



Volume 75 | Issue 2

Article 4

December 1972

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Recommended Citation

Leslie L. Megyeri, *Pandemonium in the Administrative Resolution of Government Contract Disputes*, 75 W. Va. L. Rev. (1972).

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PANDEMONIUM IN THE ADMINISTRATIVE RESOLUTION OF GOVERNMENT CONTRACT DISPUTES

LESLIE L. MEGYERI*

INTRODUCTION

As the federal budget has increased in size so have the problems connected with administering government contracts. Technology and the ever changing state of the arts employed by government contractors has had a complicating effect upon the contracting process. Moreover, the contractual instruments themselves have become extremely complicated with the incorporation of numerous clauses required by governmental fiat. These developments have resulted in a large number of claims against the Government. Not only are there more claims numerically, but they are more complex, and thus, increasingly more difficult to solve. Future forecasts indicate more of the same — the procurement needs of the federal government will increase in size and complexity.

By virtue of a standard disputes clause inserted into government contracts, the government contractor has an administrative remedy for claims under the contract before the contracting officer of the agency involved. The officer's decision may be appealed to an appropriate board of contract appeals that acts for the head of the agency. That contract appeals board will hear the evidence and decide the dispute. The decision will be final unless it violates the Wunderlich Act.¹ Although the boards of contract appeals have basically the same

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¹ 41 U.S.C. §§ 321-22 (1970), provide as follows:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in any dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged; *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessary to imply bad faith, or is not supported by substantial evidence.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

jurisdiction as that defined by the uniform contract disputes clause, the rapid proliferation of these administrative tribunals following World War II resulted in the creation of various appeal procedures. There are presently twelve such boards of contract appeals.² Since rulemaking in the field of federal contracts was apparently exempted from the Administrative Procedures Act,³ problems involving administrative due process began to appear almost immediately. Contractors had looked to the Court of Claims as the primary safeguard for administrative due process.⁴ The Court of Claims was willing to oblige the contractors by reviewing board decisions de novo prior to the Wunderlich Act. The Court of Claims followed this practice for awhile even after the enactment of the Wunderlich Act, based on the assumption that the Act intended to do no more than reinstate review standards that existed prior to the Supreme Court ruling in *U.S. v. Wunderlich*.⁵ But the Supreme Court put an end to this de novo review to a large degree by its holdings in *United States v. Carlo Bianchi & Co.*,⁶

² These boards are as follows: Armed Services BCA; Army Corps of Engineers BCA; Atomic Energy Commission BCA; Coast Guard BCA; Department of Agriculture BCA; Department of Interior BCA; Department of State BCA; District of Columbia BCA; General Services Administration BCA; NASA BCA; U.S. Postal Service BCA; and the Veterans Administration BCA. For a comprehensive analysis of the boards' functions, see Petrowitz, *OPERATION AND EFFECTIVENESS OF GOVERNMENT BOARDS OF CONTRACT APPEALS*, S. Doc. No. 99, 89th Cong., 2d Sess. (1966). An update of this report will be found in the *REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT* to be released on December 30, 1972.

³ 5 U.S.C. §§ 553-54 (1970); see Cuneo, *The Administrative Procedure Act Does Not Apply to Boards of Contract Appeals*, 1 PUB. CONT. L.J. 18 (1967). But see Davis, *The Administrative Procedure Act Applies to Board of Contract Appeals*, 1 PUB. CONT. L.J. 4 (1967); Davis, *Mr. Cuneo's Exposed Heel*, 1 PUB. CONT. L.J. 38 (1967).

⁴ Spector, *Public Contract Claims Procedures—A Perspective*, 30 FED. B.J. 1 (1971). The Government also looks to the Court of Claims for procedural due process. The Government tried to establish a right to seek judicial review of the Board of Contracts Appeals decision and was successful in *S & E Contractors, Inc. v. United States*, 193 Ct. Cl. 335, 433 F.2d 1373 (1970). However, the Supreme Court reversed the Court of Claims and held: (1) that the boards of contract appeals have exclusive authority to resolve disputes without a collateral attack by the General Accounting Office, and (2) that the Wunderlich Act does not confer upon the Department of Justice the right to appeal from decisions of the board of contract appeals. See *S & E Contractors, Inc. v. United States* 406 U.S. 1 (1972). See also Comment, *S & E Contractors and the GAO Role in Government Contract Disputes: A Funny Thing Happened on the Way to Finality*, 55 VA. L. REV. 762 (1969). Whether the pendulum has swung too much in favor of the contractors as a result of the *S & E Contractors* decision remains to be seen. The Government may attempt to restore the balance by promulgating mandatory contract clauses. The Navy is attempting to do just that by its anti-claims clauses. Thus, the Navy will take away contractors' meritorious claims because it is afraid that some unjustified claim might be filed and paid.

⁵ 342 U.S. 98 (1951); see *Volentine & Littleton v. United States*, 136 Ct. Cl. 638, 169 F. Supp. 263 (1956).

⁶ 373 U.S. 709 (1963).

and *United States v. Utah Construction & Mining Co.*,⁷ making the boards the sole bodies vested with original jurisdiction to determine facts in almost all claims cases. As a result of these Supreme Court decisions, considerable effort has been generated to improve the administrative resolution of government contract claims. Since 1950, the contractor's judicial remedy has been increasingly foreclosed by the incorporation of adjustment clauses in government contracts. These clauses are designed to prevent breach of contract actions for damages.⁸ Therefore, the government contractor is usually required to exhaust available administrative remedies prior to a judicial review.⁹ The Government cannot appeal to the courts from a board decision. In view of the foregoing, it is obvious that the various boards of contract appeals represent a critical stage in resolving government contract disputes for both parties. The problems connected with this critical stage are highlighted in this paper.

FRAGMENTATION OF REMEDIES

As stated in the introduction, the standard disputes procedure provides an administrative remedy for disputes arising under the contract. Of course the contractor must exhaust this remedy before proceeding further.¹⁰ Thus, the contractor must first decide whether the claim arises under the contract or outside the contract. It is now recognized that both types of claims can be settled by agreement of the parties.¹¹ Yet we still have not resolved the problem of identifying a disputed breach of contract claim.¹² Since the administrative remedy and the jurisdiction of a particular board of contract appeals are derivations of the contract, claims arising outside of the contract can only be decided within the judicial forum.

Although the terms, "claims arising under the contract" and "claims arising outside the contract," are used as though they were definite criteria to be applied, experience shows that it is difficult to

⁷ 384 U.S. 394 (1966).

⁸ See, e.g., ASPR § 7, 32 C.F.R. § 7 (1972).

⁹ *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234 (1946); *United States v. Blair*, 321 U.S. 730 (1944); *Morrison-Knudsen Co. v. United States*, 170 Ct. Cl. 757, 345 F.2d 535 (1965).

¹⁰ See cases cited note 9, *supra*.

¹¹ *Block & Blevins Co. v. United States*, 170 Ct. Cl. 52, 343 F.2d 951 (1965); *Cannon Constr. Co. v. United States*, 162 Ct. Cl. 94, 319 F.2d 173 (1963). *But see* 44 COMP. GEN. 353 (1964); 41 COMP. GEN. 436 (1962).

¹² Shedd, *Fragmentation of Remedies — The "All-Disputes" Solution*, 28 FED. B.J. 185-86 (1968). *But see*, Witte, *Administrative Resolution of Government Breaches — A Solution Without a Problem*, 28 FED. B.J. 234 (1968).

make a proper identification.¹³ These two types of claims emerged from the jurisdictional quandary between the boards of contract appeals and the Court of Claims and not from any rational formula that would apportion the government contract disputes to each of the two forums. When there is an equitable adjustment in the contract covering the particular act or failure to act, one has a "claim arising under the contract"; but this definition may still be unsatisfactory when a claim falls into both the administrative (under the contract) and judicial (outside the contract) categories. Thus, the contractor is confronted with what has been described as a procedural monster known as the fragmentation and fractionalization of remedies.¹⁴

Contractors, unable to determine whether their claims are within or outside the contract, will often take the administrative route first to avoid the possibility of being trapped by failing to exhaust their administrative remedies. Since the boards of contract appeals are reluctant to decide cases by motions, the contractor will present all his claims and proceed through a full hearing, only to find that some of his claims will be dismissed for lack of jurisdiction.¹⁵ The obvious result is that the contractor with several claims under the same contract must follow the administrative procedure for some claims and the judicial procedure for others, although both types of claims may be entirely interrelated and overlapping. The statute of limitations on the breach claims will not begin to run until the contractor has exhausted his administrative remedies.¹⁶ A consequence of the exhaustion doctrine is the tolling of limitations by administrative pendency of the dispute. Thus, the contractor is faced with a long delay before his dispute is resolved, and the Government pays interest on the amount owed to the contractor only under limited circumstances.¹⁷

¹³ Lane, *Administrative Resolution of Government Breaches—The Case for an All-Breach Clause*, 28 FED. B.J. 199, 207-08 (1968); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 404-07 (1966) and cases cited therein.

¹⁴ Cuneo & Anthony, *Beyond Bianchi: The Impact of Utah and Grace on Judicial Review of Contract Appeals Boards' Decisions*, 55 GEO. L.J. 602, 614 (1967); Jaffe, *Administrative Finality on Judicial Review*, 2 PUB. CONT. L.J. 115 (1968).

¹⁵ R. C. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 895 (2d ed. 1969).

¹⁶ *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967); *Nager Elec. Co. v. United States*, 177 Ct. Cl. 234, 368 F.2d 847 (1966).

¹⁷ For a discussion see Ackerman, *Payment of Interest by the Government on Amounts Owed Under Government Contracts*, 19 BUS. L. 527 (1964). *But see Payment of Interest on Contracts' Claims*, DEFENSE PROCUREMENT CIRCULAR, No. 97, Feb. 15, 1972, requiring a new clause to be included in all future contracts (except small purchases) which contain the "disputes" clause set forth in ASPR § 7-103.12, 32 C.F.R. § 7.103-12 (1972). The clause will not be

With the tendency on the part of the Government to write new contract clauses in order to provide administrative remedies for what otherwise would be breach of contract claims, the question of whether a claim is redressable under the contract remains an ever-present issue.¹⁸ This is further complicated since the Court of Claims tends to find claims redressable under the contract when the board finds no liability.¹⁹ In the two year period following *Grace* and *Utah*, the Court of Claims reversed the boards thirty-five times on the question of liability under the contract.²⁰ It is apparent that no complete relief is available before one forum.

FINALITY OF A BOARD OF CONTRACT APPEALS DECISION

The finality of administrative agency decisions rendered under the disputes clause is a persistent problem in the government contracts field. While the problem is often stated in terms of the finality of contract appeals decisions, the essence of the problem is a jurisdictional contest between forums as to who should conduct the hearing, find the essential facts, state the applicable law, and conclusively resolve the dispute. The attitudes of the various participants in the controversy have withstood numerous personnel changes and have become institutionalized. The institutional views may be summarized: (1) The agency board hears the contractor's claim and decides it; (2) the Court of Claims holds that the board's action is not final, hears the case de novo and makes a different award; (3) on appeal, the Supreme Court holds that the Court of Claims was in error and that the agency board decision should not have been reviewed de novo.²¹

The different attitudes of these forums may be succinctly stated.

incorporated into any existing contracts. See also FPR § 1-1.322, 37 Fed. Reg. 15152 (1972).

¹⁸ Sachter, *Resolution of Disputes Under U.S. Government Contracts: Problems and Proposals*, 2 PUB. CONT. L.J. 363 (1969); Shedd, *Fragmentation of Remedies — The All-Disputes Solution*, 28 FED. B.J. 185 (1968).

¹⁹ Moss, *Judicial Review of Federal Contract Appeals Decisions Today*, 3 PUB. CONT. L.J. 80 (1970); Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

²⁰ These figures were taken from a brief submitted by Mr. Moss to members of the ABA Section of Public Contract Law on October 15, 1970. The brief in opposition to a so-called "all disputes clause" and a "Reply Brief in Opposition" were submitted by John A. McWhorter. These three briefs, together with a ballot, were sent to members of the Public Contract Law Section of the ABA to vote for or against a resolution authorizing the Section to sponsor or support administrative or legislative action necessary to adopt an "all disputes clause". The members voted 299 to 158 against the resolution.

²¹ *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *Adams v. United States*, 2 Ct. Cl. (1866), *rev'd*, 74 U.S. (7 Wall.) 463 (1868).

On one hand, the Supreme Court views the contract appeals boards as quasi-judicial forums rendering decisions under adversary procedures, pursuant to precepts of the Administrative Procedure Act.²² The Supreme Court regards contract appeals decisions to be no more complex than those laid before the regulatory agencies; therefore, the same rule of judicial review ought to apply to them. The Court tends to limit the Court of Claims' review of board decisions to the administrative record in lieu of de novo hearings.²³

On the other hand, the Court of Claims sees the matter quite differently. Historically, the Court of Claims has had an abiding mistrust of the disputes procedure.²⁴ For example, in *Beuttas v. United States*,²⁵ the court refused to apply the provisions of the "all disputes" clause, which severely limited the court's review of administrative decisions. As the conscience of the Government, the Court of Claims believes that the contract controversies under the disputes clause should be tried before it de novo to insure justice.

Contract appeals boards have still a different view. Since their jurisdictions and functions are prescribed by the language of the disputes clause and Supreme Court decisions, the boards exist in a state of uncertainty amidst various proposals to expand or clarify their jurisdictions and functions by executive order, regulation, statute, revision of the disputes clause, or judicial decision. The original purpose of the boards was to provide a fair, inexpensive, and expeditious procedure to resolve disputes arising from the performance of government contracts. Yet, the boards have evolved into quasi-judicial decision-making forums. The development of a non-jury court procedure was the result of various Supreme Court decisions. Notwithstanding such uncertain conditions, the boards regard their procedures as affording the protections of administrative due process; they feel a Court of Claims review should be limited to the record made by the boards.

The judicial review and the finality afforded to the decisions of the board of contract appeals are determined by the standards of the Wunderlich Act.²⁶ This statute, in effect, elevated judicial review of their decisions to the standards contained in the Administrative Pro-

²² 5 U.S.C. § 553 (1970).

²³ *United States v. Wunderlich*, 342 U.S. 98 (1951); *United States v. Moorman*, 338 U.S. 457, 458-63 (1950).

²⁴ vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B.J. 305 (1970).

²⁵ 101 Ct. Cl. 748, 60 F. Supp. 771 (1944), *rev'd*, 324 U.S. 768 (1945).

²⁶ 41 U.S.C. §§ 321-22 (1970).

cedure Act.²⁷ Although the purpose of the Wunderlich Act was to create a right of judicial review for contractors who considered adverse administrative decisions to be wrong, a multiplicity of problems were created because of the fact — law dichotomy of the language in which the statute is framed.²⁸ According to the Petrowitz Report, the Act created “more problems than it solved.”²⁹ Under the Act, administrative decisions are subject to different rules for judicial review, depending upon whether the issue involves a question of fact or of law. Administrative decisions on the facts are final and conclusive under the first section of the Wunderlich Act unless found by the court to be “fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is [are] not supported by substantial evidence.”³⁰ Administrative rulings on the law have no binding effect on the court.

Most questions of law are obviously related to and dependent upon the determination of questions of fact.³¹ Such a distinction was probably derived from the jury trial rule that questions of fact are for the jury and questions of law are for the court. The Court of Claims has accordingly ruled that it may make its own independent decisions on law questions without regard to those made by any board.³²

In addition to the uncertainty of the finality of administrative decisions, the General Accounting Office (GAO) considers that it has the right to review a board of contract appeals decision pursuant to the Wunderlich Act.³³ The result is that the GAO reviews board de-

²⁷ 5 U.S.C. § 557 (1970).

²⁸ Sachter, *Resolution of Disputes Under United States Government Contracts: Problems and Proposals*, 2 PUB. CONT. L.J. 363 (1969).

²⁹ Petrowitz, *supra* note 2, at 23.

³⁰ 41 U.S.C. § 321 (1970).

³¹ Birnbaum, *Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals*, 19 FED. B.J. 120 (1959).

³² *Bailey Specialized Bldgs., Inc. v. United States*, 186 Ct. Cl. 71, 404 F.2d 355 (1968); *Perini Corp. v. United States*, 180 Ct. Cl. 768, 381 F.2d 403 (1967).

³³ *Hearings on S. 2487 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess. (1952); *Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 83d Cong., 1st & 2d Sess. (1954); *United States Code Congressional and Administrative News*, 83d Cong., 2d Sess., 2191 (1954). The GAO is a legislative agency and does not have the authority to review government contract claims. See Birnbaum, *Government Contracts: The Role of the Comptroller General*, 42 A.B.A.J. 433 (1956); Cable, *The General Accounting Office and Finality of Decisions of Government Contracting Officers*, 27 N.Y.U.L. REV. 780 (1952). The Comptroller General relies on 31 U.S.C. § 71 (1970), as the basis of his review of the decisions of the boards of contract appeals. For the Court of Claims' interpretation of the GAO's jurisdiction, see *Northrop Aircraft Inc. v. United States*, 130 Ct. Cl. 6267 127

cisions sua sponte, at the request of a contracting agency or a contractor.³⁴ GAO's decision is made on the record, and the parties are given the opportunity to file a written brief and request a conference.³⁵ Such a review by GAO operates to reduce even further the finality of the administrative decision. Owing to the nature of the office and the limitations of time and personnel, GAO is not in a position to afford any contractor due process of law in the sense of an open adversary proceeding and adherence to rules of evidence.³⁶

REMAND PRACTICE

The Supreme Court, in the *Bianchi* and *Grace* decisions, required the Court of Claims to return cases to the boards of contract appeals for additional findings of fact when the administrative record was deemed inadequate or incomplete.³⁷ Under the *Grace* decision, the Court of Claims was prohibited from holding a hearing to correct deficiencies in the board's record. Since an agency's record usually does not state the amount of recovery when the board denies liability, the record is "deficient" on the question of the amount if the court finds for the plaintiff. The case must be remanded to the agency to try the quantum issue, followed by a second appeal to the court, if necessary.³⁸

One of the problems occurring from the remand requirement is

F. Supp. 597 (1955); *Associated Traders v. United States*, 144 Ct. Cl. 744, 169 F. Supp. 502 (1959).

³⁴ The Comptroller General in 46 COMP. GEN. 441 (1966), held that the GAO has authority to review decisions of boards of contract appeals under the disputes clause. The opinion was challenged by the Attorney General in 37 U.S.L.W. 2415 (Jan. 21, 1969). The Comptroller General immediately reaffirmed his former opinion in B-156192, Feb. 7, 1969. The GAO generally cites 31 U.S.C. § 71 (1970), which authorizes GAO to settle and adjust claims by or against the United States, and 31 U.S.C. § 74 (1964), which prescribes its general auditing functions as the basis to review board cases. However, the Supreme Court in *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), limited this review to "fraud or bad faith".

³⁵ GAO Manual pt. 20. See also, Welch, *The General Accounting Office in Government Procurement*, 14 FED. B.J. 321 (1954). GAO has issued a proposed revised procedure for handling cases. None of these regulations mentions review of the board of contract appeals decisions.

³⁶ Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349 (1970); Schultz, *The Administrative Determination of a Government Contract Dispute*, 2 PUB. CONT. L.J. 108 (1968); Spector, *Is it "Bianchi's Ghost" — or "Much Ado About Nothing?"*, 29 LAW & CONTEMP. PROB. 87 (1964); see note 9, *supra*.

³⁷ 373 U.S. 709 (1963); 384 U.S. 424 (1966). These two decisions focused the government contractor's attention on the boards, on the fairness and effectiveness of their procedure, and on the quality of their decisions.

³⁸ Spector, *Public Contract Claims Procedures — A Perspective*, 30 FED. B.J. 1, 7 (1971).

that it needlessly prolongs the life of many cases.³⁹ Experience shows that this delay largely occurs as a result of changing personnel who represent the Government before the boards and the court. For example, agency counsel represents the Government before the boards. After the board's decision, the contractor's counsel usually follows the case to the review court; the Justice Department furnishes the government counsel, who is required to study the record anew. If a case is remanded back to a board, change in government counsel occurs again. The contractor's counsel follows the case back to the board, but agency counsel, having been away from the case for a considerable time, must undertake a complete review of what has gone before in order to begin again. This remand practice, with the changing of government counsel, builds an unnecessary delay into the handling of contract litigation. Delay may be further extended when the contractor finds the board's decision on remand to be unsatisfactory and discovers that his only recourse is to return to the court that had remanded the case originally.

PROLIFERATION OF THE BOARDS OF CONTRACT APPEALS: LACK OF UNIFORM PROCEDURES

At the present time, there are twelve established boards of contract appeals in the executive branch,⁴⁰ as well as boards maintained by the House Office Building Commission and the government of the District of Columbia. These boards are supposed to be responsive to the particular needs of the agency and at the same time independent and objective in order to present a viable alternative to a court proceeding. The contradiction in roles is obvious. Much of the criticism of the contracting roles results from the activities of the small and part-time boards.⁴¹ There have been actions in the past to consolidate

³⁹ In *Paccon, Inc. v. United States*, 185 Ct. Cl. 24, 399 F.2d 162 (1968), the plaintiff requested that the case not be remanded for further fact findings, because it was a very old controversy. The court noted that it did not have the power to do what the plaintiff requested, regardless of the vintage of the case.

⁴⁰ See note 2, *supra*.

⁴¹ Frana, *Are There Too Many Boards of Contract Appeals?*, 17 CATHOLIC U.L. REV. 44 (1967). Testimony of Irving Jaffe, Justice Department, submitted to the *House Subcomm. on Government Operations*, 91st Cong., 1st Sess., pt. 7 at 1773 (1969), disclosed that:

After the decision in the *Bianchi* case, proceedings before the boards of contract appeals of the several agencies of the Government improved considerably, as they should have. Great strides were made by the several boards of contract appeals in adopting rules of procedure, designed to assure due process, and efforts were undertaken to make uniform those rules throughout the agencies.

However, few agencies have sufficient contract disputes to justify

some of these small boards.⁴² A large step in this consolidation effort occurred when the Department of Defense established its unitary Armed Services Board of Contract Appeals in 1962.⁴³ Some of the agencies also delegate their authority to hear cases to the large boards.⁴⁴ Notwithstanding these developments, a number of part-time boards still remain.⁴⁵ There are several problems associated with the method under which various part-time boards of contract appeals render their decisions. The impartiality of part-time board members is questioned either because they depend on agency approval for their assignments or, in the case of non-agency personnel, because they represent contractors before other boards and may be the day-to-day professional advisors of counsel appearing before them. Further, the use of board members who are closely identified with the agency's interest and the absence from board rules of a separation-of-function requirement, like that used in the Administrative Procedure Act,⁴⁶ have given rise to an allegation that board procedures are inherently unfair. There is a lack of expedition in case handling (setting hearings, issuing decisions after hearings) by the ad hoc and part-time boards because deciding cases is supplemental to the primary responsibility of the board members. More importantly, these part-time members fail to develop the needed expertise to decide claims and encourage settlement of disputes prior to a full hearing. Finally, the proliferation of the boards has led to conflicting interpretations of similar contract provisions. This added confusion and uncertainty to

or support a full-time board. While some agencies have contracted with the Armed Services Board to adjudicate their appeals, others continue to have boards with part-time or ad hoc members. One or two still utilize nonlawyers as board members.

⁴² For example, when the Department of Transportation was formed, the Federal Aviation Agency Appeals Panel and the Coast Guard Board of Contract Appeals merged. 33 Fed. Reg. 2420 (1968).

⁴³ The Armed Services Board of Contract Appeals is considered by many to be a model for the other boards to follow. See also Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

⁴⁴ Contract disputes from the National Science Foundation, the United States Information Agency, the Department of State [41 C.F.R. § 6-60.1 (1972)], and the Agency for International Development [41 C.F.R. § 7-60.1 (1972)] are heard by the Armed Services Board of Contract Appeals. The Department of Treasury delegates authority to hear cases to the General Services Board of Contract Appeals [41 C.F.R. § 10-60.100 (1972)].

⁴⁵ A proposed executive order of Feb. 19, 1968, from the Justice Department, attempted to consolidate all the boards that decide disputes arising out of contracts subject to the Federal Property and Administration Services Act of 1949, Act of June 30, 1949, ch. 288, § 2, 63 Stat. 378, into the General Services Board of Contract Appeals. The executive order was never signed by the President due to agency opposition.

⁴⁶ 5 U.S.C. § 554(d) (1970).

the procurement process may be a particularly harsh trap for the unwary contractor.

Since disputes procedures and the establishment of the boards of contract appeals came about by evolution rather than by plan, no uniform rules and procedures evolved in the process.⁴⁷ Such a lack of uniformity makes appeals before the boards difficult and confusing to contractors who are not represented by counsel or who are represented by lawyers unaware of the pitfalls of the rules. It seems logical that the different boards should be governed by the same rules — the contract clauses that lead to the appeal are the same; the questions involved are frequently similar; and one party to the dispute in each instance is the federal government.

After examining the various procedures followed by the boards of contract appeals, it can be concluded that procedures have improved since *Allen & Whelan v. United States*.⁴⁸ In that case the General Services Board of Contract Appeals had conducted a hearing that was characterized as an “informal round-table discussion.” The record consisted of an admixture of argument, hearsay, opinion (apparently non-expert as well as expert) and comments by the various participants. The Court of Claims referred to these proceedings as “subnormal administrative procedures.” The General Services Administration and other boards have since revised their rules and are generally not subject to such criticism today. Thus, the current theory is that the disputes procedure must be a quasi-judicial proceeding and contain the basic elements of administrative due process.⁴⁹ Based on

⁴⁷ In August of 1969, while addressing the Section of Public Contract Law of the ABA, Chief Judge Wilson Cowan of the Court of Claims remarked that:

As you must know, the administrative disputes article procedure afforded by the various contracting agencies differ in wide range, from a high level of due process provided by some departments to no due process at all. . . . If a contractor does not receive a fair hearing in the Agency . . . or if finally gets a fair trial in one place or the other so late that it turns out to be useless, I think you will agree that this is an empty remedy for it is a remedy in name only.

One tangible result of this trend has been the drafting of three sets of proposed uniform rules of procedure. They are as follows:

- a. The rules prepared by Professor John Whelan and students during his tenure at the Georgetown University Law Center.
- b. The Uniform Contract Appeals Rules prepared by the Committee on Uniform Contract Appeals Rules, Public Contract Section, American Bar Association.
- c. The Model Rules of Procedure prepared by the Committee on Boards of Contract Appeals of the Federal Bar Association.

⁴⁸ 172 Ct. Cl. 603, 347 F.2d 992 (1965).

⁴⁹ Spector, *Is it "Bianchi's Ghost" or "Much Ado About Nothing?"*, 16

this theory, the disputes procedure of various boards is often criticized when it fails to provide the procedural safeguards contained in the Federal Rules of Civil Procedure.⁵⁰

Both the Government and claimants agree that the disputes procedures should be fair, fast, and inexpensive. Yet, the plethora of procedural devices to insure fairness may be incompatible with the desire to have a fast and inexpensive remedy. Therefore, we are faced with the problem of reconciling these competing objectives.

OBTAINING FUNDS TO PAY GOVERNMENT CONTRACT CLAIMS

At the present time, a contractor may not recover interest on a contract claim unless payment is specifically authorized by statute or by the contract itself.⁵¹ The government contractor will seldom recover any compensation for either (a) interest on borrowings necessitated by government changes or breaches of contract, or (b) loss of use of money by reason thereof. Yet the Government, through its mandatory contractual clauses, requires a contractor to pay interest on any amounts owing to the Government that are not paid within thirty days.⁵² The contractor is also obligated to pay interest on over-

AD. L. REV. 265 (1964). However, some writers view the disputes procedure as a bargaining device, e.g., Madden, *Bianchi's Ghost*, 16 AD. L. REV. 22 (1963); Frenzen, *Some Thoughts on the Similarity of the Boards of Contract Appeals to Commercial Arbitration*, 3 PUB. CONTR. L.J. 1, 56 (1970).

⁵⁰ *Hearings Before a Subcomm. of the Senate Select Comm. on Business, On Operations and Effectiveness of Government Boards of Contract Appeals*, 89th Cong., 2d Sess. (1966), Statement of Geoffrey Creyke, Jr. at 99; Sherer, *Discovery Procedure Before the Boards of Contract Appeals*, 3 PUB. CONTR. L.J. 127 (1970).

⁵¹ The rule has been codified in 28 U.S.C. § 2516 (1970) which provides as follows:

- (a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or act of Congress expressly providing for payment thereof.
- (b) Interest on judgments against the United States affirmed by the Supreme Court after review of petition of the United States shall be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed.

See also *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 5851 (1947). For a discussion of the statutory and case laws relating to the prohibition against recovery for interest on claims, see P. M. TRUEGER, ACCOUNTING GUIDE FOR DEFENSE CONTRACTS 320-22 (5th ed.); Ackerman, *Payment of Interest by the Government on Accounts Owing Under Government Contracts*, 19 BUS. LAWYER 527 (1964); Creyke, *The Payment Gap in Federal Construction Contracts*, 35 GEO. WASH. L. REV. 944 (1967); Boyd, *Interest on Contract Claims*, BRIEFING PAPERS No. 70-75.

⁵² E.g., ASPR § 7-104.39, 32 C.F.R. § 7.104-39 (1972); ASPR § 7-204.30, 32 C.F.R. § 7.204-30 (1972).

payments in a termination settlement,⁵³ on damages due to default, and on liquidated damages.⁵⁴ The only public policy advanced to justify this one-sided rule is that the Government is solvent and will pay its obligations when due.

The rigid rule against allowing interest on liquidated or mathematically ascertainable claims against the United States has been relaxed recently by incorporating payment of interest clauses in government contracts.⁵⁵ Unfortunately, interest runs only from the date of filing an appeal to a board of contracts appeal. A substantial case is likely to take at least two or three years at the contracting officer level.⁵⁶ The contractor is not anxious to appeal from the refusal of the contracting officer to render a timely decision when there is a remote possibility of a favorable decision by the officer. It is an expensive proposition to follow the disputes at the board level. Only a major corporation with a substantial claim can withstand the expense and time consumption of a disputes procedure. Most contractors cannot afford this.

The no-interest rule has an adverse affect on the contractor before disputes advance beyond the contracting officer. Governmental immunity from an obligation to pay interest eliminates any incentive on the part of the contracting officer to resolve disputes with contractors expeditiously. Since it does not cost the Government to delay pay-

⁵³ ASPR § 8-203.1 (f), 32 C.F.R. § 8.203-1(f) (1972).

⁵⁴ *United States v. American Employers Ins. Co.*, 141 F. Supp. 281 (E.D. Pa. 1956).

⁵⁵ For example:

(a) If an appeal is filed by the contractor from a final decision of the contracting officer under the disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a), above, (1) interest shall be applied from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the contracting officer determines the contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction.

FPR § 1-1.322, 37 Fed. Reg. 15152 (1972).

⁵⁶ For an example of a long delay in payment, see *Lockheed Aircraft Corp. v. United States*, 179 Ct. Cl. 545, 375 F.2d 786 (1967).

ment, other business takes priority over disputes.⁵⁷ By withholding payment for a considerable time after work is performed, the contracting officer creates a so-called "payment gap."⁵⁸ This payment gap creates severe financial pressure on the contractor. The most striking example of the payment gap arose with the construction of the Atlas and Titan bases from 1958 to 1961. Virtually every contractor involved was adversely effected; many were forced out of business, and others were sustained by their bonding companies or banks.⁵⁹ The payment of interest on borrowed funds would reduce the economic danger inherent in the performance of federal public works.⁶⁰

If a contractor wins his case, there is a convincing argument that money due him should have been paid at the time the claim accrued. Since most claims take considerable time to resolve, the loss of interest is substantial; the interest rightfully should go to the injured party. If the Government had the responsibility of paying interest every day it withheld money from a contractor who subsequently won his case, considerable effort would be concentrated to bring these disputes to an early decision before the contracting officer.

The potential detriment to the contractor, due to lack of interest payment, is augmented by the indoctrination of a contracting officer never to sign a contractual document until he has complete assurance that sufficient funds are available for that contract. This indoctrination is based on the fear that obligating funds may violate one of the numerous statutes applicable to appropriations generally, provisions relating to specific types of appropriations, or particular objects of expenditures.⁶¹ Such indoctrination is carried into the contracting offi-

⁵⁷ *Hearings on H.R. 474 Before a Subcomm. of the House Comm. on Government Operations*, 91st Cong., 1st Sess., pt. 7 at 1765 (1969).

⁵⁸ Creyke, *The Payment Gap in Federal Construction Contracts*, 35 *Geo. Wash. L. Rev.* 944 (1967).

⁵⁹ *Hearings Before the Subcomm. of the House Comm. on Appropriations for Air Force Intercontinental Ballistic Missile Program*, 87th Cong., 1st Sess. (1961); *Comp. Gen. B-133047* (Jan. 8, 1963).

⁶⁰ Statement by the Assoc. General Contractors of Am. presented by William E. Neumann *Before the Subcomm. on Pub. Works of the Senate Appropriations Comm.*, 91st Cong., 1st Sess. (1969).

⁶¹ 31 U.S.C. § 627 (1970) (construction of appropriations acts); 31 U.S.C. § 665(a) (1970) (expenditures or contract obligations in excess of funds prohibited); 31 U.S.C. § 682 (1970) (appropriations for public buildings available until completion of work); 31 U.S.C. § 712(a) (1970) (balances of appropriations expenditures); 41 U.S.C. § 11 (1970) (no contracts or purchases unless authorized or under adequate appropriation); 41 U.S.C. § 12 (1970) (no contract to exceed appropriation); 41 U.S.C. § 13 (1970) (contracts limited to one year). For Comptroller General decisions dealing with the obligation and availability of appropriations see 43 *Comp. Gen.* 687 (1964); 37 *Comp. Gen.* 861 (1958); 19 *Comp. Gen.* 980 (1940).

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cer's role as an impartial "judge" rendering final decisions. When there are insufficient funds to satisfy the equitable adjustment properly due the contractor, the contracting officer will reduce the equitable adjustment to an amount that does not exceed the funds available for that procurement. This reduction may be a result of outside pressures on the contracting officer, notwithstanding the command that he should act impartially and independently in settling disputes.⁶²

As the contracting officer fulfills his function an important conflict arises. The contracting officer is the authorized agent of the Government, charged with the responsibility of administering the contract, and at the same time he is to act impartially in resolving disputes. The employment of the contracting officer is professionally competitive; he must gain his promotions within the system. Therefore, he is subject to the subtle pressure of higher management who approve his promotions. Were he courageous enough to ignore this pressure, higher management would simply reassign the case to another contracting officer who is more tractable.

In the alternative, the contracting officer may persuade the contractor to wait until the next fiscal year, when it is hoped that additional funds will be authorized and appropriated by Congress. Another method used to obtain funds to satisfy a contractor is to request a supplemental appropriation from Congress. This is an unpopular method. The report to Congress would necessitate an explanation of the blunders that precipitated such an action.

It is obvious that obtaining funds to pay the contractor is an extremely cumbersome process when the appropriated funds are exhausted.⁶³ Therefore, to avoid this dilemma the contracting officer will deny the claim. If the shortage of funds is only at the contracting officer level and not truly agency-wide, the board's decision will force the top agency officials to provide the funds. If the shortage of money is truly agency wide, as may be the case when the equitable adjust-

⁶² In *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968), a contracting officer issued a decision defaulting a contractor following a Congressional investigation criticising the contractor. See also *Penner Installation Corp. v. United States*, 115 Ct. Cl. 733, 89 F. Supp. 545 (1950), *aff'd*, 340 U.S. 898 (1950).

⁶³ This discussion is not concerned with the time limitations placed on the use of appropriations. The different types of appropriations in terms of time are the annual, the multi-year, and the no-year appropriations. The problem discussed here arises when the funds allotted to a project have been expended and no further "expenditures" or "obligations" may be made from it. For a discussion of obligations and expenditures of funds, see R. C. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 339 (2d ed. 1969).

ment is a substantial amount, then the case will be appealed to a board of contract appeals, where the parties emphasize the nonjurisdictional aspect of the appeal. Assuming, *arguendo*, dismissal of the claim for lack of jurisdiction, the contractor will take his dispute to the Court of Claims. If the case is settled at the Court of Claims, the judgment will not be satisfied from agency appropriations where the dispute originated. Since these judgments are not paid from agency appropriations, cases that should have been settled at the contracting officer level are not settled before the case goes to trial.

CONCLUSIONS: BASIC CONSIDERATIONS TOWARDS A WORKABLE SOLUTION

Whatever the ultimate solutions might be, there are a number of considerations that experience indicates should be taken into account:

a. The distinction in the Wunderlich Act between questions of fact and questions of law has been unworkable, as indicated by the Supreme Court's decision in *United States v. Utah Construction & Mining Co.*⁶⁴

b. The present distinction between breach claims and disputes claims on the basis of the availability of administrative relief by specific contract clauses is by no means a perfect solution. One defect in this approach is that it leaves a host of minor claims beyond the board's jurisdiction that ought to lie within its jurisdiction. At the same time, there are a number of claims arising under the contract that could be better handled by the Court of Claims under its *de novo* trial procedures.

c. Any recommendations should take into account particular strengths and weaknesses of both the Court of Claims and the boards. For example, the Court of Claims, with its commissioner system, is uniquely adapted and well suited to hear very large, complex, and protracted factual litigation. Conversely, contract appeals boards are suited to handle small and medium-sized claims in an expeditious manner.

d. The holding of two trials, one before a contract appeals board and one before a court, covering the same factual events, is neither a rational, efficient, nor economical process.

e. An agency procedure by its very nature, no matter how

⁶⁴ 384 U.S. 394 (1966).

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formalized and prolonged it may become, cannot provide the impartiality afforded by an independent judiciary.

f. Disputes procedures, which are patterned after those of a trial court, guaranteeing due process, may defeat the purpose of affording the contractors a fast and inexpensive resolution of claims.

g. The Government should pay interest on a government contract claim when it first accrues.

h. There should be a contracting officer for disputes who would be independent of his agency and supervised by the contract appeals board.