**CBCA REJECTS EGREGIOUS INTERPRETATION OF CONTRACT DISPUTES ACT**

By Richard D. Lieberman, Consultant and Retired Attorney

You rarely see the Civilian Board of Contract Appeals ("CBCA") smack down either the Government or a contractor for proferring an egregious interpretation of law, but that is exactly what the CBCA did in *Shaw Areva Mox Servs. v. Dept of Energy,* CBCA 2407 (Sept. 28, 2012). DOE moved for summary judgment, which can only be granted where there are no material facts in dispute and the issue is merely a question of law.

The underlying question was the reasonableness of paying the contractor for its establishment of Long Time Temporary Assignment pay to critical contractor individuals who lived more than 50 miles from DOE's Savannah River Site where the contractor was under contract to build a nuclear processing facility. The DOE's position was simple: because the contracting officer made a thoughtful determination that this pay was *not* allowable, the Board must deny on summary judgment the appeal of what the agency characterizes as a discretionary act. DOE cited a 30 year old NASA BCA decision which stated that the Board would "not substitute its judgment for that of the Contracting Officer in the reasonable exercise of his discretionary authority." *PRC Corp Sys. Serv.*, NASA BCA 680-11, 81-2 BCA ¶ 15,179.

The CBCA fired back:

> [i]f this formulation of the law was ever correct, it has not been so since enactment of the Contract Disputes Act in 1978. This Act states that if a contracting officer makes specific findings in his decision, they 'are not binding in any subsequent proceeding.' 41 U.S.C. § 7103(e) (Supp. IV 2011) (restating language previously found at 41 U.S.C. § 605(a)). The Court of Appeals for the Federal Circuit has held, "[T]he Disputes Act itself suggests that, where an appeal is taken to a board [of contract appeals] or court, the contracting officer's award is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal." *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc) (quoting *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987)). Further, as explained by the Court, "[D]e novo review precludes reliance upon the presumed correctness of the decision. . . . [O]nce an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate." *Id.* at 1401-02; *see also Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,743.

CBCA concluded that there were material facts in dispute that precluded summary judgment. The Board noted it had scheduled a hearing, after which *the Board* would decide, based on the preponderance of the evidence, how much (if any) of the special pay costs were reasonably incurred by the company.

Tip: Always remember, that regardless of what the Contracting Officer decides on your claim, if you appeal it to a Board or the Court of Federal Claims, either forum will proceed *de novo* in accordance with its rules, and will not accept as binding any facts or law relied upon by the contracting officer unless there is adequate foundation, proof and legal support. The case will proceed in the forum "with a clean slate."