Pratt & Whitney recovered expenses related to its program manager and final assembler functions, through a device known as “drag,” which consisted of withholding a fixed percentage rate of revenues due a collaborator for costs related to

²⁰ *Id.* at 11.

²¹ *Id.* at 15.

²² *Id.* at 20.

²³ *Id.* at 18.

²⁴ *Id.*

²⁵ *Id.* at 12.

²⁶ *Id.* at 13

²⁷ *Id.* at 12

²⁸ *Id.* at 13.

overhead, program management, material handling, marketing and sales, and the like,²⁹ and finally,

- Pratt & Whitney did not include the collaborator payments in its cost input bases.³⁰

The Board's finding for firms with foreign (or even domestic) collaborators is significant. Because the decision accommodates new realities of contracting in which teams of contractors pool unique and highly qualified skill sets to meet complex agency requirements. Also, the Board's resorting to a fundamental accounting principle – that accounting should reflect the economic substance of the business transactions – gave the case far more reach than if the Board had accepted the Government's suggestion to rely upon a single FASB statement, CAS, or accounting definition.

Contractors involved in such arrangements should adopt some or all of the approaches Pratt & Whitney utilized in accounting for collaborator expenses. By so doing, they can be confident that exclusion of collaborator payments from their cost bases reflects the economic substance of their arrangements.

Teledyne

In the *Teledyne* case, the COFC considered two different asset sales by Teledyne. The dates of those sales were important because they fell on opposite sides of critical 1995 amendments to CAS 413. On January 2, 1995, Teledyne sold assets of Teledyne Electronics Systems (TES) to Litton Industries, Inc. and Litton Systems, Inc. (Litton).³¹ On March 31, 1996, Teledyne sold Teledyne Vehicle Systems (TVS) to General Dynamics Land Systems, Inc.³² The Court considered whether these sales constituted "segment closings" under CAS 413.³³ Unfortunately, the Cost Accounting Standards Board (CASB) amended CAS 413 in response to concerns of the Department of Defense Inspector General's Office and others after the first sale but before consummation of the second. Therefore, the Court had to decide whether the first sale was a segment closing under the original CAS 413 and the second sale under CAS 413, as amended.

The 1995 amendments had added language that specifically made the sale of a division a segment closing.³⁴ CAS 413 defined "segment" as "one of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to the home office."³⁵ The term "closing," however, was not defined in either the original or amended versions of CAS 413.³⁶ The Government concluded that Teledyne owed the Government all of the surplus pension monies attributable to government

²⁹ *Id.* at 14

³⁰ *Id.* at 19-20

³¹ 50 Fed. Cl. at 157.

³² *Id.* at 159.

³³ CAS 413, issued in the 1970's, requires adjustment of pension costs charged to government contractors when there are actuarial gains and losses, and requires losses to be amortized over a 15-year period.

³⁴ *Id.* at 167.

³⁵ 4 C.F.R. § 413.30(a)(11)(1986).

³⁶ 50 Fed. Cl. at 158.

contributions made under Teledyne's CAS-covered contracts, including payments made under firm fixed-price contracts.³⁷

The Court found both transactions to be "segment closings" under CAS 413. With respect to the first TES sale, Teledyne had argued that "closed" meant that the entity stopped operating altogether.³⁸ The Court disagreed, stating that it would look at whether activity ceased on the part of Teledyne, despite the fact that activity continued under Litton's ownership.³⁹ The fact that Teledyne retained control of the pensions, which did not transfer with the sale to Litton, triggered the CAS 413 adjustment.⁴⁰ The Court came to this conclusion after finding that other forums had also found sales of a segment to be a segment closing. For example, in *Gould, Inc.*, the ASBCA held that Gould's sale of five divisions in 1987 and 1988 constituted segment closings.⁴¹ In the more recent Teledyne case, the Court's definitive handling of this issue left little doubt that sales of entities that contain government contracts are going to be treated as segment closings, absent clearly distinguishable facts.

The Court also found that the TVS sale constituted a segment closing⁴² because clear language in the 1995 amendments made such a finding inevitable. Teledyne argued that the amendment was applied retroactively, an argument the Court rejected.⁴³ Unfortunately for Teledyne, it had entered into several contracts after the amendments became effective that subjected Teledyne to the amendments through the later contracts.⁴⁴

Based upon its determination that segment closings had occurred, the Court found that the CAS 413 adjustment applied to firm-fixed-price as well as flexibly priced contracts.⁴⁵ In deciding the application of CAS 413, as amended, the Court took cognizance that it actually had four parties before it: Teledyne, the Government, and two *amicus curiae*: General Motors (GM) and General Electric (GE). Each of the private parties had pension cost cases pending with slightly different facts, which caused those parties to take differing positions on various aspects of the case. Unlike the other parties, GM was attempting to recover a CAS 413 underpayment. The other parties had pension overpayments they were seeking to minimize.

The Court first determined that the contractor must examine both firm-fixed-price contracts and flexibly priced contracts under CAS 413.50(c)(12) in determining whether an adjustment is required.⁴⁶ GE argued that the provision did not apply to firm-fixed-price contracts. The Court noted, however, that the preamble to CAS 413 applied to negotiated government contracts, which includes *both* firm-fixed price contracts and cost

³⁷ *Id.*

³⁸ *Id.* at 169.

³⁹ *Id.* at 170.

⁴⁰ *Id.* at 170-171.

⁴¹ *Id.* at 169.

⁴² *Id.* at 185.

⁴³ *Id.* at 185-186.

⁴⁴ *Id.* at 186.

⁴⁵ *Id.* at 172.

⁴⁶ *Id.* at 171-172.

reimbursement and other flexibly priced contracts.⁴⁷ The Court then found that the portion of the CAS 413 segment closing adjustment not attributable to government contributions under firm fixed-price contracts was not recoverable, absent an express contract provision providing for recovery.⁴⁸ GM had only firm fixed-price contracts, and also a pension deficit, instead of the surplus Teledyne had. GM wanted to *recover* an adjustment in the absence an express contract provision, but the Court did not agree.⁴⁹ GM argued that the segment-closing portion of CAS 413 required a negotiation after every segment closing, which had not taken place. Unfortunately for GM, the CASB deleted the reference to negotiation when it published the 1995 rule.⁵⁰

GM also lost its argument that it was entitled to an equitable adjustment because the segment closing forced an accounting change. The Court sided with the Government that CAS 413 did not force a change in accounting practices. The Court found that the adjustment was based upon the prior version of CAS 413, and hence, it did not constitute a government-mandated change in cost accounting practices. In light of the 1995 amendments and their role in the Court's analysis, however, the authors of this column find this analysis less persuasive than the rest of the Court's opinion.

The Court also had to decide further how the adjustment would be calculated. The Government took the position that it was not necessary to allocate the segment closing adjustment between contract types.⁵¹ The Court rejected that argument, agreeing with Teledyne and GE that the adjustment must be allocated among the various contracts giving rise to the adjustment.⁵² The Court found that the phrase "previously-determined pension costs" constituted a clear look back at the contracts giving rise to the surplus or deficit.⁵³

The Court then addressed the issue of when these adjustments should be recognized. While the surpluses or deficits were generated over many years (i.e., several accounting periods), they are likely to be reconciled in the current accounting period under current contracts. Teledyne argued that because flexibly priced contracts had been closed long before, adjustment of costs under those contracts was now barred.⁵⁴ The Court disagreed. It found that while CAS 413.50(c)(12) looked back to determine the adjustment, the CAS terms required an adjustment in the current period.⁵⁵ As a result, the Court found that the authority for the current adjustment was the Allowable Cost and Payment Clause, FAR 52.216-7.⁵⁶ The Court also rejected Teledyne's argument that FAR § 42.701 barred an adjustment in the current period because, according to Teledyne,

⁴⁷ *Id.*

⁴⁸ *Id.* at 172. CAS 413.50(c)(12) provides that the "difference between the market value of the assets and the actuarial liability for the segment represents an adjustment of previously-determined pension costs."

⁴⁹ *Id.* at 172.

⁵⁰ *Id.* at 173-174.

⁵¹ *Id.* at 179 – 181.

⁵² *Id.* at 180.

⁵³ *Id.*

⁵⁴ *Id.* at 181.

⁵⁵ *Id.*

⁵⁶ *Id.* at 182 (48 C.F.R. § 52.216-7).

once indirect cost rates had been finalized further changes were barred.⁵⁷ However, the Court found that because recovery occurred under the Credits Clause (FAR 31.201-5), indirect cost rates did not need to be revisited.⁵⁸

Finally, the Court found that the portion of the pension contributed by employees was not subject to recovery by the Government.⁵⁹ The Court based its finding on the Credits Clause, concluding that the scope of the clause was limited to funds that the government actually reimbursed.⁶⁰ Funds submitted by employees were beyond the scope of the Credits Clause.

Teledyne clarifies issues that arise for government contractors with pension plans that divest divisions or entities. Contractors in that position now have clear and fairly extensive guidance about how to account for CAS 413 adjustments to pension plan overpayments or underpayments.

The Two Cases

These two major cost accounting cases, issued within a month of one another, have very practical applications. Each case was a first for the forum. The *Pratt & Whitney* case was the first time that the ASBCA tackled a case of revenue payments to international collaborators. *Teledyne* was the first major pension accounting case for the Court. Both ASBCA and the Court approached their respective cases thoughtfully, and applied basic accounting principles in deciding the cases. The ASBCA applied the principle that accounting for a transaction ought to follow the economic substance of the transaction. This broad underpinning for the decision, as opposed to a narrow interpretation of a single accounting rule or statement, strengthens the decision as a precedent.

The Court consistently applied the plain language of CAS 413, as amended, despite strong pleas to adjust the language of the accounting standard to the particular facts of the parties. It supported its decision with a straightforward interpretation of CAS 413, instead of relying upon external accounting principles or statements. An unintended side effect of the case is to strengthen the role of the Credits Clause, FAR § 52.216-7, in reimbursement to the Government and collection of excess monies it has paid out.

The cases also bring clarity to two major areas of government cost accounting. Several pension cost cases are working their way through the courts as of this writing, and the *Teledyne* case provides clear guidance for future cases. Its unambiguous holding, that a segment sale is a segment closing, will do much to provide real guidance to firms in this area. The authors do not agree that there is as much clarity in the history of the development of CAS 413 as the Court said there was, but its findings are hard to dispute. Firms contemplating sales of segments that have over-funded pension plans will now have to establish a reserve against the recovery of surpluses by the government. The case also settles the difficult issue of whether firm fixed-price contracts should be included in the CAS 413 adjustment process by mandating their inclusion.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 184.

⁶⁰ *Id.*

Firms establishing international collaborations have clear guidance from the *Pratt & Whitney* case about how to establish and account for those collaborations in order to avoid having revenue payments shared among joint venturers characterized as costs that must be included in cost pools. One of the most important lessons learned from *Pratt & Whitney* is that accounting for collaborator payments should mirror the contract treatment of collaborators at every step of the way.

Accounting issues are not often fully litigated, even when filed. Many such cases settle without major effects occurring. The decisions in these cases, however, provide important guidance to contractors about the proper cost accounting treatment the issues involved should receive. Both decisions are carefully and thoughtfully presented, and clearly demonstrate how these two forums will handle complex accounting issues in the future. Both cases focused on the substance of the issues before them and avoided narrow or procedural bases for the outcomes. As a result, these cases will constitute core precedents for future action.

The Criminalization of the Regulatory Process

by

Elizabeth Fleming Wallace, Esq.
Preston, Gates, Ellis, Rouvelas & Meeds LLP

What began as a trickle, has become a flood. Criminal penalties for regulatory violations are growing in number and severity. Criminal penalties that were once little used and limited in effect are now commonly considered and expanded in scope. During the heyday of active regulation, a federal agency might have resolved a dispute through informal negotiation or even an administrative dispute resolution process; in contrast, it is now more likely to refer regulatory violations to a federal prosecutor.

Regulatory crimes have become commonplace. Congress, in its need to be perceived as “tough on crime,” has undertaken what has been described as the “over-federalization” of criminal law. While much has been written about this phenomenon, commentary has ignored the fact that many new crimes and increased criminal penalties have been directed toward areas traditionally the subject of regulatory action.

With the growing attention to regulatory crimes, a “whistleblower” is now more likely to go directly to a federal enforcement agency, as opposed to bringing concerns to a regulatory body or to the offending corporation itself. Add to this the phenomenal growth in the number of both federal criminal investigative agents and federal prosecutors and important implications for the business community begin to develop.

Criminal prosecution of regulatory requirements becomes the enforcement tool of choice in health care, environment and safety, government contracting and other government regulatory programs. As a result, many important regulatory policy decisions are being made through enforcement actions and many changes are occurring in the regulatory process. Regulatory decisions that previously had been made through an open and accountable notice and comment procedure are now being left to courts to decide, with no mechanism for assurance of consistency, accountability, or systematic evaluation.

In too many instances, criminal enforcement is usurping the role of the regulatory policymaker. Criminal prosecutions for insider trading have, in effect, set the regulatory parameters for defining what is insider trading. Health care regulations poorly delineate the parameters of criminal behavior relating to reimbursement for services provided, but should a provider guess wrong, it can face fraud prosecution for submitting false claims based on what a court believes are the correct interpretation of the rules.

In such instances, regulatory policy decisions can fall by default to a federal prosecutor. By choosing whom to prosecute and under what circumstances, the prosecutor can become the *de facto* administrator of the regulatory program. Operational definitions of key regulatory terms are developed through prosecution, by a jury, circuit by circuit. Federal prosecutors are under no legal obligation to coordinate their actions

with the regulatory agency charged with implementing a regulatory program; they do not have to check with one another on which cases they are pursuing and why; and they rarely have to justify to the public the decisions they make. Inconsistent statutory interpretations resulting from these decisions can lead to different regulatory meanings in different parts of the country.

There can be little argument that for too long, regulatory penalties were viewed as simply a “cost of doing business.” While regulatory penalties were designed to make the cost of doing business outside the regulatory structure prohibitive, criminal penalties were intended to tip the balance more firmly toward such a view.

In the past, corporations that violated federal regulations could feel secure in trusting their instinct to work with regulators to achieve a reasonable solution to a problem. This is no longer the case. Now, corporate counsels must consider the significant possibility that a secret grand jury proceeding could already be underway, that any evidence turned over to an administrative agency could be used in a criminal case against the corporation or its officers, and that cooperation with the agency may not be taken into account during sentencing.

The growing creation and use of criminal penalties may be having some unintended consequences for the regulatory process. Important regulatory decisions may be shifting to federal prosecutors and too little information and accountability may be provided for regulated entities to feel reasonable certainty about their behavior. The open, accountable rulemaking process, governed by the Administrative Procedures Act, requires a notice and comment period, a reasoned response to the comments received, and an opportunity to challenge an agency’s regulatory decision as “arbitrary and capacious.” This more open regulatory process can be supplanted by a criminal enforcement proceeding, which is governed by very different rules and procedures. It is important to understand these trends, because the stakes are high and rising. “I didn’t understand that’s what would happen” is cold comfort indeed for someone who is facing the threat or the reality of incarceration, criminal fines, and loss of personal or business reputation.

Criminal enforcement is an attractive means of enforcing regulatory policies because, as a former SEC official recently said, “you get substantially more bang for the buck in a criminal prosecution than you can get in a civil prosecution.” Criminal prosecutors also have four advantages that make their jobs easier—and increase the danger to the corporations and individuals that they prosecute.

First, prosecutors enjoy virtually unlimited discretion in opening a criminal investigation. Their decisions never need to be publicly justified and rarely need be coordinated with the policies of prosecutors in other areas of the country. The United States Attorney’s Manual provides guidelines intended to govern federal prosecutors’ discretion, but prosecutors can ignore the guidelines without opening themselves to public challenge. Grand juries enjoy a similarly broad grant of power.

Second, prosecutors do not have to seek the advice of or take actions that are consistent with the regulatory agency in charge of a regulatory program. (In one recent case, the Securities and Exchange Commission was unaware of a criminal insider trading case brought by the Department of Justice until it was on appeal to the Fourth Circuit.) Prosecutors need not develop or listen to the special expertise that an agency has cultivated through its years of studying an industry.

Third, prosecutors enjoy the support of the grand jury process and the assistance of federal investigative resources. A federal prosecutor can call on the resources of a variety of federal investigative or law enforcement agencies, depending on the circumstances of the case. The scope and variety of these resources—from the Federal Bureau of Investigation to the Internal Revenue Service to the Inspectors General—can provide a prosecutor with a resource advantage in many instances.

Fourth, the “rule of lenity”—one of the most powerful constraints on the criminal process—is usually not applied in regulatory crimes. “Regulatory crimes” or “public welfare offenses” are often not as difficult to prosecute as other types of crimes, thanks to a greater tolerance for general and ambiguous definitions of such crimes. Under the “rule of lenity,” Congress must speak with some degree of specificity when deciding what will be a crime. But regulatory crimes are often created based on general grants of authority and vague statutory terms. Indictments, and convictions, for regulatory crimes based on these broad and ill-defined grants of authority have been upheld despite their ambiguity and despite the possibility of a citizen being deprived of his or her liberty based on an ambiguous regulatory provision.

Clearly Federal prosecutors are influenced by several informal constraints that help counteract, to some degree, the advantages listed above. Among these constraints are the prosecutorial guidelines; limited budgets; the power of the President to appoint people who will change the agenda; the possibility, though slight, of congressional oversight; and prosecutors’ desire to win cases, which prevents them from pursuing cases that judges are likely to see as frivolous. These constraints, however, only partially mitigate the significant advantages prosecutors enjoy—and their effect cannot be counted on in any particular situation.

Compounding the impact of the increasing use of criminal enforcement for regulatory violations is the willingness of Congress to delegate to executive branch agencies decision on what violations will be subject to criminal penalties. In theory, it is Congress that holds the power to determine what conduct is to be considered criminal. But in recent years, Congress has been delegating more of that authority to executive branch agencies. In fact, under the Act to Prevent Pollution from Ships, the violation of *any* of the regulations issued by the Coast Guard to implement the Act subjects the violation to a possible criminal penalty, no matter what the consequences of that violation.

By taking such action, Congress expands the broad range of activity entrusted to federal prosecutors. It also increases the opportunities for prosecutors and juries, rather

than regulators, to be the ultimate policymakers in defining key regulatory terms and enforcing a regulatory program.

The impact of criminal penalties on the regulated community is further enhanced by the Federal Sentencing Guidelines. Designed to promote uniformity and proportionality in sentencing, the Guidelines use a point-based system to determine a sentence, based on the crime involved and the criminal history of the offender. While the resulting scheme has made some limited progress in accomplishing Congress's goals, it has also substantially enhanced the possibility of "white collar" regulatory violations being subjected to harsher sentences.

Contributing to the enhancement of sentences for regulatory offenses under the Guidelines are: the use of individual factors, such as family situation (other than criminal history) in determining an appropriate sentence is disallowed; probation or other alternatives to incarceration are substantially reduced as options for defendants; sentencing is based on "relevant conduct," which can include counts of which the defendant has been acquitted; the prosecution must prove sentencing elements by only a preponderance of evidence, instead of beyond a reasonable doubt; and sentencing can be based upon illegally obtained evidence.

As corporations and their officers face an increasingly threatening prosecutorial environment, it becomes ever more critical to monitor and understand the forces and incentives that create and alter that environment. Being caught unaware of the increasing emphasis on criminal enforcement of numerous regulatory programs can lead to very difficult and expensive consequences for corporate entities and their officers and directors. Compliance programs and efforts undertaken to assure effective implementation of these compliance programs must take into account these complex and evolving circumstances.

GSA 01-9-30: USE OF THE DEPARTMENT OF DEFENSE PRIORITIES AND ALLOCATIONS SYSTEM IN

OPERATION ENDURING FREEDOM

by

Louis D. Victorino and James J. McCullough

With the stepped up level of military activity resulting from "Operation Enduring Freedom," we can expect there will be growing delivery pressures on Government contractors. In the past, some surge protection was provided by existing military inventories. With shrinking budgets and military downsizing, much of that surge protection has been lost. A contractual vehicle that will be utilized to meet increased demand is the Defense Production Act of 1950, 50 U.S.C. App. §2071 et seq. and its associated statutes, Executive Orders, and regulations, commonly referred to as the Defense Priorities and Allocations System. That vehicle was last used extensively during the Viet Nam conflict, but it has played a role in other military mobilizations such as Operations Desert Storm and Desert Shield. In all of these operations, the greatest impact of the priorities system was on the acquisition of traditional military items and their associated spare parts -- aircraft, missiles, and other weapons systems. But as recognized by President Bush, Operation Enduring Freedom will be a 21st century operation. Utilization of the Defense Priorities and Allocations System likely will have greater impacts on non-traditional wartime acquisitions such as services, electronics, and possibly automated data processing equipment. Operation Enduring Freedom will be fought not only with aircraft, missiles, and other weapons systems but also with information technology, intelligence, analyses, and internet resources. Contractor personnel and government procurement officials not previously experienced in the operation of the Priorities and Allocations System rules will need to learn quickly their rights and obligations under these rules.

We have therefore prepared an executive summary of the Defense Priorities and Allocations System, including its application, obligations, and protections, which is available for review on our Government Contracts webpage at <http://www.ffhsj.com/govtcon/govnew.htm>.

TREASURER'S REPORT

BCA Bar Association Balance Statement For the Period Ending February 12, 2002

The ledger of the BCBCA shows a current balance \$14,296.16. However, as of February 12, 2002 the BCBCA account with the Bank of America shows a balance of \$17,042.63.

Invoices have been submitted totaling \$3,460.

Joe McDade
Treasurer

ANNUAL MEETING OF THE BOARD OF CONTRACT APPEALS JUDGES' ASSOCIATION

Date: TUESDAY, APRIL 16, 2002

Place: HILTON ALEXANDRIA
MARK CENTER
5000 SEMINARY ROAD
ALEXANDRIA, VIRGINIA

PROGRAM DESCRIPTION

A distinguished group of participants from the Boards, the Government, and the private sector will discuss topics of current interest to the Government contract community.

Judge Cheryl Rome will moderate the first panel of Government and private practice lawyers. The panel will discuss emerging trademark issues, patents and copyrights, and DOD's recently issued Intellectual Property

Guide.

The second panel, moderated by Judge Allan Goodman, will present a discussion by the ADR neutral, counsel, and party representatives of a successful complex ADR arising from the construction of the Advanced Chemical Laboratory, National Institute of Standards and Technology (Dept. of Commerce), Gaithersburg, Maryland.

At the Luncheon, The Honorable Amy L. Comstock, Director, Office of Government Ethics, will speak on the ethical reverberations that can arise from involvement with professional associations.

In the first afternoon panel, moderated by Judge Ruth C. Burg, the panel members will discuss significant cases from the past year and their impact on Government contract law. Among recent decisions having implications for contract law practice are the decisions in Bluebonnet Savings Bank v. U.S., 266 F.3d 1348 (Fed. Cir. 2001); Grumman Aerospace Corp., ASBCA No. 50090, 01-1 BCA ¶ 31,316; McDonnell Douglas Corp. v. U.S., 50 Fed. Cl. 311 (2001); and Charles G. Williams Const., Inc. v. White, 271 F.3d 1055 (Fed. Cir. 2001).

The final session of the day, moderated by Judge Martin Harty, will discuss procurement responses to terrorism. Since 9/11/01 there has been much discussion of whether the procurement system is adequate to obtain the weapons, products, and services that may be needed to combat all forms of terrorism in the U.S. or overseas. Are new contracting approaches really needed? What can agencies learn from prior experiences with serious national security needs?

The sessions will provide an opportunity for questions and answers, permitting an exchange of views among the panel members and the audience.

PROGRAM OUTLINE

8:00 a.m. to 8:55 a.m.

PROGRAM REGISTRATION
COFFEE

8:55 a.m. to 9:00 a.m.

WELCOMING REMARKS

Judge Candida Steel, IBCA
BCAJA Program Chair

Judge Eileen Fennessy, DOTBCA

President, BCAJA

9:00 a.m. to 10:30 a.m.

INTELLECTUAL PROPERTY ISSUES IN GOVERNMENT CONTRACTING

Judge Cheryl Scott Rome, Panel Moderator
Armed Services Board of Contract Appeals
Falls Church, VA

William H. Anderson
Office of the General Counsel, USAF
Washington, DC

Lt. Col. Gregory Redick
Office of Acquisition Initiatives, USAF
Washington DC

Holly Emrick Svetz, Esq.
Morrison & Foerster, LLP
Washington, DC

Patricia H. Wittie, Esq.
Reed Smith, LLP
Washington, DC

10:30 a.m. to 10:45 a.m.

COFFEE BREAK

10:45 a.m. to 12:15 p.m.

AN ANATOMY OF A MEDIATION.

Judge Allan Goodman, Panel Moderator
General Services Administration Board of Contract Appeals
Washington, DC

Timothy Bloomfield, Esq.
Holland and Knight
Washington, DC

Kenneth Lechter, Esq.
Assoc. Dir. for External Affairs, NIST
Gaithersburg, MD

Pauline Mallgrave
Contracting Officer, NIST
Gaithersburg, MD

Charles Mitchell, Esq.
General Counsel, John J. Kirlin, Inc.
Rockville, MD

Barry Rogers
The Austin Company
Cleveland, OH

Laurence Schor, Esq.
Schor, McManus, Asmar & Darden
Washington, DC

12:15 p.m. to 1:30 p.m.

LUNCHEON

NO GOOD DEED GOES UNPUNISHED -- UNINTENDED CONSEQUENCES OF INVOLVEMENT WITH PROFESSIONAL ASSOCIATIONS.

Honorable Amy L. Comstock, Director, U.S. Office of Government Ethics

1:30 p.m. to 3:15 p.m.

THE IMPACT OF RECENT COURT AND BOARD DECISIONS ON GOVERNMENT CONTRACT LAW.

Ruth C. Burg, Judge (Retired), Panel Moderator
Armed Services Board of Contract Appeals
Falls Church, VA

Marshall J. Doke, Jr., Esq.
Gardere Wynne Sewell, LLP
Dallas, TX

W. Stanfield Johnson, Esq.
Crowell & Moring, LLP
Washington, DC

Allan J. Joseph, Esq.
Rogers, Joseph, O'Donnell & Quinn
San Francisco, CA

Professor Emeritus Ralph C. Nash, Jr.
George Washington University Law School
Washington, DC

Fred Phelps, Esq.
Director, Navy Litigation Office
Washington, DC

3:15 p.m. to 3:30 p.m.

COFFEE BREAK

3:30 p.m. to 5:00 p.m.

**COMBATING TERRORISM -- ARE NEW CONTRACTING APPROACHES
NEEDED? IS THERE A BENEFIT FROM LESSONS LEARNED?**

Judge Martin J. Harty, Panel Moderator
Armed Services Board of Contract Appeals
Falls Church, VA

Judge Stephen M. Daniels, Chair
General Services Administration Board of Contract Appeals
Washington, DC

Marcia G. Madsen, Esq.
Mayer, Brown & Platt
Washington, DC

Levator Norsworthy, Jr., Deputy General Counsel
Office of Army General Counsel
Washington, DC

Angela B. Styles
Administrator, Office of Federal Procurement Policy
Washington, DC

5:00 p.m.

Registration Fee \$150

Send Registrations to:

BCAJA
c/o Miki Shager
11018 Howland Drive
Reston, VA 20191

Include Name, Firm/Agency, Address, City, State, Zip, Telephone, and email address. Make checks payable to BCAJA. Government training forms welcome. BCAJA is NOT able to accept credit card payments.

Applications for CLE credit pending for Ohio, Pennsylvania, and Virginia. NCMA has approved the program for 6 hours of recertification credit.

The Hilton is conveniently located just off Route 395 at the Seminary Road West exit. Hotel shuttle picks up passengers every half-hour at Pentagon City Metro Station. Hotel phone: (703) 845-1010.

General information is available from Miki Shager at (202) 720-6229 or e-mail Mshager@usda.gov.

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**Board of Contract Appeals
Bar Association**

FY 2002 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 be mailed to members who request them. Otherwise, copies will be sent to individual e-mail addresses and posted to the BCABA website (www.bcabar.org), and members will receive an e-mail 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.

Mail checks to: Joseph McDade, Esq
C/O Peter McDonald
KPMG LLP, 1676 International Drive,
McLean, VA 22102