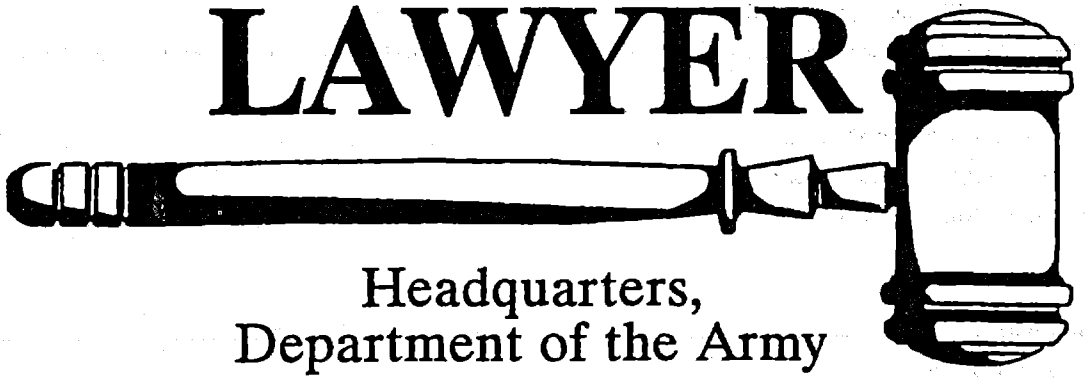
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-260
July 1994

Table of Contents

The Army Lawyer (ISSN 0364-1287)

Editor
Captain John B. Jones, Jr.

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index*, and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone (202) 783-3238.

Address changes: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Recovery of Legal Expenses in Bid Protests Before the GAO and the GSBCA*

Major Henry R. Richmond
Assistant Professor, Department of Law
United States Military Academy

Introduction

A unique aspect of government contracting is the opportunity for unsuccessful bidders to protest the solicitation and award of government contracts. A successful protest provides relief to disappointed bidders by reinserting them into the competitive process. Two forums providing such relief are the General Accounting Office (GAO) and the General Services Board of Contract Appeals (GSBCA). In addition to receiving competitive relief, protestors also may receive attorneys' fees and costs incurred in pursuing these protests under certain circumstances.

This article separately examines bid protest procedures and practices at the GAO and the GSBCA and determines under what circumstances in each forum attorneys' fees and legal costs may be recovered. The article concludes by contrasting procedures and practices between the two forums, drawing both parallels and distinctions.

Recovery of Attorneys' Fees in GAO Protests

The period since 1985 witnessed marked changes in GAO bid protest procedures. These changes came about as a result of the Competition in Contracting Act (CICA).[1] The CICA sought to impose regulation and efficiency on GAO procedures and practices that for the preceding forty years remained largely unchanged.[2] Additionally, the CICA sought to provide explicit statutory authority for GAO consideration of protests, a feature previously lacking.[3] These changes impacted not only the protest process itself, but the recovery of attorneys' fees and costs in that process as well. Prior to the enactment of the CICA, successful protestors were unable to recover attorneys' fees incurred in pursuing protests.[4] The passage of the CICA began an evolution in the development of GAO practices and procedures regarding attorney fee recoveries. Indicia of this evolution has included both decisional rules and the adoption of regulations governing bid protest procedures. This section examines the current rules for the recovery of attorneys' fees in GAO bid protests as they have evolved since the passage of the CICA. These include the standards applied for the recovery of attorneys' fees and the development of rules regarding corrective action. Additionally, this section provides information regarding the scope of recoverable attorney costs and the record keeping required to verify claims for such costs. Finally, this section notes the controversy surrounding GAO awards of costs and attorneys' fees. This examination does not include recovery of bid or proposal preparation costs except as they may relate to the recovery of attorneys' fees.

Standards for Award

Impact of the 1985 Regulation

Limitations on Awards

If a solicitation for a contract does not comply with statute or regulation, the CICA provides that the Comptroller General (GAO) may declare the appropriate interested party entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees.[5] The CICA defines an interested party as an actual or prospective bidder whose direct economic interests would be affected by the award of the contract or failure to award a contract. Additionally, the GAO will grant, in appropriate cases, protest costs to multiple protestors on the same contract when their direct economic interests are affected.[6]

The GAO initially promulgated regulations implementing the CICA in 1985.[7] Under these initial regulations, the GAO could award costs and attorneys' fees in those cases where the

---

*The manuscript originally was prepared in partial satisfaction of the thesis requirements for an LL.M. in Government Procurement Law from The George Washington University under the direction of Professors Ralph Nash and John Cibinic.

[1] Pub. L. No. 98-369, 98 Stat. 1175-1203 (1984).

[2] *See generally* Robert P. Murphy & Michael R. Golder, *New Procedures for Bid Protests at GAO*, 26 PUB. CONT. NEWSL., Spring 1991, at 3.

[3] *Id.*

[4] Paul Shnitzer, *Bid or Proposal & Protest Costs Under CICA*, Nov. 1988, 88-12 B.P. at 1.

[5] 31 U.S.C. § 3554(c)(1) (1988).

[6] *Id.* § 3551(2); *see, e.g.*, World-Wide Security Serv., Inc., B-224277, Jan. 8, 1987, 87-1 CPD ¶ 35.

[7] 4 C.F.R. § 21.6 (1985).

protestor was "unreasonably excluded" from the competition *unless* the GAO recommended award of the contract to the protestor and the protestor subsequently received the award.[8] The same rule applied in both negotiated and nonnegotiated procurements. However, in negotiated procurements—because of the subjectivity of the selection process—showing arbitrary and capricious action by the government was also necessary as a condition precedent to the award of attorneys' fees.[9] These rules reflected the belief that costs and fees should be awarded only to protestors denied the opportunity to compete.[10] This is largely consistent with the legislative history of the GAO statute that also spoke of awarding costs and fees to vendors unfairly excluded from procurements but not for cases involving minor technical violations.[11]

The language of the regulation seemed to necessarily limit the recovery of costs and fees to a narrow group of cases. Costs and attorneys' fees were not awarded when, as a result of the GAO decision, the protestor was awarded the contract or when it was afforded the opportunity to compete.[12] Many cases followed what the GAO considered to be the "letter of the rule." For example, in *Galveston Houston Co.*, the GAO found a contract improperly awarded and recommended a convenience termination followed by a resolicitation. Under those circumstances, the protestor would have an opportunity to compete for the resolicitation. As a consequence, costs and attorneys' fees were denied.[13] Similarly, in cases where the GAO recommended reopening competitive range negotiations,[14] where the GAO recommended resolicitation because the protestor had been denied a copy of the solicitation,[15] and where the government revised a solicitation in response to the protest,[16] attorneys' fees were denied because the protestor received the opportunity to compete. Conversely, in several cases the protestor was excluded from the competition but no other appropriate relief was available because the questioned contract already was performed. Under those circumstances, the GAO uniformly recommended the award of costs including attorneys' fees.[17]

A diffuse logic apparently was at work regarding the opportunity to compete. The language of the regulation held attorneys' fees recoverable where "the contracting agency . . . unreasonably excluded the protestor from the procurement."[18] If the contract had been performed when the GAO rendered its decision, logically, the protestor has been excluded from competition. However, denying attorneys' fees when, as the result of a protest, the contract was resolicited, is less logical. Although the protestor obtained the opportunity to compete, that opportunity was achieved only as the result of the protest. But for the protest, "the contracting agency . . . unreasonably excluded the protestor from the procurement."[19] Stated differently, a protestor's opportunity to compete resulted only from action to force an agency to do correctly what it should have done in the first place. Notwithstanding any appeal that this argument may have had, the GAO denied recovery of attorneys' fees and other associated costs in the cases noted above, when the protestor secured, eventually and by its own actions, the opportunity to compete.

Exceptions to the General Rule

In time, however, adhering to the above rules demonstrated a lack of uniformity. Exceptions to the rules allowed the recovery of attorneys' fees even though the protestor also would be afforded the opportunity to compete for the protested contract or its follow on. The exceptions arose in the protest of unduly restrictive specifications and procurements that were effectively sole source. The following cases illustrate these exceptions.

In *Washington National Arena Ltd. Partnership*,[20] the National Park Service amended a contract, extending its dura-

---

[8] *Id.* 21.6(e).

[9] Galveston Houston Co., B-21860.4, Nov. 4, 1985, 85-2 CPD ¶ 519.

[10] Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132.

[11] H.R. REP. No. 98-861, 98th Cong., 2d Sess. 1437 (1984).

[12] 4 C.F.R. § 21.6(e) (1985).

[13] *Galveston Houston Co.*, 85-2 CPD ¶ 519.

[14] Furhau U.S.A., Inc., B-221814.2, June 10, 1986, 86-1 CPD ¶ 540.

[15] Trans World Maintenance, Inc., B-220947, Mar. 11, 1986, 65 Comp. Gen. 401, 86-1 CPD ¶ 239.

[16] Dresser Industries, Inc., B-218535.3, Mar. 31. 1986, 65 Comp. Gen. 450, 86-1 CPD ¶ 300.

[17] Grieshaber Manufacturing Co., B-224388, Sept. 29, 1986, 86-2 CPD ¶ 367; Hobart Bros., Co., B-222579.2, Sept. 19, 1986, 86-2 CPD ¶ 323; E.C. Campbell, Inc., B-222197, June 19, 1986, 86-1 CPD ¶ 565; The Racal Corp., B-222511, June 17, 1986, 86-1 CPD ¶ 558.

[18] 4 C.F.R. § 21.6(e) (1985).

[19] *Id.*

[20] B-219136, Oct. 22, 1985, 65 Comp. Gen. 65, 85-2 CPD ¶ 435.

tion and modifying its scope, four months after the contract had expired. Thus, at the time of the amendment, no contractual relationship existed between the National Park Service and the former contractor. Washington National Arena Limited Partnership (Ticketcenter) protested the action as an improper noncompetitive sole source procurement. The GAO agreed and recommended termination for convenience and a recompetition of the requirement. Additionally, it found Ticketcenter entitled to the costs of filing and pursuing the protest, to include attorneys' fees. The opinion noted that ordinarily where recompetition is recommended, recovery of attorneys' fees are denied on the ground that the protestors interests are sufficiently protected by the resolicitation. However, this case did not involve the rejection of a bid by the agency. Rather, it involved a de facto sole source procurement. Under these circumstances, the GAO said the incentive of attorney fee and cost recovery furthered the broad CICA purpose of increasing and enhancing competition. Likewise, in *AT&T Information Services, Inc.*,[21] the protestor successfully challenged the agency's justification for a sole source procurement. As a result of the decision, AT&T was given an opportunity to compete for, at the least, a portion of the procurement. Nonetheless, citing *Washington National Arena Ltd. Partnership,* the GAO summarily and without any rationale allowed the recovery of costs including attorneys' fees.[22]

In *Southern Technologies, Inc.*,[23] the Navy issued a solicitation for the retrofit of generators that contained the requirement for including a particular brand of replacement burners and controls. Southern protested, arguing that the requirement was unduly restrictive and produced evidence from the manufacturer of the generator indicating that a number of other burners and controls would properly fit the generators. The Navy was unable to justify the requirement. Consequently, the GAO recommended resolicitation without the unduly restrictive language and found that Southern was entitled to protest costs including attorneys' fees. The GAO's rationale was similar to that in the sole source cases. "In such cases, we consider the incentive of allowing the protestor to recover the costs of filing and pursuing the protest to be consistent with the broad purpose of [the CICA], which is to increase and enhance competition."[24] In *Data-Team, Inc.*,[25] the Air Force attempted to justify a dry toner requirement for copiers by stating that it was necessary in the event of "go-to-war" mobilization. The protestor presented evidence that a number of Strategic Air Command bases had removed dry toner only requirements from their contracts. Additionally, the protestor demonstrated that newer liquid toner systems were fully mobile without the risk of toner leakage. The GAO sustained the protest on the basis of an unduly restrictive specification and—by merely citing *Southern Technologies*[26]—determined that Data-Team was entitled to costs and attorneys' fees.

The remarkable feature of these cases is the lack of stated rationale. Once the basic proposition—almost devoid of rationale itself—emerged from *Washington National Arena Ltd. Partnership,*[27] the GAO largely cited prior cases for its decisions without further discussion. There is nothing inconsistent in the *Washington National Arena Ltd. Partnership* decision with a textualist reading of the regulation.[28] These cases are consistent with the language of the regulation. They are inconsistent, however, with other GAO decisions interpreting and applying the same regulatory language.[29] While these decisions are consistent with the broad purpose of the CICA in increasing and enhancing competition, cases that denied recovery of protestor costs and fees also increased and enhanced competition.[30] The *Washington National Arena Ltd. Partnership* line of cases have been suggested as representing a broadening by the GAO of its charter, either knowingly or unknowingly coming closer to the approach taken by the GSBCA in bid protests[31] (discussed later in this article). If so, the GAO did not see fit to expand that charter during this period beyond unduly restrictive specifications and sole source procurements.

Corrective Action and Moot Issues Under the 1985 Regulation

Under the 1985 regulation, recovery of attorneys' fees and costs was conditioned on protestor success on the merits of

---

[21] B-223914, Oct 23, 1986, 66 Comp. Gen. 58, 86-2 CPD ¶ 447.

[22] *Washington National,* 85-2 CPD ¶ 435.

[23] B-224328, Jan. 9, 1987, 66 Comp. Gen. 208, 87-1 CPD ¶ 42.

[24] *Id.*

[25] B-233676, Apr. 5, 1989, 68 Comp. Gen. 368, 89-1 CPD ¶ 355.

[26] *Southern Technologies, Inc.*, 87-1 CPD ¶ 42.

[27] B-219136, Oct. 22, 1985, 65 Comp. Gen. 65, 85-2 CPD ¶ 436.

[28] 4 C.F.R. § 21.6 (1985).

[29] *See supra* notes 13-16.

[30] *Id.*

[31] Shnitzer, *supra* note 4, at 3.

the case.[32] Thus, when a protest was denied or dismissed without resolution favorable to the protestor, no recovery resulted.[33] This rule still applies.[34] Additionally, during the period 1985 to April 1991, when no decision on the merits existed—that is, when the agency took corrective action *before* a decision could be rendered—protests were dismissed as academic or moot. In those cases, costs and attorneys' fees also were denied.[35] Protestors who unsuccessfully challenged these rules did so generally on the rationale that even though the GAO did not grant the relief requested, a protest should not be dismissed as academic or moot when the agency took corrective action. They argued that the protest itself prompted corrective action. Accordingly, protestors argued that they should be rewarded for prompting this action through the award of attorneys' fees and costs. For example, in *Brandebury Aerostructures,*[36] the protestor sought, as relief, award of the contract. The agency, on reviewing its actual needs and determining that those needs had changed, terminated the contract for convenience before a decision on the protest. The GAO dismissed the protest as moot and denied the award of costs and attorneys' fees in pursuing the protest. In *Centel Federal Services,*[37] the protestor sought to overturn the award of a negotiated procurement because discussions had not occurred. The agency subsequently notified the GAO of its intent to hold discussions, whereupon the GAO dismissed the protest as academic. On a request for reconsideration, the protestor asserted that, while it had not been granted the relief requested—that is, award of the contract—it should at least be awarded costs and attorneys' fees. The GAO found that the action taken by the agency was appropriate and that, in any case, "[w]e have consistently held that a protestor is not entitled to reimbursement of its cost where the protest is dismissed as academic, so that we do not issue a decision on the merits."[38]

Impact of the 1988 Regulation Change

The evolution of GAO protest practices and procedures regarding the award of costs, including attorneys' fees, continued when the GAO revised its bid protest regulations in 1988.[39] The regulation affected all protests filed after 15 January 1988.[40] Its primary feature affecting attorneys' fees was elimination of the prior language that would "allow the recovery of costs under (d)(1) of this section where the contracting agency has *unreasonably excluded* the protester from the procurement, except where [GAO] recommends . . . that the contract be awarded to the protester and the protester receives the award."[41]

The deletion of this language expanded the circumstances in which the GAO would declare protestors entitled to costs, including attorneys' fees. Gone from decisions were discussions of whether protestors were unreasonably excluded from competition. Given the GAO's previous struggle with logic in granting fees in unduly restrictive and sole source cases,[42] one almost senses a sigh of relief in decisions that the problem no longer required attention. It has been suggested that deletion of the regulatory restriction resulted in a case-by-case analysis.[43] While apparently true and necessary in some cases, the regulatory change resulted in an almost mechanical declaration of entitlement to costs and attorneys' fees in large numbers of cases. Thus, as a result of the regulation—and in contrast with prior treatment—in cases of sustained protests where the remedy allowed the protestor further opportunity to

---

[32] Vanguard Industries, Inc., B-222647, Sept. 8, 1986, 86-2 CPD ¶ 272.

[33] *Id.* Fisherman's Boat Shop, Inc., B-223366, Oct. 3, 1986, 86-2 CPD ¶ 389.

[34] G & C Enterprises, Inc., B-250374, Jan. 26, 1993, 1993 U.S. Comp. Gen. LEXIS 74; Aircraft Porous Media, Inc., B-241665.4, June 28, 1991, 91-1 CPD ¶ 613; Shirley Construction Corp., B-240357, Nov. 8, 1990, 90-1 CPD ¶ 380.

[35] Galveston Houston Co., B-219988.4, Nov. 4, 1985, 85-2 CPD ¶ 519; Bru Construction Co., B-221383.2, May 27, 1986, 86-1 CPD ¶ 487; Bolar Pharmaceutical Co., B-234671.2, July 6, 1990, 89-1 CPD ¶ 557; Lucas Place, Ltd., B-239539.2, July 6, 1990, 90-2 CPD ¶ 18; Global Imaging, Inc., B-241035.2, Dec. 5, 1990, 90-2 CPD ¶ 460.

[36] B-236792.5, May 31, 1990, 90-1 CPD ¶ 510.

[37] B-242367.2, Feb. 14, 1991, 91-1 CPD ¶ 175.

[38] *Id.*

[39] 4 C.F.R. § 21.6(e) (1988).

[40] Shnitzer, *supra* note 4.

[41] 4 C.F.R. § 21.6(e) (1988) (emphasis added).

[42] *See supra* notes 20-31 and accompanying text.

[43] Shnitzer, *supra* note 4. An examination of the GAO comments in promulgating new rules validates this suggestion.

compete, protest costs including attorneys' fees have been routinely allowed.[44] Similarly, even in cases where the GAO has recommended that the protestor receive the protested contract, protest costs including attorneys' fees have been allowed.[45]

The precise rationale for these decisions, aside from deleting the regulatory restriction in the 1988 regulation, is not readily apparent from the decisions.[46] One could argue that, with deletion of the prior language, no particular rationale is necessary and that the only hurdle is finding a violation of law or regulation amounting to more than a mere technicality.[47] However, the GAO comments in the final promulgation of the new (1988) regulation provide a precise and expansive rationale. Specifically, while noting that contracting agencies would prefer a more restrictive standard to prevent the possibility of frivolous protests, the GAO stated that "the costs of filing and pursuing a protest generally should be granted whenever a protest is sustained based on more than some technical violation of statute or regulation, whether or not other remedies are also appropriate."[48] This suggests that where protests are sustained, absent an intervening consideration making an award inappropriate, costs including attorneys' fees will be granted. As an additional rationale, the GAO, in its comments to the 1988 regulation, endorsed the idea of protestors as private attorneys general. Under this rationale, the award of costs including attorneys' fees would encourage contractors to protest perceived violations of the contracting process.[49]

In 1992, *Department of the Navy—Request for Modification of Remedy* affirmed the private attorney general concept.[50] The protest was initially dismissed, but sustained as a result of reconsideration. The GAO held that the protestor was entitled to costs, including attorneys' fees, both for the initial protest and the reconsideration. The Navy objected, arguing that the protestor should only receive costs including attorneys' fees for the reconsideration portion of the protest. The GAO, finding against the Navy, held that the reconsideration was but a continuation of the initial protest and that the Navy position "would be inconsistent with the public interest purpose of our authority to award protest costs—'to relieve parties with valid claims of the burden of vindicating the public interest which Congress seeks to promote.'"[51]

Impact of the 1991 Regulation

Under new regulations for protests filed after April 1, 1991,[52] the GAO changed course on another issue in the area of bid protest cost and attorney fee recovery.

The new regulation addressed agency corrective action in the face of a meritorious protest. The GAO had long held that when the agency took corrective action as a result of protest that corrected the deficiency complained of, the protest would be dismissed as academic or moot.[53] Under those circumstances, protestors could not recover costs or attorneys' fees because no decision on the merits occurred. However, the new regulation provided that the GAO could declare a protestor entitled to costs including attorneys' fees even where the agency takes corrective action in response to the protest.[54]

Notwithstanding the expansive language of the regulation, the GAO apparently did not intend that recovery occur in every case where corrective action occurred. Rather, the GAO's concern was that "some agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protestors to expend unnecessary time and resources . . . ."[55] Providing for the entitlement of costs including attorneys' fees would encourage

---

[44] Sperry Marine, Inc., B-245654, Jan. 27, 1992, 1992 U.S. Comp. Gen. LEXIS 88; Beckman Industries, Inc., B-246195.3, Apr. 14, 1992, 92-1 CPD ¶ 365; U.S. Defense Systems, Inc., B-244653.2, Dec. 23, 1991, 92-2 CPD ¶ 179; Hattal & Associates, B-243357, B-243357.2, July 25, 1991, 70 Comp. Gen. 632, 91-2 CPD ¶ 90; Ford Aerospace Corp., B-239676.2, Mar. 8, 1991, 91-1 CPD ¶ 260; Jaycor, B-240029.2, Oct. 31, 1990, 90-2 CPD ¶ 354.

[45] Rexon Technology Corp., B-244653.2, Sept. 20, 1991, 91-2 CPD ¶ 262; General Kinetics, Inc., B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445.

[46] *See supra* notes 43, 44.

[47] 4 C.F.R. § 21.6(e) (1988). *See also* H.R. REP. No. 98-861, 98th Cong., 2d Sess. 1437 (1984).

[48] 52 Fed. Reg. 46,445 (1987).

[49] *Id.*

[50] B-236238.4, May 11, 1992, 92-1 CPD ¶ 430.

[51] *Id.*

[52] Murphy & Golder, *supra* note 2, at 25.

[53] *See supra* notes 34-37 and accompanying text.

[54] 4 C.F.R. § 21.6(e) (1992).

[55] Oklahoma Indian Corp., B-243785.2, June 10, 1991, 70 Comp. Gen. 558, 91-1 CPD ¶ 558.

agencies to quickly recognize and respond to meritorious claims. Consequently, protest costs and attorneys' fees would be awarded only when the agency unduly delayed taking corrective action.[56] As noted in *Oklahoma Indian Corp.*,[57] this was intended to produce a case-by-case analysis. In *Oklahoma Indian Corp.*, the agency took corrective action within two weeks of the protest filing. The GAO determined that the agency acted promptly and denied protest costs including attorneys' fees.[58] Similarly, in *Leslie Controls, Inc.*,[59] and *Laidlaw Environmental Services, Inc.*,[60] the agencies took corrective action within one month of the protest filings and costs, including attorneys' fees, were denied. Conversely, where the agency took five months,[61] two and one-half months,[62] and sixty-two days[63] to take corrective action, the GAO has found undue delay and awarded costs including attorneys' fees.

Undue delay in corrective action taken by the agency, however, does not insure the recovery of costs including attorneys' fees. The GAO has held that the protest must not only assert a violation of regulation or statute, but must be *clearly* meritorious as well.[64] Additionally, when the agency takes corrective action, but the action taken is for something other than the alleged violation, recovery will not result.[65] Furthermore, when the agency cancels a solicitation after filing of the protest for reasons not associated with the protest, recovery will not result.[66]

The impacts of the CICA on the GAO practices and procedures have been profound. From an arena where no attorneys' fees were awarded to successful protestors, the GAO progressed first to award only where protestors were excluded from competition to what is now almost pro forma awards in cases of more than mere technical violation of statute or regulation.[67] The GAO's decisions in this area seemed to presage regulatory change. The GAO also has progressed from denying recovery altogether in corrective action cases to determinations of cost and attorney fee entitlement where the agency unduly delays taking corrective action. In this instance, no decisional inroads on the rule were made. Rather, the regulation heralded the change.

Award Based on Relative Merits of Claims

In determining entitlement to costs including attorneys' fees, the GAO will look at the protestor's various claims and, where appropriate, allocate entitlement based on the success of those various claims. For example, where a protestor raises two issues in a protest and each issue is so severable and distinct from the other as to constitute, in effect, two separate protests, the GAO will limit recovery to costs and fees associated with one issue where the other is not sustained.[68] Alternatively, where the protestor raises a number of related issues, some of which are unsuccessful, the GAO will not allocate entitlement among the winning and losing issues.[69]

Data Based Decisions, Inc.,[70] is illustrative of the analysis that occurs. The Navy had obtained a systems operation contract and the protestor alleged that the procurement was in effect sole source. In addition, the protestor alleged that the awardee had an organizational conflict of interest that should have excluded it from the competition. The GAO sustained

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] B-243979.2, July 12, 1991, 91-2 CPD ¶ 50.

[60] B-246668.2, Apr. 9, 1992, 1992 U.S. Comp. Gen. LEXIS 423.

[61] Commercial Energies, Inc., B-243718.2, Dec. 3, 1991, 71 Comp. Gen. 97, 91-2 CPD ¶ 499.

[62] David Weisberg, B-246041.2, Aug. 10, 1992, 71 Comp. Gen. 498, 92-2 CPD ¶ 91.

[63] Carl Zeiss, Inc., B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274.

[64] ManTech Field Engineering Corp., B-246152.2, Dec. 17, 1992, 92-2 CPD ¶ 422.

[65] Northwest Cleaning Serv., B-243861.2, Jan. 22, 1992, 92-1 CPD ¶ 96.

[66] American Imaging Servs., Inc., B-246124.3, Feb. 28, 1992, 92-1 CPD ¶ 239.

[67] *See supra* notes 20-31 and accompanying text.

[68] Interface Flooring Systems, Inc., B-225439.5, July 29, 1987, 66 Comp. Gen. 597, 87-2 CPD ¶ 106.

[69] Princeton Gamma-Tech, Inc., B-2280525, Apr. 24, 1989, 68 Comp. Gen. 400, 89-1 CPD ¶ 401.

[70] B-232663.3, Dec. 11, 1989, 69 Comp. Gen. 122, 89-2 CPD ¶ 538.

the protest on the sole source ground and recommended that the Navy issue a new solicitation allowing all known potential sources the opportunity to compete. However, the GAO did not find an organizational conflict of interest and recommended that the prior awardee be allowed to compete as well. The protestor sought $64,000 in costs including attorneys' fees. The Navy objected arguing that Data Based should only receive costs and fees associated with its meritorious sole source allegation. In deciding not to allocate the entitlement between issues, the GAO said that the heart of the protest was that the Navy had improperly favored the awardee, a subcontractor on the prior contract. The GAO concluded that the separate issues raised by Data Based were intertwined in the root protest that the Navy had improperly favored the awardee. Accordingly, costs including attorneys' fees were awarded for issues both won and lost.

By contrast, in *CBIS Federal, Inc.*,[71] the protestor successfully asserted that the awardee proposed key personnel that it did not intend to use in contract performance. Additionally, it alleged that the agency had engaged in technical leveling. The GAO found the two issues severable and distinct. Because the unsuccessful portion of the protest had been filed and denied separately, the GAO found the issues sufficiently distinct to warrant allocating the entitlement between the successful and unsuccessful claim.

Reasonableness of Fees and Costs

The GAO regulations provide that in the case of successful protests, the protestor and the agency shall attempt to negotiate a settlement of the costs including attorneys' fees.[72] If no settlement is reached within a reasonable time, the GAO will determine the amount.[73] In these cases, the GAO will award fees it considers reasonable. A fee or expense is reasonable "if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the pursuit of its protest."[74] In one case, the agency objected to the gross number of attorney hours expended because, in its view, the numbers were excessive in relation to the complexity of the protest. The GAO said that generally it would accept the number of hours claimed, if properly documented, unless the agency could identify with particularity the hours it deemed excessive and could articulate a reasonable justification for their exclusion. The only justification the agency could present was the relative number of hours expended: 239 by the protestor versus 40 by the agency. That justification was insufficient.[75]

Hourly rates paid attorneys have been the focus of attention. In comments to the 1988 regulation, the GAO indicated that it was "not inclined to base the quantum of attorney's fees allowed on the standards in the Equal Access to Justice Act."[76] Rather, they sought to determine the reasonableness of fees on a case-by-case basis. The GAO did not exclude, however, referring to the Act for "guidance in specific cases."[77] Notwithstanding any inclination to seek guidance from the Equal Access to Justice Act, hourly fees deemed reasonable by the GAO have considerably outpaced fees awarded by boards of contract appeals under the Act.[78] For example, in 1989, in *Meridian Corp.*,[79] the GAO determined that $130 per hour for associates was reasonable. The GAO also considered $195 per hour for partners as reasonable.[80] Two years later, it considered $150 per hour for associates and $300 per hour for a senior partner reasonable.[81] Thus, when contrasted with the seventy-five dollars-per-hour limitation of the Equal Access to Justice Act, even adjusted for inflation as courts will do under the Act,[82] the GAO undoubtedly will consider prevailing rates in the legal community reasonable, regardless of their amount.

---

[71] B-245844.2, Mar. 27, 1992, 71 Comp. Gen. 319, 92-1 CPD ¶ 308.

[72] 4 C.F.R. § 21.6(f)(1) (1992). Contractors must submit their claims for costs including fees to the agency within 60 days after receipt of decision on the protest. Failure to do so will result in forfeiture of the claim absent good cause shown.

[73] *Id.* 21.6(f)(2) (1992).

[74] Bay Tankers, Inc., B-238162.4, May 31, 1991, 91-1 CPD ¶ 524; Patio Pools of Sierra Vista, Inc., B-228187.4, B-228188.3, Apr. 12, 1989, 68 Comp. Gen. 383, 89-1 CPD ¶ 374.

[75] Data Based Decisions, Inc., B-232663.3, Dec. 11, 1989, 69 Comp. Gen. 122, 89-2 CPD ¶ 538.

[76] 52 Fed. Reg. 46,445 (1987); 5 U.S.C. § 504 (1988); 31 U.S.C. § 2412 (1988).

[77] *Id.*

[78] 5 U.S.C. § 504.

[79] B-228468.3, Aug. 22, 1989, 89-2 CPD ¶ 165.

[80] Princeton Gamma-Tech, Inc., B-228052.5, Apr. 24, 1989, 68 Comp. Gen. 400, 89-1 CPD ¶ 401.

[81] Bay Tankers, Inc., B-238162.4, May 31, 1991, 91-1 CPD ¶ 524.

[82] *See generally* 5 U.S.C. § 504; 31 U.S.C. § 2412.

Recovery of reasonable fees and costs are not necessarily limited to the period between the filing of the protest and a decision by the GAO. For example, where a contractor pursued an agency level protest which was denied, fees incurred after the denial in preparation for filing a GAO protest were recoverable.[83] By contrast, however, fees incurred in pursuing an agency level protest are not recoverable as a part of the cost of pursuing a GAO protest. Agency level protests are viewed, correctly, as parallel bid protest mechanisms, independent of the GAO, and therefore are not cognizable as part of the costs of pursuing a GAO protest.[84] After the GAO has rendered a decision, it has recognized that fees associated with review of the decision, consultation, and explanation of the decision to the client are reasonable and recoverable.[85] The GAO will analyze the hours expended to determine whether they can be categorized as in pursuit of the protest.[86]

When a successful protestor and the agency cannot agree on costs and fees, the GAO determines the amount.[87] For protests filed after April 1, 1991, the GAO also is authorized to declare the protestor entitled to the costs of pursuing the claim for costs before the GAO. However, entitlement will not occur in all cases. Rather, the GAO will only make the award where it determines the agency actions—in refusing to settle the amount of the claim—are unreasonable.[88]

Protestors sometimes seek costs in connection with congressional assistance and actions in other forums as part of GAO protest costs and fees. For example, in *Diverco, Inc.*,[89] the protestor sought costs associated with obtaining senatorial assistance. Diverco asserted that these costs should be paid because the Senator's assistance led to the agency's "recognition of wrongdoing and accurate information ultimately being provided to GAO." However, the GAO denied the fees because such actions were not part of the protest process provided for by statute and regulation. On similar rationale, the GAO has denied costs associated with seeking congressional assistance because they are not part of "filing and pursuit" of the protest.[90] The protestor also sought its costs incurred in seeking injunctive relief in district court to force the agency to stay a contract pending a GAO decision. The contractor argued that the court action did not seek "substantive" relief, rather that it furthered the protest process thereby entitling it to costs and fees. The GAO denied entitlement stating that such action "cannot reasonably be considered costs of filing and pursuing a protest before GAO as contemplated by CICA."[91]

Reasonable out of pocket expenses are recoverable as the result of successful protests. Examples of these expenses include the costs of computerized legal research, photocopies, messenger and delivery service, travel, postage, and telephone charges. These expenses, in their nature and amount, must be reasonable. Litigation in this area, however, deals not so much with entitlement to these expenses as it does with proper record keeping.[92]

Record Keeping

The burden of providing sufficient evidence to support a claim for costs and fees lies with the protestor.[93] While billing records need not be contemporaneous,[94] they must be in sufficient detail to support the claim. In *Data Based Decisions*,[95] the protestor submitted attorney statements listing the service rendered by date, by whom rendered, a brief description of the service (indicating that it related to the protest) and the hours billed to the protestor. The agency objected, arguing that the bills were insufficient without identifying the time spent on each particular task for each day billed. The GAO rejected this approach, concluding that the bills provided the specificity and detail ordinarily seen in attorney billing statements.

---

[83] Diverco, Inc., B-240369.5, May 21, 1992, 92-1 CPD ¶ 460.

[84] *Id.*

[85] *Bay Tankers, Inc.*, 91-1 CPD ¶ 524.

[86] Decision of General Counsel Hinchman, B-237868.8, Dec. 20, 1991, 1991 U.S. Comp. Gen. LEXIS 1554.

[87] 4 C.F.R. § 21.6(f)(2) (1992).

[88] *Id.*; Decision of General Counsel Hinchman, Comp. Gen. LEXIS 1554.

[89] B-240369.5, May 21, 1992, 92-1 CPD ¶ 460.

[90] Omni Analysis, B-233372.4, May 1, 1990, 90-1 CPD ¶ 436.

[91] *Diverco, Inc.*, 92-1 CPD ¶ 460.

[92] *Id.*; Data Based Decisions, Inc., B-232663.3, Dec. 11, 1989, 69 Comp. Gen. 122, 89-2 CPD ¶ 538.

[93] Hydro Research Science, Inc., B-228501.3, June 19, 1989, 68 Comp. Gen. 506, 89-1 CPD ¶ 572.

[94] *Data Based Decisions, Inc.*, 89-2 CPD ¶ 538 (citing NCR Compten, Inc., GSBCA No. 8219, 86-2 BCA ¶ 18,822).

[95] *Id.*

Like attorneys' fees, claims for expenses must show the amount claimed for each individual expense, show the purpose for which expended, and demonstrate that the expense relates to the protest.[96] In one case, the protestor "lumped together all the claimed legal expenses on a monthly basis, with no further breakdown as to individual amounts claimed for each expense or how they relate to the protest." On request for further documentation, the protestor merely provided a monthly figure for amounts claimed in each expense category. The GAO found this kind of expense billing inadequate and concluded that mere statements that costs have been incurred will not suffice.[97]

Constitutionality of GAO Awards of Costs and Fees

The CICA provides that when the GAO determines that a protestor is entitled to costs including attorneys' fees, the agency involved *shall* pay such awards promptly from its own funds.[98] The government has raised the constitutionality of this provision as a defense to a protestor's suit for protest costs and fees.[99] The government argued that because the GAO is an arm of Congress such direction to executive agencies violates the separation of powers doctrine. In response to a previous suit raising this issue—since dismissed without reaching a decision on the merits—the *Federal Acquisition Regulation (FAR)* was amended to provide that GAO awards of costs and fees are recommendations only.[100] This parallels a previous amendment to the CICA providing that relief—as opposed to the award of costs and attorneys' fees—provided by the GAO in bid protests are mere recommendations to the agency rather than commands.[101] Additionally, the *FAR* also was changed to provide that agencies may recoup costs and fees from protestors if the statute is subsequently declared unconstitutional.[102] Legislative action could resolve the issue. If Congress responds to this challenge as it did in the matter of relief afforded by the GAO, awards of costs and fees will be mere recommendations to agencies. However, because the GAO is required to report to Congress when agencies fail to follow its recommendations, agencies will likely pay the bill.[103]

Recovery of Attorneys' Fees in GSBCA Bid Protests

The CICA gave the GSBCA—like the GAO—specific statutory authority to consider bid protests.[104] Its authority extends to the General Services Administration (GSA) and general government procurements in the area of automatic data processing equipment.[105] The CICA also gave the GSBCA—like the GAO—the authority to award costs and attorneys' fees to successful protestors.[106] However, unlike the GAO, the development of rules and practices in the arena of cost and attorney fee recovery has been less dramatic and more consistent.

This section examines the authority to make cost and attorney fee awards in bid protests before the GSBCA and the standards applied in making these awards. Additionally, it provides information on the evidence necessary to sufficiently document an award of costs and attorneys' fees. Furthermore, this section deals only with recovery of attorneys' fees and related expenses and will not specifically inquire into the recovery of bid or proposal preparation costs.

The CICA provides that when an agency violates law or regulation, or when an agency is shown to have violated its delegation of procurement authority (DPA), the GSBCA may award the appropriate "interested party" the costs of filing and pursuing a protest, including reasonable attorneys' fees.[107] An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the

---

[96] Diverco, Inc., B-240369.5, May 21, 1992, 92-1 CPD ¶ 460.

[97] *Id.*

[98] 31 U.S.C. § 3554(c)(2) (1988).

[99] 441 4th St. Ltd. Partnership v. United States, No. 91-1692-C (Cl. Ct. filed Dec. 16, 1991).

[100] GENERAL SERVICES ADMIN. ET AL., FEDERAL ACQUISITION REG. 33.104(g) (1 April 1984) [hereinafter FAR]. *See* United States v. Instruments, S.A. and Fisons Instruments/VG, 807 F. Supp. 811 (D.D.C. 1992).

[101] Pub. L. No. 100-463, tit. VII, § 8139, 102 Stat. 2270-47 (1988). *See generally* Murphy & Golden, *supra* note 2.

[102] FAR 33.104(h).

[103] Murphy & Golden, *supra* note 2. In an internal memorandum, the DOD General Counsel emphasized that it is DOD policy to pay GAO awards of fees and costs except in "egregious" circumstances. *See* 60 Fed. Cont. Rep. 22 (Dec. 13, 1993).

[104] 40 U.S.C. § 759(f)(1) (1988).

[105] *Id.*

[106] *Id.* § 759(f)(5)(C).

[107] *Id.*

award of a contract or by failure to award a contract. Those interested parties who may recover protest costs include not only the protestor, but, in appropriate cases, intervenors as well.[108] By regulation promulgated under the Act, a successful protestor must submit a motion for costs within thirty days of a decision sustaining the protest.[109]

Standards for Award

The authority to award costs and attorneys' fees to successful protestors is discretionary. Specifically, the statute provides that the GSBCA may award costs and fees where it finds a violation of statute or regulation.[110] Thus, the board must decide those circumstances under which it will award costs and fees. The board will consider the award of costs and attorneys' fees to appropriate interested, or prevailing, parties.[111] A prevailing party is "one that has succeeded on any significant issue in the litigation which achieves some of the benefit sought in bringing" the protest.[112] Litigation in this area has focused on four broad categories: (1) the definition and application of "significant issue"; (2) the definition and application of "some benefit"; (3) allocation of fees based on the relative merits of claims; and, (4) the award of costs and fees when a nonlitigated settlement has occurred.

"Significant Issue"

The legislative history of the GSBCA's enabling statute indicates that costs should not be awarded in cases involving minor technicalities.[113] In *Computervision Corp.*,[114] the protestor sought the award of costs, arguing that it had prevailed on issues of jurisdiction and DPA. The agency argued that the procurement was not subject to GSBCA jurisdiction under the Brooks Act and lost. Subsequently, the board granted the protest on the sole issue that the agency had not obtained a delegation of procurement authority from the GSA. The board refused to conclude, however, that the agency's actions prior to the protest were null and void. Rather, the board said that it was in the power of the agency to cure the defect (no DPA) and have it relate back to the beginning of the procurement. In denying the claim for costs and fees, the board concluded that the issue on which the protestor prevailed was not significant. A mere violation of law or regulation, by itself, was insufficient justification for the award of costs and fees. While the board did not view the failure to obtain the DPA as minor, it viewed the protestor's limited victory as only affording it the opportunity to be heard on an issue on which it did not ultimately prevail.

The same issue was visited again in *Racal Information Systems, Inc.*[115] There, a protestor and intervenor asserted the competition was defective because they were not afforded the opportunity to compete on an equal basis. While the board rejected this argument, the protest was granted on the sole issue that the agency had not obtained a DPA. The protestor and intervenor attempted to distinguish *Computervision*[116] stating that failure to obtain the DPA was not a mere administrative oversight, but the result of a continuous and erroneous belief that a DPA was not needed. The board rejected this argument, stating that success on the DPA issue had done little more than allow the protestor and intervenor the opportunity to pursue their primary bases of protest: a basis on which they lost.

Significantly, in both *Computervision* and *Racal*, while the board granted the protests, the board actions did not result in resolicitation of the requirements. Rather, the board allowed the agencies to cure the defects and proceed with the procurements. As a result, although winning on the DPA issues, the protestors and intervenor were nonetheless excluded from the protested competition. One could assert that these protests remedied violations of law and that under a private attorney general theory, the board should have awarded costs and fees. Conversely, an argument could be made that prosecuting violations of law and regulation under a private attorney general theory should only result in the award of costs and fees when the protest promotes and enhances the competition process through, for example, resolicitation. Because these procurements were allowed to continue, the decisions denying costs and fees are consistent with the second argument because they effectively did nothing to enhance or promote the competition process.

---

[108] *Id.* § 759(f)[(8)](9)(B); *See, e.g.*, The Calma Co., GSBCA No. 8865-C, 88-3 BCA ¶ 20,898; RTMC/Microwave, GSBCA No. 10580, 92-1 BCA ¶ 24,530.

[109] 48 C.F.R. § 6101.35 (1992).

[110] 40 U.S.C. § 759(f)(5)(C)(i) (1988).

[111] HSQ Technology, Inc., GSBCA No. 9985-P, 89-2 BCA ¶ 21,777.

[112] Texas State Teacher's Ass'n v. Garland Independent School District, 489 U.S. 782 (1989); NCR Compten, Inc., GSBCA No. 8829, 86-2 BCA ¶ 18,822.

[113] Amdahl Corp., GSBCA No. 7965, 85-3 BCA ¶ 18,283, at 91,761.

[114] GSBCA No. 8838-C, 87-2 BCA ¶ 19,818.

[115] GSBCA No. 10435C, 91-1 BCA ¶ 23,468.

[116] *Computervision Corp.*, BCA ¶ 19,818.

The "significant issue" problem was visited again in *Julie Research Laboratories.*[117] Although this case did not involve failure to obtain a DPA, the protestor demonstrated that the agency had failed to properly justify a requirement for a specific make and model in a solicitation. The board distinguished *Computervision* stating that while the justification issue was no more or less significant than failure to obtain a DPA, it was significantly intertwined with the substantive issues on which the protestor requested relief. It concluded that the protestor in *Julie Research* achieved much more success than the protestor in *Computervision.*[118] As with *Computervision* and *Racal,* the board did not require resolicitation. Rather, it only required the agency to obtain the necessary justification for a specific make and model solicitation. Nonetheless, the board in *Julie Research* awarded costs and fees to the protestor.[119] This case more closely equates the award of costs and fees to the private attorney general theory where a bare violation of law or regulation exists. However, because the procurement was not resolicited, no enhancement of the competition process occurred. Further, if the protestor in *Julie Research* achieved more success than the protestor did in *Computervision,* as suggested by the board, that success was illusory. The protestors in *Julie Research, Computervision,* and *Racal* all successfully protested, yet all were effectively precluded, based on the board's decisions, from engaging in the competition. Thus, within this context, logically explaining why *Julie Research* was awarded costs and fees, while the others were not, is difficult. The only explanation can be on the basis used by the board in *Julie Research*—the issue on which the protestor succeeded was more closely related to the root base of the protest than the DPA issues in the other cases.[120] When analyzed against the broad purposes of the CICA to enhance the competition process, however, this distinction is lost.

In a recent case, *CACI, Inc. v. Stone,*[121] the Federal Circuit held that contracts awarded in the absence of a delegation of procurement authority are void ab initio. The court specifically cited *Computervision* and rebuked the GSBCA for its decision in that case, stating that "there can be no clearer example of a case in which the illegality is plain."[122] While *CACI Inc.* did not involve the award of fees and costs, arguably protestors whose success reveals a failure to obtain a delegation of procurement authority are now in better positions to receive costs and fees as a result of *CACI Inc.*.

Achieving "Some Benefit"

The cases where the significance of the issue is paramount appear limited to a narrow range of cases driven by their facts. Assuming that the issue that sustains the protest is facially significant, the more important question for recovery of costs and attorneys' fees appears to be whether the protestor achieved some of the benefit sought in bringing the protest. Focus on the "some benefit" portion of the prevailing party test is the better course; it affords the opportunity for objective inquiry into whether a benefit was achieved. Meanwhile, the significant issue test is somewhat more subjective. Additionally, some cases seem to indicate that the test for the prevailing party is an either/or inquiry; that is, the protestor may recover costs and fees on either a "significant issue" or by achieving "some benefit."[123] The better course is to conclude that if the protestor achieved some benefit, the issue was significant.

Case law has provided an explanation of "some benefit" which simplifies an objective inquiry into the term. Some benefit is achieved if the litigant can point to a "resolution of the dispute which materially alters the parties' legal relationship in a manner Congress sought to promote."[124] As the following cases suggest, the board has applied this manageable standard unevenly.

In *HSQ Technology, Inc.*,[125] the agency failed to evaluate a subcontractor's proposal in accordance with the stated evaluation criteria. Before litigation, the agency agreed to terminate the contract and resolicit if funds were available. In reaching a conclusion that HSQ prevailed, the board did not discuss the significance of the issue except to imply that costs and fees could be awarded where the issue was significant or where some benefit had been achieved. Rather, it stated that HSQ crossed the threshold for the recovery of costs and fees because the result of the protest had materially altered its legal relationship with the agency in a manner Congress sought to promote. Thus, in this case, where resolicitation resulted,

---

[117] GSBCA No., 9693-C, 91-1 BCA ¶ 23,389.

[118] *Id.* at 117,375 n.1.

[119] *Id.*

[120] *Id.*

[121] 990 F.2d 1233 (Fed. Cir. 1993).

[122] *Id.* at 1236.

[123] HSQ Technology Inc., GSCBA No. 9985-P, 89-2 ¶ 21,777.

[124] Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782 (1989); Bedford Computer Corp., GSBCA No. 9837-C, 98-2 BCA ¶ 21,827.

[125] *HSQ Technology,* 89-2 BCA ¶ 21,777.

HSQ again became part of the competitive process, a change altering its legal relationship to the agency.

In *Andersen Consulting,*[126] the agency required Andersen to undergo an unwitnessed benchmark test as required by the solicitation. The agency did not require, however, the same of the firm eventually awarded the contract. The board found Andersen entitled to reimbursement for the costs of the unwitnessed benchmark test, but did not sustain the protest, order resolicitation, or revise the agency's DPA. In denying the award of costs and attorneys' fees, the board found that the unwitnessed benchmark test was a de minimus violation of the law and provided "no significant benefit"[127] to Andersen. In the board's opinion, the action had not in any significant way altered the legal relationship between the agency and the protestor. The board seemed to combine or equate "significant issue" with "some benefit," requiring both if the protestor was to recover or, in the alternative, finding a significant issue where the protestor achieved some benefit.

A comparison of these two cases indicates a willingness of the board to find an altered legal relationship only where resolicitation of the procurement is ordered. From an analytical standpoint, these cases create bright line indicia from which protestors can gauge the likelihood of recovering costs and attorneys' fees. This outcome is desirable from an efficiency standpoint. Judge Richard Posner has observed that fee litigation can turn simple cases into multiple cases, which go on "ad infinitum, or at least ad nauseam."[128] Thus, from the standpoint of efficiency and reduced litigation, the board is much better served by adhering to an inquiry of whether the legal relationship of the protestor and the agency has been materially altered.

The protest of *I-Net, Inc.,*[129] demonstrates the board's uneven handling of the prevailing standard. The protestor objected on several grounds to an oral solicitation and initially requested and received a suspension of the DPA pending resolution of the protest. The agency thereupon cancelled the solicitation, reasoning that by the time the protest was completed, the procurement would be unnecessary. The board dismissed the protest as moot, but allowed I-Net to submit evidence of a violation of law or regulation to premise its case for costs and fees. The protestor failed to supplement the record and the board denied costs and attorneys' fees. That the board allowed the protestor to pursue the cost and fee award at all is unusual. Even had the protestor demonstrated a violation of law or regulation, it would not have altered its legal relationship with the agency. Nevertheless, the board allowed the protestor the opportunity of pursuing the cost and fee case. This approach leaves two possibilities. First, had the protestor shown a significant violation of law or regulation impacting the procurement, it may have recovered costs and attorneys' fees. However, what is or is not a significant issue is not well defined.[130] Indeed, under the *Andersen*[131] analysis, whether an issue is significant could depend on the alteration of legal relationships. A second possibility is that the board could have awarded costs and attorneys' fees on the theory of promoting full and open competition through private attorneys general. Recovery on this theory was alluded to in *Bedford Computer Corp.*[132] The headnotes to the case state that the test for recovery of costs and attorneys' fees involves showing "a significant violation of law," or that a protestor "obtained some benefit regarding procurement, or was successful in furthering the promotion of full and open competition through private enforcement of the procurement laws."[133] If private enforcement is justification for recovery, the authors of the headnotes have stated it much more concisely than the board.

The cases cited in this section demonstrate a certain uneasiness on the part of the board when dealing with the prevailing party standard.[134] Depending on which authority a protestor cites, it could be a prevailing party for the award of costs and fees if the issue on which it prevailed was "significant," if "some benefit" were achieved altering the legal relationship of the parties, or if the protestor was deemed successful in promoting full and open competition under the CICA.

Protestors should use all three theories alternatively and let the board determine which of the standards is to apply. The

---

[126] GSBCA No. 11070-C, 92-3 BCA ¶ 25,086.

[127] *Id.* at 125,053.

[128] Ustrak v. Fariman, 851 F.2d 983, 987 (7th Cir. 1988).

[129] GSBCA No. 9233-C, 90-1 BCA ¶ 22,407.

[130] *See supra* notes 114-117 and accompanying text.

[131] Andersen Consulting, GSCBA No. 11070-C, 92-3 BCA ¶ 25,086.

[132] GSBCA No. 9837-C, 89-2 BCA ¶ 21,827.

[133] *Id.* at 109,810.

[134] It has been suggested that the GSBCA has taken a consistent approach to the award of protest costs, it being enough that full and open competition was not achieved. Shnitzer, *supra* note 4, at 5. The cases cited for that proposition are arguably supportive. However, the later cases cited herein do not conform with that view and suggest confusion on the part of the board in applying the prevailing party standard.

board, for its part, however, should reevaluate how it applies the prevailing party standard. The current state of application leaves no manageable bright line rules. This type of inefficiency promotes further litigation. If "significant issue" is to be a test, the question should be significant in relation to what? The approach used in *Julie Research*—that the issue is significant if it is tied to the root basis of the protest—is unworkable. A violation of law or regulation is no more or less a violation because it is more closely tied to the root of the protest. A protestor does not achieve a greater degree of success if it obtains no relief from that success. Rather, the significant issue analysis, if it is to be used at all, must be tied to a tangible result. The board could easily state that an issue is significant if it results in benefit to the protestor, like resolicitation, altering its legal relationship with the agency. At the same time, a tangible benefit to the protestor such as resolicitation or reevaluation of a bid or proposal clearly promotes full and open competition as required by the CICA. A more efficient course would be a standard that a protestor crosses the threshold to cost and attorney fee award if the protestor prevails on an issue that materially alters his or her legal relationship with the agency in such a manner as to promote full and open competition. This would alleviate the confusion. If a protestor succeeded on any issue that resulted in reinsertion into the competition, the issue would be deemed significant, the relationship with the agency would be altered, and full and open competition promoted.

Award Based on Relative Merits of Claims

Under certain circumstances, the board will award costs and attorneys' fees for issues on which the protestor succeeded and exclude fees on unsuccessful issues. While the board occasionally appears to adhere to a doctrine of severability, on balance a greater tendency exists toward awarding all costs and attorneys' fees where the protestor has prevailed. The basis for this approach stems from guidance of the Supreme Court in *Hensley v. Eckerhart*, where the Court found that "litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee."[135] However, where protestors fail to prevail on issues or claims "distinct in all respects" from successful claims or issues, the fees and costs expended on the unsuccessful issues should be excluded. Further, where a protestor achieves only limited success, the award should be reasonable in relation to the results obtained.[136]

These axioms suggest the following results. Where a protestor asserts alternative arguments, any one of which could lead to the same successful conclusion, the protestor should receive attorneys' fees and costs relating to all the theories presented so long as the protestor prevails on one of the theories.[137] However, where a protestor's allegations are distinct—that is, where it asserts unduly restrictive specification and where it challenges evaluation criteria as biased—awarded fees and costs should be segregated where the protestor prevails on one issue but not on the other. Finally, where, in the previous example, the protestor seeks as relief award of the contract but only receives a reevaluation of his proposal, attorneys' fees and costs should be reduced to reflect the failure to achieve all the relief sought.

One could argue that in earlier cases, the board seemed to be moving to the award of fees and costs regardless of any ability to segregate distinctly different claims. In *Computervision Corp.*,[138] the board, in considering three protest issues, dismissed one because it failed to state a valid basis for protest, but sustained the protest on another issue. With the exception of fees and costs related to the dismissed basis of protest, the board awarded all other fees and costs without engaging in any analysis of the relative merits of the remaining bases of protest. In so doing, the board relied on cautionary language in *Hensley*[139] that requests for attorneys' fees should not result in a second major litigation. The board found "no basis to individually evaluate each of the second and third bases of protest . . . Computervision significantly prevailed as it demonstrated respondents' violation of statute and regulation."[140] In the companion case, the intervenor was awarded attorneys' fees and costs on the same basis as *Computervision*.[141]

The board took a similar approach in *Storage Technology Corp*,[142] in which the protestor asserted three bases of protest: that the agency misapplied evaluation criteria; that it failed to consider cost appropriately; and that it failed to obtain full and open competition. The board agreed with the protestor and sustained the protest on the first basis alone without consider-

---

[135] Hensley v. Eckerhart, 461 U.S. 424 (1983).

[136] *Id.* at 440; *see also* Julie Research Laboratories, GSCBA No. 9693-C, 91-1 BCA ¶ 23,389.

[137] *See, e.g.*, NCR Compten, Inc., GSBCA No. 8229, 86-2 BCA ¶ 18,822.

[138] GSBCA No. 8686-C, 87-2 BCA ¶ 19,944.

[139] *Hensley*, 461 U.S. at 437.

[140] *Computervision Corp.*, 87-2 BCA ¶ 19,944, at 100,934.

[141] Calma Co., GSBCA No. 8687-C, 87-2 BCA ¶19,943.

[142] GSBCA No. 9110-C, 88-1 BCA ¶ 20,292.

ing the merits of the other two bases of protest. The government objected to the award of all protest fees and costs only on the basis that amounts claimed crossed the line between vindicating the public interest and the pursuit of private gain. The board rejected this argument and awarded the entire amount claimed.

Contrast the apparent willingness of the board to avoid a second major litigation by awarding attorneys' fees and costs without inquiring into merits of other, unreached, bases for protest, with later cases in which the board engaged in some searching inquiry. In *United States West Information Systems, Inc.*,[143] the protestor prevailed on one of five issues. The others were dismissed as premature. The board concluded that the protestor spent forty-five percent of its litigation fees and costs on the successful claim and rejected the award of costs and fees on issues dismissed. The protestor sought recompetition as relief. However, the board only required that the protestor be allowed to revise its technical proposal. Accordingly, it reduced the fees awarded (forty-five percent) by another twenty percent to reflect the failure to obtain the relief sought. In *Wang Laboratories, Inc.*,[144] the protest involved a number of issues. The board sustained the protest in part, finding that the solicitation was not so fundamentally flawed as to preclude full and open competition. However, it was sufficiently defective as to require revision of the specification and the evaluation criteria. In determining the amount of attorneys' fees and costs due the protestor, the government argued that based on its review of the litigation, twenty percent of the claimed amount was appropriate in relation to those issues on which Wang prevailed. The board largely accepted this analysis, finding that it was "basically fair" and falling "within the lower end of what we deem to be a range of the efforts reasonably expended on the winning portion of this protest." However, the board made an upward adjustment of that percentage based on the following conclusions: substantial benefit accrued to the competitive process as a result of Wang's limited victory; and work on unsuccessful issues contributed significantly to Wang's success on other issues. As a result, the board raised the attorney fee percentage to twenty-five percent. In the board's opinion, because the allocation of costs was not in direct relation to the winning issues, it awarded Wang sixty percent of its out of pocket expenses. In a companion case,[145] the board used the same justification to reach a result whose only difference was to award thirty percent of attorneys' fees claimed.

Currently, the board views the results in *Wang* and its companion case *(Digital Equipment Corp.)* as the exception rather than the rule. In *Rocky Mountain Trading Co.*,[146] the protestor claimed attorneys' fees and costs on issues both won and lost. The government objected to fees and costs for those issues on which the protestor did not prevail. The board, using *Hensley* as justification, approved the entire claim for fees and costs even though the protestor was clearly unsuccessful on some severable issues.[147] The board said that protestors need not prevail on all issues to receive all reasonable protests costs and attorneys' fees. The board distinguished *Wang* and *Digital Equipment Corp.*, and found that these cases resulted from their unique facts and involved issues significant but readily severable from prevailing issues.[148] Harkening back to its decision in *Computervision*,[149] the board concluded that the "[S]tatute does not direct the board to view each and every argument raised in a protest as a distinct claim and to award protest costs associated only with those arguments on which a party has prevailed . . . The board hesitates to view cases in such a manner"[150] given the guidance in *Hensley* that litigants who raise alternative grounds for relief should not be penalized for rejection or nonconsideration of some of those grounds.

---

[143] GSBCA No. 9114-C, 98-2 BCA ¶ 21,774. This case consisted of two protests. In the first, West alleged five bases for relief. Four were dismissed as premature. The fifth, involving lack of a sufficient DPA, was sustained. The board segregated fees among the counts in the first protest and awarded West in toto those fees associated with summary disposition of the DPA issue. Interestingly, the rationale used in *Computervision*—denying fees because the issue (also a DPA issue) was insignificant—was not used in this case. The two cases are, distinguishable, however. In both, the DPA issue provided a basis or condition precedent on which the protestors could address more substantive issues. In this case, unlike *Computervision*, those other, more substantive issues, succeeded in achieving some benefit to the protestor.

[144] GSBCA No. 9288-C, 89-3 BCA ¶ 22,180.

[145] Digital Equipment Corp., GSBCA No. 9285-C, 89-3 BCA ¶ 22,181.

[146] GSBCA No. 9750-C, 90-3 BCA ¶ 23,040.

[147] GSBCA No. 9750-C, 90-3 BCA ¶ 23,040. The protest was sustained on an ambiguous specification. The protestor also unsuccessfully attempted to amend the protest to include additional counts and lost. Facially, these appear severable.

[148] The board observed that the *Wang* and *Digital Equipment* decisions did not seem to turn so much on the severability of the claim or issues as the failure of the parties to accurately segregate their billings among issues. Consequently, the board was unable to determine with any specificity the amount of time spent on prevailing issues. This may have been the unspoken unique fact on which these cases turned.

[149] Computervision Corp., GSBCA No. 8838-C, BCA ¶ 19,818.

[150] *Id.*

Settlement Litigation

Parties often will settle protests before litigation, which is consistent with board and general policy favoring settlement.[151] When parties settle a protest, they often stipulate the prevailing party for purposes of awarding attorneys' fees and costs.[152] This presents a paradox. By statute, the GSBCA must approve the settlement if the award of costs and attorneys' fees is to come from the permanent indefinite judgment fund.[153] Consequently, the board will review the record of the case to determine independently whether a party has prevailed for purposes of costs and fee awards.[154] If the parties agree that reimbursement of costs and attorneys' fees will come from agency appropriations rather than the judgment fund, the board need not approve the settlement or determine who the prevailing party was.[155]

Payment of costs and attorneys' fees from the permanent indefinite judgment fund has been referred to as a "pipeline to the mint" for agencies. It has been criticized and characterized as a situation where *A* and *B* settle a protest and agree that *C*, not a party, will pay the costs and fees.[156] In *Bedford Computer Corp.*,[157] just such a settlement was reached. The board, however, did not have sufficient information to determine whether the protestor had prevailed, as the parties had stipulated. Accordingly, the board—rather than denying the award of fees outright—allowed the parties to supplement the record to provide sufficient facts on which a prevailing party determination could be made. In an exasperated dissent, one judge highlighted the seeming inequity of such agreements, but concluded that the unopposed motion for fees and costs simply should be granted and the matter ended. He suggested that the inequity could be overcome by requiring that the agency reimburse the judgment fund. However, in *Sysorex Information Systems, Inc. v. Department of the Treasury*, the full board decided by majority that agencies were not required to reimburse the judgment fund for amounts awarded.[158] For protestors, whether costs and fees come from the agency or the judgment fund is irrelevant. In negotiating settlement agreements, however, protestors should protect themselves by including a proviso that if costs and fees from the judgment fund are not awarded, the agency will provide the funds.

Substantively, in making prevailing party determinations, the board will look to the terms of the agreement to determine whether the agency admits a violation of statute or regulation.[159] Absent evidence in the settlement, the board, as noted in *Bedford*,[160] will consider supplementary evidence on the issue.

Reasonableness of Fees and Costs and Record Keeping

Reasonableness of Costs and Fees

The board occasionally awards attorneys' fees and costs when the record keeping of the protestor has been insufficient to make precise calculations of hours and costs expended.[161] However, protestors must adhere to standards of reasonableness and maintain proper records to justify the award of attorneys' fees and costs.

Requests for the award of costs and fees must be reasonable in their nature and amount. The board will reduce the award if the government can articulate a reasoned analysis for rejection of certain hours and the board determines the hours to be excessive,[162] or the board determines sua sponte that the hours

---

[151] Bedford Computer Corp., GSBCA No. 9837-C, 89-2 BCA ¶ 21,827.

[152] *Id.*; Comdisco, Inc., GSBCA No. 9979-C, 89-2 BCA ¶ 21,613; Systemhouse Federal Sys., Inc., GSBCA No. 9908-P, 1989 GSBCA LEXIS 37; Pansophic Sys., Inc., GSBCA No. 10499-P, 1990 GSBCA LEXIS 88; Government Technology Serv., Inc., GSBCA No. 11477-P, 1991 GSBCA LEXIS 548; Berry Computer, Inc., GSBCA No. 12040-C, 1992 GSBCA LEXIS 589.

[153] 40 U.S.C. § 759(f)(5)(C) (1988).

[154] *Id.*; International Data Products Corp., GSBCA No. 10403-C, 93-2 BCA ¶ 25,606.

[155] Storage Technology Corp., GSBCA No. 9110-C, BCA ¶ 20,292.

[156] Bedford Computer Corp., GSBCA No. 9837-C, 89-2 BCA ¶ 21,827.

[157] *Id.*

[158] GSBCA No. 10781-C, 10642-P, 91-3 BCA ¶ 25,428. *See also* GSBCA Proposes Procedural Changes for ADP Protests, Contract Appeals, 58 Fed. Cont. Rep. 751, (Dec. 28, 1992).

[159] International Data Products Corp., GSBCA No. 10403-C, 93-2 BCA ¶ 25,606.

[160] Bedford Computer Corp., GSBCA No. 9837-C, 89-2 BCA ¶ 21,827.

[161] *See e.g.*, Digital Equipment Corp., GSBCA No. 9285-C, 89-3 BCA ¶ 22,181. Although not stated in the award, the decision of the board in this case equates to a jury verdict approach.

[162] NCR Compten, Inc., GSBCA No. 8829, 86-2 BCA ¶ 18,822.

expended are unreasonable.[163] The board will determine the amount of fee award under the "lodestar rule," that is, by multiplying the number of reasonable hours expended by a reasonable hourly rate.[164]

The timing and reason for incurring fees will impact a determination of their reasonableness. Fees and expenses incurred before the protest and after a decision may be allowed. For example, the time expended conferring with a protestor and attending a debriefing prior to filing of the protest have been allowed when the protest was anticipated because of perceived unfair treatment in the competition process.[165] Additionally, expenses incurred in preparation and defense of a motion for attorneys' fees and costs after a decision is rendered are recoverable.[166] Further, fees incurred pursuing a reconsideration or appeal are similarly recoverable.[167] Therefore, the determination of reasonableness is not as much a matter of timing as it is the purpose for which the fees and costs were expended.

The board will reject claimed fees that it deems excessive. For example, fees were denied where the protestor expended "nearly twelve hours" in filing and pursuing a motion for costs and attorneys' fees. The board concluded that no aspect of the litigation was particularly complicated or novel warranting the recovery requested.[168] In *Horizon Data Corp.*,[169] the protestor sought an award for 749.25 billed attorney hours. However, in a separate protest of the same procurement, the protestor expended only 312.6 billed attorney time. Horizon responded that its work product was superior to that of the other protestor and that it had assumed a lead position in the case, thereby justifying higher award. The board found no superior work product and concluded that the parties shared responsibility for the protest in roughly equal proportion. The board used the other protestor's billed hours as the "lodestar" amount against which Horizon's claim would be judged and reduced the award accordingly.

The hourly rates charged by attorneys generally will be approved if reasonable in relation to fees normally charged within the legal community. The board has declined to define reasonable attorneys' fees as those in line with the $75 limitation imposed by the EAJA.[170] In one case, the rates charged were deemed reasonable because they were in line with rates reported in *The American Lawyer Guide to Leading Law Firms*.[171] Additionally, in cases where attorneys billed $190[172] and $250,[173] the board has deemed these rates reasonable.

The board will not award fees to pro se litigants. The reasons for this rule deal not so much with whether costs are reasonable as they do with the nature of CICA. The Act has been construed correctly as a limited waiver of sovereign immunity and must be read narrowly. The statute provides potential reimbursement for the services of licensed attorneys only. Accordingly, where a protestor acts without those services, he or she will not recover.[174] Notwithstanding the rule on pro se litigants, protestors may recover the actual costs of services of in-house counsel as long as they are licensed attorneys.[175] Additionally, when more than one attorney works on a protest—whether in-house or retained—the board will allow recovery for all those involved.[176] The nature of the work performed, however, may impact whether fees are reasonable. In *DSI, Inc.*, the agency objected that attorneys should have used persons other than themselves to verify citations, ensure proper filing of the protest, and review docketing orders. The board expressly allowed fees for these tasks. Indeed, the board has indicated that it favors attorneys doing such tasks.[177]

---

[163] Pacificorp Capitol, Inc., GSBCA No. 10830-C, 92-3 BCA ¶ 25,117.

[164] U.S. West Information, Sys., Inc., GSBCA No. 9114-C, 98-2 BCA ¶ 21,774.

[165] Genasys Corp., GSBCA No. 8841-C, 87-2 BCA ¶ 19,726.

[166] Computer Consoles, Inc., GSBCA No. 8450-C, 87-1 BCA ¶ 19,440.

[167] *Id.*; Thorson, Co., GSBCA No. 8820-C, 87-1 BCA ¶ 19,405.

[168] Pacificorp, Inc., GSBCA No. 10830-C, 92-3 BCA ¶ 25,117.

[169] Horizon Data Corp., GSBCA No. 11018-C, 92-2 BCA ¶ 24,852.

[170] Storage Technology Corp., GSBCA No. 9110-C, 88-1 BCA ¶ 20,292.

[171] NCR Compten, Inc., GSBCA No. 8829, 86-2 BCA ¶ 18,822.

[172] U.S. West Information Sys., Inc., GSBCA No. 9114-C, 98-2 BCA ¶ 21,774.

[173] Electronic Sys. & Assoc., Inc., GSBCA No. 11719-P, 1992 GSBCA LEXIS 93.

[174] Computer Lines, GSBCA No. 8334-C, 87-1 BCA ¶19,403: Julie Research Laboratories, GSBCA No. 9693-C, 91-1 BCA ¶ 23,389.

[175] International Business Machines Corp., GSBCA No. 11605-C, 1992 BPD 220 (Aug. 21, 1992); U.S. West Information Sys., Inc., GSBCA No. 9114-C, 98-2 BCA ¶ 21,774.

[176] DSI, Inc., GSBCA No. 8726-C, 87-2 BCA ¶ 19,892.

[177] Digital Serv. Group, Inc., GSBCA No. 8866-C, 87-1 BCA ¶ 19,555.

Record Keeping

Generally, records of fees and costs must be sufficiently detailed to allow the government to test their accuracy, efficiency, or necessity.[178] In *Storage Technology Corp.*,[179] the attorneys' fees and costs were arranged by month. They listed, for each attorney working on the case, the day that the services were rendered, the nature of the service performed, and the total hours spent on the protest for each day. The board criticized this format as "not the best." In the board's view the format was not sufficiently detailed to show the time spent by attorneys on "each discrete activity." For example, when multiple activities were pursued, the bills did not break down the hours spent on each activity for each day. Nonetheless, the board found the records sufficient in the absence of a claim by the government that the hours were either excessive or the service rendered inappropriate.[180] On balance, records will be sufficient if the law firm certifies, by attorney, the nature of the work performed, the hours expended, and the hourly rate.[181]

Litigation Expenses

Recoverable litigation expenses generally include "those out of pocket expenses of providing a lawyer's services that are not covered by the hourly rate." Accordingly, courier service, fax transmissions, copying costs, travel expenses, computerized research, telephone charges, and even food costs are recoverable expenses.[182] For a time, the recovery of expert witness fees, in-house corporate salaries expended in pursuit of protests, and consultant fees were prohibited by the board's decision in *Sterling Federal Systems*.[183] However, the Court of Appeals for the Federal Circuit recently vacated that decision, deciding that fee shifting statutes limiting these awards in *courts* of the United States do not apply to awards made by boards. Boards of contract appeals, the court concluded, derive their broader authority to award costs from the CICA.[184]

Comparisons Between GAO and GSBCA Practices

While many similarities between the practices at the GAO and the GSBCA exist regarding the recovery of protest attorneys' fees and costs, certain comparisons should be highlighted.

Relative Stability of GSBCA Rules v. GAO Rules

Recovery of attorneys' fees and costs at the GAO has been more developmental than at the GSBCA. The rules promulgated in 1985 began with a fairly restrictive standard for recovery, requiring that protestors demonstrate unreasonable exclusion from the competition process. Promulgation of the 1988 rules presaged an expanded notion of recovery with deletion of the "unreasonably excluded" language. The GAO adopted what it called a case-by-case analysis. However, it fully endorsed the concept of recovery based on vindication of public interest through private attorneys general. Finally, in 1991, the GAO partially discarded its rules against recovery in the face of agency corrective action. In their place are rules permitting recovery when agencies unduly delay taking corrective action. By contrast, the GSBCA has adhered to the prevailing party standard for recovery from the beginning. While this has been more consistent, the GSBCA has never grasped the difficulties made for itself in some decisions by considering the "significant issue" problem apart from the "some benefit" portion of the test. Additionally, while the GSBCA appears occasionally to have flirted with the private attorney general concept as a basis for recovery, neither has it fully embraced that concept as a basis of recovery.

Thus, the GSBCA apparently has been more consistent. However, the GAO has demonstrated more willingness to alter the rules, make cleaner breaks with past practices, and fine tune its system rather than becoming bogged down in the morass of analysis and attempts at reconciliation evident at the GSBCA.

That the GAO has not embraced the *Hensley v. Eckerhart*[185] axioms in determining entitlement to attorneys' fees and costs—as has the GSBCA—is curious. The result has been the avoidance of analytic difficulties apparent in GSBCA decisions. The reasons for the GAO's different course are unclear. It presumably stems from the GAO's position as an arm of the legislature rather than—as in the case of the GSBCA—an arm of the executive. Apparently the GAO has

---

[178] Storage Technology Corp., GSBCA No. 9110-C, 88-1 BCA ¶ 20,292.

[179] *Id.*

[180] *Id.*

[181] NCR Compten, GSBCA No. 8829, 86-2 BCA ¶ 18,882.

[182] Storage Technology Corp., GSBCA No. 9110-C, 88-1 BCA ¶ 20,292; DALFI, Inc., GSBCA No. 8848-C, 88-2 BCA ¶ 20,782; Grammco Computer Sales, Inc., GSBCA No. 9049-C, 88-2 BCA ¶ 20,691.

[183] Sterling Fed. Sys., Inc., GSBCA No. 10000-C, 92-2 BCA ¶ 25,118.

[184] Sterling Fed. Sys., Inc. v. Goldin, 1994 U.S. App. LEXIS 1383; 39 Cont. Cas. Fed. (CCH) ¶ 76,615 (Fed. Cir. 1994).

[185] Hensley v. Eckerhart, 461 U.S. 424 (1983).

not seen itself constrained by the necessities implied at the GSBCA which views itself correctly as more in the nature of a court and accordingly constrained by limitations that stature entails. Whether the *Sterling*[186] decision will impact the GSBCA in matters other than the award of expert witness fees, consultant fees, and salaries of in-house personnel working on protests remains to be seen.

While the GAO almost routinely awards attorneys' fees and costs, the GSBCA remains much less inclined to follow the same approach. One view is that not only is the GSBCA more consistent, it also is more inclined to award attorneys' fees and costs when shown that full and open competition is not achieved.[187] However, if one takes the view that a violation of law or regulation in and of itself detracts from full and open competition and the broad purposes envisioned by the CICA, the evolution at the GAO appears to more fully implement those broad purposes which the CICA seeks to promote.

Awards Based on Relative Merits of Claims

Both the GAO and the GSBCA occasionally will analyze various claims of protestors and reject attorneys' fees and costs on those claims when the protestor did not succeed. The GAO and the GSBCA treat these claims similarly. Both will look to see if unsuccessful claims were so intertwined with successful claims as to warrant the award of fees and costs on all. Both also will reject costs and fees on claims that are severable and distinct from successful claims. Both evince a desire to avoid a second major litigation regarding the award of costs and attorneys' fees. However, when it does segregate fees and costs, the GSBCA demonstrates more willingness to go further and apply an upward or downward adjustment of the award based on the degree of success achieved by the protestor in relation to the relief requested.

Settlements and Corrective Action

Although settlements often occur at the GSBCA while corrective action occurs at the GAO, the reasons for the different treatment are unclear. A longstanding rule at the GAO was that when the agency took corrective action, the GAO had nothing to decide, resulting in dismissals of protests as moot. When the GAO made no decision on the protest, attorneys' fees and costs were not awarded. This provided incentive for agencies to correct their mistakes in the face of meritorious protests and avoid litigation costs. With the rule change in 1991—allowing the recovery of attorneys' fees and costs where the agency unduly delays in taking corrective action—the incentive remains to take corrective action and avoid litigation costs. By contrast, corrective action by the agency has not barred the recovery of costs and fees at the GSBCA.[188] Further, agencies have no disincentive to settle cases because, generally, the payment of costs and fees of the action will come from the judgment fund whether the case is settled or litigated. The practical result is that at the GAO, the agency can admit wrong in the face of meritorious protests, take corrective action, and avoid litigation costs. From an agency viewpoint, the same result occurs at the GSBCA because payment of costs and fees comes, not from the agencies' pockets, but from the judgment fund. For the protestor, however, the differences can be dramatic. If the agency admits wrong and takes timely corrective action in the face of a GAO protest, the protestor will recover no attorneys' fees and costs. However, if the agency does effectively the same thing in a GSBCA protest in the form of a settlement agreement, the protestor will recover costs and attorneys' fees. In GSBCA protests it is of no consequence to the protestor whether the money comes from the judgment fund or the agency.

Reasonableness of Fees and Costs and Record Keeping

The requirements at the GAO and the GSBCA for record keeping and the justification of claims for attorneys' fees and costs are roughly equivalent. Both forums apply the "lodestar" principle in determining the reasonableness of attorneys' fees. Neither forum gives deference to the EAJA when determining the reasonable hourly rate charged by attorneys, and neither awards fees to pro se litigants. In the past, both forums routinely have awarded the same kind of protest expenses, generally adhering to the out-of-pocket rule. The GSBCA attempted to chart for itself a different course from the GAO in the award of expert fees, consultant fees, and in-house corporate salaries expended in pursuit of protests. The federal circuit's action reversing the GSBCA's decision in *Sterling*, however, again aligns the GSBCA with the GAO in awarding such costs.

---

[186] *Sterling*, U.S. App. LEXIS, at 1383.

[187] Shnitzer, *supra* note 4.

[188] North American Automated Sys. Co., Inc., GSBCA No. 7976-P, 85-3 BCA ¶ 18,281.

Contesting Applications for Attorneys' Fees and Costs in Government Contract Litigation

Major Terry L. Elling
Trial Attorney
United States Army Contract Appeals Division

Major Scott L. Kilgore
Trial Attorney
United States Army Contract Appeals Division

Introduction

Losing a fiercely contested contract dispute is bad enough without then having to defend against an application from the winning party for attorneys' fees and costs under the Equal Access to Justice Act (EAJA).[1] This situation is particularly vexing when the government's decision to contest a case appeared to have a compelling basis in law and fact or when the opposing party refused a settlement offer, or perhaps even an offer of judgment,[2] that equals or exceeds the damages ultimately awarded.

The government may avoid all or some portion of requested fees and costs if it can show that its position in contesting the case was "substantially justified." Although assessing whether an agency is "substantially justified" is often difficult, the decisions of the courts and administrative tribunals provide some guidance. Further, when the circumstances justify extending a settlement offer to the other party, the agency may take measures to support its defense against a posttrial EAJA application.

A contractor that declines a settlement offer or offer of judgment eventually may regret that decision. If the contractor prevails on a dollar amount less than or substantially equal to the rejected settlement offer, it may lose its claim for fees and costs incurred after the date of the offer. Even if the contractor prevails in an amount that is greater than the offer, the government may succeed in reducing the EAJA recovery when the fees and expenses are out of proportion to the additional damages awarded. Additionally, the same case law provides the government a strong added incentive to investigate the facts surrounding a case and, when it appears that the government has some liability, to make a reasonable, well-documented settlement offer as early as possible.

This article will analyze three issues pertaining to the EAJA: (1) when a tribunal will conclude that a contractor/appellant qualifies as a "prevailing party" under the statute; (2) when a tribunal will conclude that the government's position was not "substantially justified"; and (3) what consideration a tribunal will extend to a rejected settlement offer or offer of judgment that equals or exceeds the contractor's recovery. The article presents the predominant federal cases in each area followed by representative cases from the various Boards of Contract Appeals applying the federal case law to government contract disputes. Lastly, this article will offer our observations and guidelines for government lawyers and other officials involved in resolving contract claims.

When Is the EAJA Applicant a "Prevailing Party?"

For an applicant to recover fees and costs under the EAJA, it must be a "prevailing party" in the litigation.[3] This is the first requirement for recovery under any EAJA application. If a party obtains relief on all, or nearly all, aspects of its complaint at trial, little question exists that it is a "prevailing party" and, therefore, will be entitled to its costs and attorney's fees under the EAJA. What happens when a party is only partially successful at trial?

The courts and agency tribunals have developed a broad standard for determining when a party has "prevailed." Success on only a relatively small portion of a claim may support a finding that a litigant has "prevailed" against the government and, thereby, is entitled to recovery under the EAJA. A party typically will be found to have met this threshold requirement absent a total loss.

---

[1] 5 U.S.C. § 504 (1988); 28 U.S.C. § 2412 (1988) [hereinafter EAJA]. Title 5, United States Code, § 504 applies to administrative adversary adjudications of tribunals such as agency boards of contract appeals, whereas 28 U.S.C. § 2412 applies to federal court rulings, including those of the United States Court of Federal Claims. Only individuals with a net worth of not more than two million dollars, business entities with a net worth of not more than seven million dollars and not more than 500 employees, and certain tax exempt organizations are eligible to apply for attorneys' fees and costs under the EAJA. 5 U.S.C. § 504(b)(1); 28 U.S.C § 2412(d)(2). The two statutes have no substantive differences for the purposes of this article.

[2] *See* FED. R. CIV. P. 68. *See infra* notes 35-49 and accompanying text for a detailed discussion of offers of judgment. An excellent summary of the utility of offers of judgment appears in Michels, *Settlement Offers: The Role Rule 68 Can Play,* TEX. B.J., Mar. 1993, at 224.

[3] *See* Hensley v. Eckerhart, 461 U.S. 424 (1983).

The Case of Hensley v. Eckerhart: *A "Generous" Standard*

Hensley v. Eckerhart[4] is the leading case in determining the status of a "prevailing party" and the amount of award that it is entitled to pursuant to an EAJA claim. In *Hensley*, the plaintiffs challenged the constitutionality of treatment and conditions on behalf of persons involuntarily confined at a state mental hospital. The United States District Court for the Western District of Missouri found for the plaintiffs on five of six allegations.[5]

Shortly after the verdict, the plaintiffs filed a request for attorneys' fees[6] totalling $225,000.[7] After reducing the number of hours worked by one attorney by thirty percent and declining to adopt a proposed enhancement factor to increase the award, the district court awarded plaintiffs a fee of $133,332.25. The defendants objected, claiming that the plaintiffs' fees application included hours spent in pursuit of unsuccessful claims.

On appeal, the United States Supreme Court initially found that the plaintiffs were "prevailing parties." Citing *Nadeau v. Helgemoe*,[8] the Court defined "prevailing parties" as those that "succeed on any significant issue in litigation which achieves some of the benefit sought in bringing suit." The Court held, however, that this "generous formulation" only brought plaintiffs across the statutory threshold for receiving fees and costs. The exact amount of those fees and costs remained to be decided in light of what was reasonable in relation to the degree of success enjoyed by the plaintiffs.[9]

Additionally, the Court recognized that if a plaintiff has achieved only limited success, compensating him or her for the entire amount of the legal fees incurred may lead to an excessive amount, even if those claims were not frivolous and were raised in good faith.[10] The most critical factor in determining the amount of attorneys' fees is the degree of success obtained during the merits of the case.[11] Although the Court declined to announce a precise standard or formula for making this type of determination, it allowed the district courts broad discretion to measure the degree of success in relation to the amount of the fee award. It concluded that "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."[12] Thus, when a plaintiff fails to prevail on a claim that is distinct in all respects from its successful claims, the hours spent on the unsuccessful claim may be excluded.

The *Hensley* ruling does not necessarily preclude the recovery of attorneys' fees when counsel advance alternate legal theories for recovery on the same claim. Litigants may, in good faith, raise alternative legal theories for recovery under the same claim. A court's failure to adopt or reach all of the specific grounds advanced by the party does not preclude recovery of fees incurred for their advancement if the plaintiff obtained the relief sought.[13]

Boards of Contract Appeals' Treatment of the "Prevailing Party" Issue

The various boards of contract appeals have applied the standard set forth in *Hensley* to determine who is a "prevailing party." As long as an appellant succeeds on any significant issue in the litigation and achieves some of the benefit that it sought in appealing the action, the boards of contract appeals will consider it a "prevailing party."[14]

The only situation short of a total loss where the boards will not find for the appellant on the "prevailing party" question,

---

[4] *Id.*

[5] *Id.* at 427.

[6] Although *Hensley* involved an application for attorneys' fees under the Civil Rights Attorney's Fees Act of 1976, 41 U.S.C. § 1988, the Court stated that the same standards applied to any case in which Congress intended to award attorneys' fees to a "prevailing party."

[7] This amount represented a total of 2985 hours worked, seeking payment at rates from 40 to 65 dollars per hour. Plaintiffs also requested that the fee be enhanced by 30% to 50%.

[8] 581 F.2d 275 (1st Cir. 1978).

[9] *Hensley*, 424 U.S. at 433. The Court further held that a claimant for fees and costs should submit detailed documentation on the number of hours expended in the case. When the documentation of hours is inadequate, courts may reduce the award accordingly.

[10] *Id.* at 436.

[11] *Id.*

[12] *Id.* at 440.

[13] If a private plaintiff or appellant does not raise an alternate theory of recovery until late in the case, however, the EAJA fees may be reduced or denied because the government's position in deciding to litigate a case—based on the plaintiff's original position—was substantially justified.

[14] Construction Mgmt. Assocs., ASBCA No. 39996, 91-2 BCA ¶ 23,956.

appears to be when a board has failed or declined to render a decision on the merits of an appeal. For example, this occurs when the underlying appeal has been withdrawn without prejudice pending correction of the defect—such as, a defective certification or a failure to submit a claim to the contracting officer.[15] An appellant may, pending correction of the defect, submit an application for attorneys' fees incurred up to that point. The boards have held that such applications are premature because the appellant has not yet succeeded on any significant aspect of the litigation or received the benefit sought.[16]

The EAJA applicants generally will meet the "prevailing party" requirement if they have prevailed on any aspect of the case. The tribunal will then find the government liable for some amount of fees and expenses, as reduced to reflect the degree of the applicant's success and other factors, unless the government's position was substantially justified.

Was the Government's Position "Substantially Justified?"

A litigant that has met the threshold requirement of establishing that it has prevailed against the United States will recover some portion of its attorney's fees and costs "unless [the court or administrative tribunal] finds that the position of the [United States or agency] was substantially justified or that special circumstances make an award unjust."[17] The government bears the burden of proving that its position was substantially justified.[18] As developed by the courts and boards, the standard for determining when the agency has "substantially justified" its position is considerably narrower than the standard for determining when a private party has "prevailed."

The "position of the United States" includes not only the position taken by the government in the course of an adversarial proceeding, but also the underlying agency action or inaction that gave rise to the claim.[19] In the government contract setting, the agency action or inaction at issue usually will include the consideration given to the contractor's claim and issuance of the final decision.[20]

Private litigants urge that to be "substantially justified," the United States position must have been more than merely reasonable or made in good faith; the government must show that its position had a high probability of success. Conversely, the government maintains that its position must have had only "some substance and a fair possibility of success."[21] The United States Supreme Court has attempted to strike a middle ground in interpreting the plain language of the statute.

Justice Scalia, writing for the majority in *Pierce v. Underwood*,[22] held that "substantially justified" means neither "more than merely undeserving of sanctions for frivolousness," nor does it mean "justified to a high degree." Rather, it means "'justified in the substance or in the main'—that is, justified to a degree that could satisfy a reasonable person."[23]

Pierce involved a statute which authorized the Department of Housing and Urban Development (HUD) to implement a subsidy program to offset rising utility and property tax expenses experienced by the owners of government-subsidized housing. The plaintiffs maintained that the statute was mandatory in nature, and filed suit to compel implementation of the program. The government contended that the statute was permissive in nature and that the owners were not entitled to the subsidy program. The Supreme Court affirmed that the

---

[15] *See* Victor Wilburn Assocs., DOTCAB No. 1863, 87-3 BCA ¶ 19,978; Construction Mgmt. Assocs., 91-2 BCA ¶ 23,956.

[16] Construction Mgmt. Assocs., 91-2 BCA ¶ 23,956. At least one board, the Department of Transportation Board of Contract Appeals (DOT BCA), has held that an appellant did not qualify as a "prevailing party" where the appellant ultimately recovered an amount *less* than that found by the contracting officer in his final decision. *See* Tom Shaw, Inc., DOTCAB No. 2105-E, 90-3 BCA ¶ 23,247. The DOT BCA reasoned that the appellant was not a "prevailing party" under the *Hensley* standard because it had not obtained any benefit in appealing the final decision. However, this situation may be more appropriately resolved under the determination of whether the government's litigation position was "substantially justified." *See infra* notes 17-34 and accompanying text.

[17] 28 U.S.C. § 2412(d)(1)(A) (1988); 5 U.S.C. § 504(a)(1) (1988).

[18] Pierce v. Underwood, 487 U.S. 552 (1988); Kos Kam, Inc., ASBCA No. 34,684, 88-3 BCA ¶ 21,049.

[19] *See* 28 U.S.C. § 2412(d)(1)(c)(2)(D) (1988); 5 U.S.C. §504(b)(1)(E) (1988).

[20] The court or board may examine several phases of a dispute to determine the extent of any EAJA award. A tribunal may disallow all fees and expenses after a certain date if it finds that the government changed its position from one not substantially justified to a substantially justified position, or may allow fees for those phases or aspects of a case in which it finds the government's position to be substantially justified and disallow fees for those phases in which it was not substantially justified. *See, e.g.*, Hart's Food Servs., ASBCA No. 30756R, 93-1 BCA ¶ 25,524, where the board allowed a substantial EAJA recovery for fees and costs incurred to contest entitlement but disallowed recovery in connection with the quantum phase of the dispute because it found the government's position to be substantially justified.

[21] *See Pierce* 487 U.S. at 563-64.

[22] *Id.* at 563-68. This opinion also provides a good example of Justice Scalia's much noted position on limiting the use of purported legislative history to interpret statutes.

[23] *Id.* at 565-66.

district court did not abuse its discretion in finding that the government's position was not substantially justified in light of the record in the case, including additional statutory language which indicated that the program was intended to be mandatory.[24]

The *Pierce* standard can be difficult for government officials to apply prospectively to resolve whether the position they adopt in denying a claim will be viewed as "substantially justified" by a tribunal many months later. Though some situations are relatively simple to evaluate—such as, when the weight of legal precedent or the particular set of facts dictate a certain result—many decisions are made when only limited information is available. Attempts to make the best business decision whether to litigate may be complicated further when the contractor is unclear as to the legal basis for its claim or does not disclose all relevant information.

The various courts and boards of contract appeals decisions demonstrate that to be "substantially justified" the government must have rather compelling legal and factual bases in deciding to litigate a case. The government is unlikely to convince the board that its position was substantially justified when its opposition to an EAJA application merely restates arguments rejected by a board when made at trial.[25]

The boards have found, however, substantial justification in appropriate cases where additional factors appear which justified the government's position. In *R.J. Crowley*,[26] the ASBCA disallowed attorney's fees where the government prevailed at hearing before the board, but the United States Court of Appeals for the Federal Circuit (Federal Circuit) reversed the decision. The ASBCA had rendered a unanimous decision for the government and also had denied a request for reconsideration. Because the case involved a "close question" of whether the contract ambiguity at issue was patent or latent in nature, the board denied recovery of EAJA fees relating to the original hearing and appeal.[27] In *Ace Services, Inc.*,[28] the GSBCA found the government's position to be substantially justified and denied an EAJA application. In *Ace*, the government predicated its decision to litigate a contractor's claim for wage increases mandated by the Department of Labor on a *General Services Acquisition Regulation* (*GSAR*, the GSA's *FAR* Supplement) that allocated the risk of such increases to the contractor, which the GSBCA had found to be reasonable and enforceable in two prior cases. The General Accounting Office (GAO) subsequently decided that the regulation was not enforceable and was inconsistent with a *FAR* clause that postdated the GSAR. On these facts, in a case involving a matter of first impression, the GSBCA held that the government was substantially justified.[29]

Absent a compelling scenario such as that presented in *R. J. Crowley* or *Ace Services, Inc.*, the government is unlikely to prevail on the substantial justification issue. Even winning the case at hearing, but then losing on appeal, does not avoid EAJA fees and costs. In *Community Heating & Plumbing, Inc. v. Garrett*[30] for example, the Federal Circuit reversed an ASBCA decision denying contractor claims because accord and satisfaction concerning the claims existed. Even though the government originally had prevailed, the Federal Circuit held that the contractor was entitled to an EAJA recovery. Hence, even a victory before the board or the Court of Federal Claims is no guarantee that the government is substantially justified.

Government practitioners should be aware that the boards occasionally will find the government's position substantially justified when the government's decision to contest a case is based largely on a contractor's refusal or inability to provide documentation that is necessary to evaluate the claim. In *Olson's Mechanical & Heavy Rigging*,[31] the Corps of Engi-

---

[24] *Id.* at 570-71.

[25] For example, in Hart's Food Servs., ASBCA No. 30756R, 93-1 BCA ¶ 25,524, the Armed Services Board of Contract Appeals (ASBCA) rejected the government's argument that its position that a contractor was not entitled to a refund of deductions based on deficiencies noted in the course of weekend inspections was substantially justified. At hearing, the ASBCA found that the government had failed to follow the contract's inspection procedures and also found no correlation between the deficiencies noted and the amounts of deductions taken. Given these findings of fact, and noting that the government was presenting essentially the same arguments that it had presented previously, the ASBCA concluded that the government's position was not substantially justified. Similarly, in Quality Diesel Engines, Inc., GSBCA No. 12385-C (1 July 1993), 93-__ BCA ¶__, the General Services Board of Contract Appeals (GSBCA) found no substantial justification where the government reiterated an argument made at hearing which the board had found to be based on a "less than reasonable" interpretation of certain contract requirements.

[26] ASBCA No. 34872, 93-3 BCA ¶ 26,014.

[27] However, the board did award EAJA fees incurred for the period of time following the Federal Circuit's reversal. The parties subsequently settled all issues except the amount of any EAJA recovery, and the board concluded that the government's position in not stipulating to the contractor's right to pursue an EAJA application or to agree to a consent judgment was not substantially justified.

[28] GSBCA No. 12067-C, 93-2 BCA ¶ 25,727.

[29] 93-2 BCA at 128,012. *See also* R & B Bewachungsgesellschaft GmbH, ASBCA No. 42221, 94-1 BCA ¶ 26,315.

[30] 2 F.3d 1143 (Fed. Cir. 1993).

[31] ENG BCA Nos. 5260-F, 5293-F, 90-1 BCA ¶ 22,472.

neers Board of Contract Appeals found that the government's decision to oppose differing site condition claims had a "reasonable basis in law and fact" and denied a request for EAJA fees and costs. Critical to the board's ruling was that the contractor in *Olson's* failed to provide a clear statement of the grounds for its claim and also failed to submit adequate documentation of the increased costs caused by the differing site conditions. Boards will scrutinize closely the facts of each case to evaluate the merits of a government allegation that a contractor had unreasonably failed to support its claim and, concurrently, whether the government's contention that more information was needed is meritorious. In *AST Anlagen und Sanierungstechnik GmbH*,[32] the ASBCA found that the government was not justified in a total denial of damages when a contractor permitted an auditor to review documents substantiating portions of its claim only a few days before trial. In *AST*, the board found that the government's proffered rationale for disputing damages to be unreasonable, noting that a relatively complete audit of the claim had been performed at an earlier stage of the case.

Boards of contract appeals also may find for the government if a contractor advances a new theory of recovery at a late stage in the proceedings, when the government has no meaningful notice or opportunity to consider the new grounds for relief. In *Yamas Construction Co.*,[33] the ASBCA denied recovery of any EAJA fees or costs largely because the contractor did not clearly articulate a differing site condition theory, on which it prevailed, for the first time in its posthearing brief. The Department of Interior Board of Contract Appeals also has denied an EAJA application in its entirety where, *inter alia*, a specific industry practice which served as the basis for the contractor's recovery was presented for the first time at hearing.[34]

In determining whether an agency's position was substantially justified, boards will consider whether the contractor unreasonably rejected a settlement offer or offer of judgment. Unlike the foregoing factors bearing on substantial justification, the government has greater control over whether and when to attempt to settle a case. The remainder of this article discusses the utility of settlement offers and offers of judgment in forestalling substantial EAJA recoveries.

The Effect of Offers of Judgment and Settlement Offers

Offers of Judgment

Federal Rule of Civil Procedure 68[35] (Rule 68) provides for offers of judgment. Rule 68 allows a party defending against a claim to serve on an opposing party—in writing and within ten days before trial—an offer to allow judgment to be taken against it for a specified sum, including costs accrued up to that date.[36] If the offer is refused, the offer cannot be admitted into evidence, except in a proceeding to determine costs.[37] If the offeree rejects the offer, it must pay costs incurred after the submission date of the offer, if the final judgment is not more favorable.[38]

The rationale behind Rule 68 is simple; it encourages settlement and attempts to avoid litigation.[39] Both parties must evaluate their respective positions—including the risks and costs of litigation—and balance the likelihood of success at trial.[40] Once a proper offer of judgment is made, its potential effects on the course of further litigation cannot be underestimated. A party that rejects a reasonable offer puts itself at substantial risk of emerging from trial with a net loss when costs and attorney's fees are factored into the judgment of the tribunal.

Rule 68 merely requires that an offer of judgment be in writing and include an offer to allow judgment to be taken against the offering party for a specified sum, with costs then accrued.[41] The courts, however, have outlined more specific criteria that must be included in the offer for it to operate as a bar to costs incurred after its submission to the opposing party.

Marek v. Chesny[42] is the seminal case dealing with Rule 68 and the issue of what constitutes a proper offer of judgment, in the context of recovering attorneys' fees under fee shifting

---

[32] ASBCA No. 42118 (31 Mar. 1993), 93-1__ BCA ¶__.

[33] ASBCA No. 27,336, 87-2 BCA ¶ 19,695.

[34] Hal Allred, IBCA No. 2683-F (15 Nov. 1989), 89-__ BCA ¶__.

[35] FED. R. CIV. P. 68.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Marek v. Chesny, 473 U.S. 1, 5 (1984).

[40] *Id.*

[41] FED. R. CIV. P. 68

[42] *Marek*, 473 U.S. at 1. *Marek* dealt with recovery of attorneys' fees under a similar fees shifting statute under the Civil Rights Act, 42 U.S.C. § 1988.

statutes such as the EAJA. *Marek* involved a lawsuit in federal court by the father of an individual who was shot and killed by police while they were responding to a domestic disturbance call. Prior to trial, the plaintiff refused the government's offer to settle the case for $100,000, including costs and attorney's fees. At trial, the court awarded plaintiff a total of $60,000. The plaintiff then sought to recover $171,692.47 in costs and attorney's fees because it was a "prevailing party."

The defendants contested the award of attorneys' fees on the grounds that they had made a proper offer of judgment under Rule 68. The plaintiff countered that, because the offer made no mention of costs, it could not determine whether costs were included and consequently could not form an accurate assessment of its litigation risk.

The Supreme Court examined the requirements for an offer of judgment under Rule 68 and concluded that the government had made a proper offer. The Court considered whether Rule 68 expressly required offers of judgment to be bifurcated; first, into damages and, secondly, into costs then accrued. Focusing on Rule 68's underlying rationale of encouraging settlements and avoiding litigation, the Court held that the key component of this portion of Rule 68 was that the offer allow judgment to be taken against the offering party for both damages caused by the challenged conduct and the costs then accrued.[43] The plain language of Rule 68 requires that offerors include costs in the offer. Thus, the offeror can make the offer, either by (1) stating that the costs then accrued are included in the sum offered, or (2) not mentioning costs at all, whereby the tribunal will presume that costs then accrued are included in the offer. "As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid."[44] The Court also held that postoffer costs may not be factored into the judgment when determining whether the amount of the judgment exceeded the offer.[45]

The Supreme Court's holding in *Marek* indicates that courts should not be overly concerned with the form of an offer of judgment under Rule 68 provided that the offer is timely, in writing, and allows judgment to be taken against the offering party. *Marek* further indicates that counsel must be careful not to imply that the offer does not include costs then accrued.

The Federal Rules of Civil Procedure—including Rule 68—do not directly apply to board proceedings.[46] The Veterans Administration Board of Contract Appeals (VABCA) appears to be the only board that has expressly addressed offers of judgment in disallowing or reducing the amount of EAJA fees. See *Bridgewater Construction Corp.*,[47] where the VABCA declined to award any fees and costs incurred after the date the government presented an offer of judgment. The government's prehearing offer in *Bridgewater*, a copy of which was filed with the board under seal, totalled $25,000, including $5000 in attorney's fees, which substantially exceeded the board's award of about $10,000 in damages.[48]

No reason exists as to why all boards should not be guided by the principles underlying Rule 68 in deciding EAJA applications.[49] Although the boards have not universally embraced Rule 68 offers of judgment, they have widely addressed the similar situation where an appellant has rejected a government settlement offer that was roughly equal to or greater than the final recovery.

The Effect of Settlement Offers

As with offers of judgment, tribunals will scrutinize rejected compromise offers in determining whether the government's position was justified and whether the party which

---

[43] *Id.* at 6.

[44] *Id.*

[45] *Id.* at 7.

[46] Each board of contract appeals has its own procedural rules. Although the federal rules are not binding in board proceedings, they are applied to provide guidance in situations where the boards' specific rules are not dispositive. *See* Holk Dev. Inc., ASBCA No. 43047 (7 Dec. 1993), 93-__ BCA ¶__ (ASBCA applied Rule 9(b) in denying a motion to dismiss); Dae Lim Ind. Co., ASBCA No. 28416, 87-3 BCA ¶ 20,110 (ASBCA guided by Rule 60(b) in granting a motion to reopen proceedings for the purpose of taking additional evidence).

[47] VABCA No. 2956E, 92-3 BCA ¶ 25,064 at 99,654 (citing *Marek*, 473 U.S. at 1; Kos Kam, Inc., ASBCA No. 34684, 88-3 BCA ¶ 21,049).

[48] The ASBCA declined to adopt Rule 68 in Toombs & Co., ASBCA No. 39152, 91-1 BCA ¶ 23,403, where the government requested a ruling that Rule 68 should be applied to any recovery by appellant to enable the government to recover *the government's* costs where appellant had rejected an offer of judgment. The board's rationale in *Toombs* was that it was unfair to impose government recovery of costs on appellants without prior notice to litigants in the published rules of the board. This situation is distinguishable, however, from the situation where a *private party* is seeking recovery of fees and costs.

[49] The current practice of the United States Army Contract Appeals Division (Division) is to make settlement offers rather than offers of judgment in cases pending before the ASBCA. No express authority exists for any agency other than the Department of Justice to fund settlements via the permanent indefinite judgment fund. 31 U.S.C. §1304 (1988). For this reason, and because no Department of the Army policy on this issue currently exists, the Division's position is that avoiding unilateral offers of judgment as a mechanism to reach settlement is preferable. The Division does take the prospect of an EAJA recovery into account in evaluating the advisability and timing of government offers to settle disputes.

rejected the offer acted reasonably. The ASBCA has noted that a rejected settlement offer that is comparable to an appellant's ultimate recovery "may be probative of the reasonableness of attorney's fees and other expenses incurred after the applicant has declined to accept the settlement."[50] A rejected offer may defeat or reduce an EAJA recovery even if the final decision is somewhat higher than the offer amount, if the attorneys' fees are disproportionately higher than the additional amount recovered.[51]

A significant body of case law indicates that boards consistently will examine rejected settlement offers to determine the reasonableness of attorneys' fees and costs, and will reduce the award of fees and costs in appropriate cases. In *Sage Construction Co.*,[52] a contractor seeking recovery of $125,027 in delay damages rejected government prehearing offers to settle various elements of the claim totalling $46,055 plus interest. These offers were incorporated into unilateral contract modifications and paid by the government. Sage Construction ultimately recovered $48,760 plus interest and thereafter sought recovery of $22,031 in attorneys' fees and costs, most of which were incurred after rejection of the government's offers. After observing that "[r]elatively speaking, this was a small victory for Sage at great expense," the board proceeded to award only $4000 as reasonable fees and costs.[53]

In *AST Anlagen-und Sanierungstechnik GmbH*,[54] the ASBCA reduced EAJA fees and expenses from $93,700 to $8383 because of, *inter alia*, appellant's unreasonable rejection of a prehearing settlement offer that actually exceeded the contractor's ultimate recovery. Similarly, in *Charles G. Williams Construction, Inc.*,[55] the ASBCA reduced an EAJA recovery by sixty-five percent where the appellant prevailed only on part of a claim and had rejected a settlement offer that was about $660 greater than the ultimate recovery.

Case law also demonstrates that the government must carefully document the nature and timing of all settlement offers. Boards have placed little or no weight on government assertions that a private party unreasonably rejected a settlement offer when doubt exists as to the terms of an alleged offer or as to the authority of the government representative to extend the offer. In *Environmental Protection & Consulting, Inc.*,[56] the ASBCA did not disallow fees incurred after the date on which government counsel made an oral settlement offer that was close in amount to the board's award. The board noted that the government could not produce any contemporaneous documentation of the offer and an affidavit submitted by appellant's counsel stated that the government attorney specifically represented that he did not have authority to make a binding offer.[57]

For the government to use any information—including rejected settlement offers—to prove that its position was substantially justified, it must be part of the "administrative record."[58] Although the contents of the "administrative record" vary, some boards have indicated that a lack of written evidence establishing the nature of the rejected offer will preclude the government from introducing evidence of the offer for the first time in response to an EAJA application. In *AST Anlagen-und Sanierungstechnik GmbH*,[59] the ASBCA stated that it could not consider affidavits attesting to an oral prehearing offer which were introduced for the first time in the government's response to the EAJA application.[60] In *Coffey Construction Co.*,[61] the VABCA ruled that the government was barred from presenting a written rejected settlement offer in its EAJA response because it could not be considered to be part of the underlying administrative record. The offer in *Coffey* had not been filed with the board pursuant to its practice of accepting such offers under seal, to be opened only in the

---

[50] Fiesta Leasing and Sales, Inc,, ASBCA No. 29311, 90-2 BCA ¶ 22,729 at 114,085 (citing *Kos Kam, Inc.*, 88-3 BCA ¶ 21,049 at 106,322; *Marek*, 473 U.S. at 1).

[51] *Id.*

[52] ASBCA No. 34284, 92-1 BCA ¶ 24,493.

[53] *Id.* at 122,240.

[54] ASBCA No. 42118 (31 Mar. 1993), 93-__ BCA ¶__.

[55] ASBCA No. 42592, 93-3 BCA ¶ 25,912.

[56] ASBCA No. 41264, 91-3 BCA ¶ 24,311.

[57] *Id.* at 121,497-98. *See also* Quality Diesel Engines, Inc., GSBCA No. 12835-C (1 July 1993), 93-__ BCA ¶__, where the GSBCA placed no weight on an alleged prehearing settlement offer because the government did not reduce it to writing and because the appellant disputed the terms of the offer.

[58] *See* 5 U.S.C. 504(a)(1) (1988).

[59] ASBCA No. 42118 (31 Mar. 1993), 93-__ BCA ¶__.

[60] However, the board did cite the contractor's unreasonable rejection of the settlement offer as a factor in reducing the amount of the EAJA award.

[61] VABCA No. 3473E (14 Dec. 1993), 93-__ BCA ¶__.

event of a subsequent EAJA application.[62] Although the boards' reasoning in both *AST-Anlagen* and *Coffey Construction* is suspect, prudence would seem to dictate that measures should be taken to ensure that a rejected offer is a part of the administrative record, such as by filing the offer with the board under seal.

To prove the reasonableness—that is, substantial justification—of the government's position, counsel should consider whether a settlement offer should remain open throughout the course of the dispute. If the government expressly or impliedly withdraws a compromise proposal, the board may hold that the government's conduct had the effect of thereafter forcing the contractor to litigate.[63] This was the finding in *Universal Development Corp.*,[64] where the GSBCA declined to disallow any EAJA recovery even though the ultimate award was less than a settlement proposal made by the contracting officer several years before. In *Universal Development*, the contracting officer subsequently rejected any government liability in his final decision and the contractor's only recourse was to litigate the claim.

A board will examine the government's position at every stage of a dispute to assess whether the government was substantially justified and, further, whether the contractor's degree of success in proceeding with litigation was proportionate with the amount of legal fees and costs incurred. This provides the government with a strong incentive to extend compromise offers at as early a stage as possible when the facts and circumstances indicate settlement to be the prudent course. Hence, every effort must be made to investigate claims as soon as possible and, if appropriate, recognize liability early in the case. This conclusion is supported by cases such as *Decker & Company*,[65] where the EAJA fees were disallowed where appellant's ultimate recovery was the same both in amount and in rationale as the compromise offered by the contracting officer in his final decision.[66]

Conclusion

From the case law development to date, the following conclusions and suggestions are offered for practitioners involved in resolving government contract disputes:

- Contracting personnel and legal counsel at the local or command level must develop the facts surrounding a dispute as early and as completely as possible. Consider documenting all settlement attempts prior to, or in the course of, issuing the contracting officer's final decision, and ensure that litigation counsel is made aware of these offers. This can prevent recovery of all fees and costs under the EAJA if the original assessment of the claim is found to be compelling.

- Where a claim cannot reasonably be evaluated because of insufficient supporting information, note all these shortcomings and request additional information from the contractor. Request any needed additional information as early possible. If the contractor refuses, note its refusal in the final decision. An unreasonable refusal to provide this documentation may "substantially justify" the government's decision to contest a case.

- Carefully document all settlement offers. When appropriate, consider filing a copy of the offer under seal with the tribunal. Any doubt or ambiguity as to the existence of an offer, authority of the attorney to make the offer, or other terms of the offer, probably will be resolved against the government.

- Consider making a formal settlement offer or offer of judgment prior to trial when appropriate. Correspondence accompanying the offer should advise the contractor that the government will assert a rejection of the offer in any subsequent proceedings for recovery of attorneys' fees and costs.

- Where a contractor's ultimate recovery is substantially similar to a settlement offer or offer of judgment or where a board's rationale for deciding in the contractor's favor is similar to the government's prehearing position, contest any EAJA application vigorously.

Forestalling EAJA recoveries should not be the overriding factor in government litigation. The decision to litigate or to settle must be based on the individual merits of each case. In cases involving small businesses eligible to recover fees and costs under the EAJA, however, potential recovery of these amounts provide some additional considerations that bear on the timing and nature of any settlement offers or offers of judgment the government might decide to make.

---

[62] The authors strongly disagree with the VABCA's holding in *Coffey* and with the ASBCA's holding in *AST-Anlagen*. In the absence of any guidance as to what constitutes the "administrative record," rejected settlement offers reflected in communications between government attorneys and contractors should be considered part of the record. Further, assuming that rejected offers are not part of the administrative record, no reason exists as to why they should not be considered as relevant on the issue of whether the contractor's incurrance of fees and costs after the date of the offer are reasonable.

[63] Counsel must evaluate each case to determine whether the tactical advantage of setting a deadline for acceptance of an offer outweighs the possible disadvantage of losing the opportunity to raise the rejected settlement in contesting a posthearing EAJA application. Arguably, the government could reasonably set the start of the hearing as the deadline for acceptance of a settlement offer without prejudicing its ability to contest a subsequent EAJA application. In this situation, the contractor, not the government, has forced the case to proceed to hearing.

[64] GSBCA No. 12174-C, 93-2 BCA ¶ 25,836.

[65] ASBCA No. 39238, 92-2 BCA ¶ 24,815.

[66] Exercise caution in acknowledging government liability in a final decision. The Federal Circuit recently held that such acknowledgments constitute evidentiary admissions against interest that are admissible against the government at trial. *See* Melvin Wilner v. Garrett, 994 F.2d 783 (Fed. Cir. 1993). The court's judgment in *Wilner* was vacated and the case is pending a rehearing en banc. Apparently, this problem could be avoided if the terms of any acknowledgement of liability were contained in a settlement offer forwarded by a government attorney, which presumably would be inadmissable under Federal Rule of Evidence 408.

The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field

Lieutenant Commander Stephen R. Sarnoski, JAGC, USNR
Office of The Judge Advocate General, Department of the Navy
International Law Division

When a modern armed force takes to the field, it often brings with it many civilian support and auxiliary personnel. Some of these civilian support and auxiliary personnel accompany the armed force at its invitation, for example, to provide needed technical services. Others, such as newspaper correspondents and reporters, although not specifically "invited" by their hosts, are necessary concomitants of free societies, and, to the extent possible, must be protected from harm. Because of the nature of their activities, these civilians frequently risk capture by the enemy during the conduct of hostilities. Therefore, understanding their status under the law of armed conflict, as well as appreciating the nature of the rights and obligations that adhere to these individuals, is important. To further this understanding, this article summarizes existing international law[1] pertaining to persons serving with or accompanying armed forces in the field.

Every person who falls into enemy hands must have some status under international law. These persons are either prisoners of war and, therefore, are protected under the Geneva Convention of 12 August 1949 Relative to the Treatment of Prisoners of War (Third Geneva Convention of 1949), civilians covered by the Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention of 1949), or members of the medical professions within the armed forces, covered by the Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[2] (First Geneva Convention of 1949). "There is no intermediate status; nobody in enemy hands can be outside the law."[3]

Protocol I Additional to the Geneva Conventions of 12 August 1949[4] (Protocol I), provides several relevant definitions differentiating members of the armed forces from civilians. Article 43 of Protocol I defines the armed forces of a party to a conflict as follows:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.[5]

International law further differentiates between combatant and noncombatant belligerents. In case of capture by the enemy, these parties to an armed conflict both have the right to be treated as prisoners of war.[6] Article 50 of Protocol I further defines a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2),

---

[1] Unless otherwise stated, the United States has signed and ratified all treaties and conventions referred to and they remain currently in force.

[2] Collectively known as the Geneva Conventions of 12 August 1949, the four conventions are the Geneva Convention for the Protection of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention of 1949]; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention of 1949]; the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Third Geneva Convention of 1949]; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention of 1949].

[3] PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA 51 (1958) (emphasis omitted).

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 1 [hereinafter Protocol I] was adopted at a diplomatic conference held in Geneva, Switzerland, on June 10, 1977 and was opened for signature on December 12, 1977. As of April 12, 1979, 62 states had signed the protocol. The United States signed the protocols on December 12, 1977, subject to three understandings (the details of which are not relevant here), but has never formally ratified them.

[5] *Id.* art. 43, para. 1.

[6] *See* 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Law and Customs of War on Land, art. 3, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, T.S. 539, Bevans 631 (1910) [hereinafter Hague Convention IV of 1907].

(3) and (6) of the Third Convention and in Article 43 of this Protocol."[7] To avoid confusion over the proper handling of persons whose status may be in question, Article 50 concludes, "[i]n case of doubt whether a person is a civilian, that person shall be considered a civilian."[8]

The status of persons serving with or accompanying an armed force in the field does not fit neatly into either of the above definitions of members of the armed forces or civilians. These persons do not wear the distinctive uniform of members of the armed forces and typically are not subject to military discipline. Nor are they purely civilians who, by the hand of fate, find themselves in the midst of an armed conflict in which they neither desire, nor are expected, to play an active role. Precisely where is the line drawn between civilian support of the armed forces and military participation in an ongoing conflict? Is there a third category of individual, somewhere between that of civilians and belligerents into which nonmilitary persons serving with or accompanying an armed force may be placed? The International Committee of the Red Cross (ICRC) Conference of Government Experts in 1971 carefully considered these questions when formulating its draft proposals for the protocols to the existing Geneva Conventions.

Although the distinction between belligerents and civilians was fundamental to the evolution of humanitarian international law applicable to armed conflicts prior to the development of the 1977 Protocols to the Geneva Conventions of 12 August 1949, no clearly articulated, preexisting definition of the term "civilian population" existed in international law.[9] The language in Article 50 is, therefore, exclusive in its scope. Persons falling outside the enumerated categories of individuals, referring to Article 4A(1), (2), (3), and (6) of the Third Geneva Convention of 1949, are civilians. This includes persons serving with or accompanying the armed forces, as described in Article 4, paragraph (4).[10] In its initial proposals, the ICRC attempted to exclude from the definition of the civilian population those who directly participated in "military operations," while including within the scope of the definition of the term civilian population those persons whose activities contributed to the "war effort."[11] The draft was rejected, however, out of fear that the language would, in effect, create a new category of persons who were neither combatants nor civilians.[12] This result would not have fit well with the ICRC's proposals for relief action in which the designated beneficiaries of relief were the same persons who were the beneficiaries of the protection against the effects of an attack.[13] Moreover, whether a supervising Protecting Power

---

[7] Article 4 of the Third Geneva Convention of 1949, *supra* note 2, of 12 August 1949 provides, in pertinent part, as follows:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> . . .
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

[8] Protocol I, *supra* note 4, art. 50, para. 1.

[9] BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS, THE HAGUE 260 n.1 (1982). *See* 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 293 (1949) (citing ICRC, Conference of Government Experts, Doc. III, at 17 (1971)). The ICRC had attempted to define, however, the civilian population in its 1956 Draft Rules. *See id.* at 50 (Art. 4)).

[10] *See infra* notes 19, 20 and accompanying text.

[11] The ICRC defined "military operations" as "movements of attack or defense by the armed forces" and "war effort" as "all national activities which by their nature or purpose would contribute to the military defeat of the adversary." *See* Summary Reports of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts III (CDDH/III/SR), Geneva, No. 2, para. 9 (1974-77).

[12] *See* BOTHE ET AL., *supra* note 9, at 294 n.8 (citing ICRC, Conference of Government Experts Report, vol. I, para. 3.117 (1972)).

[13] ICRC draft 1973, Art. 60; CDDH/III/SR. 5, para. 34. *See also* Protocol I, *supra* note 4, art. 70, entitled "Relief Actions."

would long have tolerated the distribution of relief supplies to those civilians who accompanied and served with the armed forces remains doubtful.[14]

The result of this discussion and controversy with regard to the definition of civilian persons was the present language of Article 50. Persons serving with or accompanying the armed forces are civilians who, by virtue of their peculiar status with regard to the parties to an armed conflict, are afforded privileged treatment as prisoners of war on falling into enemy hands. Despite that special treatment, these individuals are, for all other purposes, mere civilians subject to all of the other provisions of the Geneva Conventions of 1949 and relevant Protocols.[15]

As a result of their peculiar status, modern international law found it necessary to make special provisions concerning the status of persons serving with or accompanying armed forces in the field, at least with regard to their status as prisoners of war on falling into enemy hands. Thus, as early as 1907, Article 13 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV provided that:

> Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are *entitled to be treated as prisoners of war,* provided they are in possession of a certificate from the military authorities of the army which they were accompanying.[16]

Each of the Geneva Conventions of 12 August 1949 considered the subject important enough to address separately. Similar to Hague Convention IV of 1907, the First Geneva Convention of 1949 specified that persons who accompanied the armed forces without actually being members—such as, civil members of aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces—were subject to the protections of the Convention when sick or wounded, provided that they had received authorization from the armed forces which they accompanied.[17] This language was repeated verbatim in the Second Geneva Convention of 1949 relative to persons wounded, sick, or shipwrecked at sea.[18] Finally, and most importantly, Article 4, paragraph A, section (4) of the Third Geneva Convention of 1949 included the following language within its definition of the categories of persons entitled to be treated as prisoners of war on falling into the hands of the enemy:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, *provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.*[19]

This provision is a revised and updated version of Article 81 of the 1929 Geneva Convention which was based on Article 13 of the 1907 Hague Regulations. The list of covered civilians articulated therein has been interpreted as merely illustrative and not as exclusive. The text may, therefore, cover other undefined categories of persons or services who might be called on, under certain circumstances, to follow the armed forces during some future conflict.[20]

---

[14] BOTHE ET AL., *supra* note 9, at 295 n.10.

[15] What is the proper treatment of persons serving with or accompanying the armed forces, who, for reasons of individual or collective self defense, take up arms on the approach of the enemy and subsequently fall into enemy hands? Apparently the proper status of these persons is best judged by the standards set forth in Article 4.A of the Third Geneva Convention of 12 August 1949. Whether these persons may be tried and sentenced as civilians, or whether they will enjoy the privileges accorded prisoners of war, likely will depend on whether they can convincingly persuade a "competent tribunal" of their status under paragraph (6) of that article. Unfortunately, the success or failure of such a defense turns, in large measure, on the geographic location of the engagement. Prisoner of war status is afforded "spontaneous combatants" only where they act in the capacity of "inhabitants of a non-occupied territory." With the possible exception of some foreign journalists, most persons serving with or accompanying the Armed Forces of the United States would be unable to satisfy this standard in any conflict occurring on foreign soil. The lack of support for according wide-ranging protected status to civilians who take up arms on the approach of the enemy is further reflected in the provisions of Protocol I, *supra* note 4, art. 51(3), which states that "[c]ivilians shall enjoy the protection afforded by this Section [providing general protection against dangers arising from military operations], unless and for such time as they take a direct part in hostilities." *See also id.* art. 57 which provides for precautions to be taken with regard to protecting civilian populations, civilians, and civilian objects from military attack.

[16] 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Law and Customs of War on Land, Article 13 (emphasis added). A "sutler" is defined as a civilian person who acts as a "provisioner" to an army post. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

[17] *See* First Geneva Convention of 1949, *supra* note 2, art. 13, para. 4.

[18] *See* Second Geneva Convention of 1949, *supra* note 2, art. 13, para. 4.

[19] *See* Third Geneva Convention of 1949, *supra* note 2, art. 4, para. A, sect. 4; annex IV (emphasis added). See the appendix to this article for a copy of the identity card found in Annex IV of the Third Geneva Convention.

[20] *See* PICTET, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, INTERNATIONAL COMMITTEE ON THE RED CROSS, GENEVA 64 (1960) (citing Report on the Work of the Conference of Government Experts, at 112-13) [hereinafter PICTET, TREATMENT OF PRISONERS OF WAR].

The language of Article 4 of the Third Geneva Convention of 1949 refers pointedly to the provision of an identity card for persons accompanying armed forces in the field. Annex IV to the Convention depicts a sample of the card, which is intended to be carried by persons who accompany the armed forces without actually being members thereof. Pursuant to the language of Article 4, the card actually provided merely needs to be "similar" to the one depicted. Department of Defense Directive 1000.1 of January 30, 1974 implements the provisions of Article 13, and enclosure (1) to that Directive portrays the exact specifications of *DD Form 489,* the Geneva Convention identity card for persons who accompany the Armed Forces of the United States. Additional information on who is entitled to receive an identification card, and the manner in which it may be issued, is covered in articles 4620100 and 4620140 of the *Navy Military Personnel Manual (MILPERSMAN),* and by Marine Corps Order (MCO) P1070.12D.

Where civilian persons serving with or accompanying armed forces in the field fall "into the power of the enemy"[21] while in possession of the required identification card, they are to be afforded the status of prisoners of war. However, where persons fall into the hands of the enemy and have lost or misplaced their identity card, or it has been taken from them, the status to which these persons are entitled seems less clear. The determining factor should not be, however, merely whether the individual can produce the appropriate identity card. Rather, the capacity in which the person was serving should be dispositive. The possession of the card is not an indispensable condition precedent to the right to be afforded the status of a prisoner of war, but merely a supplementary safeguard.[22] The application of Article 4 depends on the authorization to accompany the armed forces. The identity card serves merely as a convenient form of proof.[23]

The intent of Article 4 of the Third Geneva Convention of 1949—wherein persons accompanying the armed forces are afforded the status of prisoners of war in the event of their capture by the enemy—is supported and amplified by Article 5. Article 5 states, in pertinent part,

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[24]

Article 5 expresses a preference for treating captured individuals as prisoners of war until all doubt has been resolved regarding their proper status, where (1) a belligerent act has been committed, and (2) the perpetrators have fallen into the hands of the enemy. Article 5 further provides for a "competent tribunal" whose function is to determine that status. The requirement for such a tribunal was intended to avoid the possibility of arbitrary decisionmaking on the part of a local military commander, and to discourage summary executions. The phrase "competent tribunal" was used rather than "military tribunal" to permit civil courts to act if this was allowed by the laws of one of the parties to a conflict.[25] The composition of the tribunal was deliberately referred to in general terms only, to permit the same to be determined under the law of the parties to a conflict. An administrative board is generally considered sufficient to satisfy this requirement.[26]

This interpretation of Article 5 of the Third Geneva Convention of 1949, concerning the treatment to be afforded persons who fall into the hands of the enemy, also is consistent with the provisions of Article 45, paragraph 1 to Protocol I to the Geneva Conventions of 1949.[27] At first blush, the provi-

---

[21] The words "fallen into the power of the enemy" contained in paragraph A, section 4 of Article 4 of the Third Geneva Convention of 12 August 1949 replace the word "captured" which appeared in the 1929 Convention. The current expression has been interpreted to have wider significance covering, for example, soldiers who become prisoners without fighting following a surrender. *See* PICTET, TREATMENT OF PRISONERS OF WAR, *supra* note 20, at 50.

[22] *See* 2B FINAL RECORD, *supra* note 9, vol. IIA, at 417.

[23] *See* PICTET, TREATMENT OF PRISONERS OF WAR, *supra* note 20, at 64-65.

[24] Fourth Geneva Convention of 1949, *supra* note 2, art. 5.

[25] BOTHE, ET AL., *supra* note 9, at 260 n.1. *See also* 2B FINAL RECORD, *supra* note 9, vol. IIB, at 270.

[26] DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 71b (15 July 1976) [hereinafter FM 27-10].

[27] Protocol I, *supra* note 4, art. 45, provides, in pertinent part, as follows:

> 1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
>
> 2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence (sic) arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated . . . .

sions of Article 5 of the Third Geneva Convention of 1949 appear to be in conflict with the provisions of Article 50 of Protocol I to the Conventions. Whereas the Third Convention requires that persons be afforded the protection of prisoner of war status when doubt as to the proper status exists, Protocol I apparently provides to the contrary. Under Article 50, paragraph 1 of the Protocol, when doubt exists, persons are to be afforded only the status of a civilian.[28]

This apparent conflict did not go unnoticed by the drafters. The 1974 Summary Report of Committee III of the Diplomatic Conference on the Reaffirmation and Development of International and Humanitarian Law Applicable in Armed Conflicts (CDDH/III/SR), Geneva, 1974-1977, reflects concern within the working group that the presumption of civilian status proposed by the International Committee of the Red Cross might be in conflict with the existing provisions of Article 5 of the Third Geneva Convention of 1949. To resolve this apparent inconsistency, the Committee changed the operative words to "shall be considered."[29] This change was not intended to effect any substantive change in meaning. No conflict ultimately was envisioned between the two articles. Properly interpreted, the two provisions cannot operate at the same time with respect to the same individual. "Each gives the individual the benefit of the doubt at relevant times which cannot coincide. That of Art. 50 applies only when the person might be a target for attack—the other, only after he has been taken into custody by the adverse Party."[30] Thus, when choosing potential targets, when doubt exists, Article 50 of Protocol I requires that the target be considered a civilian one, and therefore protected, until proven to the contrary.[31] When dealing with persons who have fallen into the hands of the enemy, however, Article 5 of the Third Geneva Convention of 1949 affords persons the greater protections entitled prisoners of war until their status is proven otherwise. The result is a well thought out scheme in which, regardless of the context, each individual is consistently given the benefit of the doubt until his or her status is conclusively determined. Of course, much can be done to resolve any doubt as to the status of captured persons by the simple possession of an appropriate identity card as provided for by the Conventions.

In conclusion, exercise great caution to ensure that civilian persons serving with or accompanying armed forces in the field are provided with an appropriate identity card pursuant to the provisions of the Geneva Conventions of 12 August 1949 and consistent with the requirements of DOD Directive 1000.1 of January 30, 1974. Further, those individuals who qualify for identity cards should be made to understand the significance of their credentials, both for their own personal

---

[28] This seemingly trivial distinction can be important when a civilian accompanying the armed forces is accused of having committed a crime or similar belligerent act. Whereas the provisions of the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea apply equally to civilians and combatants alike, the provision of the Third and Fourth Geneva Conventions Relative to the Treatment of Prisoners of War and Civilian Persons in Time of War, respectively, differ greatly. The manner in which each category of detainee is afforded due process in criminal and disciplinary proceedings differs significantly and can have an important effect on the disposition of the individual. Persons who, without having complied with the conditions prescribed by the law of armed conflict for recognition as belligerents, commit hostile acts about or behind enemy lines are not treated as prisoners of war and may be tried and sentenced to execution or imprisonment. *See* First Geneva Convention of 1949, *supra* note 2. These acts include sabotage and acts of espionage not falling within Articles 104 and 106 of the Uniform Code of Military Justice, or within Article 29 of the 1907 Hague Convention IV Regulations. *See* FM 27-10, *supra* note 26, para. 81.

[29] BOTHE ET AL., *supra* note 9, at 294-95 n.12. *See also* CDDH/III/SR 50, Rev. 1, para. 4.

[30] BOTHE ET AL., *supra* note 9, at 294-95 n.12.

[31] When examining the question of whether a particular individual is a legitimate "target" with regard to the law of armed conflict, journalists occupy a place of special recognition. In this regard, Article 79 of Protocol I provides as follows:

> 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
>
> 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status as provided for in Article 4A(4) of the Third Convention.
>
> 3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Additionally, the United Nations General Assembly passed a resolution, No. 2673 (XXV), on December 9, 1970, in which it directed the Economic and Social Council and, through it, the Human Rights Commission, to draft a convention providing for the protection of journalists on dangerous missions. The latest version of this resolution may be found in the United Nations Secretary General's note A/10147 of 1 August 1975. The measure is stalled, in large part, as the result of controversy over whether it is in the interest of the international community to weaken the protection afforded medical, religious, and civil defense personnel, as well as the delegates of the protecting powers and the International Committee of the Red Cross, by extending the existing protection to a group that is not directly working on behalf of war victims. It seems justifiable from a political and practical point of view to drop the idea of creating a special protected status for journalists. *See* Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions: Law Applicable in Periods of Armed Conflict*, 1983 INT'L REV. OF THE RED CROSS 3, at 6, 9-10.

well-being, and for the benefit of compliance with applicable international law.[32] Finally, before accompanying an armed force into the field, at least under circumstances when the likelihood of falling into the hands of the enemy exists, these persons should be thoroughly briefed as to the limitations of their privileged status under the Geneva Conventions of 12 August 1949 and the 1977 Protocols. Only in this manner can fully informed, voluntary adherence to the law of armed conflict be assured.

Appendix
Identity Card

(Name of the country and military authority issuing this card)

Photograph of the bearer

IDENTITY CARD

FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES

Name .....

First names .....

Date and place of birth .....

Accompanies the Armed Forces as .....

Date of issue Signature of bearer

Height	Weight	Eyes	Hair

Any other mark of identification

Fingerprints (optional)
(Left forefinger)
(Right forefinger)

Blood type

Religion

Official seal imprint

NOTICE

This identity card is issued to persons who accompany the Armed Forces of ..... but are not part of them. The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the Detaining Authorities, to assist in his identification.

[32] Perhaps the best illustration of why every journalist accompanying an armed force into an area in which hostilities may be expected to occur should be knowledgeable as to his or her rights under international law can be drawn from the experience of CBS' Bob Simon during the Gulf War. Bob Simon and his three-man CBS News crew left Dharan, Saudi Arabia, on January 20, 1991, for the Saudi-Kuwaiti border. The men were expected to return the following night. Two days later, a Saudi military patrol found their four-wheel drive vehicle abandoned at the border. The whereabouts of the men remained a mystery until February 15, 1991, when the Cable News Network (CNN) reported that they were being held in Baghdad. Thereafter, it became known that the men were being held for "questioning" by the Iraqi intelligence community. On February 26, 1991, three days after the allied ground offensive against Iran had begun, the Department of State summoned Iraq's top diplomat in Washington and made an official request for the release of the CBS News crew. The haggard, but healthy, men were not released by the Iraqis, however, until March 2, 1991, following the personal intervention of Soviet Premier Michail Gorbachev. The CBS News crew spent forty days in captivity. *See generally,* SIMON, FORTY DAYS (Putnam Publishing Co. 1992).

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin),* designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 1, number 8) is reproduced below:

Clean Air Act (CAA)

CAA Fines

State and local regulators continue to cite Army facilities for violations of local and state air quality laws and regulations, and, in some instances, assess fines. The Army's position is that § 118(a) of the Clean Air Act, 42 U.S.C. § 7418(a),

does not waive the federal government's sovereign immunity from state or local civil fines. This position is based on the Supreme Court's decision in *Department of Energy v. Ohio*.[1] In that case, the Court held that the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA) do not waive the federal government's sovereign immunity from civil fines for violations under those statutes. Section 118(a) of the CAA is similar to the CWA and RCRA waiver provisions considered in *Department of Energy v. Ohio,* and the Court's reasoning and analysis appears equally applicable to CAA § 118(a).

Installations that are assessed fines for violations of local, state, or federal air quality laws and regulations should assert sovereign immunity and attempt to negotiate a satisfactory compliance agreement without the payment of civil fines. With the exception of the payment of civil fines and penalties, CAA § 118(a) requires the Army to comply with all federal, state, and local air pollution control requirements "in the same manner and to the same extent as any nongovernmental entity." Consequently, Department of Army (DA) facilities must pay administrative fees and assessments imposed by local and state authorities to defray the costs of their air programs, if the fee or assessment is not punitive in nature. Consequently, in cases where a fine is assessed, installations may offer to pay an administrative fee, in lieu of a fine, to defray the costs associated with the state or local agencies' investigation and enforcement action. In this context, DA facilities should not pay administrative fees that are clearly in excess of the state or local agency's costs.

Installation attorneys should coordinate with the ELD, through the MACOM environmental law specialist, in all cases where CAA penalties are assessed or are likely. Major Teller and Major Bell.

Resource Conservation and Recovery Act (RCRA) Availability of *The 1993 RCRA Inspection Manual (Manual)*

The 1993 *Manual* replaces the 1988 *RCRA Inspection Manual.* The *Manual* sets outs the procedures and checklists employed by inspectors during RCRA § 3007 inspections. The *Manual* is available from the following sources:

EPA Headquarters 410 M Street, SW Room M2616 Washington, DC 20460 Tel: (202) 260-9327	Approximately 450 pages (does not include some appendices (tables, references)) and if individual government installations write, copies *may* be made available, but this is not definite.
National Technical Information Service U.S. Dept. of Commerce Springfield, VA 22161 Tel: (703) 487-4600	675 pages at a cost of $77.00 plus $3.00 handling. Request number is NTIS #PB94-963-605
Government Institutes 4 Research Place Suite 200 Rockville, MD 20850	600 pages, $125.00 plus $4.00 shipping/handling. Request ISBN: 0-86587-395-X

The Army Environmental Center also will be distributing a copy through environmental channels in the near future. Major Bell.

Federal Facility Compliance Act (FFCA)

Fines, Fines, Fines

The Army has received notice of potential fines in a variety of forms. The actual fine assessment may follow the initial notice of violation or compliance order by days, weeks, or months. As expected, state procedures vary widely. For example, one installation received an order—which set forth the alleged violations and mandated compliance within certain time limits—that an appeal had to be filed within thirty days. The order was accompanied by a separate notice of penalty, which set forth a different procedure and time limits for appealing the penalty. Environmental law specialists should ensure that both are "answered" to preserve the installation's rights under the state's administrative procedures. Even within the Environmental Protection Agency (EPA), the regions have taken different approaches in assessing fines. In one case, the region forwarded a draft consent order that included the fine assessment. Informal settlement negotiations ensued, without the pressure of time constraints specified in 40 C.F.R. part 22, formal procedures. In other cases, the region has filed a complaint, and the installation had to file its answer within thirty days to comply with the part 22 procedures. In the latter cases, informal negotiations have continued, with regular reports to the administrative law judge. Major Bell.

Base Realignment and Closure (BRAC)

Environmental Protection Agency Guidance on Concurrence for Community Environmental Response Facilitation Act (CERFA) Parcels

On 19 April 1994, the EPA issued guidance to the EPA regions on the approach to use in determining whether to concur that a parcel has been properly identified as uncontaminated and therefore transferrable under CERCLA § 120(h)(4). The guidance was in response to questions raised by the regions and the Department of Defense (DOD) regarding routine use of pesticides and household hazardous substances. Several regions earlier had opined that such factors would result in a nonconcurrence with DOD CERFA reports.

[1] 112 S. Ct. 1627 (1992).

The 19 April EPA guidance states that if the information we provide to the regions indicates that the storage, release, or disposal was associated with activities that would not be expected to result in an environmental condition that poses a threat to human health or the environment, the parcels should be eligible for reuse. The EPA memo indicates that concurrence decisions should be made on a case-by-case basis, however, concurrence is likely for: (1) parcels on which the routine licensed application of pesticides has taken place, provided there is no evidence of a threat to health or the environment, such as water contamination or proximity to sensitive habitat and (2) housing areas where there is an absence of evidence indicating that any storage, disposal or spillage of any hazardous substances and petroleum products contained in heating oil and household products poses a threat to human health or environment. Finally, evidence—such as stained pavement—of incidental releases of petroleum products on roads or parking lots should not disqualify parcels from being deemed uncontaminated.

The EPA guidance is not binding on the states. The analysis provided in the guidance should, however, be used in discussing these issues with states reviewing CERFA reports for properties not listed on the National Priority List. Major Miller.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Reauthorization Update

The House Transportation and Hazardous Materials Subcommittee has marked up the Administration's reauthorization bill, H.R. 3800. The EPA Administrator and Representative Swift, a major player in the reauthorization effort, announced that broad support has been achieved for several revisions to the Administration's bill. The revisions include a new remedy selection section, changes to liability, cost allocation, and to public participation provisions. Also revised is the Environmental Insurance Resolution Fund. Many influential stakeholders, including the Chemical Manufacturers Association, have expressed support for the bill, but the prospects for final approval are unclear. Mr. Nixon.

Criminal Enforcement

The EPA's Criminal Investigation Guidance

In a memorandum dated 12 January 1994, concerning the exercise of investigative discretion, the EPA set forth policy guidance for its enforcement personnel to use in deciding when to proceed with a criminal, as opposed to civil, investigation. The decision to prosecute is ultimately made by the Department of Justice. The EPA's intent is to select only "the most significant and egregious violations" for criminal investigation. The guidance establishes two primary criteria in selecting cases for criminal investigation: significant actual or threatened environmental harm and culpable conduct. In determining if these criteria are met, the guidance sets forth a series of factors that must be evaluated. Of particular importance to installations, the guidance provides that the failure to disclose and correct violations discovered during internal environmental audits, such as those conducted under the Environmental Compliance Assessment System, indicates culpable conduct. Conversely, systematic self-auditing, with prompt disclosure and correction of violations, mitigates criminal culpability. Major Teller.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Notes

Federal Circuit Endorses *Eichleay*

The United States Court of Appeals for the Federal Circuit (Federal Circuit) recently endorsed a single formula for calculating unabsorbed overhead costs following certain government-caused delays in construction contracts. Contractors and contracting officers frequently have disagreed about the appropriate method of calculating unabsorbed overhead delay costs. The Federal Circuit's decision now mandates the use of the *Eichleay* formula[1] to calculate unabsorbed overhead when certain prerequisites are met, and prohibits the use of alternative methods of calculation. The case also prohibits contractors from moving direct costs into their overhead pool to increase the size of their unabsorbed overhead recoveries.

[1] *See* Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894.

Wickham Contracting Co. v. General Services Administration[2] involved a General Services Administration (GSA) contract to renovate a federal post office and courthouse in Albany, New York, for the sum of approximately three million dollars. The contract allowed 365 days from notice to proceed to completion, but the GSA delayed completion until 969 days after the scheduled completion date. The contractor sought to recover unabsorbed overhead costs incurred during the period of delay, and disagreed with the contracting officer that the parties should calculate the amount of recoverable unabsorbed overhead using the *Eichleay* formula.[3] Applying this formula, the contracting officer determined that the GSA owed Wickham Contracting Co. (Wickham) thirty-four percent of its overhead costs during the relevant period of delay. Applying a different methodology, Wickham contended that the GSA owed it eighty percent of its overhead during the same period.

During the Albany contract delay, Wickham performed two other major contracts. According to Wickham, these contracts were responsible for twenty percent of Wickham's total overhead costs during the period of GSA-caused delay. Accordingly, Wickham argued that the GSA should pay eighty percent—instead of thirty-four percent—of Wickham's incurred overhead, because eighty percent of its home office activity—and, therefore, eighty percent of its home office overhead expense—was devoted to the Albany contract during the relevant time frame. The government responded that Wickham had no current books or records to support its proposal of eighty percent. On appeal of the contracting officer's final decision denying the higher recovery rate, the General Services Board of Contract Appeals (GSBCA) agreed with the government.[4] The GSBCA denied Wickham's claim for recovery at an eighty percent rate, and permitted recovery only at the thirty-four percent rate allowed by the GSA. The GSCBA also denied Wickham's request to include several costs that were directly attributable to the GSA contract in the contractor's total overhead pool. Wickham appealed the GSBCA's decision to the Federal Circuit.

The Federal Circuit denied Wickham's appeal and rejected Wickham's request to modify application of the *Eichleay* formula, or, in the alternative, to determine unabsorbed overhead by "jury verdict." The court noted that Wickham's request to modify the *Eichleay* formula was neither supported by previous board decisions nor required by the circumstances of the case. On the contrary, the court found that *Eichleay* was the exclusive means available for calculating unabsorbed overhead in a delayed contract whenever a contractor meets the *Eichleay* prerequisites.

These "prerequisites," according to the court, are that "compensable delay occurred, and that the contractor could not have taken on any other jobs during the contract period."[5] The court determined that the prerequisites were present in *Wickham.* Although Wickham had performed some other work during the delay period, its resources for the Albany contract were on standby throughout the GSA-caused delay. Wickham's commitment of resources—such as, workers and equipment—to that contract limited its ability to perform additional work to absorb more overhead during the delay period.

The court also endorsed the contracting officer's decision to exclude from the overhead pool all costs that were directly attributable to the GSA contract. By definition, "overhead costs benefit and are caused by the business as a whole, not any one project."[6] Wickham's argument that certain costs were directly attributable to the GSA contract, and would increase its overhead rate for that contract, was a "non sequitur."[7] If the costs were directly attributable to one contract, then they were direct costs, and should not have been part of the overhead pool at all. If Wickham wished to recover such costs, it should have claimed them as direct costs, not as part of its overhead.

Following *Wickham*, the burden on contractors seeking application of innovative, unusual formulas other than *Eichleay* to calculate unabsorbed overhead during government-caused delays in construction contracts is substantial. The Federal Circuit has endorsed the *Eichleay* formula for the calculation of unabsorbed overhead, and has made its use mandatory whenever certain prerequisites are met. This case will assist contracting officers by limiting the ability of contractors to increase overhead pools or tailor conventional overhead allocation formulas to suit their particular needs. Judge advocates should ensure that contracting officers are aware of *Wickham*, and should assist them in identifying when application of the *Eichleay* formula is appropriate. Lieutenant Colonel Killham.

---

[2] Wickham Contracting Co. v. General Servs. Admin., 12 F.3d 1574 (Fed. Cir. 1994).

[3] The *Eichleay* formula is a three-step procedure. First, to obtain *allocable contract overhead,* multiply the total overhead cost incurred during the contract period times the ratio of billings from the delayed contract to total billings of the firm during the contract period. Second, to obtain the *daily contract overhead rate,* divide allocable contract overhead by days of contract performance. Third, multiply the daily contract overhead rate times days of government-caused delay. The result is the *amount recoverable.* Capital Elec. Co. v. United States, 729 F.2d 743, 747 (Fed. Cir. 1984).

[4] *See* Wickham Contracting Co., GSBCA No. 8675, 92-3 BCA ¶ 25,040, *aff'd sub nom.,* Wickham Contracting Co. v. General Servs. Admin., 12 F.3d 1574 (Fed. Cir. 1994).

[5] C.B.C Enters., Inc. v. United States, 978 F.2d 669, 673-74 (Fed. Cir. 1992).

[6] *Wickham,* 12 F.3d at 1578.

[7] *Id.*

Default Terminations for Failure to Prosecute the Work

Contractors frequently encounter problems in performing government contracts. Many times these problems arise long before the required completion date. The contracting officer need not wait until the contractor misses the contract completion date to terminate the contract for default, but may terminate the contract if the contractor "fails to prosecute the work . . . with diligence that will ensure its completion within the time specified in [the] contract."[8]

Often a contractor will challenge such a default termination, arguing that it would have completed performance in the absence of the termination. Although the *FAR* provides no guidance on what constitutes a "failure to prosecute the work with diligence," courts and boards have held that the government need not show that timely performance was impossible.[9] Rather, the contracting officer must have a "reasonable belief" that "no reasonable likelihood" exists that the contractor could perform on time.[10] While this standard certainly allows the contracting officer to exercise a degree of discretion, the boards of contract appeals recently have shown that the government still bears a heavy burden when defending a termination based on a contractor's failure to prosecute the work with diligence.

In *Technocratica*,[11] the Air Force had awarded a contract in February 1991 to dismantle and relocate four buildings on Hellenikon Air Base, Greece. The contracting officer extended the completion date to 24 August 1992 because of design problems and other factors. This extension allowed no additional time for the contracting officer's improper denial of contractor access to the work site for nearly three months. On 3 August 1992, the contracting officer issued a cure notice advising the contractor of its failure to "prosecute the work with diligence so as to complete it within the time remaining for contract performance."[12] In response, the contractor stated that it was not responsible for the lack of progress on the job. After the contracting officer issued a show cause notice, the contractor contended that its lack of progress was due to the government's denial of site access for nearly three months. Notwithstanding the contractor's reply, the contracting officer terminated the contract for default, purportedly because the contractor was making "poor progress" toward completing the work.

The board found the contracting officer's termination decision improper, because it was based on the contractor's "poor progress" rather than its inability to complete the work on time. The board held that prior to termination, the contracting officer must analyze progress problems against a specified completion date. Moreover, the government must adjust this "completion date" for government-caused delays.[13]

In *Pipe Tech, Inc.*,[14] the Corps of Engineers had awarded a contract on 3 March 1992 for the protection of crabs at Gray's Harbor, Washington. The contract required the contractor to place oyster shells in the harbor not later than 9 May 1992 (sixty days after the notice to proceed), which would be used as a habitat by crab larvae that settled out of the water column in the Gray's Harbor tidal flats. The completion date was critical, because a later placement date would miss the crab larvae settling out in 1992. Although the contract required the contractor to bring the oyster shells in by barge at high tide and place them in the water by crane, the contractor requested approval to place the oyster shells by Chinook helicopter. The contracting officer denied this request, advising the contractor that its failure to prosecute the work "with the diligence that will insure its completion within the time specified"[15] may result in termination. The contracting officer also directed the contractor to provide a plan to "remedy this situation." The contractor's lawyer then renewed the contractor's request to place the oyster shells by helicopter, submitted a "plan for equipment to be used for placement of the oyster shells," and reiterated that the contractor was "ready, able and willing to perform according to the terms of its contract."[16] The following day, 17 March 1992, just fourteen days after award and fifty-five days before the required completion date, the con-

---

[8] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.249-10 (1 Apr. 1984) [hereinafter FAR] (fixed-price construction contracts). For fixed-price supply and service contracts, FAR 52.249-8 provides that the government may terminate the contract if the contractor fails to "make progress, so as to endanger performance." *See also* FAR 49.402-3(d).

[9] *See* Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Ener-Tech Automated Control Sys., Inc., ASBCA No. 31527, 89-3 BCA ¶ 22,091.

[10] *Lisbon*, 828 F.2d at 765.

[11] ASBCA No. 45077, 94-2 BCA ¶ 26,606.

[12] 94-2 BCA ¶ 26,606, at 132,368.

[13] FAR 52.249-10(b) provides that the government shall not terminate the contract if the delay in completing the work arises from "unforeseeable causes beyond the control and without the fault or negligence of the contractor," including "acts of the government in either its sovereign or contractual capacity." *See* FAR 52.249-8(c).

[14] ENG BCA No. 5959 (Dec. 20, 1993), 94-___ BCA ¶ ___, 1993 Eng. BCA LEXIS 30, *motion for recon. denied*, (Feb. 24, 1994), 94-___ BCA ¶ ___, 1994 Eng. BCA LEXIS 9.

[15] 1993 Eng. BCA LEXIS 30, at *6.

[16] *Id.* at *12.

tracting officer determined that the contractor inexcusably failed to prosecute the work "in a manner to insure its timely completion," and terminated the contract for default. The contracting officer then awarded a reprocurement contract to the second low bidder, who performed the contract within the time allowed for the performance of the first contract.

As in *Technocratica*, the board in *Pipe Tech* found that the contracting officer improperly terminated the contract. The board noted that ninety-two percent of the contract time remained for performance at the time the contracting officer issued his termination. Further, the board held that the reprocurement contractor's successful completion of the work within the original contract performance schedule "devastates the government's position" that the contractor could not have performed. Although the board expressed "some sympathy" for the contracting officer due to the significant time pressure stemming from the "lifestyle of the very young crabs,"[17] the board nevertheless sustained the contractor's appeal and set aside the default termination.

These two decisions illustrate the requirement for contracting officers to make reasoned determinations that contractors will not complete performance on time prior to terminating contracts for default for failure to prosecute the work. The contracting officer must base the termination decision on more than hunches, guesswork, or "mere speculation that performance is less than certain."[18] Thus, the contracting officer should consider whether the contractor has failed to provide submittals or preproduction items in a timely manner, or otherwise failed to meet critical progress milestones.[19] More importantly, the contracting officer should compare the amount of work completed with the amount of time remaining under the contract. For example, several years ago the Armed Services Board of Contract Appeals sustained a default termination of a contract for siding replacement and painting of 249 military housing units. The board determined that the contractor demonstrated a lack of diligence by working on only twenty of the units in five months, leaving numerous deficiencies in these units requiring correction, while only two and one-half months remained to complete the other 229 units.[20] In contrast, the contracting officer in *Pipe Tech* failed to make such a comparison, and failed to articulate how the lack of progress threatened the timely completion of the project.

While comparison of the amount of work completed with the amount of time left for performance may provide some evidence that the contractor will be unable to perform, the contracting officer's inquiry should not stop there. The government still must demonstrate that there is "no reasonable likelihood" that the contractor will timely perform.[21] Thus, the contracting officer should consider the ability of the contractor to increase production rates or hire additional employees. Likewise, the contracting officer should consider whether the contractor has overcome earlier problems that were plaguing its performance, or whether further problems will continue to erode its ability to complete performance on time.

Additionally, when comparing the amount of work completed with the amount of time remaining to complete performance, the contracting officer must consider the *appropriate* completion date. Frequently the contractor will have some excusable delay which hindered its performance of the contract.[22] If the contractor has excusable delay, the contracting officer must extend the completion date before comparing it with the amount of work to be completed on the contract. The contracting officer's failure to extend the completion date to account for three months of government delay was fatal to the default termination in *Technocratica*.

Prior to default termination of a fixed-price supply or service contract for failure to make progress, the contracting officer must issue a cure notice to the contractor, specifying the failure and providing a minimum of ten days to cure the failure.[23] No such notice is required prior to termination of a fixed-price construction contract;[24] however, the contracting officer should use a cure notice when appropriate. Additionally, the contracting officer should issue a show cause notice "if practicable," requesting the contractor to show cause why the contract should not be terminated for default.[25] Often the contractor's response to a cure notice or a show cause notice will provide the contracting officer with information pertaining to excusable delays, or will otherwise show that the contractor has cured its failure to prosecute the work.

---

[17] *Id.* at *16.

[18] California Dredging Co., ENG BCA No. 5532, 92-1 BCA ¶ 24,475.

[19] *See, e.g.*, Starr Painting & Contracting Co., VABCA No. 1982, 85-3 BCA ¶ 18,393 (default termination for failure to progress is proper where contractor failed to provide 17 submittals six days before contract completion date).

[20] Dave's Aluminum Siding, Inc., ASBCA No. 29397, 86-1 BCA ¶ 18,623. *See also* Barton & Barton Co., ASBCA No. 40112, 93-3 BCA ¶ 26,188 (government properly terminated contract for default where contractor had just 23 days to complete 112 days worth of work).

[21] *See* California Dredging Co., ENG BCA No. 5532, 92-1 BCA ¶ 24,475 (board refuses to grant summary judgment to government even though only 11 weeks remained on a contract with a 26-week performance period at time of default termination).

[22] *See supra* note 13.

[23] FAR 49.402-3(d); FAR 52.249-8(a)(1)(ii).

[24] *Id.* 52.249-10(a).

[25] *Id.* 49.402-3(e)(1).

Finally, the contracting officer must consider whether the government waived the completion date. The government may waive the completion date by failing to terminate within a reasonable time and by encouraging the contractor to continue performance after the completion date has passed.[26] If the government has waived the completion date, the government may not terminate for failure to prosecute the work until the government establishes a new completion date.[27]

Termination for default is a "contractual death sentence"[28] which must be exercised with great care. The ASBCA will hold the government to a high standard of proof before sustaining a default termination. Legal advisors should work closely with their contracting officers to ensure that a reasonable basis exists for doubting that a contractor will complete its work on time, prior to any default termination of a contract for failure to prosecute the work with diligence. Major Causey.

Criminal Law Notes

Funeral Oration in Honor of *United States v. Burton*[29]

With apologies to William Shakespeare and in appreciation of the good humor of the judges of the United States Court of Military Appeals before whom this was delivered as part of the Court's 1994 judicial conference.

Friends, honorable judges, countrymen and women, lend me your ears;
I come to bury *United States v. Burton,* not to praise it.
The evil that bright line rules do lives after them; the good is oft interred with their textual bones;
So let it be with *Burton.*

The honorable Judge Cox Hath told you that *Burton* was "something of a crude stopgap"
If it were so, it was a grievous fault;
and grievously hath *Burton* answered for it.
Here, under leave of Judges Cox, Crawford, and Gierke,
for they are all honorable judges,
Come I to speak at *Burton's* funeral.

Burton was my friend, a bastion of our treatise
But Judge Cox says the landscape of speedy trial has changed dramatically since *Burton* and *Driver*
and Judge Cox is an eminent and learned judge

Many cases did *Burton* overturn at first
all for the cost of enforcing Article 10 and sparing from durance vile, the accused
You all did love *Burton* once, not without cause;
What cause withholds you, then to mourn for it?
But yesterday, the rule of *Burton* might
Have stood against the world; now lies it here, overruled

It is not meet that you know how well *Burton* bolstered the Code
And *Henderson*, at 38 M.J. 260, note 1;
This was the most unkindest cut of all;
For when the Court ordered those murder charges dismissed whose fault indeed was it; dear *Burton's,* or those who ignored the commands of the court and code?

For *Burton's* legacy is Rule 707.
Our service member's rights remain
protected by discretion without guide

They that have done this deed are honorable
What private griefs they have, alas, I know not,
That made them do it;—they are wise and honorable
And have in their opinion with reasons answered
I come not, friends, to steal away your reason,
albeit *Kossman* will steal away our lawyers.
For unavailability of counsel is now an excuse
as speedy trial no longer mandates their need
Indeed Judge Cox has said so, and Judge Cox is an honorable jurist

For I have neither wit, nor words, nor worth
as have Judges Wiss and Sullivan, whose dissents
stir men's blood.
Were I Sullivan, Chaos I would predict
Were I Wiss, of the results of Dunlap's overruling, might I warn

I tell you that which you yourselves do know;
Show you sweet *Burton's* wounds, poor dumb, dead, case
and cast the auguries for the future without it
Here is the will and legacy of overruled *United States v. Burton*

Litigation yet again;
for double, double toil and trouble
the legal caldron bubbles.

Colonel Fredric I. Lederer[30]

---

[26] S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838.

[27] *See* Lanzen Fabricating, Inc., ASBCA No. 40328, 93-3 BCA ¶ 26,079. The contracting officer may establish a new completion date by either (1) reaching agreement with the contractor, or (2) notifying the contractor of a reasonable completion date.

[28] Pipe Tech, Inc., ENG BCA No. 5959, (Dec. 20, 1993), 94-___ BCA ¶ ___, 1993 Eng. BCA LEXIS 30, at *16.

[29] As subsequently modified, United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), announced the 90-day speedy trial rule requiring dismissal of charges if the accused has been in pretrial confinement for more than 90 days after subtracting defense delays. *Burton* was overruled in United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993).

[30] Chancellor Professor of Law Designate, Marshall-Wythe School of Law, College of William & Mary in Virginia; Colonel, JA (USAR).

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer;* send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

Former Spouses' Protection Act Update

Although enacted in 1983, the Uniformed Services Former Spouses' Protection Act (USFSPA)[31] continues to be a critical subject of interest for many senior officers and noncommissioned officers, all of them potential legal assistance clients. Legal assistance attorneys (LAAs) must not only understand the basics of the USFSPA, but also should be aware of major issues related to its application.

One resource that all LAAs should have at hand is the recent message sent to the field by the Office of The Judge Advocate General (OTJAG).[32] This message emphasizes how state law can dramatically affect rights to military retirement benefits. For example, several states—such as, Mississippi, Indiana, Arkansas, and Tennessee—still condition division of pension benefits on "vesting." One of these states, Mississippi, recognizes no right to pension benefits that accrues to domiciliaries of Mississippi (although it will recognize pension benefits that have vested while a domiciliary of another state).

Another significant issue that the OTJAG message addresses is division of VSI and SSB benefits. While some courts have not been reluctant to divide these benefits, other states might condition division on when the benefit was received—that is, before or after the date of classification.

In addition to subjects addressed in the OTJAG message, LAAs need to recognize that interpretation and application of the USFSPA continues to evolve in litigation before state courts. For example, a recently reported Idaho case joins California and New Mexico courts in requiring retirement eligible service members to begin payment of the former spouse's share of retirement benefits, *even though the service member has not yet retired.*[33] A North Carolina court also recently examined the closely related question of pension valuation.[34] This court held that valuation must be determined as of the date of separation and be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

However questions related to pension valuation and division are resolved, LAAs need to recall that to be processed for direct payment, a final decree must state the former spouse's share in terms of a percentage or fixed amount of disposable retirement pay. If the service member is not yet retirement eligible, and this prevents the parties from determining the former spouse's share with specificity, the parties should take steps to ensure continuing jurisdiction to remedy this problem when retirement or retirement eligibility is reached.

The military pension is frequently not only the most significant asset our clients will have, but the most significant asset LAAs will work with. Advice and decisions regarding jurisdiction over this asset can, in some cases, mean a difference of hundreds of thousands of dollars to a party. Legal assistance attorneys must review the law of the client's domicile regarding military pension division, and be able to compare that law to any other state where a service member is considering a change in domicile or consent to jurisdiction.[35] Legal assistance attorneys may want to keep the following state-by-state analysis of the divisibility of military retired pay handy for just this purpose. Major Block.

State-by-State Analysis of the Divisibility Of Military Retired Pay[36]

On 30 May 1989, the United States Supreme Court announced its decision in *Mansell v. Mansell.*[37] In *Mansell,* the Court ruled that states cannot divide the value of Department of Veterans Affairs disability benefits that are received

---

[31] 10 U.S.C. §1408 (1988).

[32] Message, Office of The Judge Advocate General, Legal Assistance Division, subject: Division of Military Retirement Pensions (061400Z Jan 94). The point of contact for this message is Mrs. Patricia H. Laverdure, Army OTJAG Legal Assistance Division, DSN 227-3170, commercial (703) 697-3170. An in-depth analysis of many of the issues in this area is facilitated by use of the new Legal Automated Army-Wide System Separation Agreements Program now being fielded by the Army OTJAG.

[33] *See* Balderson v. Balderson, 20 Fam. L. Rep. 1246 (BNA) (Idaho Ct. App. 1994) favorably citing several cases from both California and New Mexico.

[34] Bishop v. Bishop, 20 Fam. L. Rep. 1221 (BNA) (N.C. Ct. App. 1994).

[35] Jurisdiction to divide a military pension as marital property is limited by federal law to states where the service member is domiciled, living not as a result of assignment by military orders, or consents to jurisdiction. 10 U.S.C. § 1408(c) (1988).

[36] This note updates the Note, "State-by-State Analysis of the Divisibility of Military Retired Pay," The Army Lawyer, May 1992, at 37. It was developed with the assistance of military attorneys, active and reserve, and civilian practitioners located throughout the country. In a continuing effort to foster accuracy and timeliness, updates and suggested revisions from all jurisdictions are solicited. Please send your submissions to the Administrative and Civil Law Division, The Judge Advocate General's School, Attn: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

[37] 490 U.S. 581 (1989).

in lieu of military retired pay.[38] The Court also clarified that states are limited to dividing disposable retired pay, as defined in 10 U.S.C. § 1408(a)(4).[39] When using the following materials, remember that *Mansell* overruled case law in a number of states.

Alabama

Military retired pay is divisible as of August 1993, when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property. *Vaughn v. Vaughn,* 634 So. 2d 533 (Ala. 1993). *Kabaci v. Kabaci,* 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with *Vaughn* are expressly *overruled.* Note that Alabama previously has awarded alimony from military retired pay. *Underwood v. Underwood,* 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); *Phillips v. Phillips,* 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded fifty percent of husband's gross military pay as alimony).

Alaska

Military retired pay is divisible. *Chase v. Chase,* 662 P.2d 944 (Alaska 1983) (overruling *Cose v. Cose,* 592 P.2d 1230 (Alaska 1979), *cert. denied,* 453 U.S. 922 (1982)). Nonvested retirement benefits are divisible. *Lang v. Lang,* 741 P.2d 649 (Alaska 1987). Note also *Morlan v. Morlan,* 720 P.2d 497 (Alaska 1986), where the trial court ordered a civilian employee to retire to ensure that the employee's spouse received her share of his pension—the pension otherwise would have been suspended while the employee continued working. On appeal, the court held that the employee should have been given the option of continuing to work while periodically paying the spouse the sums that she would have received from the retired pay (citing *In re Gillmore,* 629 P.2d 1 (Cal. 1981)). *See also Clausen v. Clausen,* 831 P.2d 1257 (Alaska 1992) which held that while *Mansell* precludes division of disability benefits received in lieu of retirement pay, it does not preclude *consideration* of these payments when making an equitable division of marital assets.

Arizona

Military retired pay is divisible. *DeGryse v. DeGryse,* 661 P.2d 185 (Ariz. 1983); *Edsall v. Superior Court of Arizona,* 693 P.2d 895 (Ariz. 1984); *Van Loan v. Van Loan,* 569 P.2d 214 (Ariz. 1977) (nonvested military pension is community property). In a decision addressing a civilian retirement plan, the Arizona Supreme Court held that, if the employee is not eligible to retire when the trial court dissolves the marriage, the trial court *must* order that the spouse begin receiving the awarded share of retired pay when the employee becomes *eligible* to retire, whether or not he or she actually retires then. *Koelsch v. Koelsch,* 713 P.2d 1234 (Ariz. 1986).

Arkansas

Military retired pay is divisible. *Young v. Young,* 701 S.W.2d 369 (Ark. 1986). *But see Durham v. Durham,* 708 S.W.2d 618 (Ark. 1986) (military retired pay not divisible when the member had not served twenty years at the time of the divorce, and therefore the military pension had not "vested"). *See also Burns v. Burns,* 847 S.W.2d 23 (Ark. 1993) (in accord with *Durham,* but strong dissent favors rejecting twenty years of service as a prerequisite to "vesting" of a military pension).

California

Military retired pay is divisible. *In re Fithian,* 517 P.2d 449 (Cal. 1974); *In re Hopkins,* 191 Cal. Rptr. 70 (Ct. App. 1983). A nonresident service member did not waive his right under the USFSPA to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues. *Tucker v. Tucker,* 226 Cal. App. 3d 1249 (1991); *Hattis v. Hattis,* 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible. *See In re Brown,* 544 P.2d 561 (Cal. 1976); *cf. In re Mansell,* 265 Cal. Rptr. 227 (Ct. App. 1989) (on remand from *Mansell v. Mansell,* 490 U.S. 581 1989) (holding that the service member's gross retired pay was divisible because it was based on a stipulated property settlement to which res *judicata* had attached). California law has held that military disability retired pay is divisible to the extent that it replaces what the retiree would have received as longevity retired pay. *In re Mastropaolo,* 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (Ct. App. 1985); *In re Mueller,* 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (Ct. App. 1977). *But see Mansell,* 490 U.S. at 589. If a service member is not retired when the marriage is dissolved, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes *eligible* to retire, or anytime thereafter, even if the member remains on active duty. *In re Luciano,* 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Ct. App. 1980); *cf. In re Gillmore,* 629 P.2d 1 (Cal. 1981) (applying same principle to civilian pension plan).

Colorado

Military retired pay is divisible. *Gallo v. Gallo,* 752 P.2d 47 (Colo. 1988) (vested military retired pay is marital property); *see also In re Grubb,* 745 P.2d 661 (Colo. 1987) (vested but unmatured civilian retirement benefits are marital property; expressly overruling any contrary language in *Ellis v. Ellis,* 552 P.2d 506 (Colo. 1976); *In re Nelson,* 746 P.2d 1346

[38] *Id.* at 594.

[39] *Id.* at 589.

(Colo. 1987) (applying *Grubb* in a case involving vested contingent pension benefits—contingency was that the employee must survive to retirement age). The *Gallo* decision will not be applied retroactively, however. *See in re Wolford,* 709 P.2d 454 (Colo. Ct. App. 1989). Some practitioners in Colorado Springs have reported that, despite the unmistakable language in the case law, many local judges divide military retired pay or reserve jurisdiction on the issue, even if the member has not served twenty years at the time of the divorce.

Connecticut

Military retired pay is divisible. *See* Conn. Gen. Stat. § 46b-81 (1986) (affording divorce courts broad power to divide property); *cf. Thompson v. Thompson,* 438 A.2d 839 (Conn. 1981) (holding nonvested civilian pension divisible).

Delaware

Military retired pay is divisible. *Smith v. Smith,* 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible. *Donald R.R. v. Barbara S.R.,* 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Military retired pay is divisible. *See Barbour v. Barbour,* 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Military retired pay is divisible. Since October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); *see also* 1988 Fla. Sess. Law Serv. § 3(1) at 342. These legislative changes appear to overrule the prior limitation in *Pastore v. Pastore,* 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided). *Deloach v. Deloach,* 18 Fam. L. Rep. 1105 (Fla. Dist Ct. App., Nov. 21, 1991) recently adopted this interpretation.

Georgia

Military retired pay probably divisible. *Cf. Courtney v. Courtney,* 344 S.E.2d 421 (Ga. 1986) (nonvested civilian pensions are divisible); *Stumpf v. Stumpf,* 294 S.E.2d 488 (Ga. 1982) (military retired pay may be considered in establishing alimony obligations). In *Holler v. Holler,* 354 S.E.2d 140 (Ga. 1987), the Georgia Supreme Court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," *id.* at 141 (citing *Courtney,* 344 S.E.2d, at 421, *Stumpf,* 294 S.E.2d at 488 n.1), but decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce, *id.* at 141-42.

Hawaii

Military retired pay is divisible. *Cassiday v. Cassiday,* 716 P.2d 1133 (Haw. 1986); *Linson v. Linson,* 618 P.2d 748 (Haw. Ct. App. 1981). In *Wallace v. Wallace,* 677 P.2d 966 (Haw. Ct. App. 1984), the trial court ordered a Public Health Service employee—an organization covered by the USFSPA—to pay his spouse a share of retired pay on reaching retirement age, regardless of whether he actually retired then. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the appellate court affirmed the order. In *Jones v. Jones,* 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that *Mansell's* limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that *Mansell* applies to military disability retired pay as well as to VA benefits.

Idaho

Military retired pay is divisible. *Griggs v. Griggs,* 686 P.2d 68 (Idaho 1984) (reaffirming *Ramsey v. Ramsey,* 535 P.2d 53 (Idaho 1975)). Courts cannot circumvent *Mansell's* limitation on dividing VA benefits by using an offset against other property. *Bewley v. Bewley,* 780 P.2d 596 (Idaho Ct. App. 1989). *See also Balderson v. Balderson,* 20 Fam. Law Rep. 1246 (BNA) (Idaho 1994) (service member ordered to pay spouse her community share of the military pension, even though he had decided to put off retirement).

Illinois

Military retired pay is divisible. *In re Dooley,* 484 N.E.2d 894 (Ill. App. Ct. 1985); *In re Korper,* 475 N.E.2d 1333 (Ill. App. Ct.1985). *Korper* points out that, under Illinois law, a pension is marital property even if it is not vested. In *Korper,* the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and, therefore, state courts are preempted from awarding the spouse anything before retirement. The court rejected this argument in favor of the position taken in *In re Luciano,* 164 Cal. Rptr. 93 (Ct. App. 1980) for an application of such a rule. *See also* Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allowing courts to modify agreements and judgments that became final between 25 June 1981 and 1 February 1983, unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Military retired pay is divisible. Ind. Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, *inter alia*, "The right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage."). The right to receive retired pay must be vested as of the date the divorce petition for the spouse to be entitled to a share, *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. *In re Bickel*, 533 N.E.2d 593 (Ind. Ct. App. 1989). *See also Arthur v. Arthur*, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985.). *But see Sable v. Sable*, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Military retired pay is divisible. *In re Howell*, 434 N.W.2d 629 (Iowa 1989). The service member already had retired, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the VA, paid in lieu of a portion of military retired pay, are not marital property. *Id.* at 632-33. Moreover, the court apparently intended to award the spouse a percentage of *gross* military retired pay, but it "direct[ed] that 30.5% of [the husband's] *disposable retired pay*, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code. . . ." *Id.* at 633 (emphasis added). *Mansell* may have overruled the court's holding that it has authority to divide gross retired pay. *See Mansell*, 490 U.S. at 589.

Kansas

Military retired pay is divisible. Kan. Stat. Ann. § 23-201(b) (1987) (recognizing vested and nonvested military pensions as marital property); *See also In re Harrison*, 769 P.2d 678 (Kan. Ct. App. 1989) (holding that section 23-201(b) overruled the previous case law that prohibited division of military retired pay).

Kentucky

Military retired pay is divisible. *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); *See also* Ky. Rev. Stat. Ann. § 403.190 (Michie/Bobbs-Merrill Supp. 1991) (expressly defines marital property to include retirement benefits).

Louisiana

Military retired pay is divisible. *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested, unmatured military retired pay is marital property); *see also Gowins v. Gowins*, 466 So. 2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983); *see also Campbell v. Campbell*, 474 So.2d 1339 (Ct. App. La. 1985) (court can award a spouse a share of disposable retired pay, not gross retired pay, and a court cannot divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the *Mansell* concerning divisibility of gross retired pay).

Maine

Military retired pay is divisible. *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987). *See also* Me. Rev. Stat. Ann. tit. 19, § 22-A(6) (1989) (providing that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

Maryland

Military retired pay is divisible. *Nisos v. Nisos*, 483 A.2d 97 (Md. Ct. App. 1984); *see also* Md. Fam. Law Code Ann. § 8-203(b) (directing the courts to treat military pensions as they would other pension benefits—that is, as marital property under Maryland law); *Deering v. Deering*, 437 A.2d 883 (Md. 1981); *Ohm v. Ohm*, 431 A.2d 1371 (Md. Ct. App. 1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. *Andresen v. Andresen*, 564 A.2d 399 (Md. 1989).

Massachusetts

Military retired pay is divisible. *Andrews v. Andrews*, 543 N.E.2d 31 (Mass. App. Ct. 1989). In *Andrews*, the trial court awarded the spouse alimony from military retired pay. The spouse appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the [trial] judge could have assigned a portion of the pension to the wife [as property]." *Id.* at 32 (citing *Dewan v. Dewan*, 506 N.E.2d 879 (Mass. 1987)).

Michigan

Military retired pay is divisible. *Keen v. Keen*, 407 N.W.2d 643 (Mich. Ct. App. 1987); *Giesen v. Giesen*, 364 N.W.2d 327 (Mich. Ct. App.1985); *McGinn v. McGinn*, 337 N.W.2d

632 (Mich. Ct. App.1983); *Chisnell v. Chisnell,* 267 N.W.2d 155 (Mich. Ct. App. 1978). *see also Boyd v. Boyd,* 323 N.W.2d 553 (Mich. Ct. App. 1982) (only vested pensions are divisible).

Minnesota

Military retired pay is divisible. *Deliduka v. Deliduka,* 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but this portion of the decision may have been overruled by *Mansell,* 490 U.S. at 589. *See generally Janssen v. Janssen,* 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible); *Mortenson v. Mortenson,* 409 N.W. 2d 20 (Minn. Ct. App. 1987) (jurisdiction over soldier's retired pay cannot be based solely on his past residence in the state absent his consent).

Mississippi

Military retired pay is divisible *sometimes.* In *Flowers v. Flowers,* 624 So.2d 992 (Miss. 1993), the Mississippi Supreme Court clarified that Mississippi law does not grant a spouse an interest in, or right to, a portion of a spouse's retirement pension—including a military pension. However, Mississippi courts will respect pension rights granted under the laws of another jurisdiction in which the military member was domiciled for all, or part, of the period of service, and divide military pensions accordingly. Even if retirement pay is determined to be separate property, Mississippi continues to regard retirement benefits as income that will be considered in fixing alimony. *Brown v. Brown,* 574 S. 2d 688, 691 (Miss. 1990).

Missouri

Military retired pay is divisible. Only disposable retired pay is divisible. *Moon v. Moon,* 795 S.W.2d 511 (Mo. Ct. App. 1990); *see also Fairchild v. Fairchild,* 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); *Coates v. Coates,* 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Military retired pay is divisible. *In re Kecskes,* 683 P.2d 478 (Mont. 1984); *In re Miller,* 609 P.2d 1185 (Mont. 1980), *vacated and remanded sub. nom. Miller v. Miller,* 453 U.S. 918 (1981).

Nebraska

Military retired pay is divisible. *Taylor v. Taylor,* 348 N.W.2d 887 (Neb. 1984); Neb. Rev. Stat. § 42-366 (1989) (pensions and retirement plans are part of the marital estate).

Nevada

Military retired pay probably is divisible. *Tomlinson v. Tomlinson,* 729 P.2d 1303 (Nev. 1986) (speaking approvingly of the USFSPA in dicta but declining to divide retired pay in this case involving a final decree from another state). The Nevada state legislature reversed *Tomlinson* legislatively by enacting the Nevada Former Military Spouses Protection Act (NFMSPA) Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be partitioned even if the decree is silent on division and even if it is foreign). The legislature, however, later repealed the NFMSPA effective March 20, 1989; *see* 1989 Nev. Stat. 34. The Nevada Supreme Court subsequently ruled that the doctrine of *res judicata* bars partitioning military retired pay where "the property settlement has become a judgment of the court." *See Taylor v. Taylor,* 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. *Gemma v. Gemma,* 778 P.2d 429 (Nev. 1989). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, even if the employee spouse does not retire immediately. *Gemma,* 778 P.2d at 429.

New Hampshire

Military retired pay is divisible.

> Property shall include all tangible and intangible property and assets . . . belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes . . . employment benefits, [and] vested and nonvested pensions or other retirement plans . . . . [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution . . . .

N.H. Rev. Stat. Ann. § 458:16-a (1987). The New Hampshire Supreme Court relied on this provision in *Blanchard v. Blanchard,* 578 A.2d 339 (N.H. 1990), when it overruled *Baker v. Baker,* 421 A.2d 998 (N.H. 1980) (military retired pay not divisible as marital property, but may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Military retired pay is divisible. *Castiglioni v. Castiglioni,* 471 A.2d 809 (N.J. 1984); *Whitfield v. Whitfield,* 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); *Kruger v. Kruger,* 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd,* 375 A.2d 659 (N.J. 1977). Postdivorce cost-of-living raises are divisible; *cf. Moore v. Moore,* 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Military retired pay is divisible. *Walentowski v. Walentowski,* 672 P.2d 657 (N.M. 1983); *Stroshine v. Stroshine,* 652 P.2d 1193 (N.M. 1982); *LeClert v. LeClert,* 453 P.2d 755 (N.M. 1969); *see also White v. White,* 734 P.2d 1283 (N.M. Ct. App. 1987) (court can award a spouse a share of gross retired pay); *but see Mansell,* 490 U.S. at 589 (gross retirement pay not divisible). In *Mattox v. Mattox,* 734 P.2d 259 (N.M. Ct. App. 1987), a case involving two civilians, the court cited the California *Gillmore* decision approvingly, suggesting that a court can order a member to begin paying the spouse the spouse's share of the service member's retirement benefits when the member becomes eligible to retire, even if the member elects to remain on active duty.

New York

Military retired pay is divisible. Pensions in general are divisible; *Majauskas v. Majauskas,* 463 N.E.2d 15 (N.Y. 1984). Most lower courts hold that nonvested pensions are divisible. *See, e.g., Damiano v. Damiano,* 63 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; *E.g., Lydick v. Lydick,* 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); *Gannon v. Gannon,* 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent that it reflects deferred compensation; *See West v. West,* 475 N.Y.S.2d 493 (N.Y. App. Div. 1984).

North Carolina

Military retired pay is divisible. N.C. Gen. Stat. § 50-20(b) (1988) expressly declares vested military pensions to be marital property. In *Seifert v. Seifert,* 346 S.E.2d 504 (N.C. Ct. App. 1986), *aff'd on other grounds,* 354 S.E.2d 506 (N.C. 1987), the court suggested that vesting occurs when officers serve for twenty years but not until enlisted personnel serve for thirty years. *But see Milam v. Milam,* 373 S.E.2d 459 (N.C. Ct. App. 1988) (holding that a warrant officer's retired pay had "vested" when he reached the eighteen-year "lock-in" point). In *Lewis v. Lewis,* 350 S.E.2d 587 (N.C. Ct. App. 1986), the court held that a divorce court can award a spouse a share of *gross* retired pay, but, because of the wording of the state statute, the amount cannot exceed fifty percent of the retiree's *disposable* retired pay. *Mansell,* 490 U.S. at 589, may have overruled the court's decision in part.

North Dakota

Military retired pay is divisible. *Delorey v. Delorey,* 357 N.W.2d 488 (N.D. 1984); *see also Morales v. Morales,* 402 N.W.2d 322 (N.D. 1987) (affirming an order awarding 17.5% of a former service member's retirement pay to a spouse of seventeen years because courts may consider equitable factors in dividing military retired pay); *Bullock v. Bullock,* 354 N.W.2d 904 (N.D. 1984) (court can award a spouse a share of gross retired pay); *But see Mansell,* 490 U.S. at 589 (possibly overruling *Bullock*).

Ohio

Military retired pay is divisible. *Anderson v. Anderson,* 468 N.E.2d 784 (Ohio Ct. App. 1984); *see also Lemon v. Lemon,* 537 N.E.2d 246 (Ohio Ct. App. 1988) (nonvested pensions are divisible as marital property).

Oklahoma

Military retired pay is divisible. *Stokes v. Stokes,* 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state attorney general earlier had opined that military retired pay was divisible, based on the prior law. Only a pension vested at the time of the divorce, however, is divisible. *Messinger v. Messinger,* 827 P.2d 865 (Okla. 1992). A former spouse is entitled to a retroactive division of a retiree's military pension pursuant to their property settlement agreement which provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

Oregon

Military retired pay is divisible. *In re Manners,* 683 P.2d 134 (Or. Ct. App. 1984); *In re Vinson,* 616 P.2d 1180 (Or. Ct. App. 980); *see also In re Richardson,* 769 P.2d 179 (Or. Ct. App. 1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Military retired pay is divisible. *Major v. Major,* 518 A.2d 1267 (Pa. Super. Ct. 1986) (nonvested military retired pay is marital property).

Puerto Rico

Military retired pay *not* divisible as marital property. *Delucca v. Colon,* 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation not yet published as of June 1994). This case overruled *Torres v. Robles,* 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. Pensions may be considered, however, in setting child support and alimony obligations.

Rhode Island

Military retired pay is divisible. R.I. Pub. Laws § 15-5-16.1 (1988) (giving courts broad powers over the parties' property

to effect an equitable distribution). A court cannot use a soldier's implied consent to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). *Flora v. Flora,* 603 A.2d 723 (R.I. 1992).

South Carolina

Military retired pay is divisible. *Tiffault v. Tiffault,* 401 S.E.2d 157 (S.C. 1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, are subject to equitable distribution. Nonvested military retirement benefits also are subject to equitable division. *See Ball v. Ball,* 430 S.E.2d 533 (S.C. Ct. App. 1993) (NCO acquired a vested right to *participate* in a military pension plan when he enlisted in the army; this right, which is more than an expectancy, constitutes property subject to division). *But see Walker v. Walker,* 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife who lived with parents during entire period of husband's naval service made no homemaker contributions to the marriage and therefore, she was not entitled to any portion of the military retired pay).

South Dakota

Military retired pay is divisible. *Gibson v. Gibson,* 437 N.W.2d 170 (S.D. 1989) (court stated that military retired pay—Reserve Component retired pay where the member had served twenty years but had not yet reached age sixty—is divisible); *Radigan v. Radigan,* 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, postdivorce efforts); *Hautala v. Hautala,* 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse forty-two percent of military retired pay; this award was not challenged on appeal); *Moller v. Moller,* 356 N.W.2d 909 (S.D. 1984) (commenting approvingly on cases from other states that recognize divisibility, but declining to divide retired pay because a 1977 divorce decree was not appealed until 1983). *See generally Caughron v. Caughron,* 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); *Hansen v. Hansen,* 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); *Stubbe v. Stubbe,* 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Military retired pay is divisible. *See* Tenn. Code Ann. § 36-4-121(b)(1) (1988) (defining all vested pensions as marital property). No reported Tennessee cases specifically concern military pensions.

Texas

Military retired pay is divisible. *Cameron v. Cameron,* 641 S.W.2d 210 (Tex. 1982); *see also Grier v. Grier,* 731 S.W.2d 936 (Tex. 1987) (court can award a spouse a share of gross retired pay, but postdivorce pay increases constitute separate property); *But see Mansell,* 490 U.S. at 589 (possibly overruling *Grier* in part). Pensions need not be vested to be divisible. *Ex Parte Burson,* 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling is in accord with *Mansell.*

Utah

Military retired pay is divisible. *Greene v. Greene,* 751 P.2d 827 (Utah Ct. App. 1988). In *Greene,* the court clarified that nonvested pensions can be divided under Utah law, and, in dicta, it suggested that only disposable retired pay is divisible, not gross retired pay. *But see Maxwell v. Maxwell,* 796 P.2d 403 (Utah App. 1990) (pursuant to a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount deducted from his retired pay for taxes).

Vermont

Military retired pay probably is divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that

> The court shall settle the rights of the parties to their property by . . . equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property.

Virginia

Military retired pay is divisible. Va. Ann. Code § 20-107.3 (Michie 1988) defines marital property to include all pensions, whether or not vested. *See also Mitchell v. Mitchell,* 355 S.E.2d 18 (Va. Ct. App. 1987); *Sawyer v. Sawyer,* 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division); *Owen v. Owen,* 419 S.E.2d 267 (Va. Ct. App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay—held not to violate *Mansell*).

Washington

Military retired pay is divisible. *Konzen v. Konzen,* 693 P.2d 97 (Wash. 1985), *cert. denied,* 473 U.S. 906 (1985);

Wilder v. Wilder, 534 P.2d 1355 (Wash. 1975) (nonvested pension held to be divisible); *In re Smith*, 657 P.2d 1383 (Wash. 1983);*Payne v. Payne*, 512 P.2d 736 (Wash. 1973).

West Virginia

Military retired pay is divisible. *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution; a court can award a spouse a share of gross retired pay. *But see Mansell*, 490 U.S. at 589 (may have overruled *Butcher* in part).

Wisconsin

Military retired pay is divisible. *Thorpe v. Thorpe*, 367 N.W.2d 233 (Wis. Ct. App. 1985); *Pfeil v. Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983); *see also Leighton v. Leighton*, 261 N.W.2d 457 (Wisc. 1978) (nonvested pension held to be divisible); *Rodak v. Rodak*, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned *before* marriage is included in marital property and subject to division).

Wyoming

Military retired pay is divisible. *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property). In March 1993, the Wyoming Supreme Court affirmed award of 100 percent of a retiree's military retirement benefits to his former spouse. *Forney v. Minard (formerly Forney)*, 849 N.W.2d 724 (Wyo. 1993).

Canal Zone

Military retired pay is divisible. *Bodenhorn v. Bodenhorn*, 567 F.2d 629 (5th Cir. 1978).

Major Block.

Administrative Law Note

Administrative Separations: Reporting Actions Involving Allegations of Homosexuality

The Office of The Judge Advocate General (OTJAG) continues to receive numerous requests for information about the application of the new homosexual conduct policy. To ensure accurate and timely responses to these requests, OTJAG has initiated a new reporting requirement for Army legal offices.[40]

All legal offices, both active and reserve, will report the initiation and disposition of administrative separation actions in which the Army homosexual conduct policy forms all or part of the basis for the separation action.[41] The reports will be made to OTJAG, Administrative Law Division (DAJA-AL, Attn: Major Stranko/Captain Fair) by telefacsimile (commercial (703) 693-2518, alternate DSN 225-8370, commercial (703) 695-8370).[42]

At a minimum, the reports will include the name of the soldier, the unit of assignment, the initiating commander (by position), the relevant referral and or separation authority, the basis for separation action—that is, homosexual acts, homosexual marriages, homosexual statements, or combinations of the above (state which)[43]—a brief synopsis of the facts supporting the basis, any involvement by law enforcement in the inquiry or separation process, the recommendation of any board or other investigation, and a synopsis of the action taken by the separation authority.[44] The reports also should indicate whether the soldier being processed initiated the action or otherwise requested separation, whether any known civil litigation or significant media interest in the process exists, and whether any questions or issues have been raised during the process that might indicate a need for additional action by Headquarters, Department of the Army.[45]

The OTJAG message establishing the requirement contains additional details about the reporting requirement. If you need a copy of the message, or have any questions about the reporting requirement, contact Major Stranko or Captain Fair at DSN 224-4588/commercial (703) 614-4586. Major Peterson.

---

[40] Message, Headquarters, Dep't of Army, DAJA-ZX, subject: Homosexual Conduct Policy (191425Z May 94).

[41] The reports will be used by OTJAG for informational purposes only; OTJAG will not conduct any legal review in lieu of legal reviews normally conducted in the field. The reporting requirement includes all officer and enlisted administrative separation actions commenced on or after 28 February 1994. Legal offices also will report any disqualification or separation actions in recruiting and officer accession programs. *Id.* paras. 1, 4, 5.

[42] Information copies will be sent to the relevant major command. *Id.* para. 3.

[43] *Id.* para. 2.

[44] The initial report should contain as much of the above information as is available. Subsequent reports should be made at significant steps in the disposition. *Id.* para. 4.

[45] *Id.* para. 2.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Amendment of 10 U.S.C. § 1095

Congress recently amended 10 U.S.C. § 1095 by adding the following language to paragraph (g), "or under any other provision of law from any other payer" after the phrase "collected under this section from a third party payer." The amendment applies to claims asserted on or after 30 November 1993 and expands collection authority to include collection from premises liability, products liability, and workers compensation insurance or any other sources of recovery that may apply to a particular incident.

Monies recovered from any of the above-mentioned sources must be deposited in the proper operations and maintenance (O&M) account of the military treatment facility (MTF) that provided the medical care. This is imperative because the amendment also requires the Secretary of Defense to submit a report to Congress specifying the amount credited under this subsection to each MTF's O&M account. Monies collected under this section are not considered when establishing the MTF's operating budget. Captain Park.

Proof of Tender when Items Are Not Listed on the Inventory

In recent years, a noticeable trend has developed in which the Comptroller General has consistently denied the government's recovery of damages paid from a carrier when delivered damaged items were not listed on the carrier's inventory. The Comptroller General has maintained that the government may not recover from a carrier when no proof of tender exists. This note discusses some of these cases and a recent case in which the Army was successful in establishing tender. The note also discusses actions that the claims office can pursue to reverse this trend and prove tender even when an item is not listed on the inventory.

In 1991, the Comptroller General issued *Sentry Household Shipping, Inc.*[1] which held that the Air Force failed to establish sufficient proof of tender for a delivered damaged item. The decision involved an antique violin that was not listed on the claimant's inventory, but was noted on *DD Form 1840R*[2] as having a cracked front. The Air Force paid the member $200 for repairs and offset the carrier when it refused to pay liability. The carrier appealed to the General Accounting Office (GAO). The GAO Claims Group held for the carrier. It found no credible evidence to establish that the antique violin was tendered and, even assuming that it had been tendered, the GAO noted that there was no evidence to establish that it was delivered in a worse condition than when tendered.

The Air Force appealed this Settlement Certificate to the Comptroller General. The Air Force contended that the carrier had the duty to prepare the inventory properly and argued that permitting a carrier to avoid liability by simply not listing an item on the inventory was unfair.

The Comptroller General affirmed the Claims Group Settlement Certificate. He noted that there was no substantive evidence to establish that the violin was tendered to, or delivered by, Sentry. The Comptroller General noted that every household good need not be listed on the inventory, but some substantive evidence of tender must exist. At a minimum, that evidence ought to be a statement from the member reflecting some personal knowledge of the circumstances of tender.

The Comptroller General found it unreasonable that the member allowed an expensive antique violin to be shipped without being identified as part of the shipment and listed on the inventory. He noted that there was no statement from the member establishing tender, or evidence indicating the condition of the violin prior to shipment, and there was no basis to determine if the damage was preexisting.

In *American Van Service, Inc.*,[3] the GAO Claims Group affirmed offset for a broken ceramic plaque packed in a carton of books, a crushed vacuum cleaner brush packed in a dishpack with shelf glass, a broken wicker basket packed in a carton of games, and two lampshades packed in a carton labeled, "lampshade." The carrier objected to offset and contended that no proof of tender existed because the damaged items were not listed on the inventory and that the items did not relate to the cartons in which they were allegedly packed.

The Comptroller General affirmed the Settlement Certificate in part. He found substantial evidence of tender for the lampshade because it would not be unusual to pack more than one lampshade in a carton. He upheld offset for the plaque, agreeing with the carrier that a ceramic plaque would not normally be packed with books. However, the Comptroller General reasoned that the *DD Form 1840R* described the item as broken into several hundred pieces and that type of damage would be consistent with the plaque being packed with heavy objects such as books.

---

[1] B-243922, July 22, 1991 (unpub.).

[2] Dep't of Defense, DD Form 1840R, Notice of Loss or Damage (Jan. 1988).

[3] B-249966, Mar. 4, 1993 (unpub.).

The Comptroller General agreed with the carrier on the remaining items. He found the general contents of the cartons were unrelated to the claimed damaged items. The Comptroller General specifically indicated that the claim record contained no personal observations by the shipper or others describing the packing process and how the diverse items came to be packed together.

In a related Air Force case, in which tender was at issue, the Comptroller General found that a prima facie case of carrier liability was not established. In *Carlyle Van Lines, Inc.*[4] the inventory reflected that a "rug red with flowers" was tendered to the nontemporary storage facility in 1985. In 1990, the member received a rug, but returned it to the carrier contending it was not his rug. Carlyle maintains that the carpet that was returned was a red carpet with flowers.

The Comptroller General held for Carlyle. He found no evidence in the record establishing the quality and value of the rug, the circumstances surrounding its tender, or how the delivered carpet differed from the one that was tendered. The member claimed that he shipped a nine-by-twelve foot handmade Turkish carpet that could be replaced for $3400. The Comptroller General noted that it would be reasonable to expect the record to contain more detailed evidence of the nature and value of such an item. He also faulted the Air Force for merely denying that the correct rug was delivered, without evidence of an investigation into the nature of the delivered carpet.

In a recent Settlement Certificate, the GAO Claims Group held for the carrier in a case which involved a decorative copper pot that was delivered smashed. The copper pot was not listed on the inventory. The Claims Group agreed with the carrier, Security Van Lines, when it claimed that there was no evidence that the item was tendered or delivered. The Army appealed the Settlement Certificate. In *Security Van Lines*,[5] the Comptroller General reversed the Claims Group Settlement Certificate and held for the Army.

The Army noted that *DD Form 1840R* informed the carrier that the copper pot was delivered smashed and not packed in a carton. A staff attorney from the United States Army Claims Service (USARCS) telephoned the claimant to inquire about the circumstances of tender, the circumstances of delivery, and why he had failed to note the damage at delivery. The claimant clearly remembered the move. He said it was such a bad move that at the time of delivery his major concern was the missing items. He inadvertently failed to note damage to the copper pot on *DD Form 1840.* However, he remembered seeing the copper pot as it was taken off the van. It was unwrapped, unprotected, and was inside a plastic laundry basket along with legs from a child's table. At the time of delivery, he took a photograph of the damaged pot inside the laundry basket as the laundry basket was placed on his front lawn. At USARCS's request, he forwarded a letter with photographs corroborating the telephone conversation. The letter and photographs were included in the administrative report sent to the Comptroller General.

The Comptroller General noted that the Army should have obtained a specific statement from the member describing the circumstances surrounding his transfer of the copper pot to the carrier. The Comptroller General found, however, that the record included sufficient evidence for the Army to have reasonably concluded that the member tendered the pot, and that the damage was the type likely to occur during transit. The Comptroller General cited the photograph showing the dented pot in the clothes basket and the letter from the claimant describing events at delivery. The Comptroller General noted that the damage was consistent with the general condition of the shipment; items simply were thrown together without sufficient packing material.

What is the claims office's responsibility when an item is not listed on the inventory? The claims office must build a case sufficient to establish that the unlisted item was tendered and left off the inventory by the carrier. To begin, the claims office must check the inventory to determine if the claimed item was listed. If it is missing, the claimant must be questioned:

- How does the claimant know that the item was tendered?
- What were the circumstances at the time of tender?
- Why did the claimant sign the inventory when the item was not listed?
- Does the claimant have photographs establishing ownership of the item prior to shipment?
- Does the claimant have a personal inventory showing the purchase date, price, and condition of the item?
- Are there other people who can attest to the ownership?
- Are there statements from these people?
- Why did the claimant fail to notice the damage at delivery?
- Did any unusual circumstances exist at the time of delivery?
- Did the claimant take photographs of the damaged item at delivery or shortly thereafter?
- Is all this recorded on the chronology sheet?

The most important piece of evidence, cited repeatedly by the Comptroller General, is the personal detailed written statement signed by the claimant, describing tender of the item to the carrier, and any other information that would help establish that the item was tendered, but not delivered. By taking these steps, claims offices will greatly strengthen the Army's position in negotiating settlements with carriers or when offset becomes necessary. Ms. Schultz.

[4] B-247442.2, Dec. 14, 1993 (unpub.).

[5] B-254197, Feb. 2, 1994 (unpub.).

Professional Responsibility Notes

Department of the Army Standards of Conduct Office

Ethical Awareness

The following summary describes the application of the *Army's Rules of Professional Conduct for Lawyers*[1] *(Army Rules)* to actual professional responsibility cases. To stress education and protect privacy, neither the identities of the office nor the names of the individuals involved are published. Lieutenant Colonel Fegley.

Case Summary

Army Rule 1.9(a)(1)
(Conflict of Interest: Former Client)

A lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation . . . .

Army Rule 1.7(b)
(Conflict of Interest: General Rule)

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests . . .

Captain *A* (CPT *A*) was a law center officer in charge. He and Sergeant First Class *B* (SFC *B*) both participated in the Youth Services haunted house. While they were getting into their costumes, SFC *B* recognized CPT *A* as an officer of the Judge Advocate General's Corps. Sergeant First Class *B* approached CPT *A* and began to discuss marital problems that he and his wife were experiencing. Sergeant First Class *B* left with the impression that CPT *A* would be his lawyer with respect to his marital problems.

Captain *A* has no recollection of any such conversation with SFC *B*, although he recalls SFC *B* participating in the haunted house. He concedes that he may have spoken briefly with SFC *B* and given some sort of generic or general advice. Captain *A* made no record of the conversation and never annotated client file cards at the legal assistance office. Based on statements made by SFC *B* concerning the conversation with CPT *A* and CPT *A*'s statement concerning how he would have handled such a situation, the preliminary screening official (PSO) concluded that a conversation occurred. He further concluded that CPT *A* gave SFC *B* only general advice—such as, to close joint bank accounts—and advised SFC *B* to make an appointment to see him in his office (which SFC *B* did not do).

Approximately one year later, SFC *B*—who still was married—was investigated for alleged adultery. The inquiry was initiated based on a statement by SFC *B*'s alleged paramour, Mrs. *X*, wherein she admitted to having sexual relations with SFC *B* on a number of occasions. During the course of that inquiry, a statement was provided by CPT *A*'s wife, a friend of Mrs. *X*, the alleged paramour. In her statement, CPT *A*'s wife stated that Mrs. *X* always had maintained to her that the relationship between Mrs. *X* and SFC *B* was platonic.

Captain *A*—in his role as the command legal advisor—opined that the evidence gathered during the investigation was insufficient to title SFC *B* for adultery, but recommended imposition of adverse administrative action—that is, a written reprimand and withdrawal of SFC *B*'s Military Police Investigator credentials. Captain *A* subsequently drafted a letter of reprimand for SFC *B*'s commander's signature. Prior to rendering his opinion and drafting the reprimand, CPT *A* did not employ client conflict screening procedures, although in this case it would not have mattered because no client card existed for SFC *B*.

Captain *A* considered the information provided by his wife, and specifically considered whether her input impacted on his ability to provide "independent" advice to the command. Ultimately, CPT *A* decided that the information provided by his wife—that no adultery occurred—was incorrect in light of the evidence supporting the opposite conclusion. Having discounted his wife's statement, CPT *A* perceived no conflict of interest based on his wife's involvement as a peripheral witness.

After rendering advice to the command concerning disposition of SFC *B*'s case, CPT *A* checked legal assistance client cards and discovered that he had represented SFC *B*'s wife on a consumer matter even before he met SFC *B* at the haunted house. Captain *A* immediately notified his supervisor to discuss whether his prior representation of SFC *B*'s spouse in an unrelated matter created a conflict of interest so as to preclude his further participation in providing advice concerning the adultery allegation. He was advised that no conflict existed.

Sergeant First Class *B* complained to the attorney who assisted him on the adverse administrative actions that CPT *A* had been his attorney and advised him regarding his marital difficulties, but then switched sides and advised the command to take adverse action based on the allegations of adultery. Sergeant First Class *B*'s attorney raised the matter with CPT *A*'s staff judge advocate. Thereafter, CPT *A* had no further involvement in the matter of SFC *B*'s alleged adultery.

---

[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

The PSO identified the central issue in this matter as whether SFC *B* became a client such that later representation of the government's interests was a conflict of interest for CPT *A*. He concluded that the subjective belief of the putative client is determinative in such situations and that an attorney-client relationship arose between SFC *B* and CPT *A* during their brief contact.[2] He also determined, however, that CPT *A* did not remember that SFC *B* had been a client when he acted for the government against SFC *B* a year later.

The PSO specifically found that CPT *A*'s command advice concerning disposition of SFC *B*'s case involved a matter related to his representation of SFC *B* a year earlier. The marital difficulties between SFC *B* and his wife that were discussed at the haunted house were identified by CPT *A* in his written advice to the command as one reason why SFC *B* may have committed adultery. The relationship between the two matters is close enough that a violation of Rule 1.9(a)(1) of the *Army Rules* arose.[3] That rule precludes a lawyer who has formerly represented a client in a matter from thereafter representing another person "in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation."[4] The PSO took note of the Comment to Rule 1.9(a)(1) which provides that "[t]he underlying question is whether the lawyer was so involved in a particular matter that the subsequent representation can justly be regarded as changing sides in the matter in question."[5] He concluded that any doubt should be resolved in favor of protecting the attorney-client relationship.

The PSO also found the following:

- No evidence existed that CPT *A* used any information from the conversation at the haunted house to SFC *B*'s disadvantage.

- Captain *A* appropriately recognized a potential ethics issue when he discovered that he had seen SFC *B*'s wife on a consumer matter even before his conversation with SFC *B*, and that CPT *A* and his supervisor concluded, correctly, that no ethics violation existed.

- Captain *A*'s decision to continue providing advice to the command after his wife became involved as a witness did not violate the Rule 1.7(b)[6] prohibition against representing a client if the representation may be materially limited by the lawyer's responsibilities to another person or by the lawyer's own interests. In this regard, the PSO's finding apparently was based on CPT *A* choosing to believe evidence that contradicted his wife's statement. The PSO concluded, however, that CPT *A*'s decision to continue was a judgmental error.

Given the circumstances under which the attorney-client relationship arose and the lack of evidence that CPT *A* used any information gained from that relationship in any manner adverse to SFC *B*, the violation in this case was determined to be minor.

---

[2] *See also* Prof. Resp. Notes: *Avoiding Misperceptions About the Existence of a Lawyer-Client Relationship,* ARMY LAW., Dec. 1992, at 42.

[3] AR 27-26, *supra* note 1, rule 1.9(a)(1).

[4] *Id.*

[5] *Id.* rule 1.9, cmt.

[6] *Id.* rule 1.7(b).

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Fiscal Year 1995 JAGC Colonel Promotion Selection Board

On or about 23 August 1994, a promotion selection board will convene to consider eligible JAGC lieutenant colonels for promotion to colonel. The announced zones of consideration are as follows:

Above the zone:	31 August 1990 and earlier
In the zone:	1 September 1990 through 31 July 1991
Below the zone:	1 August 1991 through 30 June 1992

The key items that the board considers include: the performance fiche of the Official Military Personnel File (OMPF);

the Officer Record Brief (ORB); and the official Department of the Army (DA) photograph. These items should be current and complete. Please note that photographs[1] and physicals[2] older than five years are considered out of date.

Officers who have not reviewed their OMPF performance fiche lately should obtain a copy from PERSCOM. A written request containing the officer's full name, rank, social security number, and mailing address should be sent to:

Commander
U.S. Total Army Personnel Command
ATTN: TAPC-MSR-S
200 Stovall Street
Alexandria, Virginia 22332-0444

Alternatively, requests can be faxed directly to PERSCOM at commercial: (703) 325-0742; or DSN: 225-0742.

Officers also should contact their supporting Personnel Service Center (PSC) to review their board ORB. Personnel Command mailed board ORBs to PSCs on or about 2 June 1994. The PSC will forward the signed board ORB through personnel channels to PERSCOM for inclusion in the officer's promotion board file.

Updated DA photographs (a color photograph is preferred, but not required), a back-up copy of the signed board ORB, and any documentation missing from the OMPF performance fiche should mailed directly to:

Office of The Judge Advocate General
ATTN: DAJA-PT (MAJ Poling)
2200 Army Pentagon
Washington, DC 20310-2200

For the board to consider an academic evaluation report (AER) or officer evaluation report (OER), the original report must be received by the Evaluation Reports Branch (TAPC-MSE-R) at PERSCOM not later than 16 August 1994. If a report is late, a waiver can be obtained in accordance with *Army Regulation (AR) 624-100*.[3] Complete-the-record OERs must comply with *AR 623-105*[4] and have a "Thru Date" of 17 June 1994. They also are due at PERSCOM not later than 16 August 1994.

Questions about this board should be addressed to MAJ Poling (DAJA-PT), DSN: 225-1353.

Assignment Preferences

Field grade judge advocates who are scheduled for a permanent change of station during the summer of 1995 should now be thinking about the types of positions and locations for which they would like to be considered. The most effective way to communicate these preferences is to complete the "PP&TO Preference Form" located at Appendix B, *1993-94 JAGC Personnel and Activity Directory and Personnel Policies*, and mail it to:

Office of The Judge Advocate General
ATTN: DAJA-PT (COL Romig)
2200 Army Pentagon
Washington, DC 20310-2200

Officers are encouraged to submit their preference forms by 15 September 1994.

Combined Arms and Services Staff School (CAS3)

All officers selected for conditional voluntary indefinite (CVI) status are automatically enrolled in Phase I of CAS3. Although each officer has up to twenty-four months to finish Phase I, the earlier it is completed the more flexibility the officer will enjoy in scheduling resident attendance of Phase II at Fort Leavenworth, Kansas. The Judge Advocate General's Corps has secured spaces for over 100 of its officers to attend the resident Phase II of CAS3 during fiscal year 1995. The class schedule is as follows:

Class	*Dates*	*Spaces*
95-1	12 Oct - 15 Dec 94	21
95-2	4 Jan - 8 Mar 95	18
95-3	13 Mar - 12 May 95	21
95-4	17 May - 19 July 95	21
95-5	7 Aug - 6 Oct 95	21

Officers must schedule their attendance at Phase II of CAS3 through LTC Odegard (DAJA-PT), DSN: 225-1353, after they have coordinated with their supervisory judge advocates.

---

[1] DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY PERSONNEL FILES (1 Oct. 1990).

[2] DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

[3] DEP'T OF ARMY, REG. 624-100, PROMOTION OF OFFICERS ON ACTIVE DUTY, para. 2-7 (21 Aug. 1989).

[4] DEP'T OF ARMY, REG. 623-100, OFFICER EVALUATION REPORTING SYSTEM, para. 5-21 (31 Mar. 1992).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Accession of Judge Advocates into the Army National Guard

A recent On-Site elicited a question on accession procedures for National Guard judge advocates. Understanding the accession process is necessary for the efficient selection and appointment of judge advocates in the Army National Guard.

All Army National Guard judge advocates are selected by their respective states, territories, or district for appointment to a specific judge advocate position. Selection is a function of the state, territory, or district concerned.[1] Federal recognition is required for appointment.

The staff judge advocate (SJA) of the Guard unit with the vacancy typically initiates the selection process. Some SJAs appoint a local board to screen applicants. If the individual chosen is not already a federally recognized member of the Army Judge Advocate General's Corps, an application packet must be submitted.[2] This application packet is sent through the chain of command to the State Area Command (STARC). If favorably considered, the packet is forwarded with endorsements to the office of the National Guard Bureau, Judge Advocate (NGB JA). The Chief, NGB, is the authority for extending federal recognition of the appointment.

Before applicants for appointment into the Judge Advocate General's Corps are considered for federal recognition an applicant's appointment must be "authorized"[3] by The Judge Advocate General (delegated to Director, Guard & Reserve Affairs (GRA)). Therefore, the NGB JA forwards the application file to the GRA Division. To assist the Director, GRA, an Accession Board is convened to review each file and to make recommendations. The standard for authorization is that of "fully qualified."

The process is the same for all applicants, prior service or nonprior service, who are not already federally recognized members of the Army Judge Advocate General's Corps. Changes have been made to expedite the process at the NGB and GRA levels.

The authorization rate historically has been around seventy percent. To avoid wasted time and effort, SJAs may wish to consider several practical tips:

- Give priority to recruiting individuals who are already educationally qualified. Consider filling the vacancy with a prior service Army judge advocate. The Guard & Reserve Affairs Division can provide you with information about REFRADs (Release from Active Duty), IMAs (Individual Mobilization Augmentees), and IRR (Individual Ready Reserve) Army judge advocates in your geographical area.

- Select individuals who do not need waivers. The authorization rate for overage nonprior service individuals is very low.

- Shorten the time for the processing of the application packet at the state level. Personally shepherd the packet through the STARC. Lieutenant Colonel Menk.

The Judge Advocate General's Continuing Legal Education (On-Site) Training

This note identifies the training sites, dates, subjects, and local action officers for The Judge Advocate General's Continuing Education (On-Site) Training Program for academic year 1995. The Judge Advocate General has directed that all judge advocates assigned to USAR Judge Advocate General Service Organizations (JAGSO) or to the judge advocate sections of USAR TPUs shall attend on-site training sessions conducted in their geographic areas.[4] Other judge advocates serving in the USAR, National Guard, or on active duty are strongly encouraged to attend local training sessions. The On-Site Training Program—which features instructors from The Judge Advocate General's School—has been approved for continuing legal education (CLE) credit in many states. Many on-site sessions also include instruction by judge advocates of other services and distinguished civilian attorneys.

---

[1] DEP'T OF ARMY, NATIONAL GUARD REG. 600-100, PERSONNEL—GENERAL: COMMISSIONED OFFICERS—FEDERAL RECOGNITION AND RELATED PERSONNEL ACTIONS, paras. 2-1, 2-2 (15 Nov. 1985) [hereinafter NGR 600-100].

[2] *See id.*; DEP'T OF ARMY, REG. 135-100, ARMY NATIONAL GUARD AND ARMY RESERVE: APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS OF THE ARMY (1 Feb. 1984) [hereinafter AR 135-100].

[3] AR 135-100, *supra* note 2, para. 3-11(b)(1).

[4] *See* DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, paras. 10-10, 11-11 (15 Sept. 1989).

Each host unit has designated a local action officer. They must coordinate with all Reserve Component units to which judge advocates are assigned and must invite judge advocates on nearby active duty Army installations to attend on-site training. Action officers also must notify members of the IRR that on-site training will occur in their geographical areas.[5]

Whenever possible, action officers are encouraged to provide legal specialist and noncommissioned officer (NCO) training and court reporter training concurrently with on-site training. In the past, active duty and Reserve Component judge advocates and NCOs, as well as instructors from the Army legal clerks' school at Fort Jackson, South Carolina, have conducted enlisted training programs.

Questions concerning the On-Site Training Program should be directed to the appropriate local action officer. Any problem that an action officer or a unit commander cannot resolve should be directed to Captain Eric Storey, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, Office of The Judge Advocate General, Charlottesville, Virginia 22903-1781 (telephone (804) 972-6383).

---

[5]Limited funding from ARPERCEN may be available for an IRR member to attend on-site training in active duty for training (ADT) status. An IRR member should submit an application for ADT status eight to ten weeks before the scheduled on-site session to Commander, ARPERCEN, ATTN: DARP-OPS (LTC Carazza), 9700 Page Boulevard, St. Louis, MO 63132-5260. Members of the IRR also may attend on-site training for retirement point credits. *See generally* DEP'T OF ARMY, REG. 140-185, ARMY RESERVE: TRAINING AND RETIREMENT POINT CREDITS AND UNIT STRENGTH ACCOUNTING RECORDS (15 Sept. 1979).

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	SUBJECTS	ACTION OFFICER
15-16 Oct 94	Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731	Int'l Law Contract Law	MAJ Donald Lynde (617) 377-2845 DSN 470-2845
22-23 Oct 94	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	Ad & Civ Int'l Law	COL Armstrong (612) 430-6335
5-6 Nov 94	New York City, NY 77th ARCOM/4th LSO Fordham Law School New York, NY	Ad & Civ Crim Law	LTC Wysocki (718) 352-5703
12-13 Nov 94	Willow Grove, PA 79th ARCOM/153d LSO Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	Ad & Civ Int'l Law	MAJ Wogan (215) 342-1700 (717) 787-3974
6-8 Jan 95	Long Beach, CA 78th LSO Hyatt Regency Long Beach, CA 90815	Int'l Law Ad & Civ	COL J.F. Gatzke (714) 229-3700
21-22 Jan 95	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	Crim Law Contract Law	LTC Vadnal (206) 281-3002

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, Academic Year 1994 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	SUBJECTS	ACTION OFFICER
25-26 Feb 95 split training w/Denver	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third Street Salt Lake City, UT 84114	Crim Law Ad & Civ	COL Nixon (801) 468-2639
25-26 Feb 95	Denver, CO 87th LSO Fitzsimmons AMC, Bldg. 820 Aurora, CO 80045-7050	Crim Law Ad & Civ	COL Nixon (801) 468-2639
4-5 Mar 95	Columbia, SC 120th ARCOM Univ of SC Law School Columbia, SC 29208	Crim Law Ad & Civ	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
10-12 Mar 95	Dallas/Fort Worth 1st LSO Bldg. 602 Ft. Sam Houston, TX 78234	Int'l Law Crim Law	Mr. Abbott (210) 221-2900 DSN 471-2900
11-12 Mar 95	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	Int'l Law Contract Law	LTC Merrill W. Clark 7402 Flemingwood Lane Springfield, VA 22153 (703) 756-2281
18-19 Mar 95	San Francisco, CA 5th LSO Sixth Army Conference Room Presidio of SF, CA 94129	Ad & Civ Crim Law	COL P.K. Graves (206) 281-3002
1-2 Apr 95	Indianapolis, IN National Guard	Ad & Civ Crim Law	COL George A. Hopkins
7-9 Apr 95	Orlando, FL 81st/65th ARCOMS	Contract Law Int'l Law	TBD
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO	Ad & Civ Crim Law	LTC Beggs (614) 692-2589/5108
5-7 May 95	Huntsville, AL Corps of Engineer Ctr. Huntsville, AL	Contract Law Crim Law	LTC Downs 121st ARCOM 255 W. Oxmoor Rd. Birmingham, AL (205) 939-0033
19-21 May 95 (Armed Forces Day is 20 May)	Kansas City, MO 89th ARCOM 3130 George Washington Blvd. Wichita, KS 67120	Contract Law Ad & Civ	LTC Hamack (210) 221-2208 DSN 471-2208

College Work Study Program

Many legal offices in the federal government—including those in the Department of the Army—overlook the College Work Study Program (CWSP) as a source of relief from their heavy workloads. In the past, the Army Research Laboratory, Watertown Legal Office (ARL-WT), has successfully employed several law students through the CWSP. The management policies of the program at the ARL-WT are set forth in a local guidance memorandum authored by the installation's chief counsel.[1] Legal offices and their clientele who are in need of assistance also should consider using this program.

The CWSP program is presently authorized by the Higher Education Act of 1965.[2] The program's primary purpose is to stimulate and promote part-time employment during the academic year and full-time employment during the summer months for undergraduate, graduate, and professional students who "are in need of earnings from employment to pursue courses of study at eligible institutions."[3]

Over one million students are estimated to have participated in the CWSP since it was first authorized. Although many students work on campus, some students seek outside employment to gain experiences for future careers. For a law student, the CWSP is one way to consider a career in the federal government.

Under the CWSP, students must receive approval from their respective institutions as being eligible to work under the program[4] and must be accepted in writing for employment with a qualified host agency.[5] Once these steps have been completed, the student's school will prepare a written CWSP agreement and forward it to the agency.[6] The agency's personnel office must approve this agreement[7] and the agency's legal office also may review the agreement to ensure compliance with applicable laws and regulations.[8]

The agency forwards the CWSP agreement and other relevant documents back to the student's school. At the school, the financial aid office signs, approves, and properly files the agreement.[9] The financial aid office sends a letter of confirmation, program time sheets, and a pay schedule to the agency. Before the student actually begins employment, the agency should request that its budget office reserve funds for the student's employment and provide a copy of the CWSP agreement and other relevant documents.

Students are paid directly by their school for the work that they have performed.[10] Funds for student salaries initially are allocated in the federal budget to the Department of Education which, in turn, awards monies to eligible schools.[11] For a student to receive a paycheck, the agency supervisor submits signed time sheets to the school's financial aid office.[12] The school, with the funds provided by the Department of Education, will cover as much as eighty percent of the student's salary.[13]

The agency is responsible for the remaining portion of the student's salary and agrees to reimburse the school for its

---

[1] College Work Study Program (CWSP): A How To Guide, MTL-M 690-300w (1987).

[2] Pub. L. No. 89-329, Title IV, §§ 441-446, 79 Stat. 1219 (1965), *amended by* 42 U.S.C.A. §§ 2751-2756(b) (West 1994); *see also* DEP'T OF ARMY, REG. 690-300, EMPLOYMENT, chs. 308. 309 (15 Oct. 1979) (C, 11 May 1992).

[3] 42 U.S.C. § 2751(a) (1988).

[4] *See generally* 34 C.F.R. §§ 675.9, 675.10 (1993).

[5] *See generally id.* §§ 675.20(a), 675.22.

[6] *See generally id.* § 675.20(b).

[7] At the ARL-WT, the civilian personnel office designated a personnel specialist to execute CWSP agreements on behalf of the agency.

[8] The agreements, for example, cannot contain "hold harmless" clauses because they would violate the Anti-Deficiency Act. Additionally, it is suggested that the agreements contain Federal Acquisition Regulation clause 52.232-19, "availability of funds for next fiscal year," if employment would bridge the beginning of the fiscal year.

[9] An executed CWSP agreement must be on file at the school prior to the first day of the student's employment.

[10] *See generally* 34 C.F.R. § 675.16(a)(2) (1993).

[11] 42 U.S.C. §§ 2751(b), 2752, 2753(a), 2755 (1988).

[12] *See generally* 34 C.F.R. § 675.19(b)(2)(i) (1993).

[13] *See* 42 U.S.C. § 2753(c) (1988); 34 C.F.R. § 675.26 (1993).

share through the CWSP agreement.[14] At the end of each pay period, the school will send the agency a bill for the agency's share.[15] When the agency receives the bill, it must submit the appropriate forms to their budget office for payment. Some schools bill monthly; however, the ARL-WT has successfully negotiated reimbursement on a semester basis to simplify the payment process.[16]

Students in the CWSP are considered employees of their school and not their host agency. Accordingly, the CWSP workers are not counted toward manpower ceilings[17] and are not considered federal employees under civil service laws or regulations.[18] Because of this, they also are not subject to hiring freeze restrictions that may be placed on the agency.

Under the CWSP, the conditions of a student's employment must be governed by standards that are appropriate and reasonable.[19] Some of these conditions are outlined by applicable statutes. Other more specific requirements usually are set forth in the individual CWSP agreements.[20] Typical agreements touch on the following areas: documenting work performance, providing adequate supervision, and ensuring a proper work environment.

Both the students and the government benefits from the CWSP. For the students at the approximately eight law schools and sixty Boston area colleges, the CWSP provides relevant and valuable practical work experience, and it allows exploration into future career possibilities. For the government, it provides relatively inexpensive assistance throughout the year. This is especially attractive to those agencies that are understaffed or are experiencing limited funding. Christopher M. Bellomy, College Work Study Program Law Clerk, Army Research Laboratory—Watertown Site.

---

[14] *See generally* 34 C.F.R. § 675.20(b) (1993). This system provides substantial savings for the host agencies. For example, the current rate of pay for many law students is eight dollars per hour. If the amount of the agency's share is 25%, the amount the agency would pay for an eight dollar per hour law student would be two dollars per hour. On a weekly basis, the student would receive $160 a week but the agency would pay only $40 a week for the student's services.

[15] *See generally id.* § 675.19.

[16] 42 U.S.C. § 2753(b)(1)(A); 34 C.F.R. § 675.22(e)(2).

[17] *See* DEP'T OF ARMY, REG. 570-4, MANPOWER AND EQUIPMENT CONTROL: MANPOWER, para. 5-1a (25 Sept. 1989).

[18] A student's employment time under the CWSP can be credited as work experience but not as federal service experience when the student applies for later government employment.

[19] *See* 34 C.F.R. § 675.20(c) (1993).

[20] Most institutions have standard agreements which they send out to the host agencies. A sample agreement is set forth at 34 C.F.R. § 675, app. B.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

Please note that the 18th Criminal Law New Developments Course, originally scheduled for 8-12 August 1994, has been rescheduled for 14-18 November 1994.

1994

1-5 August: Fiscal Law Off-Site (Maxwell AFB).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 1st Federal Courts and Boards Litigation Course (5F-F13).

19-30 September: 2d Criminal Law Advocacy Course (5F-F34).

3-7 October: 1994 JAG Annual Continuing Legal Education Workshop (5F-JAG).

12-14 October: 1st Ethics Counselors' CLE Workshop

17-21 October: USAREUR Criminal Law CLE (5F-F35E).

17-21 October: 35th Legal Assistance Course (5F-F23).

17 October-21 December: 135th Basic Course (5-27-C20).

24-28 October: 126th Senior Officers' Legal Orientation Course (5F-F1).

31 October-4 November: 40th Fiscal Law Course (5F-F12).

14-18 November: 18th Criminal Law New Developments Course (5F-F35).

14-18 November: 58th Law of War Workshop (5F-F42).

5-9 December: USAREUR Operational Law CLE (5F-F47E).

5-9 December: 127th Senior Officers' Legal Orientation Course (5F-Fl).

1995

9-13 January: 1995 Government Contract Law Symposium (5F-F11).

10-13 January: USAREUR Tax CLE (5F-F28E).

23-27 January: 46th Federal Labor Relations Course (5F-F22).

23-27 January: 20th Operational Law Seminar (5F-F47).

6-10 February: 128th Senior Officers' Legal Orientation Course (5F-Fl).

6-10 February: PACOM Tax CLE (5F-F28P).

6 February-14 April: 136th Basic Course (5-27-C20).

13-17 February: 59th Law of War Workshop (5F-F42).

13-17 February: USAREUR Contract Law CLE (5F-Fl5E).

27 February-3 March: 36th Legal Assistance Course (5F-F23).

6-17 March: 134th Contract Attorneys' Course (5F-Fl0).

20-24 March: 19th Administrative Law for Military Installations Course (5F-F24).

27-31 March: 3d Procurement Fraud Course (5F-F37).

3-7 April: 129th Senior Officers' Legal Orientation Course (5F-F1).

17-20 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs' Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop

5-9 June: 130th Senior Officers' Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 7th STARC Judge Advocate Mobilization & Training Workshop

10-14 July: 6th Legal Administrators' Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 5th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers' Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 12th Contract Claims, Litigation and Remedies Course (5F-F13).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

October 1994

2-7, NCDA: The Executive Program, Scottsdale, AZ.

3-7, ESI: Managing Projects in Organizations, Washington, D.C.

9-13, NCDA: Trial Advocacy, San Francisco, CA.

11-12, ESI: Cost Allowability, Washington, D.C.

11-13, ESI: Advanced Project Cost Estimating, Washington, D.C.

11-13, ESI: International Business and Project Management, Washington, D.C.

12-14, ESI: Contracting for Project Managers, Washington, D.C.

16-19, NCDA: National Conference on Domestic Violence, Orlando, FL.

17-18, ESI: Contract Performance Measurement: A Key to Problem Prevention, Washington, D.C.

17-18, ESI: Terminations, Washington, D.C.

18-21, ESI: Contract Accounting and Financial Management, Washington, D.C.

19-24, GWU: Federal Procurement of Architect and Engineer Services, Washington, D.C.

23-27, NCDA: Prosecution of Homicide Cases, Colorado Springs, CO.

24-26, ESI: Changes, Claims, and Disputes, Washington, D.C.

24-28, GWU: Administration of Government Contracts, Washington, D.C.

25-28, ESI: Contracting for Services, San Diego, CA.

25-28, ESI: Specifications for ADP/T (FIP) Hardware and Software, Washington, D.C.

30 October-2 November, NCDA: Evidence for Prosecutors, Philadelphia, PA.

31, GWU: Suspension and Debarment, Washington, D.C.

31 October-1 November, ESI: Award-Fee Contracting: The Creative Use of Incentives, Washington, D.C.

31 October-2 November, ESI: Strategic Purchasing, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1994 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-nine states currently have a mandatory continuing legal education (CLE) requirement.

In these MCLE states, all active attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, *JAGC Personnel Policies,* JAG Pub. 1-1, paragraph 6-15 (1993-94), provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	*Local Official*	*CLE Requirements*
Alabama*	MCLE Commission Alabama State Bar 415 Dexter Ave. Montgomery, AL 36104 205-269-1515	-Twelve hours per year. -Active duty military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona*	Director, Programs and Public Services Division 363 North First Ave. Phoenix, AZ 85003 602-252-4804	-Fifteen hours each year including two hours professional responsibility. -Reporting date: 15 July.
Arkansas*	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 501-664-8737	-Twelve hours per year. -Reporting date: 30 June.
California*	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 415-241-2100	-Thirty-six hours every thirty-six months. Eight hours must be on legal ethics and/or law practice management, with at least four hours in legal ethics, one hour of substance abuse and emotional distress, and one hour on the elimination of bias. -Attorneys employed by the federal government are exempt. -Reporting date: 1 February.
Colorado*	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 303-893-8094	-Forty-five hours, including seven hours of legal ethics during three-year period. -Newly admitted attorneys also must complete fifteen hours in basic legal and trial skills within three years. -Reporting date: Anytime within three-year period.
Delaware*	Commission on CLE 831 Tatnall Street Wilmington, DE 19801 302-658-5856	-Thirty hours during two-year period. -Reporting date: 31 July.
Florida*	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5690	-Thirty hours during three-year period, including two hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: Assigned month every three years.
Georgia*	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 404-527-8710	-Twelve hours per year, including one hour legal ethics, one hour professionalism and three hours trial practice (trial attorneys only). -Reporting date: 31 January.
Idaho*	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701- 0898 208-42-8959	-Thirty hours during three-year period. -Reporting date: Every third year depending on year of admission.
Indiana*	Indiana Commission for CLE 101 West Ohio	-Thirty-six hours within a three-year period (minimum six hours per year).

State	*Local Official*	*CLE Requirements*
Indiana* (cont')	Suite 410 Indianapolis, IN 46204 317-232-1943	-New admittees by examination are given three-year grace period beginning 1 January before admission. -Reporting date: 31 December.
Iowa*	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 515-281-3718	-Fifteen hours each year, including two hours of legal ethics during two-year period. -Reporting date: 1 March.
Kansas*	CLE Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 913-357-6510	-Twelve hours each year including two hours of ethics. -Reporting date: 1 July.
Kentucky*	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 502-564-3795	-Fifteen hours per year, including two hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.
Louisiana*	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-Fifteen hours per year, including one hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January.
Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 517-372-9030	-Thirty or thirty-six hours (depending on whether admitted in first or second half of fiscal year) within three years of becoming active member of bar. Six or twelve hours the first year, twelve hours in the second year and twelve hours in the third year. Courses must be taken in sequence identified by CLE Commission. -Reporting date: 31 March.
Minnesota*	Director, Minnesota State Board of CLE 1 West Water St., Suite 250 St. Paul, MN 55107 612-297-1800	-Forty-five hours during three-year period. -Reporting date: 30 August.
Mississippi*	CLE Administrator Mississippi Commission on CLE P.O. Box 2168 Jackson, MS 39225-2168 601-948-4471	-Twelve hours per year. -Active duty military attorneys are exempt, but, must declare exemption. -Reporting date: 1 August.
Missouri*	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-Fifteen hours per year, including three hours legal ethics every three years. -New admittees three hours professionalism, legal/judicial ethics, or malpractice in twelve months. -Reporting date: 31 July.
Montana*	MCLE Administrator Montana Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660	-Fifteen hours per year. -Reporting date: 1 March.
Nevada*	Executive Director Board of CLE 295 Holcomb Avenue Suite 5-A Reno, NV 89502 702-329-4443	-Ten hours per year. -Reporting date: 1 March.
New Hampshire*	New Hampshire Bar Association 18 Centre Street Concord, NH 03301 (603) 224-6942	-Twelve hours per year, including at least two hours of legal ethics, professionalism or the prevention of malpractice, substance abuse or attorney-client disputes. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 1 August.

State	*Local Official*	*CLE Requirements*
New Mexico*	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: thirty days after program.
North Carolina*	Executive Director The North Carolina State Bar 208 Fayetteville Street Mall P.O. Box 25148 Raleigh, NC 27611 919-733-0123	-Twelve hours per year including two hours of legal ethics. Special three-hour block of ethics once every three years. -New attorneys nine hours practical skills each of first three years of practice. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 28 February of succeeding year.
North Dakota*	North Dakota CLE Commission P.O. Box 2136 Bismarck, ND 58502 01-255-1404	-Forty-five hours during three-year period. -Reporting date: period ends 30 June; affidavit must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 East Broad Street Second Floor Columbus, OH 43266-0419 614-644-5470	-Twenty-four hours during two-year period, including two hours of legal ethics or professional responsibility every cycle, including instruction on substance abuse. -Active duty military are exempt, but pay a filing fee. -Reporting date: every two years by 31 January.
Oklahoma*	MCLE Administrator Oklahoma State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-Twelve hours per year, including one hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: 15 February.
Oregon*	MCLE Administrator Oregon State Bar	-Forty-five hours during three-year period, including six hours of

State	*Local Official*	*CLE Requirements*
Oregon* (cont')	5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 503-620-0222 -ext. 368	legal ethics. New admittees—Fifteen hours, ten must be in practical skills and two in ethics. -Reporting date: Initially date of birth; thereafter all reporting periods end every three years except new admittees and reinstated members—an initial one-year period.
Pennsylvania	Pennsylvania CLE Board c/o Administrative Office of Pennsylvania Courts 5035 Ritter Road Suite 700 Mechanicsburg, PA 17055 717-795-2119	-Five hours per year. -Active attorneys must complete a minimum of five hours on ethics and professionalism each year. Up to ten hours may be carried forward and applied against the minimum requirement for either of the next two succeeding years. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: Annually as assigned.
Rhode Island*	Executive Director Rhode Island Mandatory Continuing Legal Education Commission 250 Benefit Street Providence, Rhode Island 02903	-Ten hours each year including two hours of legal ethics. -Reporting date: 30 June.
South Carolina*	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 803-799-5578	-Twelve hours per year, including six hours ethics/professional responsibility every three years in addition to annual MCLE requirement. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.

State	Local Official	CLE Requirements
Tennessee*	Executive Director Commission on CLE 214 2nd Ave., Suite 104 Nashville, TN 37201 615-242-6442	-Twelve hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.
Texas*	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 512-463-1442	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Last day of birthmonth yearly.
Utah*	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 801-531-9077 800-662-9054	-Twenty-four hours during two-year period, plus three hours of legal ethics. -Reporting date: End of two-year period.
Vermont*	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 802-828-3281	-Twenty hours during two-year period, including two hours of legal ethics. -Reporting date: 15 July.
Virginia*	Director of MCLE Virginia State Bar 801 East Main Street 10th Floor Richmond, VA 23219 804-786-5973	-Twelve hours per year including two hours of ethics. -Reporting date: 30 June (annual license renewal).
Washington*	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 6th Ave. Seattle, WA 98121-2599 206-448-0433	-Fifteen hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; $50 1st year; $150 2nd year; $250 3rd year, etc.).
West Virginia*	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 304-348-2456	-Twenty-four hours every two years, at least three hours must be in legal ethics or office management. -Reporting date: 30 June.
Wisconsin*	Director Board of Bar Examiners 119 Martin Luther King, Jr. Boulevard Room 405 Madison, WI 53703-3355 608-266-9760	-Thirty hours during two-year period including three hours of legal ethics. -Reporting date: 31 December every other year.
Wyoming*	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-Fifteen hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche

copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/ JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/ JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A269036 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A273376 The Law of Federal Employment/JA-210(93) (262 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569.* All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed fulltime by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and the pending RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the com-

pressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, 28 February 1994.
JA235.ZIP	August 1993	Government Information Practices.
JA241.ZIP	September 1993	Federal Tort Claims Act, August 1993.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA265A.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part A, September 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA265B.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part B, September 1993
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994 Legal	Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officer's Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, February 1994.
JA505-12.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, February 1994.
JA505-13.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, February 1994.
JA505-14.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, February 1994.
JA505-21.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, February 1994.
JA505-22.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, February 1994.
JA505-23.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, February 1994.
JA505-24.ZIP	March 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, February 1994.
JA506-1.ZIP	May 1994	Fiscal Law Course Deskbook, Part 1, May 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA506-2.ZIP	May 1994	Fiscal Law Course Deskbook, Part 2, May 1994
JA506-3.ZIP	May 1994	Fiscal Law Course Deskbook, Part 3, May 1994
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	March 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International Law, or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

4. 1994 Contract Law Video Teleconferences (VTC)

July VTC Topic (to be determined)

18 Jul, 1530-1730: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

19 Jul, 1530-1730: TRADOC installations, ISC, DESCOM, ARL, MICOM

October VTC Topic (to be determined)

5 Oct, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Oct, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined)

8 Nov, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

9 Nov, 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined)

5 Dec, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Dec, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

NOTE: Mr. Moreau, Contract Law Division, OTJAG, is the VTC coordinator. If you have any questions on the VTCs or scheduling, contact Mr. Moreau at commercial: (703) 695-6209 or DSN: 225-6209. Topics for 1994 VTCs will appear in future issues of *The Army Lawyer*.

5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties:

Norman Ansley, Note, *Legal Articles on the Employee Polygraph Protection Act of 1988*, 23 POLYGRAPH 112 (1994).

Comment, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, Vol. 47 U. MIAMI L. REV. 1449 (1993).

6. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

7. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Office of the Staff Judge Advocate, Attn: CW3 William T. Gardner, HQS, I Corps & Fort Lewis, Fort Lewis, WA 98433-5000, DSM 357-4540, commercial (206) 967-4540, FAX 357-5126, has the following material:

- Federal Rules of Evidence News
- Words and Phrases
- Federal Labor Relations Reporter, 17 volumes

Depot Chief Counsel, Attn: Allison Gamble, Tooele Army Depot, Tooele, UT 84074-5000, DSN 2536, commercial, (801) 833-2536, has the following material:

- Army Federal Acquisition Register
- Federal Law Review Report
- Arizona Revised Statutes, Digest Annotated and Rules of Court
- New Mexico Statutes and Statutes Annotated
- Page on Wills
- West Pacific Digest
- CCH Employment Practice Decisions
- ALR Federal 2d
- Jones Legal Forms
- EPA General Counsel Opinions
- Environmental Rights & Remedies
- Moore's Manual Forms
- Texas Cases Southwestern Reporter

Office of the Staff Judge Advocate, Attn: ATZK-JA (CW2 Worthey), USA Armor Center, Fort Knox, KY 40121, DSN: 464-2669/4628, commercial (502) 624-4628/2669 has the following material:

- West's Military Justice Reporter, volumes 1-38, 5 sets

*U.S. Government Printing Office: 1994 — 300-675/00004

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
06764

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

PIN: 072706-000