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State Public Contract Disputes: A Prospectus for Comprehensive Reform

PAUL F. DAUER*

The public construction contractor in the State of California is confronted with one of two statutory procedures for resolving disputes associated with performance of the contract: submission of a claim to the Board of Control,¹ or a determination of rights.² Due to inherent limitations and the essentially equitable character of the Board's powers, the former has been reduced to practically a *pro forma* step in exhaustion of administrative remedies prior to litigation.³ This leaves the determination of rights proceeding as the only statutory administrative scheme available to handle public contract claims; beyond this, resort must be made to the courts.

* The opinions expressed are those of the author and do not represent the views of any present or former employer. B.A., 1962 University of California, Santa Barbara; J.D., 1965 University of Michigan Law School.

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1. CAL. GOV'T CODE §900 *et seq.*

2. CAL. GOV'T CODE §§14378, 14379, 14404.

3. A. Teichert & Son, Inc. v. State, 238 Cal. App. 2d 736, 48 Cal. Rptr. 225 (1965).

Perennially, contractors' organizations within and without the state have argued for changes in contract procedures and terms because of dissatisfaction with the time and expense required in resolving contract disputes⁴ under a procedure whereby the contracting entity's engineer acts as final arbiter of contract claims.⁵ These arguments have stimulated a number of legislative

4. *Interim Study on SB 547 Before the Senate Judiciary Committee* (Oct. 9, 1968) (Statement by Warren R. Mendel, Executive Vice President, Engineering and Grading Contractors Association).

5. BETTER CONTRACTING FOR UNDERGROUND CONSTRUCTION, NATIONAL ACADEMY OF SCIENCES 44 (1974) [hereinafter cited as NAS STUDY]. Letter from Oscar F. Irwin, attorney, to Carl R. Burg, Painting and Decorating Contractors of California, Inc., Feb. 13, 1976 (copy on file at the *Pacific Law Journal*) [hereinafter cited as Irwin letter]. The rule of exhausting administrative remedies as recognized in California includes contractual remedies as well as statutory remedies. *A. Teichert & Son, Inc. v. State*, 238 Cal. App. 2d 736, 48 Cal. Rptr. 225 (1965). This article will not address the contractual remedies except to the extent that any solution suggested would supplant contractual procedures above an initial decision by the entity. However, as a setting for the evaluation of the existing statutory procedures the reader should be briefly familiar with the two principal forms of contractual claims procedures utilized by the agencies whose contracts are subject to the statutory claims procedure.

The procedure utilized by Cal-Trans defers all claims consideration or prosecution until the end of the contract performance.

The contractor is required to give the engineer a notice of potential claim setting forth any claim or grievance as it arises during the course of the work. This alerts the engineer to the existing situation and permits a consideration of the claim on its merits at an early stage. The District Office and often Headquarter's Construction are consulted and meetings with the contractor during the course of the work are held in an effort to resolve particular problems.

Upon completion of the work, the Resident Engineer prepares his proposed final estimate (updating the monthly progress estimates) which sets forth his recommendations for final payment. Under the contract the contractor has 30 days to file all his outstanding objections to the proposed final estimate. These objections become the contractor's formal claims. In processing these claims the District Office advises the contractor of its recommendation on each claim. If the contractor is dissatisfied with any portion of this recommended disposition he is invited to meet with the District personnel for further discussions. Following this meeting and review by Sacramento Headquarters Construction, the District advises the contractor of its conclusions and advises the contractor that if he is in disagreement he will be afforded an opportunity to meet with the Board of Review in Sacramento to orally present his claims to the top State Highway officials. This Board submits its recommendations to the State Highway Engineer who makes a final decision on each claim from which the final estimate is prepared.

The purpose and functions of the Board of Review are to review all claims unresolved at the District level and make recommendations to the State Highway Engineer. This provides top management with direct lines to insure statewide uniformity of interpretation and application of specification requirements. The contractor is invited to this meeting of the Board to present his claim personally or through his attorney to a Board made up of Deputy and Assistant State Highway Engineers, the Departmental Controller, and an attorney. The contractor's attendance is invited but not required

Interim Study on SB 547 Before the Senate Judiciary Committee (Oct. 9, 1968) (Statement by the Department of Public Works).

By contrast the Department of Water Resources procedure was summarized as follows:

[I]t is the decision of the Department's Deputy Director that constitutes the Department's decision of a claim. In some instances, however, the decision can be made by the field engineer in charge of the project with which the claim is associated. Decisions of field engineers are typically made pursuant to consultation with a member of the Department's legal staff.

Should the dispute continue, it will be presented for a decision by the Chief of the Construction Branch. . . . At this level of Departmental decisionmaking, legal advice is again obtained.

Finally, an appeal from the decision of the Chief of the Construction Branch may be lodged by the contractor with the Deputy Director. Acting in an advisory capacity to the Deputy Director is a Claims Appeal Board, consisting of two engineers and one attorney.

The decision of the Deputy Director is the final one within the Department; it is the decision that is subject to review by the courts

proposals to enact, modify, or extend claims procedures,⁶ or to require arbitration of public contract claims.⁷

With increasing levels of contracting expenditure by state and local governments⁸ as a barometer, the pressure for adequate and responsive

Grunschlag, *Lawyer/Non-Lawyer Decisions in Adjudication of Public Contract Claims: A Study of Administrative Process*, 12 SANTA CLARA LAW. 36, 38-39 (1972).

6. Principal among these are: SB 547, 1968 Regular Session (proposing a court of contract claims); SB 88, CAL. STATS. 1969, c.1462 §1, at 2982 (enacting the determination of rights procedure); AB 2246, 1975 Regular Session, and AB 4419, CAL. STATS. 1976, c. 1397 §1, at—(raising the monetary amount of claims subject to a determination of rights); and SB 1457, CAL. STATS. 1976, c. 1398 §1 at—(raising monetary amounts and requiring the incorporation of mandatory disputes procedures in all public works project contracts of the state or the state university and colleges).

7. SB 88, CAL. STATS. 1969, c. 1462, §1, at 2982. Compare NAS STUDY, *supra* note 5, at 44-45. Cf. *San Francisco Firefighters v. City & County of San Francisco*, 57 Cal. App. 3d 173, 129 Cal. Rptr. 39 (1976), holding that a union agreement providing for arbitration of matters vested by the city charter in a commission of the city was illegal and unenforceable since the agreement constituted an unauthorized attempt to delegate municipal powers absent express authority to do so. *Id.* at 180-81, 129 Cal. Rptr. at 43-44.

Arbitration is opposed by state agencies and the Office of Attorney General on the theory that arbitration absent express statutory authorization would constitute an illegal delegation of a discretionary duty. Formal Letter Opinion No. 7354 of the Attorney General to Department of Natural Resources, Dec. 5, 1930, citing *Buswell v. Board of Supervisors of Alameda County*, 116 Cal. 351, 48 P. 226 (1897) (copy on file at the *Pacific Law Journal*); *Morton Bros. v. Pacific Coast S.S. Co.*, 122 Cal. 352, 55 P. 1 (1898). See also Informal Letter from John Morris, Deputy Attorney General, to Joseph R. Knowland, Chairman, State Park Commission, Nov. 27, 1956 (copy on file at the *Pacific Law Journal*).

A recent development may stimulate new interest in the availability of arbitration involving public entities. California Code of Civil Procedure Sections 1141.10 and 1141.20, CAL. STATS. 1975, c. 1006, §1, at —, authorized the Judicial Council to adopt rules providing for arbitration of superior court causes upon stipulation of the parties or where requested by the plaintiff if the award will not exceed \$7,500. The Council adopted Rule 1600 *et. seq.*, California Rules of Court, effective July 1, 1976, providing generally for arbitration procedures and the selection of panels of arbitrators. Under these provisions plaintiff-contractors may argue that public entities have been legislatively subjected to arbitration of contract controversies which are within the \$7,500 limit, at the plaintiff contractor's discretion. Plaintiff-contractors might also assert that the provision for stipulation of arbitration is sufficient to permit an entity to agree to arbitrate matters pending before the superior courts. Other considerations of concern to public entities, see note 24 *infra*, make any wide-spread use of arbitration unlikely.

8. State and local spending is projected to increase 235 percent from \$131.83 billion in 1970 to \$309.27 billion in 1980. Keyes, *Some Approaches Toward a Uniform Code for State and Local Government Procurement—A Condition Ripe for a Solution*, 6 THE URB. LAW., 763, 765 (1974). As Keyes notes, federal grants-in-aid to state and local governments more than tripled in the decade to 1969 and were estimated to double by 1975. *Id.* at 765 n.1. The Council on State Governments reported that state and local purchasing expenditures for goods and services were \$75.7 billion in 1973 compared to \$25.3 billion in 1963. This contrasts to comparable federal spending of \$53.8 billion and \$38.9 billion respectively. COUNCIL OF STATE GOVERNMENTS, STATE AND LOCAL GOVERNMENT PURCHASING I.1 (1975). More recently it was noted that with the vast outpouring of grant and revenue sharing funds, state and local procurement expenditures would aggregate \$100 billion per year. vom Baur, *The Project for a Model Procurement Code*, 8 PUB. CONT. L.J. 4, 5 (1976). The level of contracting activity for the State of California is difficult to determine since no cumulative statistics are collected and published. Reference to the major kinds of contract activity and the principal contracting entities of State government can give some perspective on the magnitude of total contracting activity.

The Department of Public Works reported that:

During the calendar year 1967, the Department awarded approximately 600 highway contracts with a total bid value of \$460 million. During this same year over 700 written notices of potential claims were filed with our 11 districts. A total of 60 claims on 37 contracts came before the Board of Review, representing claims of \$1.22 million. These 37 contracts represented work in excess of \$88 million In this same time period 10 Board of Control claims were filed and 7 lawsuits were filed.

Interim Study on SB 547 Before the Senate Judiciary Committee (Oct. 9, 1968) (Statement of Department of Public Works). The Office of the State Architect (formerly the Office of Architecture and Construction) indicated that in 1974 and 1975, 186 construction contracts were

awarded by that office totaling \$69,794,208. Letter from Ray R. Soehren, Secretary, OSA Claims Review Board to Paul Dauer, Feb. 18, 1976 (copy on file at the PACIFIC LAW JOURNAL) [hereinafter cited as Soehren letter]. In fiscal year 1974-75, the California state university and colleges had 1037 contractual transactions for all campuses aggregating \$18,785,713. CALIFORNIA STATE UNIVERSITY & COLLEGES, AUXILIARY & BUSINESS SERVICES, REPORT BEFORE CALIFORNIA STATE UNIVERSITY AND COLLEGES, PROCUREMENT AND SUPPORT SERVICES OFFICER'S MEETING IN SACRAMENTO (Feb. 25-26, 1976). That figure is exclusive of transactions exempted by the Trustee's Office, authority for which is delegated to the respective campuses. Included in the figure, however, are lease transactions for space requested by State College Foundations, as auxiliary organizations, and off-campus leases which numerically accounted for 64 transactions during that period. The trend in the number and monetary amount of contract transactions for the university and colleges can be seen from the following table covering the past decade:

Fiscal Year	Total Contract Documents	Total Monetary Amount
1974-75	1,037	18,785,713
1973-74	838	12,343,350
1972-73	908	18,712,764
1971-72	920	27,422,918
1970-71	758	30,802,544
1969-70	773	19,461,241
1968-69	642	13,083,452
1967-68	610	11,839,356
1966-67	680	8,512,563
1965-66	—	2,077,098

Purchases by or through the Office of Procurement for the Department of General Services under CAL. GOV'T CODE §14792 (state purchases) and §14814 (local government purchases) as requested are shown in Table 1 for the five fiscal years ending 1969-70, and Table 2 for the five fiscal years ending 1974-75 (separate tables are used due to changes in the manner and items that were recorded):

TABLE 1*:

	Purchase Orders Issued	Contract Value	Form 42's	Local Agency	Total
1965-66	119,686,922	22,086,356	781,812	0	142,555,090
1966-67	113,648,000	25,282,539	1,180,907	0	140,111,446
1967-68	105,445,002	31,423,943	1,484,863	21,729	138,375,537
1968-69	106,178,733	35,152,255	3,530,808	4,167,707	149,027,503
1969-70	100,210,870	41,488,336	2,625,966	8,106,888	152,432,060

* All figures are in dollars.
(The value of contracts does not include purchases of automobiles, furniture, and machines which in 1970-71 amounted to \$11,587,013.)

disputes procedures can be expected to intensify. Some measure of current claims activity can be discerned from a review of the statistics of construction contract claims appealed under contract claims procedures.⁹

The Department of Water Resources in the years after its peak construction activity had claims totaling \$1,854,244, representing contracts of \$226,547,206, appealed to the Deputy Director of that Department and

TABLE 2:

	Annual Contracts		Purchase Orders		Local Contracts	
	Number	Amount in Dollars	Number	Amount in Dollars	Number	Amount in Dollars
1970-71	271	68,465,328	49,376	86,890,688	801	7,931,996
1971-72	370	65,095,978	50,223	96,954,153	976	9,268,488
1972-73	349	70,577,106	45,157	86,461,692	1463	13,591,279
1973-74	354	86,571,924	48,669	103,278,320	1480	13,760,959
1974-75	385	118,765,599	50,348	128,679,446	1733	14,164,404

During the period 1973-75 the increase in the cost of oil products and paper products purchases (approximately \$15 to \$18 million) was 50 percent. In one year alone the increased cost attributed to these purchases was \$6 to \$8 million. Interview with John Babich, California State Procurement Officer, Sacramento (Feb. 11, 1976).

Personal service and consulting contracts represent an area of intense contracting activity. Again statistics are not generally available on a statewide basis. The Joint Legislative Audit Committee reported that for the five-year period July 1, 1966, to June 30, 1971, \$31,939,848 was expended on consulting for management services, computer systems, research, technical, legal, and other professional services. Principal among the areas of expenditure were education (\$3,221,465) and the Department of Public Works (\$6,603,078). *Prefatory letter from Vincent Thomas, Chairman Joint Legislative Audit Committee, to members of the California Legislature*, in JOINT LEGISLATIVE AUDIT COMMITTEE, REPORT ON STATE AGENCIES CONTRACTS FOR CONSULTING SERVICES (1971). A recent comprehensive survey of personal service contracts revealed that, based on State Personnel Board statistics of contracts in excess of \$5,000, more than \$75 million were expended in 1974 on 1,048 contracts and \$33 million in 1975 on 1,056 contracts. In addition, a survey of the State Controller's Office files identified 500 contracts with an individual value of \$1,200 to \$5,000 and an aggregate value of \$1.5 million as of mid-year 1975-76. Interview with Ben Vasallo, Department of General Services, Sacramento (Feb. 11, 1976). Finally, lease transactions have also grown in number and amount although continuation of that trend is in part dependent on administration policy. Table 3 reflects the actual or estimated number and amount of outstanding leases annually.

TABLE 3:

Year	Number of Leases	Amount in Dollars
1972-73	1672	19,251,000
1973-74	1710	24,206,000
1974-75	1879	28,000,000
1975-76	2098	31,000,000
1976-77	2245	35,000,000

Source: Department of General Services, Space Management Division.

9. See note 5 *supra* for a description of the typical contract claims procedures.

reviewed by the Department's Claims Appeal Board.¹⁰ The Office of State Architect reported claims of \$136,437, on construction contracts of

10. TABLE 4:

CLAIMS APPEALED TO DEPUTY DIRECTOR, DEPARTMENT OF WATER RESOURCES,
AND REVIEWED BY CLAIMS APPEAL BOARD
1970 THROUGH 1975

Specifica- tion No.	Amount Appealed to Deputy Director	Deputy Director Decision	Amount Allowed	Total Contract Amount
1970				
64-13	16,310.00	1970	14,802.00	2,599,562.75
66-32	152,664.00	1970	7,438.40	11,573,487.08
	111,728.20	1970	9,524.80	
	10,569.53	1970	601.68	
	20,472.83	1971	—	
	27,121.85	1971	—	
	60,119.37	1971	—	
	1,034.00	1971	—	
	(383,709.78)*		(24,928.48)**	
66-44	11,163.00	1970	—	2,137,500.58
67-02	118,022.00	1970	—	39,198,798.92
67-38	7,200.00	1970	—	845,307.42
67-60	59,755.00	1971	16,810.00	9,084,487.21
67-67	2,570.00	1970	254.80	808,295.15
	2,396.16	1970	—	
	178.14	1970	107.30	
68-44	11,290.43	1970	—	5,580,777.60
69-05	3,873.50	1970	—	25,706.00
69-13	1,050.00	1970	—	34,300.65
1971				
65-12	12,000.00	1972	Withdrawn	3,125,979.27
67-10	61,871.01	1971	—	9,012,107.06
67-24	5,400.00	1972	—	14,197,017.02
67-33	59,068.82	1971	—	22,457,682.79
67-39	20,000.00±	1972	—	24,902,072.48
69-04	206,800.00	1971	—	8,357,539.26
1972				
67-39	8,660.95	1972	3,525.00	24,902,072.48
67-60	60,915.33	1972	—	9,084,487.21
68-46	249,672.64	1972	95,000.00	13,523,475.62
68-60	45,531.11	1972	—	2,020,451.51
69-28	462,698.54	1972	—	8,076,761.54
1973				
64-68	17,198.00	1973	—	1,148,571.55
69-01	52,356.90	1973	—	9,824,837.38
69-09	4,212.99	1973	—	2,173,527.79
	3,200.55	1973	—	
	16,174.56	1973	11,700.00	
	(23,588.10)***			
1974				
65-31	111,440.00	1974	4,801.70	1,523,768.52
1975				
72-27	6,493.85	1975	6,493.85	328,642.74
				226,547,206

* Aggregate of claims on Contract No. 66-32.

** Aggregate of amounts allowed: Contract No. 66-32.

*** Aggregate of claims on contract No. 69-09.

Source: Department of Water Resources

\$35,555,920, in 1974 and claims of \$604,911, on contracts of \$34,238,288, in 1975.¹¹

Cal-Trans, the California Department of Transportation, represented that:

During 1968 construction contractors filed approximately 660 notices of potential claims with the Division of Highways. During the same year, 67 claims on 23 contracts came before the Board of Review for consideration. Thirteen Board of Control claims and seven lawsuits were filed during the same period of time.¹²

The foregoing all relate to claims arising during the performance of the contract, as opposed to bid protests or alleged bid mistakes. Also, this represents only construction contract activity, since disputes procedures are not commonly included in purchase and service contracts where the Board of Control¹³ is relied on as the sole claims forum apart from the courts.

The necessity for a revision of claims procedures, or the necessity for any

11. Soehren letter, *supra* note 8.

12. Letter from Orrin Finch, Department of Public Works-Legal Division, to C.A. Barrett, Office of the Attorney General, Feb. 7, 1969 (copy on file at the *Pacific Law Journal*). A detailed breakdown of claims activity before the Cal-Trans Board of Review for the periods 1963 to 1968 and 1969 to 1975 is set forth in Tables 5 and 6 below:

TABLE 5:

	CALIFORNIA DEPARTMENT OF TRANSPORTATION SIX-YEAR SUMMARY OF BOARD OF REVIEW						Totals
	1963	1964	1965	1966	1967	1968	
No. of Contracts Reviewed	22	29	24	22	37	23	157
Some Allowance by Board on:	9	13	16	8	21	12	79
Average Dollar Value of Claims on Each Contract Before Board	30,800	56,400	94,500	77,000	33,100	24,200	
Median Point (in dollars)	6,350	9,800	17,100	8,000	14,500	18,400	
Total Claimed (in millions of dollars)	3.3	1.6	3.6	5.2	1.2	0.5	
Percentage of Total Amount Claimed Allowed	3.4	15.8	2.6	0.3	20.5	17.0	5:3

13. See CAL. GOV'T CODE §900.2.

procedure at all, depends on the efficacy of existing procedures. Thus, this article will examine the viability and effectiveness of the determination of rights proceeding as the sole statutory procedure available for adjudicating a contractor's dispute. Once this is complete, the ABA Model Procurement Code [hereinafter referred to as the Model Code]¹⁴ will be evaluated as an alternative, though more encompassing, claims procedure. Finally, a comprehensive statutory disputes structure will be proposed which would, if adopted, be applicable to all state contracts and to all disputes, including bid protests and bid mistakes.

DETERMINATION OF RIGHTS

A. Legislative Development

Senate Bill 88, enacted in 1969,¹⁵ established a claims procedure denominated the determination of rights.¹⁶ The bill, as introduced, *permitted*

TABLE 6:

	CALIFORNIA DEPARTMENT OF TRANSPORTATION SUMMARY OF BOARD OF REVIEW						
	1969	1970	1971	1972	1973	1974	1975
Contracts to Board Review	24	37	37	39	38	39	33
Total Bid Value**	56,719,925	92,660,250	133,530,000	96,890,000	93,150,200	47,540,200	125,295,500
Total of Claims on Above	48	88	67	81	66	111	90
Contracts Awarded	753	757	796	765	690	590	567
Dollar Amount Claimed	628,240	2,050,100	2,025,700	956,200	987,100	4,232,500	7,457,000
Percent of Total Claimed Allowed	10.5	6.27	4.08	8.52	4.17	2.81	2.38
Dollar Amount Allowed Subsequent To Bd. Rev.	66,330	128,650	82,700	81,500	41,200	119,200	177,650*

* One contract still pending.

** Does not reflect total dollar value of all contracts awarded.

14. References to the ABA Model Procurement Code are to the draft code prepared by a Coordinating Committee of the ABA Section of Public Contract Law and the ABA Section of Local Government Law pursuant to a Law Enforcement Assistance Admin. (LEAA) grant. The draft referred to, unless otherwise indicated, is ABA MODEL PROCURE. CODE, Prelim. Working Paper No. 1 (June 1976 Draft) [hereinafter cited as MODEL CODE].

15. CAL. STATS. 1969 c. 1462, §1 at 2982.

16. CAL. GOV'T CODE §§14378, 14379, 14380, 14404.

inclusion of a compulsory arbitration provision in the public works contracts of both the state and any political subdivision.¹⁷ The initial amendment to SB 88 narrowed the focus of the bill to public works contracts of the state under the State Contract Act¹⁸ and those contracts of the State University and Colleges under the State University and Colleges Contract Law;¹⁹ additionally, this amendment *mandated* the inclusion of a compulsory arbitration provision in all affected contracts.²⁰ A monetary maximum of \$50,000 per dispute (later reduced to \$25,000) first appeared in the next amended version, which version also introduced a limitation to the time spent in administrative claims procedures, other than in arbitration.²¹ Further amendments eliminated the requirement of compulsory arbitration of all claims within the \$50,000 limitation, but retained the option for the contractor to submit such claims to arbitration.²²

This amended arbitration proposal generated uniform opposition to SB 88 by state agencies, principally because arbitration was viewed as beyond the powers of the state entities affected.²³ Secondly, opposition centered on the perceived tendency of arbitration to produce awards which “split the difference”²⁴ and the attendant increased exposure to liability.²⁵ Some opponents also questioned whether, as asserted in the policy declaration of

17. SB 88, 1969-70 Regular Session, *as introduced*, Jan. 15, 1969; JOURNAL OF THE CALIFORNIA SENATE 117 (1969 Reg. Sess.).

18. CAL. GOV'T CODE §14250 *et seq.*

19. CAL. EDUC. CODE §25200 *et seq.*

20. SB 88, 1969-70 Regular Session, *as amended*, Feb. 17, 1969; JOURNAL OF THE CALIFORNIA SENATE 437-38 (1969 Reg. Sess.).

21. SB 88, 1969-70 Regular Session, *as amended*, March 20, 1969; JOURNAL OF THE CALIFORNIA SENATE 885 (1969 Reg. Sess.). The time limitation was directed at precluding contract clauses requiring exhaustion of any procedure for more than 120 days after a notice of claim had been given by the contractor. This amended version also detailed the arbitration procedure to be utilized.

22. SB 88, 1969-70 Regular Session, *as amended*, March 28, 1969; JOURNAL OF THE CALIFORNIA SENATE 1057 (1969 Reg. Sess.).

23. See note 7 *supra*. File memorandum, Department of Public Works, undated, summarizing opposition to SB 88 as amended on March 28, 1969 (copy on file at the *Pacific Law Journal*).

24. Letter from W.R. Gianelli, Director, Department of Water Resources, to Senator W.E. Coombs, Feb. 27, 1969 (copy on file at the *Pacific Law Journal*) [hereinafter cited as Gianelli letter], citing 6A A. CORBIN, CONTRACTS §1433 (1962). In characterizing arbitration, the letter noted:

[A]rbitration has been a device for compromising a dispute, based less on the contractual merits of the claim than on concepts of “equity.” It shifts attention away from objective criteria, and places reliance instead upon the subjective judgment of the deciding authorities, in a proceeding which essentially assumes the claimant’s right to recover and is directed toward a determination of “how much.”

That tendency was emphasized in the bill. It was noted by the absence of legal or contractual restraints on the award and the absence of any legal or technical expertise of the arbitrators. A similar concern with the absence of any requirement that the arbitrator be an engineer was expressed by the California Legislative Council of Professional Engineers: “[e]ngineering decisions affecting the adequacy of the work could be made by non-engineers.” California Legislative Council of Professional Engineers, Statement regarding SB 88-Arbitration, March 18, 1969 (copy on file at the *Pacific Law Journal*). A subsidiary effect of splitting the difference was also adverted to in the Gianelli letter in noting its tendency to subvert the competitive bidding system. Gianelli letter, *supra*.

25. File Memorandum, Department of Public Works, undated, summarizing opposition to SB 88, as amended, March 28, 1969 (copy on file at the *Pacific Law Journal*).

the original bill, the arbitration procedure would be more expeditious or less costly.²⁶

As a consequence of the opposition of state agencies, meetings were conducted with industry groups, primarily the Associated General Contractors. An amendment²⁷ evolved incorporating the concept of adjudication by the Office of Administrative Hearings as an objective and independent third party for claims of reduced monetary amount. This amendment accorded less finality to the claims decision than under arbitration; a degree of finality was specified comparable to that normally accorded to the engineer's decision in most contracts.²⁸

B. Review of the Statutory Scheme and Regulations

As enacted, SB 88 procedures apply only to State Contract Act contracts²⁹ and California State University and Colleges construction contracts.³⁰ Thus, the Departments of Water Resources, Transportation, General Services, and Navigation and Ocean Development with respect to beach erosion control projects, together with State University and Colleges contracts, are the only procurement activities within the purview of determination of rights procedures.³¹ Additionally, without the consent of the contractor *and* procuring body, a dispute cannot be heard prior to the end of a contract;³² no other disputes are cognizable.

The monetary amount of contract claims which is subject to determination of rights is that "totaling in the aggregate twenty-five thousand dollars (\$25,000) or less on any contract"³³ and contract clauses implementing the

26. *Id.* An example of the basis for that concern is found in *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co.*, 271 Cal. App. 2d 675, 77 Cal. Rptr. 100 (1969) which was decided at the height of legislative consideration of SB 88. The court noted:

This case illustrates that unfortunately arbitration is not always a simple, expeditious, or inexpensive method of adjudication commercial controversies.

Id. at 677, 77 Cal. Rptr. at 101-02. In a footnote the court stated:

The total elapsed time for the arbitration was 19 months, of which 202 days were consumed for hearings and three days for oral arguments. It took 25,000 pages of a reporter's transcript to record the oral proceedings; 1,500 exhibits were introduced.

Over \$400,000 in arbitration expenditures, exclusive of attorney's fees, were incurred.

Id. at 677 n.1, 77 Cal. Rptr. at 102 n.1. Admittedly, the amount at issue, in excess of \$900,000, far exceeded the proposed jurisdictional limits of SB 88.

27. SB 88, 1969-70 Regular Session, *as amended*, July 7, 1969; JOURNAL OF THE CALIFORNIA SENATE 4020 (1969 Reg. Sess.).

28. CAL. STATS. 1969, c. 1462, §2 at 2982.

29. CAL. GOV'T CODE §14250, *et seq.*

30. CAL. EDUC. CODE §25200 *et seq.*

31. CAL. GOV'T CODE §14254.5; 1 CAL. ADMIN. CODE §102(f).

32. CAL. GOV'T CODE §14379(b), *repealed and replaced*, CAL. STATS. 1976 c. 1397, §§2, 3, at —.

33. CAL. GOV'T CODE §14378, *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —. Whether this is a jurisdictional limitation or a restriction on the quantum of relief, and whether the phrase is intended to refer to claims presented pursuant to the procedure or to the total of all claims under a contract has been questioned by some. Under one view a question of the claimant's right to waive the excess claims may be presented. See Dauer & McLeod, *Administrative Claims Procedures*, ABA CALIFORNIA PUBLIC CONTRACT LAW CONFERENCE SYLLABUS §VII (1970).

procedure are required.³⁴ Salient features of the procedure include the following: (1) dispensation from the requirement that contract claims

34. CAL. GOV'T CODE §14378, *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —. The provision incorporated by Cal-Trans is premised on the determination of rights occurring after full contract performance. This is indicated by the notice period for requesting the determination which is measured from the final estimate that is issued after contract completion. The Cal-Trans provision also limits the procedure to contracts on which the sum of all claims under the contract is less than \$25,000. That, of course, could not be ascertained until contract completion. The Cal-Trans Standard Specification provides:

9-1.045 Determination of Rights.—If the total monetary amount of all the Contractor's claims arising under or by virtue of the contract does not exceed \$25,000, such claims are subject to determination of rights under the contract by a hearing officer of the Office of Administrative Hearings as provided for in Sections 14378 and 14379 of the Government Code, if requested by either party.

The party seeking a determination of rights shall give notice in writing of the claim to the other party and to the Office of Administrative Hearings, setting forth therein the facts on which the claim is based. Such notice shall be given not later than 6 months after the issuance of the final estimate.

The Office of Administrative Hearings will appoint a hearing officer to hear such claim within 60 days after such notice but not before completion of the contract unless the Department consents to earlier appointment. The hearing officer will hear and determine the controversy and render his decision in writing within 60 days after his appointment unless otherwise agreed to by the parties or unless for good cause the hearing officer extends such time. Each party shall bear its own costs and shall pay [one-half] of the cost of the hearing.

Rules and regulations adopted by the Office of Administrative Hearings pursuant to Section 14380 of the Government Code will govern the conduct of the hearings, including requirements as to pleadings and other documents to be filed. The rules and regulations may be obtained from the Office of Administrative Hearings.

STATE OF CALIFORNIA BUSINESS AND TRANSPORTATION AGENCY DEPARTMENT OF TRANSPORTATION, STANDARD SPECIFICATIONS 73 (1975). The provision in use by the Office of the State Architect (OSA) and the Department of Navigation and Ocean Development (DNOD) conceptually parallels that of Cal-Trans. It might be argued, however, that unlike Cal-Trans the language of these provisions permits filing a number of separate claims under a contract provided that the aggregate portions of each claim do not exceed \$25,000. OFFICE OF THE STATE ARCHITECT, GENERAL CONDITION No. 38. The approach of the Trustees of the California State University and Colleges follows the conceptual format of Cal-Trans except that provision is made for contracts with separately accepted subportions of the work:

On contracts bid with a segregation of costs for separate, independent portions which portions are accepted individually . . . , the time limitations specified by this Article shall apply to each portion so accepted although the \$25,000 limitation shall apply to the total project.

TRUSTEES OF THE CAL. STATE U. & C., CONTRACT GENERAL CONDITIONS, art. 7.01, at 24 (rev. July 1972). The Department of Water Resources provision departs from those of the other entities in two significant respects. Claims totaling \$25,000 may be pursued in a determination of rights procedure *irrespective* of the aggregate amount of claims on a contract, and with the Department's consent the determination of rights may proceed prior to completion of the contract work. The latter is consistent with the Department's contractual procedures, which unlike those of other State Contract Act entities, provide for handling claims as they arise. The Department's determination of rights clause in appropriate part provides:

(e) Determination of Rights.—Claims totaling in the aggregate twenty-five thousand dollars (\$25,000) or less arising from this contract may, at the option of the Contractor or the Department, be subject to determination of rights under this contract in accordance with Sections 14378-14380 of the California Government Code, the rules and regulations adopted in implementation thereof, and the provisions of this article.

. . . . The Contractor may apply to the Department for consent to appointment of a hearing officer prior to completion of this contract. Such application shall be in writing. Consent to such early appointment shall rest in the sole discretion of the Department, but in no event shall such consent be given if: a. The total of the amount claimed and of amounts claimed on all prior claims, if any, on which consent to such earlier appointment has been given exceeds twenty-five thousand dollars (\$25,000).

A decision by a hearing officer pursuant to a determination of rights proceeding shall be final if supported by law and by substantial evidence.

Letter from Alfred Golze, Deputy Director, Department of Water Resources, to Earle Beattie, Oct. 31, 1969 (copy on file at the *Pacific Law Journal*). Interestingly enough, no determination of rights petition has ever been filed under a Water Resources contract.

against the state be presented to the Board of Control under Government Code Section 900 *et seq.*³⁵ (2) hearing officers are impliedly authorized to decide questions of law;³⁶ (3) substantial evidence is the standard of review;³⁷ and (4) procedural rules and regulations promulgated by the Office of Administrative Hearings are mandated.³⁸

Venue for a determination of rights is oriented to the site of contract performance with the actual hearings occurring in San Francisco, Los Angeles, or Sacramento unless the the Office of Administrative Hearings for good cause or on stipulation designates another site.³⁹ Proceedings are commenced by the petitioner, who may be either the contactor or the procuring entity,⁴⁰ filing a petition with the appropriate regional office of the Office of Administrative Hearings and by service of a copy on the respondent. Evidence of service on each respondent is introduced at the time of hearing.⁴¹

The petition must: (1) identify each respondent by name and address; (2) succinctly state the nature of the claim, the basis for the claim in law and fact, the contract provisions, and the location of the contract performance; (3) allege the consent of the public agency; (4) allege the name and address of petitioner for service; (5) identify the Office of Administrative Hearings office where the petition is filed; and (6) provide any other relevant information.⁴² Amendments of the petition are permitted as a matter of right prior to the filing of an answer and on motion and order of the Office of Administrative Hearings following an answer.⁴³ The petition must be accompanied by a \$500 deposit against the costs of the proceeding; these costs are eventually

35. CAL. GOV'T CODE §14404 is permissive which raises a question of whether a contractor could elect to pursue a claim under the Board of Control procedures even though it had also been the subject of a determination of rights. If a Board of Control Claim is filed and the Board acts in other than its equitable capacity, the *res judicata* effect of the determination might be raised. Although as yet not an issue, the opinion was expressed during legislative consideration of SB 88 that the intent of the language of CAL. GOV'T CODE §14404 was to eliminate any requirement for resort to Board of Control procedures as an element of exhaustion of administrative remedies. Letter from John L. Baine, Legislative Coordinator for the Department of General Services, to Orrin F. Finch, Department of Public Works-Legal Division, July 14, 1969 (copy on file at the *Pacific Law Journal*), in reference to SB 88, as amended July 7, 1969. That intent was expressed as being understood to apply to non-determination of rights claims as well as determination of rights claims. Presumably that was because the language of Section 14404 was not tied to the determination of rights procedure. CAL. GOV'T CODE §14404 is situated in a wholly separate article of the State Contract Act. An alternative construction would be to construe CAL. GOV'T CODE §14404 as an integral part of the determination of rights procedure since it was added to the Code in the same bill. Thus construed, Section 14404 could be limited to instances where the SB 88 procedure has been invoked.

36. See CAL. GOV'T CODE §14379, *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —.

37. See CAL. GOV'T CODE, *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —; *cf.* *Clack v. State ex rel. Dep't Pub. Works*, 275 Cal. App. 2d 743, 80 Cal. Rptr. 274 (1969), *Macomber v. State*, 250 Cal. App. 2d 391, 58 Cal. Rptr. 393 (1967), *A. Teichert & Son Inc. v. State*, 238 Cal. App. 2d 736, 48 Cal. Rptr. 225 (1965).

38. CAL. GOV'T CODE §14380. See 1 CAL. ADMIN. CODE ch. 2.

39. 1 CAL. ADMIN. CODE §107.

40. 1 CAL. ADMIN. CODE §102(d).

41. 1 CAL. ADMIN. CODE §106.

42. 1 CAL. ADMIN. CODE §110.

43. 1 CAL. ADMIN. CODE §111.

shared by respondent and petitioner.⁴⁴

The answer, which must state all defenses and affirmative defenses,⁴⁵ must be filed and served within 15 days⁴⁶ and failure to file an answer is a ground for default.⁴⁷ Lodging an objection to the petition extends the period to answer to a time set by the Office of Administrative Hearings.⁴⁸ A default for failure to appear at the time of the hearing may be set aside on motion of the petitioner and five days' notice.⁴⁹ An objection to the petition may be founded on failure to state facts sufficient for a determination of rights, or on ambiguity, uncertainty, or unintelligibility of the allegations.⁵⁰

The time of hearing on the merits is set by the Office of Administrative Hearings and the required notice of the hearing must be given a minimum of ten days prior.⁵¹ Continuances are granted only on stipulation with consent of the Office of Administrative Hearings or for good cause shown.⁵² Discovery paralleling the California Administrative Procedure Act, which sets forth procedures for most administrative hearings,⁵³ is provided on 15 days notice after the answer, if one is filed.⁵⁴

Evidence is taken on oath and any relevant matter, if responsible persons are accustomed to rely on it in the conduct of serious affairs, is admissible; hearsay is included.⁵⁵ Proof may consist of judicially noticeable matters, express admissions, or any evidence that would support findings of fact in an uncontested civil matter. Contrary to the provisions of the California Administrative Procedure Act, which permits *official notice* of matters,⁵⁶ the hearing officer under a determination of rights proceeding may acknowledge only matters within the narrower concept of judicial notice.⁵⁷

A party may move for a rehearing within ten days of service of the decision.⁵⁸ The decision is issued in writing and consists of fact findings and findings on all legal issues presented.⁵⁹ Grounds for a rehearing are limited to: (1) any irregularity in the proceedings affecting fairness; (2) unavoidable surprise; (3) insufficiency of evidence; (4) unavoidably omitted evidence; or (5) error of law.⁶⁰ Absent a motion for rehearing, the decision of the hearing

44. 1 CAL. ADMIN. CODE §109.

45. 1 CAL. ADMIN. CODE §113.

46. 1 CAL. ADMIN. CODE §112.

47. 1 CAL. ADMIN. CODE §118.

48. 1 CAL. ADMIN. CODE §112.

49. 1 CAL. ADMIN. CODE §121.

50. 1 CAL. ADMIN. CODE §115.

51. 1 CAL. ADMIN. CODE §108.

52. 1 CAL. ADMIN. CODE §127. For a discussion of good cause see CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE §2.93 (1970).

53. CAL. GOV'T CODE §11507.6.

54. 1 CAL. ADMIN. CODE §116.

55. 1 CAL. ADMIN. CODE §124.

56. CAL. GOV'T CODE §11515.

57. 1 CAL. ADMIN. CODE §125.

58. 1 CAL. ADMIN. CODE §133.

59. 1 CAL. ADMIN. CODE §130.

60. 1 CAL. ADMIN. CODE §133.

officer is final and conclusive if supported by law and substantial evidence.⁶¹ Unless extended by agreement or for good cause, a hearing officer must decide a petition within 60 days of his appointment.⁶²

As can be readily discerned, the determination of rights procedure is of limited value to a sizeable portion of state procurements given the \$25,000 lid placed on contract disputes susceptible to its use. Further deficiencies will be highlighted in the following discussion which focuses on administrative experience with the procedure in the seven years subsequent to legislative enactment.⁶³

C. Experience Under Determination of Rights

The spate of cases which might have been anticipated with enactment of the determination of rights remedy did not materialize. In part, the format of the law, which implemented the remedy through contractual clause⁶⁴ rather than through an immediate statutory right, accounted for an initial hiatus. The length of this hiatus was accentuated by the absence of any amendments to existing contracts to incorporate the remedy; a result based on the interpretation by the affected agencies that the new procedure was only prospective in effect. Until contracts incorporating the remedy reached a stage of performance where claims had accrued or matured to the level of presentation,⁶⁵ no activity could be expected. Additionally, implementation was necessarily deferred until the adoption of regulations detailing the procedural aspects of the remedy, and this did not occur until July 13, 1970, effective August 13, 1970.⁶⁶

The first claims under determination of rights were filed late in 1971. Thus, a five-year sample is available to analyze for the kind and number of claims and the effectiveness of the remedy. Table 7⁶⁷ sets out all petitions for a determination of rights which have been filed to date, based on the Office of Administrative Hearings' records. Most surprising in the context

61. CAL. GOV'T CODE §14379(a), *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —.

62. CAL. GOV'T CODE §14379(b), *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —. The statistical data analyzing claims to date under the determination of rights procedure, Table, 7 *infra* note 67, reveals an average of 368 days between filing the petition and decision. Whether the period is a result of good cause or stipulated delays, the rather significant deviation from the 60 day decision period provided by statute and regulation, suggests that a principal goal of SB 88, expeditious resolution of contract disputes, is not being realized.

63. The next section deals extensively with empirical data gathered by the author from varied sources. This is believed to be the most effective means available for analysis of determination of rights experience.

64. CAL. GOV'T CODE §14378, *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —.

65. For a discussion of the Department of Water Resources clause which permitted prosecution of claims during performance and those of other agencies which necessitated deferral until completion of the contract work see note 34 *supra*.

66. 1 CAL. ADMIN. CODE §101; *History: 1. New, ch. 2 (Sections 101-133) filed 7-13-70; effective thirtieth day thereafter (Register 70, No. 29).*

67. Table 7 presents complete detail on all claims filed under the procedure.

of the level of state contracting during the period⁶⁸ is that only 18 petitions have been filed as of July 21, 1976. An aggregate of \$299,990.61 has been claimed for an average claim of \$15,788.98. An average of \$8,662.89 has been recovered on claims for which an allowance has been granted. The average combined cost per hearing is \$1,202.92⁶⁹ and the ratio of recovery to dollars expended for the hearing, on claims for which some relief was granted, is \$14.80 to one.

Relief was granted on nine of 12 petitions that have gone to decision.⁷⁰ In half of those instances, the relief was substantially in the contractor's favor; that is, more than 50 percent of the amount claimed was recovered. The amount of time involved in claims resolution ranged from a low of 56 days to a high of 794 days, with the average being just under a year, at 358.0 days.⁷¹

Fifteen of the 18 petitions filed have been against Cal-Trans or one of its divisions. Three petitions, one of which is for work on behalf of the State University and Colleges, have been against the Office of the State Architect. No petitions have been filed against the Departments of Navigation and Ocean Development or Water Resources.

The percentage recovery on amounts claimed was 13 percent for Office of the State Architect claims and 32.54 percent for Cal-Trans claims. Office of the State Architect claims, processed under internal contractual claims procedures, resulted in recovery of 94.9 percent in 1974 and 23.2 percent in

68. See note 67 *supra*.

69. The Office of Administrative Hearings currently charges \$42.50 per hour of hearing officer time in hearing, preparation, and decision writing and \$21.50 per hour for reporter services during the hearing. The comparable rates for 1977-78 are \$48.00 and \$23.00. DEPARTMENT OF GENERAL SERVICES PRICE BOOK & DIRECTORY OF SERVICES (6th ed. rev. Aug. 26, 1976).

70. See Table 7, *supra* note 67.

71. This is three times the maximum statutory period under CAL. GOV'T CODE §14379, *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at —, if the full 60 days for appointment of a hearing officer and the full 60 days for decision are considered. The average, however, does not depart significantly from that for similar proceedings. A survey of federal contract claims boards in 1972 concluded that 51 percent of claims were resolved within 12 months. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 18 (1972). For the largest of these boards, in terms of personnel and case load, the Armed Services Board of Contract Appeals, the average time for a claim on docket in fiscal year 1976 was less than 13 months and the median time was nine and one-half months. The comparable figures for the three preceding years were: 1973—average 410, mean 360; 1974—average 442, mean 345; 1975—average 420, mean 300. Memorandum from Richard C. Solibakke, Chairman, Armed Services Board of Contract Appeals, to Secretaries of Defense, Navy, Army, and the Air Force, re: REPORT OF TRANSACTIONS AND PROCEEDINGS OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS FOR THE FISCAL YEAR ENDING 30 JUNE 1976 (July 29, 1976) (copy on file at the *Pacific Law Journal*) [hereinafter cited as ASBCA ANNUAL REPORT].

TABLE 7

Case Number	Case Name	Time to Resolution	
		(Days)	(Filed ^a)
N449	Lewis-Nicholson Inc. v. Dept. of Public Works	357	10-7-71
N819	Bay Cities Paving & Grading, Inc. v. Dept. of Public Works	794 ^c	12-20-71
N2178	G.T. Engineering, Inc. v. Dept. of Public Works	597	9-18-72
N2241	Dillingham Const. Corp. v. Office of Arch. & Const.	156	12-2-72
N2776	M.G.C. Co. & Underground Const. Co. v. Trustees of Cal. St. Colleges (Office of Arch. & Const.)	443	3-21-73
N3018	McGuire & Hester v. Dept. of Public Works	103	4-27-73
N3825	Hensel Phelps Const. Co. v. Dept. of Public Works	723	10-29-73
N3988	Modern Alloys Inc. v. Dept. of Public Works	719	12-5-73
N4332	Flintkote Corp. v. Dept. of Public Works	235	2-26-74
N5248	Granite Const. Co. v. Dept. of Transportation	181	8-22-74
N6416	George Reed, Inc. v. Office of Arch. & Const.	321	5-14-75
N7416	Guy F. Atkinson v. Dept. of Transportation	—	12-8-75
L0940	Dan J. Peterson Co. v. Dept. of Public Works	195	12-7-71
L3582	Kasler Corp. & Gordon H. Ball, Inc. v. Dept. of Transportation	93	2-5-73
L6201	Kasler Corp., Gordon H. Ball, & R.E. Fulton, Inc. v. Dept. of Transportation ^b	56	3-13-74
L7426	Roy G. Barnett v. Dept. of Transportation (Toll Bridge Authority)	398	9-17-74
L10407	Steve P. Rados v. Dept. of Transportation	—	11-19-75
L12533	McCutcheon-Peterson v. Dept. of Transportation	—	7-21-76
TOTALS			
AVERAGES		358 days	

- a. Filing date to disposition.
- b. Includes only charges by the Office of Administrative Hearings. Amount indicated is the aggregate cost to both parties.
- c. An additional 339 days in processing the claim were incurred at the local government level.
- d. Case was settled. Costs limited to filing fee.
- e. Case settled in full amount claimed. Costs limited to filing fee.
- f. Damages in excess of jurisdictional amount were waived.
- g. Case settled after initial hearings.

TABLE 7

Contract Amount	Amount in Claim	Recovery	Per-Cent	Hearing Cost ^b	Ratio: Recovery Cost
327,930.00	22,215.00	17,927.14	81	4,919.60	7.28:1
74,662.00	14,384.18	—	—	2,801.00	—
417,519.47	29,440.00	7,631.00 [\$4,480.00 had been paid by Dept.]	25.9	1,001.30	15.24:1
10,630,000.00	23,146.50	—	—	384.54	—
3,397,400.00	23,887.05	9,669.19	40.5	2,198.77	8.78:1
189,138.00	13,778.13	^d	—	5.00	—
1,709,470.00	1,174.24	—	—	1,148.50	—
18,397.00	17,600.00	—	—	1,121.90	—
289,909.00	3,936.87	3,936.87	100	7.50 ^e	NA
21,968,893.00	6,278.14	4,066.40	65	632.25	12.86:1
42,563.00	12,397.93	2,028.00	16.4	953.90	5.38:1
11,231,152.00	25,000.00 ^f	—	—	—	—
195,800.00	8,989.10	150.00	1.7	931.57	0.32:1
7,077,777.00	13,511.67	9,000.00	66.6	400.10 ^g	44.98:1
6,842,000.00	23,000.00 [1,860.00]	—	—	265.00	—
2,259,581.90	24,341.20	23,557.49	96.8	999.60	23.56:1
636,216.00	24,950.00	—	—	—	—
749,300.00	10,100.60	—	—	—	—
68,057,707.37	299,990.61	77,966.09		15,638.03	
3,780,983.70	15,788.98 ⁱ	8,662.89 ^j	55.2	1,202.92 ^k	14.8:1

h. Two claims: one by subcontractor. The contractor's figure is the bottom of the two indicated and the contractor's claim was dropped after an initial hearing.

i. Treating L6201 as two claims.

j. Average of actual recoveries. The average recovery on all claims decided is \$5,197.73. This is a 25.9 percent recovery on the total amount claimed.

k. The two cases in which only filing fees were incurred (N4332 and N3018) were excluded in computing the average hearing cost.

1975.⁷² The corresponding comparison for Cal-Trans claims is 5.3 percent based on a ten-year average.⁷³ A comparable internal claims recovery figure for the Department of Water Resources based on the five years from 1970 to 1975 is 9.6 percent.⁷⁴

The determination of rights proceeding seems to have demonstrated some advantages, most notably to contractors of Cal-Trans who recovered significantly higher percentages of the amount claimed when pursuing a determination of rights rather than the Cal-Trans internal claims procedure. However, on the whole the statistics show that determination of rights seems to have failed as an effective vehicle for claims adjudications. If determination of rights is responsive, it is hard to perceive why only two claims against Cal-Trans out of the 90 filed in 1975 were prosecuted via a determi-

72. These figures, derived from data accompanying the Soehren letter, *supra* note 8, are as follows:

	1974	1975
Number of contracts awarded for year	82	104
Dollar amount of contracts awarded	35,555,920.83	34,238,288.81
Average dollar amount of contract	433,609.00	329,214.00
Number of claims filed for year	14	23
Average claim filed (dollars)	9,745.00	26,300.00
Dollar amount of claims	136,437.05	604,911.43
Number of claims denied	2	4
Number of claims voided	1	
Dollar amount of claim settlement	101,828.15	115,995.36
Average dollar amount of claims settlement	9,257.00 (of 11 claims)	6,105.00 (of 19 claims)
Average settlement of all claims filed (dollars)	7,273.00 (14 claims)	5,043.00 (23 claims)

The percentages are computed for claims on which an allowance was made. The comparable percentages if all claims are considered including those which were denied are 1974—74.6 percent and 1975—19.17 percent. These figures suggest that if all OSA claims decided under internal procedures had been submitted to a determination of rights and if recoveries had been consistent with the limited historical experience of OSA, \$37,356.88 would have been saved in claims payments in 1975, at a hearing cost of \$11,234 or \$591.26 per claim. Similarly in 1974, on the same assumptions, a saving in claims payments of \$84,091.34 would have been realized, at a hearing cost of \$12,013.04 or \$1,092 per claim. Since both the OSA contract clause and CAL. GOV'T CODE §14378 permit the agency as well as the contractor to opt for a determination, such a possibility is not foreclosed and might in appropriate circumstances offer advantages to the agency.

73. See note 12 *supra*. For perspective, Cal-Trans in the decade 1958 to 1968 was involved in 29 construction contract actions seeking \$7.7 million. Judgments or settlements of \$581,000 were reached on those suits. Letter from Orrin Finch, Department of Public Works—Legal Division, to C.A. Barrett, Office of the Attorney General, Feb. 7, 1969 (copy on file at *Pacific Law Journal*). This is an average judgment of \$20,034.48 and a 7.5 percent recovery on amounts claimed. Parenthetically, the percentage recovery on claims for both OSA and Cal-Trans seems to be roughly an inverse function of the number of claims filed in a particular year. Thus, in a year with a higher number of claims the percentage recovered on each is lower. There is no evidence that internal claims decisions are consciously affected by the fiscal or budgetary effect of the aggregate of claims allowed. The apparent correlation suggests, however, that those adjudicating claims may subconsciously be responding to an intuitive reaction to the number of claims and the net affect on the agency's budget. Whether a detailed analysis would or could verify the correlation, its potential may be an additional argument for claims adjudications by an independent organ of government which would be insulated from the fiscal impact of a determination of a party's entitlement to compensation.

74. This determination is based on data in Table 4, *supra* note 10.

nation of rights or why in 1974 only four claims out of 111 were similarly prosecuted. The nominal number of claims filed and the extended period of time taken to secure a decision are sufficient to indict the procedure. The experience with the Office of the State Architect, where one claim out of 14 in 1974 and one out of 23 in 1975 were submitted for determinations, though less dramatic, leads no less convincingly to the same conclusion.

The absence of claims by or against the Department of Navigation and Ocean Development can be attributed to the very low level of State Contract activity by that Department. The lack of claims involving the Department of Water Resources can not be similarly rationalized but may be, as one commentator suggests, a consequence of satisfaction with and preference for the contractual procedures by both the contractor and the Department.⁷⁵

Most likely, the general lack of claims can be attributed to several factors: (1) principally, a failure to achieve a non-judicial, informal, and expeditious proceeding;⁷⁶ (2) an increase rather than a decrease in costs of adjudication; (3) parochial jurisdiction;⁷⁷ and (4) a rejection attitude toward SB 88.⁷⁸

A survey of the determination cases reveals that counsel was used in at least 12 of them.⁷⁹ Although undocumented, experience indicates that there exists a feeling that lawyers over-formalize matters which could easily be handled by engineers who understand the technical side of the business.⁸⁰ To the extent that minimization of the need for legal assistance was an objective addressed by the determination of rights proceeding, that objective has not been met.

The expeditious processing of claims which concerned those who pro-

75. Grunschlag, *Lawyer/Non-Lawyer Decisions in Adjudication of Public Contract Claims: A Study of Administrative Process*, 12 SANTA CLARA LAW. 36, 38 n.6 (1972).

The Departments abstention is easily understood as evidence of preference for, and satisfaction with, its internal processes for resolving claims. The failure of contractors to elect the new procedure may be explained on several grounds: the financial unattractiveness of the cost-sharing provision, particularly in light of the monetary limit on the claim; satisfaction with the fairness of the Department's process; a judgment that the chances of winning are better in a particular case through the Department's process; reluctance to learn new formalities of procedure; or, reluctance to engage in expected initial arguments concerning the nature and scope of the hearing officer's authority.

Id. at 38 n.2.

76. The dichotomy between the informal proceeding and one satisfying due process concepts was noted in 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 32 (1972). Rationalizing the dichotomy produced conflicting recommendations by the Commissioners.

77. See text accompanying note 84 *infra*.

78. See text accompanying notes 83-84 *infra*.

79. In two instances a corporate officer presented the claim and the status of that individual as an attorney could not be determined from the OAH records. However, a review of the pleadings in those instances strongly suggested legal training on the part of the corporate officer.

80. *Compare*, NAS STUDY, *supra* note 5, at 44, where in assessing the existing claims procedures and recommending arbitration, it was observed,

One of the most important objectives of this study is to minimize the adversary relationship between owner and contractor All entities involved know that too much time and money is spent in disputation and litigation Lawyers often engage in delaying tactics, with consequent loss and expense to both sides What is important is that there is too much of an adversary relationship, and steps must be taken to minimize it.

moted previous attempts to streamline dispute procedures⁸¹ and which the statutory decision period of 60 days was designed to achieve, was thwarted. In part this occurred either because of good cause delays or because the parties themselves agreed to the delay.⁸² Since only one petition has been decided within the statutory period, it seems unlikely that good cause extensions accounted for all the continuances—particularly when the average disposition time is six times the statutory period. A lack of timely resolution definitely resulted from the requirement for deferral of claims decisions until job completion.

Empirical analysis of the determination of rights proceeding compels the conclusion that it is necessarily more expensive than previous procedures. While a determination saves the time and expenditure of the internal claims procedures, the determination is more formalized and legalistic, requires a greater degree of preparation, and apparently, as the data indicates, more often than not the participation of counsel. Of course, to these costs must be added the cost of the hearing itself. Naturally, some saving in cost accrues in any subsequent judicial proceeding on the claim since a trial *de novo* is not required or permitted; however, it is suspected that the saving, when coupled with the increased cost in the administrative proceeding, is negligible if not non-existent. Since Board of Control proceedings have through practice been reduced to *pro forma* action,⁸³ any saving due to the elimination of that disputes level from the exhaustion of remedies process is probably nominal.

A small, though perhaps significant, factor in the failure of determination of rights may be the rejection reaction to SB 88. The precursor of SB 88, SB 547, sought unsuccessfully a court of contract claims and SB 88 initially provided for arbitration. What resulted from discussions between the industry advocates of SB 88 and state agencies in opposition was a compromise procedure of indeterminate form and with no counterpart familiar to contractors. The lack of familiarity and conceptual identification with the outcome may have fostered a subtle rejection reaction.

Perhaps the most significant factor in the failure of the determination of rights procedure was the parochial jurisdiction committed to the proceedings. Major areas of public contract related disputes were not included within the ambit of the procedure. Bid protests were omitted even though a majority of contracting controversies seem to arise in that area. All purchasing and service contract disputes were outside the procedure as were dis-

81. See note 4 *supra*. *Interim Study on SB-547 Before the Senate Judiciary Committee* (Oct. 9, 1968) (statement by Warren R. Mendel, Executive Vice President, Engineering and Grading Contractors Association). Compare NAS STUDY, *supra* note 5, at 45.

82. CAL. GOV'T CODE §14379(b), *repealed and replaced*, CAL. STATS. 1976, c. 1397, §§2, 3, at _____.

83. See note 3 *supra*.

putes attendant on local governmental contracting. The consequence was that the case load was too limited to develop a general familiarity with and utilization of the procedure. Moreover, the absence of case load necessarily restricted the ability to develop a cadre of arbiters, experienced in adjudicating public contract issues, who would have promoted expeditious resolution of disputes. The absence of case load forestalled development of a hearing capability unrestrained by calendar competition or operational constraints conducive to delay.⁸⁴

Perhaps some of these shortcomings reflected in the empirical evidence under the determination of rights procedure have been perceived by the California Legislature as well. In any event, a bill to reform the determination of rights proceeding was recently enacted and will be considered next to determine its potential efficacy.

REFORM OF DETERMINATION OF RIGHTS: SB 1457

The first major effort to amend the determination of rights procedure, other than to simply increase the jurisdictional amount was considered and passed by the California Legislature on August 24, 1976.⁸⁵ That measure, Senate Bill 1457, was one of two bills⁸⁶ which were an outgrowth of Governor Brown's veto of Assembly Bill 2246⁸⁷ earlier in the 1975-76 Legislative Session.⁸⁸ Assembly Bill 4419, which also passed the legislature, responded to the Governor's veto message declaring support for a "more modest increase" in the jurisdictional amount,⁸⁹ by merely setting a new claims limit at \$50,000. On the other hand, SB 1457 specifies an identical increase in the total amount of claims cognizable and adds substantive and procedural reforms as well.

The format of SB 1457 calls for the mandatory inclusion of a disputes clause in all contracts issued under the State Contract Act and the State University and Colleges Contract Law.⁹⁰ This disputes clause requires one

84. The Office of Administrative Hearings has a projected calendaring delay, for matters under its jurisdiction, of 60 days—equal to the maximum decisional period afforded by CAL. GOV'T CODE §14379. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE ix (Supp. 1975). The calendar competition with licensing and disciplinary matters is compounded by the operational practice, and necessity, of calendaring in circuits to serve agencies in several locales.

85. SB 1457, CAL. STATS. 1976, c. 1397, §2 at —.

86. AB 4419, raising the monetary ceiling of the determination of rights procedure from \$25,000 to \$50,000, was passed on August 23, 1976. CAL. STATS. 1976, c. 1397, §1, at —.

87. AB 2246, 1975 Regular Session.

88. Veto message by Governor Edmund G. Brown, Jr., JOURNAL OF THE CALIFORNIA ASSEMBLY 12986 (1976 Reg. Sess.).

89. *Id.* The veto message clearly implied a rejection of the concept that the monetary ceiling should apply to individual claims rather than to the total of all claims under a contract. The veto message reflected reservations concerning the hearing officers, now administrative law judges, of the Office of Administrative Hearings deciding claims of the magnitude permissible under the separate claim ceiling of AB 2246. AB 4419 was responsive in this particular as well, abandoning the separate claim approach and reverting to the existing language of "claims totaling in the aggregate."

90. CAL. GOV'T CODE §14379, *added by*, CAL. STATS. 1976, c. 1397 §2 at —.

of the parties to exercise volition before the administrative procedures are invoked; thus, despite the inclusion of this clause in all affected contracts, there is little change from the present procedure.

Two additional reforms are specified: first, full civil discovery is provided, and second, disputes may be filed for an administrative determination prior to the end of contract performance.⁹¹ In contrast with the determination of rights procedure which specifies a standard for judicial review, SB 1457 simply states that all administrative determinations are subject to judicial review. Thus, if SB 1457 is construed to substitute a new Government Code Section 14379 for the existing Section 14379,⁹² it might also have the effect of eliminating the standard of finality accorded administrative determinations under the latter. With the elimination of a standard of finality, arguably no finality attaches to a claims decision under SB 1457 procedure unless the agency head's decision is not appealed.

The impact of SB 1457 must abide the evolution of an historical experience. In the interim, it is difficult to predict with certainty whether the reforms enacted will have the effect of reversing past trends discussed herein. The decision to use this revised procedure to resolve public contract disputes remains with the contracting parties and they will undoubtedly weigh its utility against the perceived difficulties encountered in its predecessor. Perhaps these changes will enhance the desirability of administrative resolution; on the other hand, it is difficult to see how this new proceeding will lessen the participation of attorneys since full civil discovery, an invitation to practice lawyering skills, is now available. Undoubtedly, use of counsel will not decline and may increase. Full discovery rights will result in higher costs plus increased formality. Finally, the problem of parochial jurisdiction remains. If these assertions prove to be well founded, an effective administrative resolution of public contracts disputes will not have been realized.

CONSIDERATIONS FOR REFORM

Formulation of changes that will have some reasonable prognosis of success necessitates isolating the focal policies to be subserved as well as the symptoms of failure in the existing circumstances. Thus, this section will attempt to state the policies which the architects of any effective disputes resolution procedure must accommodate.

91. CAL. GOV'T CODE §14379.

92. SB 1457 incorporated several anomalies certain to produce controversy if not litigation. Section 2 of the bill, CAL. STATS. 1976, c. 1397, §2, at — purported to add CAL. GOV'T CODE §14379 without first repealing the existing CAL. GOV'T CODE §14379. The existing CAL. GOV'T CODE §14379 was then repealed by Section 3 of the bill. CAL. STATS. 1976, c. 1397, §3, at —.

SB 1457 also authorized adoption of rules and regulations for claims hearings by the Office of Administrative Hearings pursuant to CAL. GOV'T CODE §14350. CAL. STATS. 1976, c. 1397, §2, at —. CAL. GOV'T CODE §14350 relates to relief from bid mistakes and apparently reference to CAL. GOV'T CODE §14380 was intended.

Central to any effective administrative law proceeding is independence and the attendant ability to objectively weigh and determine issues free of budgetary, policy, or special interest inhibitions.⁹³ That principle has its application in contract disputes proceedings, as well.⁹⁴ This is not an argument that adjudicatory bodies should be permitted to substitute their policy judgments for those properly delegated to the program entities; however, the administration of a contract which has defined the rights and duties of the respective parties should not become the vehicle for program implementation through creative construction of the contract provisions and obligations. Policy discretion was exhausted with the decision to undertake the object of the contract and with the contract's execution. The adjudicatory process, at least with regard to contract claims, is merely declaratory of existing rights between the parties.

More basic is the subtle penchant for and at times necessity of an adjudication conforming to the executive policy and precedent of the contracting agency rather than to reality and legal parameters. It is exactly the incestuous relationship of the contracting officer or engineer to the engineer's employer which undermines the credibility, if not the integrity, of decisions, as perceived by the contracting community.⁹⁵ This is so despite

93. The concern for objectivity and independence was called to the attention of the legislature in reviewing the operation of the Administrative Procedure Act in California.

[T]he fact that the hearing officer is an employee of the investigating and prosecuting agency, with the attendant control over original appointment, assignment of duties, promotion, performance reports, pay, vacation, sick leave, and layoff or demotion are sufficient in and of themselves to instill into such hearing officers enough desire to please the agency and to adopt an institutionalized approach which cannot help but reflect itself into the fact finding process . . . [N]o person need be educated by an administrative agency in order to make a fair and impartial determination of facts, and if the opportunity exists within an administrative agency to inculcate the staff hearing officers, all guarantees to the litigant for a free and independent determination of facts lie solely upon the integrity of the individual hearing officer to whom the case is assigned.

FIRST REPORT OF THE SENATE INTERIM COMMITTEE ON ADMINISTRATIVE REGULATIONS AND ADJUDICATIONS. THE USE OF INDEPENDENT HEARING OFFICERS FOR ADMINISTRATIVE ADJUDICATIONS 128-129 (1957). That report, which was prepared when licensing entities still maintained staffs of captive hearing officers, ultimately led to creation of a separate Office of Administrative Hearings. CAL. GOV'T CODE §11370 *et seq.* Creation of a separate office, however, did not fully resolve the issue of the hearing officer's independence since the decision of the hearing officer is prepared for adoption by the head of the licensing entity, which is a party to the proceeding. CAL. GOV'T CODE §11517. Although Chapter 2048, CAL. STATS. 1961, c. 2048, §2, at 4267, added some organizational insulation for hearing officers, full independence will be assured only when the hearing officers are extended the power of final decision and an organizational independence from all litigant entities, a final step in the evolution and maturation of the concept originally recommended by the Judicial Council. CAL. JUDICIAL COUNCIL, TENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 13-14 (1944). The same concern for independence has been expressed in the context of contract claims procedures:

It is obvious that the contractor cannot obtain a decision from a person who is impartial and objective when it is the architect or engineer making the decision that involves a question of his own negligence or mis-performance in the design of the project

A provision allowing a party who has a direct interest in the matter to make the decision (with the obvious bias that any human being must have in such an event) is repugnant to all of the legal principles of giving parties a fair hearing by an impartial and objective person who further is trained in the applicable law

Irwin letter, *supra* note 5.

94. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 21 (1972).

95. See note 93 *supra*.

the fact that few, if any, documented instances exist where the agency head, the engineer, the contracts administrator, or the captive hearing officer acted other than fairly and in all good faith.

Whether or not influence of the contracting entity is brought to bear on the disputes decision-making process, such a procedure will be improved if that possibility is eliminated.⁹⁶ Necessarily, that will require housing the adjudicatory organ outside the organizational structure of contracting entities, or at least wholly insulating it from the heads of contracting entities, in all matters including employment decisions.⁹⁷

Multiple claims forums, whether judicial or administrative, which can or must be pursued, generate added cost, time and uncertainty. Thus, an effective procedure should avoid multiple proceedings. The initial decision authority preliminary to the commencement of a dispute proceeding must be retained within the discretion of the entity administering the contract. Beyond that, a single forum to adjudicate the dispute would minimize the cost of prosecuting a dispute. Contractors and public agencies would be able to minimize legal expenses since lawyers would need to prepare and present their client's case only once. Elimination of repetitive hearings will save personnel time for representatives and witnesses. Moreover, a single forum will encourage early resolution of claims while personnel are available and the circumstances of the dispute are fresh in their minds.⁹⁸

Limitation of disputes resolution to a single forum will engender two ancillary effects. With a single forum, decisions affecting contract performance will achieve an early finality. This will permit a maximum degree of flexibility to mitigate the adverse consequences of a decision. That flexibility is of equal importance to the entity and the contractor. The agency, by ordering changes in the work or the contractor by re-sequencing the order of performance, may be able to totally avoid costs which, absent a decision, they might incur based on their perception of their probable ultimate liability in the dispute. Both parties in a dispute are forced to assume some risks of an adverse decision. These risks can be and often are aggravated by lost opportunities for alternative actions in the interim pending a decision.

With a single forum, the parties would be compelled to exhaustively pursue the advocacy of their position. To facilitate this, the forum must be capable of issuing subpoenas and subpoenas duces tecum. The parties must be entitled to mutual and full discovery.

Multiple-forum claims structures are vulnerable to claimed or actual inconsistencies arising among alternative forums. Multiple claims forums

96. See note 93 *supra*.

97. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 21 (1972).

98. This need is particularly pressing in the construction industry where the worldwide mobility and nomadic inclinations of contractor employees make the economical production of witnesses a hardship on both the agency and the contractor.

prompt charges that the contractors can continue to shop for decisions until one is favorable, while the entity must exhaustively present its case at each level to protect against an adverse decision.⁹⁹ Furthermore, multiple claims forums detract from the credibility of decisions in any one forum. One postulate of an effective administrative law adjudication structure must be judicial credibility if a trial *de novo* of each dispute is to be avoided.

Avoiding a trial *de novo* is not only desirable but necessary and it is consistent with administrative practice in California. A limited trial *de novo*, to the extent of court review of the administrative record for substantial evidence in support of the decision, is the familiar standard of appellate review under administrative mandamus.¹⁰⁰ It is also the standard of review applied to decisions by engineers of agencies, which by the contract terms are made final absent fraud or gross error.¹⁰¹

Limited review enhances the single forum concept by reducing the impact on the judicial system. Cases previously tried *de novo* would be eliminated from the perennially crowded court calendar. To the extent that the administrative mandamus case load increases, that increase, logically, should be less in effect and volume than the trial case load reduction. This substitution of review cases for trials *de novo* has the advantage of greater court calendaring flexibility, freedom from jury proceedings, and elimination of the necessity for extended oral testimony. A single forum will also foster a level of expertise which should produce more expeditious and knowledgeable decisions.¹⁰² With, in effect, a special jurisdiction board the parties could expect full consideration of their claims without calendar competition from other substantive matters.

In the most desirable disputes resolution scheme, the procedure would be catholic and uniform throughout the state. The principles of law do not differ significantly between state and local jurisdictions; however, the contracting practices and procedures indisputably do. Contractors, whether builders, sellers or consultants, market throughout the state and they are confronted with a plethora of contracting procedures. Small differences in procedure, for example the differing periods for giving notice of claims, can have devastating effects in lost contract rights. These losses are particularly significant to less sophisticated, less experienced, or smaller contractors. The usual adverse effect of these differences is economic, and this effect may be multiplied if the contractor is a principal employer in an area. The resulting inability to freely contract throughout the state necessarily restrains

99. Each forum or claims stage presents the contractor with a kind of discovery simply by observing the evidence and theories on which the entity presents its case.

100. CAL. CODE CIV. PROC. §1094.5.

101. *Connell v. Higgins*, 170 Cal. 541, 150 P. 769 (1915); *Clack v. State ex rel. Dep't of Pub. Works*, 275 Cal. App. 2d 743, 80 Cal. Rptr. 274 (1969); *Macomber v. State*, 250 Cal. App. 2d 391, 58 Cal. Rptr. 393 (1967).

102. NAS STUDY, *supra* note 5, at 45; Irwin letter, *supra* note 5.

competition and tends to balkanize local public contracting, which in turn raises the cost to the taxpayer. A uniform claims procedure and a statewide claims forum would promote uniformity of principles and procedure, and facilitate contracting mobility with attendant cost reductions and greater economic health.

A catholic jurisdiction would ensure a sufficient case load to maintain an economically viable hearing organ and ensure a breadth of involvement in a wide range of contract problems. This will redound in greater expertise. With a statewide board, the skill and resources of a claims board could be available to governmental units which could not otherwise maintain a full time board. Furthermore, legal decisions on claims which might be highly politically charged, particularly at the local level, and which currently must be decided by local governing bodies,¹⁰³ could be more equitably resolved if a non-resident, objective agency could be injected into the process. Finally, any effective claims procedure must confront the conflicting issues of expedition and informality versus due process and judicialization.

The foregoing exposition of focal criteria exposes the author's predilection in this regard. A judicialization of the claims process seems most consistent with a single claims forum. Informality, contrary to the implicit belief of many exponents of nonjudicial, "non-lawyerized" proceedings, does not necessarily breed speed. Too often informality is tacitly equated with a greater latitude to reach a favorable result: that is, to do the "fair" or "equitable" thing without being bound by the strictures of the law or the contract. If this were completely true, it might be expected that a high number of claimants would actively participate in appeal to the Board of Control whose powers are essentially equitable in character. That is a phenomenon which has not materialized. To the contrary, either because of the degree of calendar competition or the absence of claims procedures,¹⁰⁴ presentation of claims to the Board has deteriorated to a *pro forma* step.¹⁰⁵

With these considerations in mind, it appears that California needs to restructure its public contract claims procedures to attain a more viable administrative determination system. One such system presents itself in the form of the Model Procurement Code. At the present time only interim

103. CAL. GOV'T CODE §905. Authority exists currently for local entities to contract with the Office of Administrative Hearings to have hearings conducted on its behalf, CAL. GOV'T CODE §27727, but apparently no use has been made of that authority in the area of public contract disputes.

104. Even for bid protest hearings on purchasing contracts pursuant to CAL. GOV'T CODE §14813 the Board of Control has adopted only a minimum of procedural provisions. 2 CAL. ADMIN. CODE §870 *et seq.* These are primarily limited to defining "interested parties," setting for notice and decisional periods, and noting the right and procedures to secure record of the hearing. Apart from recognizing the right to a hearing and committing the conduct of the hearing to the Board or a hearing officer, no procedural rules exist governing order of appearance, burden of proof, or other details of the hearing. No rules have been adopted specifically for presentation or adjudication of contract disputes. Even the right to a hearing is conditioned on the Board determining that the protest is not frivolous or totally without merit. *See* 2 CAL. ADMIN. CODE §872.

105. *See* note 3 *supra*.

redrafts of the Code are available for analysis; necessarily, then, final judgment on the efficacy of the Model Procurement Code cannot be made until the final draft form is available. The following is an analysis of the general conceptual outline of the remedies section.

THE MODEL PROCUREMENT CODE

A. Background

An effort to draft a model code governing state and local procurement activity was funded by the Law Enforcement Assistance Administration (LEAA) on March 11, 1975.¹⁰⁶ The effort is jointly sponsored by the American Bar Association Sections of Local Government Law and Public Contract Law through a Coordinating Committee. The goal of the project is to control white collar crime through simplifying, clarifying and modernizing purchasing law, and to generate an increased professionalism with an attendant increase in public confidence.¹⁰⁷

The "Preliminary Working Paper No. 1," an initial public draft of the Model Code, was released for external comment in July, 1976.¹⁰⁸ Section 7 of that draft set forth recommended provisions for performance disputes and bid protests.¹⁰⁹

B. Summary of the Model Code Remedies Proposal

The Model Code remedies section addresses performance disputes and bid protests. An option for a judicial or administrative law forum is provided; however, under the Model Code the principal forum for both types of disputes remains the trial court. The commitment to that forum is evidenced by provisions which circumscribe the finality of decisions in the administrative forum. Further, the administrative forum may be divested of jurisdic-

106. ABA Coordinating Committee on a Model Procurement Code, Information Letter No. 5, Nov. 1976. The Department of Health, Education and Welfare, and the Office of Federal Procurement Policy joined LEAA in making an additional, expanded grant, effective January 1977, for a fifteen month drafting and implementation period. ABA Public Contract Newsletter No. 2, Jan. 1977, at 6. For more detail of the origins, methodology and thrust of the grant project, see vom Baur, *The Project for a Model Procurement Code*, 8 PUBLIC CONT. L.J. 4 (1976).

107. ABA Coordinating Committee on a Model Procurement Code, Information Letter No. 2, July, 1975, at 2.

108. The edition disseminated as ABA MODEL PROCUR. CODE, PRELIMINARY WORKING PAPER No. 1 is the only edition which has received general distribution to date. This version is cited herein as MODEL CODE, see note 15 *supra*. An additional version of the MODEL CODE with revisions and additional substantive divisions was distributed at a public discussion meeting in San Francisco on February 13, 1977. ABA MODEL PROCUR. CODE, NATIONAL SUBSTANTIVE COMMITTEE DRAFTS LOOKING TO THE PREPARATION OF PRELIMINARY WORKING PAPER No. 2 (Feb. 5, 1977) [hereinafter cited as COMMITTEE DRAFTS]. The COMMITTEE DRAFTS assign the remedies sections to Article 9 (designated by a "9" prefix) rather than Article 7 as in the MODEL CODE (designated by a "7" prefix).

109. The conceptual mold was set by an early conclusion that "the 'remedies' provisions . . . should be based on the recommendations of the Commission on Government Procurement . . ." Memorandum from the Chairman of the Remedies Committee to the Members of the Committee, Nov. 14, 1975 (copy on file at the *Pacific-Law Journal*). The extent to which the Model Code ultimately adheres to that premise depends on the evolution of ensuing drafts.

tion if litigation is filed prior to initiating the administrative proceeding.¹¹⁰

The determination of a performance dispute commences with issuance of a written decision by the public entity or on the failure to issue a decision within 120 days, in which case the lack of a decision is deemed to be an adverse response.¹¹¹ The contractor's appeal of the decision is directly to the trial courts of the state, absent enactment of the provisions creating a Contract Appeals Board,¹¹² or to a special Court of Claims, if that alternative is adopted.¹¹³

Appeals may be prosecuted in either of the courts even if the quasi-judicial Contract Appeals Board is adopted. The jurisdiction of that Board is conditioned on the contractor not instituting a judicial action.¹¹⁴

The Board's substantive jurisdiction encompasses all controversies concerning the payment, performance or interpretation of the contract.¹¹⁵ The period of limitations for filing appeals is 90 days after an adverse agency decision or within a "reasonable time" of the agency's failure to issue a written decision.¹¹⁶ No separate limitations period for commencing a judicial action is specified by the Model Code since it states that "all statutory limitations upon actions filed in courts of this State, apply"¹¹⁷ to any judicial action on a dispute. The period for appealing a decision of the Contract Appeals Board is 12 months from receipt of the Board's decision.¹¹⁸

In the initial Model Code draft two alternative provisions were suggested

110. MODEL CODE §7-402(1), (2).

111. MODEL CODE §7-202, *compare* COMMITTEE DRAFTS, *supra* note 108, §9-202.

112. MODEL CODE §7-103, Alternative A.

113. MODEL CODE §7-103, Alternative B.

114. MODEL CODE §7-402(1)(a). Since jurisdiction is conditioned on the absence of a judicial action by the contractor, filing of such an action, even if filed after the Board action is commenced, would appear to divest the board of jurisdiction. The contractor is the only party empowered to so interrupt the Board's deliberation on a matter by filing litigation even though both parties have standing to commence actions either with the Board or the courts. MODEL CODE §7-402. Although Section 7-402(3) prohibits the contractor from unilaterally "discontinuing" an appeal to the Board, that is not likely to preclude the divestiture suggested above since the courts have original jurisdiction of the dispute. Even if the filing of a judicial action was conceived as a "unilateral discontinuance" and an adverse decision on the dispute, Section 7-301(2) provides that the decision is "without force or effect in the courts." Query: Whether the filing of a judicial action is a unilateral discontinuance? Query, too: Whether a discontinuance is a decision of the Board which would be subject to review or to the limitations on review provided under either alternative in Section 7-403(3)?

115. MODEL CODE §7-402(1).

116. MODEL CODE §7-402(1)(b).

117. MODEL CODE §7-302.

118. MODEL CODE §7-403(1). Measuring the limitations period from receipt rather than service of the decision would seem questionable when the lengthy appeal period is considered. Proof of the date of receipt, absent personal service or a return receipt on certified mail, is likely to present a problem. In relying on date of receipt the appeals period may be different for the government and the contractor. If so, one party might lose its appeal rights while the other's were still extant. Such a situation is inherently unfair and a source of uncertainty since both parties will have difficulty in determining the appeal period with sufficient certainty to permit a meaningful determination of whether to appeal. A decision which affords partial relief to each party might not be appealed but would if there was a prospect of a modification of the decision on appeal regarding the other party. No particular advantage seems to accrue in using the date of receipt and the disadvantages are readily avoided by measuring the limitations period from the date of service of the decision in accordance with state law.

for the standard of review applicable to the decision of the Contract Appeals Board. Under the more liberal standard, the findings of fact in an administrative board decision would be reviewed for a preponderance of supportive evidence, but on leave of the court the factual record could be augmented.¹¹⁹ No presumptions would attach to the administrative decision and the reviewing court would have unlimited power of review.¹²⁰

The more restrictive standard of review accords finality to factual matters "unless fraudulent, capricious or clearly erroneous, or erroneous as a matter of law."¹²¹ In lieu of a preponderance of the evidence as a standard of review, a subsequent revision substituted a substantial evidence standard.¹²² The intent was to provide a relaxed standard of review which would encourage expeditious informal board proceedings.¹²³ Disputes concerning the bidding¹²⁴ and award of contracts are provided for by one of two administrative forums,¹²⁵ or before the head of the purchasing entity,¹²⁶ or in a direct judicial action.¹²⁷ Of the administrative forums, one alternative provides that the State Procurement Board would have original jurisdiction;¹²⁸ the other provides for creation of a separate board or designation of a separate official by gubernatorial appointment.¹²⁹ Protests are filed with the

119. MODEL CODE §7-403(3), Alternative A.

120. MODEL CODE, Commentary §7-501 at 5. In effect this alternative seems to provide a modified trial *de novo* since the record in the administrative proceeding is "admissible" as the basic record which can be fully supplemented. Theoretically, if neither party offered the administrative record into evidence on appeal, a wholly new record would have to be developed ab initio.

The practical vulnerability of Alternative A seems to be the inability to force an exhaustive and good faith resort to the administrative forum. In *Clack v. State ex. rel. Dep't of Pub. Works*, 275 Cal. App. 2d 743, 80 Cal. Rptr. 274 (1969), the court in construing a contract clause which accorded finality to the engineer's decisions except in case of gross error, noted,

Judicial review which extends to reweighing the evidence denotes the reviewing tribunal's power to try the entire controversy *de novo*, to exercise its independent judgment on the evidence . . . Independent, *de novo* consideration by the court would deprive the administrative settlement of the degree of finality accorded it by the contracting parties.

Id. at 749, 80 Cal. Rptr. at 278 (1969). It also erodes the integrity of the entire administrative claims process.

121. MODEL CODE §7-403(3), Alternative B. Apparently this alternative states the substantial evidence rule as recognized in California.

The substantial evidence rule, moreover, has been highly developed and refined as a standard of . . . judicial review of the findings of administrative agencies . . . [A]bsorbing it as one kind of gross error which permits review of the administrative settlement of public contract disputes is eminently practical.

Clack v. State ex. rel. Dep't of Pub. Works, 275 Cal. App. 2d 743, 748, 80 Cal. Rptr. 274, 277 (1969).

122. COMMITTEE DRAFTS, *supra* note 108, §9-404(3), Alternative A.

123. COMMITTEE DRAFTS, *supra* note 108, §9-404(3), Commentary.

124. Protests of contractor selection are apparently limited to formally advertised, *i.e.*, competitively bid procurements.

125. MODEL CODE §7-501.

126. COMMITTEE DRAFT *supra* note 108, §9-501, Alternative C.

127. MODEL CODE §7-502(1).

128. COMMITTEE DRAFTS, *supra* note 108, §9-501(1), Alternative A. The State Purchasing Board is apparently intended. That Board is established under COMMITTEE DRAFTS, *supra* note 108, §2-201. The Board is vested with powers as the centralized entity for establishing procurement rules, regulations, and policies, as well as supervising the actual procurement activity under Option 2 of COMMITTEE DRAFTS, *supra* note 108, §2-202. Potentially the Board under MODEL CODE §7-501(1), Alternative A would decide protests of its own decisions and rules and policies.

129. MODEL CODE §7-501(1), Alternative B.

head of the contracting entity, with the administrative forum,¹³⁰ or with the trial courts in an original proceeding.¹³¹

Protests must be promptly filed in the administrative forum or with the head of the contracting entity, and in any case within 14 days after the protestor knows or should have known of the facts giving rise to the protest.¹³² An original protest with the courts must be filed within 30 days after the moving party has or should have had knowledge of the facts giving rise to the action.¹³³

A bidder, prospective bidder, or contractor has standing to appeal a decision of the administrative forum or the agency head.¹³⁴ The appeal must be filed within 14 days after receipt of the decision.¹³⁵ The decision of the administrative forum or the agency head is final unless fraudulent or unless an appeal is filed.¹³⁶ With the filing of an appeal the decision loses all finality on facts and law¹³⁷ irrespective of the absence of gross error or the quantum of evidence.¹³⁸

C. *The Model Code: A Solution?*

Analysis of the Model Code at the current level of evolution confirms that the remedies proposals do not offer California an adequate, effective and expeditious vehicle for claims adjudication. The cardinal weaknesses of the Model Code are frailty of the quasi-judicial administrative forum and the scant statutory outline. The intent of the latter was to permit individual jurisdictions to administratively tailor the detail of Model Code philosophies and policies to the local concerns through regulations.¹³⁹ That premise

130. MODEL CODE §7-501(2).

131. MODEL CODE §7-502(1).

132. MODEL CODE §7-501(2), Alternative B.

133. MODEL CODE §7-502(1).

134. MODEL CODE §7-502(2)(a). No right of appeal is recognized for the public entity. Since no grounds for appeal are stated by the code but a protest of the solicitation, as opposed to the award, is permitted, it must be assumed that the entity could have a material interest in appealing a bid protest. This would be particularly true if the administrative forum and the contracting entity were separate and distinct governmental organs. For example, an interested bidder might question the level of quality specified by the procuring agency. A decision adverse to the agency might significantly affect the agency's ability to accomplish its program unless the agency was entitled to judicial review. Since the right of appeal is not limited to a party to the original protest, it appears that any of the enumerated parties would have a right to appeal a protest decision.

135. MODEL CODE §7-502(2)(a).

136. MODEL CODE §7-501(4). The reference to fraud as a ground for vitiating the finality of the decision departs significantly from the recognized and generally accepted concept in California. Fraud includes the connotation of arbitrary action and gross mistake as well as the ordinary sense of fraud. *Macomber v. State*, 250 Cal. App. 2d 391, 58 Cal. Rptr. 393 (1967). "Fraud or bad faith, as morally reprehensible qualities, are not necessary attributes of arbitrariness, hence are not indispensable ingredients of gross error." *Clack v. State ex rel. Dep't of Pub. Works*, 275 Cal. App. 2d 743, 747, 80 Cal. Rptr. 274, 277 (1969). "To require dishonesty or bad faith as indispensable elements stamps the decision with more finality and constricts judicial review more narrowly than the phrase permits." *Id.* at 746-47, 80 Cal. Rptr. at 276. Perhaps the net effect is less significant when MODEL CODE §7-501(4) is read in conjunction with MODEL CODE §7-502(2)(b).

137. MODEL CODE §7-502(2)(b).

138. Compare note 173 *infra*.

139. ABA Coordinating Committee on a Model Procurement Code, Information Letter No. 2, July 1975, at 3.

produced a statutory skeleton too sparse to bear the flesh of regulations for a jurisdiction with the procurement sophistication of California's contracting community and governmental entities. The Code reflects an absence of substantive detail of the rights of the various potential parties; for example, the grounds for a bid protest are not stated.

Basic procedural rights essential to ensuring expedition in claims resolution and realization of due process protections are omitted or insufficiently detailed. Matters as critical as a "short form" or accelerated procedure, so essential to the small claim and for the small businessman-claimant, are conspicuously absent.¹⁴⁰

The inadequacy of the administrative forum is manifested principally by the optional nature of its existence as a disputes remedy.¹⁴¹ Even the availability of the forum is contingent on the contractor refraining from a judicial adjudication.¹⁴² Equally debilitating is the legal effect accorded the board's decisions.¹⁴³ The most restrictive standard of review limits the finality of the decision to matters of fact.¹⁴⁴ That precludes any finality on matters such as the interpretation of the meaning or effect of contract provisions. As recognized in California, legal matters can be determined in an administrative adjudication and enjoy the same degree of finality as factual matters.¹⁴⁵ Provisions which incorporate less than that degree of finality undermine the administrative adjudication process and could reduce

140. Memorandum from the Chairman of the Remedies Committee to the Members of the Committee, Nov. 14, 1975 (copy on file at the *Pacific Law Journal*), expressly states that the remedies provisions "should be based on the recommendations of the Commission on Government Procurement." Recommendation 3 of the report of that commission concludes that administrative contract boards should be afforded subpoena and discovery powers. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 20 (1972). Similarly, recommendation 4 espouses a small claims dispute system. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 22 (1972). Without question these recommendations will be considered in later stages of the MODEL CODE project and where appropriate, translated into useful adjuncts of the MODEL CODE remedies scheme.

141. MODEL CODE §7-401, Commentary §7-501 at 5.

142. MODEL CODE §7-402(1)(a).

143. MODEL CODE §§7-403(3), 7-501(4) and 7-502(2)(b). The decisions of the federal boards of contract appeals are subject to the Wunderlich Act, 41 USC §321 (1970), and are entitled to finality absent gross error or error of law. The federal courts, including the Court of Claims, are restricted to reviewing the record of the administrative hearing and can not conduct a trial de novo on matters within the jurisdiction of the boards. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1962). The culmination in the development of the scope of review of a board's decisions was reached in *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), which held that in the absence of factual matters in the record a dispute must be remanded by the courts for a trial of factual issues by the board. Preceding the *Grace* decision finality had been extended to a board's factual determinations, even as applicable to controversies beyond a board's jurisdiction, *i.e.* breach of contract claims. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966).

Seemingly, the MODEL CODE would undo the effect of these decisions at the state and local governmental level.

144. MODEL CODE §7-403(3), Alternative B imposes factual finality "unless fraudulent, capricious or clearly erroneous, or erroneous as a matter of law." See note 123 *supra* regarding the effect of revisions in the standard of finality under Alternative A of the COMMITTEE DRAFTS, *supra* note 108, §9-404(3), Commentary.

145. See *Clack v. State ex rel. Dep't of Pub. Works*, 275 Cal. App. 2d 743, 80 Cal. Rptr. 274 (1969). *Walnut Creek Elec. v. Reynolds Constr. Co.*, 263 Cal. App. 2d 511, 69 Cal. Rptr. 667 (1968).

the board to a supernumerary in the claims process. Not only is it not then a constructive force in the effective disposition of contract disputes, but resort to the Board is, if anything, productive of delay and additional expense.

Resolution of bid disputes is to be provided for in one of three alternatives:¹⁴⁶ the State Procurement Board;¹⁴⁷ a gubernatorially designated official, board, or commission,¹⁴⁸ or the head of the purchasing agency.¹⁴⁹ The creation of another board or commission under the second alternative results in a proliferation of the number of entities with the potential for conflicting precedents and policies. Further, the designation of a separate official or commission in adding to the complexity of the adjudication matrix could have a deterrent effect on potential claimants who are confused or intimidated by the "bureaucracy."

The decision on a bid protest is emasculated by a standard of review which negates the decision.¹⁵⁰ The existence of a parallel right of action in the courts further eviscerates the viability of the quasi-judicial bid protest forum.¹⁵¹

The absence of any meaningful finality of decision by the administrative board on disputes and bid protests will necessarily erode the confidence of the parties and the courts. It is, thus, more likely that any administrative record will be discounted during judicial review and opened to supplementation¹⁵² which will encourage summary presentations in the administrative process or total disregard of it. That will hinder development of respected expertise and will reduce the case load of the Board with a resultant loss of its economic base. If not adding to the judiciary's calendar problems, certainly the administrative process will do nothing to relieve the court congestion and attendant delays in resolution of contract disputes.¹⁵³

146. COMMITTEE DRAFTS, *supra* note 108, §9-501.

147. COMMITTEE DRAFTS, *supra* note 108, §9-501(1), Alternative A. Although the title of the board was not revised in the February 13, 1977 draft, this board is apparently the "State Purchasing Board" created under Sections 2-201 and 2-202 (Option 2). To the extent this board is empowered to exercise policy making and program powers, any adjudicatory jurisdiction over bid disputes would be counter productive of contractor and public credibility. In any instance of a controversy over the validity, intent, or application of a board regulation embodying a contract policy or principle the board would have a divided interest. Any state or local jurisdiction electing Option 2 under Section 2-202 was probably intended to be foreclosed from also selecting Alternative A of COMMITTEE DRAFTS Section 9-502(1).

148. COMMITTEE DRAFTS, *supra* note 108, §9-501(1), Alternative B.

149. COMMITTEE DRAFTS, *supra* note 108, §9-501(1), Alternative C. Vesting the head of the purchasing agency, as defined in Section 1-201 (17), with authority to decide protests of the individual's or agency's contracting action raises the potential specter of a vested interest in the outcome of the dispute. The danger thus presented is noted in the comment to Section 9-301 which observed:

[T]he practice of placing the State engineer or official in the position of an arbitrator for purposes of determining [disputes] does not satisfy concepts of fairness and due process and is not good procurement practice.

Contra, *Clack v. State ex rel. Dep't. of Pub. Works*, 275 Cal. App. 2d 943, 80 Cal. Rptr. 274 (1969).

150. MODEL CODE §7-502(2)(b). Contrary to the standard of review applied under other sections, the decision on a bid protest is not final on either law or fact.

151. MODEL CODE §7-502(1).

152. MODEL CODE §7-403(3), Alternative A.

153. To achieve any legislative acceptance the MODEL CODE will have to offer something to

The Code comment to Section 7-501 notes:

Little real purpose is served in creating a board to act as a substitute court. Pleadings discovery and time are not any less costly or time consuming merely because they are pressed in the name of a board

The cloaking of a board's decision with finality or making a board a substitute court does not result in expeditious proceedings. Lawyers and litigants then have no choice but to press for full judicialization of the only and last step available to them.¹⁵⁴

In the overall picture of the claims process, a single administrative forum with the full quasi-judicial powers could produce net savings in cost and time from the avoidance of repetitive litigation of a claim. In addition, monetary savings are possible since judges tend to command higher salaries and support costs than administrative forums.

On the other hand, an administrative board could produce "informal, expeditious proceedings, and [develop] a uniform set of precedents."¹⁵⁵ A board would produce earlier claims resolution by avoiding court calendar congestion. The board would also be likely to provide speedier consideration because of knowledgeable arbiters.¹⁵⁶ Alternatively, if jurisdiction is vested in the trial courts of the state,¹⁵⁷ no single county is likely to have a sufficient case load to warrant a separate judicial position for public contract disputes. The public contracts case load is thus subsumed in the court's overall case load. Given the dilutional effect of a county-by-county handling, it is not very probable that any one judge, even if assigned all such cases in the county, would develop a significant degree of expertise.¹⁵⁸

the contracting community and the public. If the code responds to the enumerated facets of the claims adjudication problem it is likely to be more marketable. This fact was recognized in an early observation to the MODEL CODE personnel:

If State legislators are expected to enact this code, we should be able to demonstrate some saving values. This could be done if the Board's functions were in lieu of a trial court proceeding.

Letter from Orrin F. Finch, Attorney, Department of Transportation to Mr. Robert Wallick, Chairman of the Remedies Committee, Jan. 23, 1976 (copy on file at the *Pacific Law Journal*).

154. MODEL CODE, Commentary §7-501 at 5.

155. MODEL CODE, Commentary §7-501 at 5.

156. Irwin letter, *supra* note 5.

157. The exclusive authority for the existence of the courts is expressed in the CALIF. CONST. art. VI, §10. The legislature could not detract from the jurisdiction or judicial powers of the enumerated courts except to the extent that art. VI, §10 permits diversion of jurisdiction to justice and municipal courts.

158. On this as a goal, see generally, NAS STUDY, *supra* note 5, and Irwin letter, *supra* note 5.

The Commentary states that permitting an optional use of the administrative forum would result in 96 percent of controversies being resolved at minimum cost based on federal experience which would produce only 4 percent remaining for judicial resolution. The quoted figures appear deceptive if the percentages relate to those controversies arising under the contract; that is, disputes which are not based on breach theories. The dichotomy of breach-non-breach has bred the problem of fractionalization of remedies at the federal level which potentially forces a claimant to elect at his hazard the avenue for relief while the clock of limitations ticks in his ear. See *A. Teichert & Sons, Inc., v. State*, 238 Cal. App. 2d 736, 48 Cal. Rptr. 225 (1965), which rejected, in California, the problem of fractionalization as archaic and inequitable nonsense. To resurrect the concept in any degree is unwarranted. The optional character of the judicial and administrative remedies would contravene the concept of exhaustion of administrative re-

No more violence is done to the concept of separation of powers¹⁵⁹ by permitting a quasi-judicial, administrative adjudication than has been the historical experience of administrative law in California. That experience illustrates that an administrative, adjudicatory agency can function quickly and effectively to protect vested and significant economic interests with the adequate safeguard of limited judicial review. Occupational licensing and discipline,¹⁶⁰ worker's compensation claims,¹⁶¹ unemployment insurance appeals,¹⁶² public utilities matters,¹⁶³ and occupational safety and health citation appeals¹⁶⁴ are all quasi-judicial adjudicatory functions effectively executed within the executive branch.

PUBLIC CONTRACT ADJUDICATIONS ACT: A PROPOSAL

If not the Model Code, then what, if anything? The existing statutory system for claims adjudication has been shown to be demonstrably inadequate. A revision and restatement of the remedial procedures applicable to public contracts is possible consistent with the principles and policies stated in this article. Such an effort with section-by-section commentary is set forth in *Appendix A* as a proposed Public Contract Adjudications Act [hereinafter referred to as Proposed Act].

A. Summary of the Proposed Act

The Proposed Act encompasses the broadest range of contract disputes including related proceedings such as relief from bid mistakes¹⁶⁵ and proceedings to validate public contracts.¹⁶⁶ The Proposed Act is drafted to include only state contracts but it would be effective if extended to all public entities within the state.

The focal and only entity for adjudications is the Contract Adjudications Board,¹⁶⁷ which is a rough analog of a federal board of contract appeals

medies. Relieved of that obligation it is unlikely that the federal, historical experience would repeat in any degree in California. As indicative, since the determination of rights procedure was established, it appears that of the most heavily represented agency about 3 percent of disputes were presented to the administrative forum. Presumably the balance was pursued judicially. This conclusion is based on Cal-Trans data in Table 6, *supra* note 12, which indicated 503 claims from 1969-1975 plus the 16 submitted to the determination process. This preference militates that the resort to the administrative forum must be mandatory if it is to function meaningfully.

159. After observing that creation of a board as a substitute court serves no real purpose the comment states, "Our tradition of separation of powers suggests that the judicial function should be placed in the courts, not in the executive branch." MODEL CODE, Commentary §7-501 at 5. Counteracting the suggestion is the significant potential for saving court time, expense to the judicial system and the parties, and achieving faster resolution of disputes between the public contractor and government.

160. CAL. GOV'T CODE §11370 *et seq.*

161. CAL. LABOR CODE §5300 *et seq.*

162. CAL. UNEMP. INS. CODE §1334.

163. CAL. PUB. UTIL. CODE §§1005, 1705.

164. CAL. LABOR CODE §6300 *et seq.*

165. PROPOSED PUBLIC CONTRACT ADJUDICATIONS ACT §7000 *et seq.* [hereinafter cited as PROPOSED ACT]. The provisions of the PROPOSED ACT are set out in Appendix A, *infra*.

166. PROPOSED ACT §5000 *et seq.*, *infra* Appendix A, at 590.

167. PROPOSED ACT §2017, *infra* Appendix A, at 580.

without the debilitating features of jurisdiction limited to contract adjustments, and more importantly, not dependent for its existence on delegation from the agency head. The initial level of contract administration is retained within the contracting entity¹⁶⁸ to avoid interjecting the Board into daily administration decisions or into the discretionary decisions associated with contract formation.

Representation on the Board, initially and if subsequently expanded, is specified to reflect all interests in public contracting: the public, the contracting community, and public entities.¹⁶⁹ The flexibility for orderly handling of case load is provided by provision for hearing personnel to supplement the capability of the Board¹⁷⁰ and by provision for expansion of Board membership.¹⁷¹

The Board is independent of any contracting program entity and is afforded full powers of discovery.¹⁷² Board decisions are final if supported by substantial evidence and if not erroneous as a matter of law.¹⁷³ Stringent time limits are stated to facilitate prompt disposition of controversies, from which all parties may meaningfully benefit, and to avoid entities using delay to gain disproportionate bargaining power.

Finally, a short form, small claims procedure is established¹⁷⁴ as an option to those parties, including any entity, willing to accept the limitations imposed on the procedure in exchange for the added expedition and cost savings afforded by the procedure. In addition to priority in calendaring,¹⁷⁵ the accelerated procedure provides for more limited discovery,¹⁷⁶ and a short-form decision.¹⁷⁷ Appeals are discouraged by requiring that, if appealed, the decision in an accelerated procedure must be returned for a hearing *de novo* as a non-accelerated matter and the appellant must bear the other party's costs of the *de novo* hearing.¹⁷⁸

B. Proposed Act: An Evaluation

In all major features, the Proposed Act is responsive to the principles of an effective disputes procedure and corrective of deficiencies in existing

168. E.g., PROPOSED ACT §6001, *infra* Appendix A, at 598.

169. PROPOSED ACT §§2003, 2006, *infra* Appendix A, at 575, 576.

170. PROPOSED ACT §2008, *infra* Appendix A, at 576-77.

171. PROPOSED ACT §§2001, 2006, *infra* Appendix A, at 573, 576.

172. PROPOSED ACT §2016(b), *infra* Appendix A, at 579.

173. PROPOSED ACT §2010(b), *infra* Appendix A, at 577.

174. PROPOSED ACT §8000 *et seq.*, *infra* Appendix A, at 602. For the Armed Services Board of Contract Appeals, the procedure applies to claims of \$25,000 or less, at the election of either party, unless good cause is shown for not treating the matter as an accelerated proceeding. The parties are expressly encouraged to waive discovery, pleadings, and briefs. The form of decision parallels that proposed in §8011, *infra* Appendix A, at 606-07. Oral decisions on claims under \$25,000 are similarly provided for in §8009, *infra* Appendix A, at 606.

175. PROPOSED ACT §8003, *infra* Appendix A, at 604.

176. PROPOSED ACT §8005, *infra* Appendix A, at 604.

177. PROPOSED ACT §8010, *infra* Appendix A, at 606.

178. PROPOSED ACT §8011, *infra* Appendix A, at 606-07.

remedies.¹⁷⁹ Independence, credibility, efficiency, simplicity, uniformity, and equity are all present.

The Contract Adjudications Board is clothed with a jurisdiction and stature which will engender credibility, expertise, and efficiency. Its jurisdiction is comprehensive of all public contract related matters to the exclusion of all other forms of disputes process except for judicial appellate review.¹⁸⁰ As such, reiterative presentation of claims in the process of exhaustion of remedies is eliminated and with it the duplicative costs of representation whether by counsel or lay personnel. At the same time, as the sole disputes forum, exhaustive resort to its process is encouraged. The Board is vested with powers to foster that effort. Thus, for example, civil discovery is authorized and a right to the full panoply of due process is expressly recognized.

Credibility and stature is fostered by an existence organizationally independent of all contracting agencies. As such, the Board will have no program goals to foster with its decisions, thus avoiding what might be perceived as a decisional prejudice. Even though Board members are designated from specific sectors of interest, the membership is not intended to advocate the views of that particular sector in its deliberations. Rather, the specified membership is a further effort to instill confidence that the Board's allegiance is not to a single perspective.

Additional stature is bestowed by a degree of finality which is designed to minimize the substitution of judicial judgment. At the same time, protection against arbitrary action is ensured by permitting judicial intervention when, on appeal to the courts, the administrative decision does not rise to the level of substantial evidentiary support or when an application of the law is

179. See text accompanying notes 93-105 *supra*.

180. In drafting the PROPOSED ACT the danger of intruding on the constitutional limitations under CAL. CONST. art. VI or detracting from the powers and jurisdiction of the judiciary was recognized. Conceptual rationale of the PROPOSED ACT is intended to give full deference to those limitations.

"Party" as defined in §9001(a), *infra* Appendix A, at 607, and "interested party" as defined in §9001(b), *infra* Appendix A, at 607, encompass persons who can be construed to have consented as a result of participation in the public contracting process to the exclusive applicability of the PROPOSED ACT to legal issues arising out of that process. Thus, a bidder in submitting a bid or a potential bidder in requesting solicitation documents or, perhaps even if requesting prequalification of a product or as an individual would be deemed to have evidenced his promise to resort only to the PROPOSED ACT. To ensure that result a separate statutory provision might be appropriate which would expressly state that as a condition of participating in public contracts. This conceptual approach might exclude extension of the PROPOSED ACT to include taxpayer suits. Thus, for example, the jurisdiction for a validation action by a taxpayer would remain in the Superior Courts since the taxpayer could not be construed as having in any way consented to the exclusive jurisdiction of the PROPOSED ACT unless the taxpayer was also a party or interested party. However, even on the limited number of actions properly within the jurisdiction of the Superior Court it would be hoped that the court might refer the proceeding to the Contract Adjudications Board to exploit its expertise and procedural advantages.

An alternative rationale for the PROPOSED ACT is to analyze the use of the administrative forum to the exclusion of the judicial forum, except for review, as a condition on waiver of sovereign immunity just as exhaustion of remedies is so construed. While sovereign immunity has lost most of its vitality in California, seemingly sufficient conceptual life remains to support such a rationale.

grossly erroneous.¹⁸¹

The base caseload, whether limited to state contracts or including those of all governmental entities, should ensure a cost effective operation, in the sense of minimizing the outlay of tax revenues consistent with a functionally effective remedy, and a viable existence.¹⁸² The level of activity accompanying that case load should foster an early attainment of the highest expertise. The requirement for legal training and significant legal experience will ensure that Board members are cognizant of the legal role of the adjudicatory process and the parameters of their action.

Finally, the Contracts Adjudication Board as the single adjudicatory forum should aid in achieving timely disputes processing. The elimination of multiple levels of hearing is one means for saving overall processing time, as is the specification of temporally narrow "windows" for Board action.

The accelerated disputes procedure offers an optional trade-off to the parties which permits a balance in the total remedies scheme of due process concerns with those for expedition.¹⁸³ If fully utilized by those professing the latter as a goal of the claims process,¹⁸⁴ a significant step toward

181. Review is provided by a CAL. CODE CIV. PROC. §1094.5 mandamus action in the Superior Court. Review in that judicial forum and by the vehicle of mandate is traditional to administrative adjudications in California. See generally CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS (1966).

With the statutory enunciation of the substantial evidence test as a standard for review of the administrative board's decisions, PROPOSED ACT §2010(b), *infra* Appendix A, at 577, review might ultimately be directly to the Courts of Appeal, as suggested by Justice Burke.

The Legislature ultimately could provide for the direct appeal of administrative decisions to the Courts of Appeal, thereby vesting the appellate function in courts experienced in performing that function.

As stated in the *Drumney* case, *supra*, which originated the independent judgment rule and selected mandamus as the appropriate review procedure: "Normally application for such writs should be filed in the trial courts, whose normal function it is to determine . . . controverted issues of fact." (13 Cal. 2d 75, 86). If a uniform substantial evidence review were adopted, the Court of Appeal rather than the trial court would be the logical forum to perform the review function. Preliminary review by the trial court would be superfluous and uneconomic in cases requiring no determination of controverted issues of fact.

Bixby v. Pierno 4 Cal. 3d 130, 159 n. 21, 93 Cal. Rptr. 234, 255 n. 2, 481 P.2d 242, 263 n. 21 (1971) (Burke, J., concurring).

182. Just as the courts today are increasingly challenged to account for the cost of effective management of the judicial process so are the administrative hearing organs of the executive.

Any governmental agency must be cognizant of its costs and strive to return full value. Justice as a social, institutional or human concept has no "real", *i.e.*, quantifiable value but value analysis and value budgeting engender a cost consciousness which ensures vigilance for unwarranted expenditures and promotes economies which enhance the viability

1 ADMIN. L. BULL. at i (1972).

183. The Commission on Government Procurement recognized this same conflict in the evolution of the federal boards of contract appeals and the difficulty in resolving what in large measure must be conflicting considerations. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 16 (1972). Compare the Supplemental Statement of Perkins McGuire, Chairman, advocating resolution of the conflict in favor of a claims court. *Id.* at 32.

184. The low volume of Rule 12 cases (accelerated procedures) was noted in the ASBCA REPORT, *supra* note 71. The chairman, Richard C. Solibakke, observed:

One may ponder how really serious many contractors and their lawyers are about getting rapid disposition of their appeals when they elect Rule 12 and then, for example, ask for a 90-day extension to file a complaint, which could be waived, or

achievement of the goal will result. The familiarity with and understanding of the claims process, bred by its universality, will be a catalyst for prompt disposition.

CONCLUSION

The absence of a responsive vehicle for effective claims presentation and adjudication has long confronted contractors of the State of California. The determination of rights proceeding, while less than the special claims court or mandatory arbitration sought by some segments of the contracting community, offered promise of effective, if limited, relief. Empirical analysis, however, confirmed by renewed efforts for legislative revamping, attests to the failure of the determination of rights experiment. Whether a consequence of limited jurisdiction, cost, or lack of acceptance, the determination of rights procedure failed in its purposes. Nor does a revision of the statutory basis seem conducive to greater success, so basic was the conceptual and practical failure of the claims vehicle.

While assuredly not a panacea, the Public Contract Adjudications Act seeks to innovatively address the spectrum of public contract controversies and to forge a mechanism palatable and equitable to all interests. Some may bemoan the judicialization and formalization of the process while others decry the dilution of administrative control, but each would gain far more than any speculative loss. Where a right is accorded one party, a counterpart is extended to the other; and if prerogatives are constrained for one, so too, for all others. The balance between the adversaries is struck and is hedged about with safeguards in any instance when undue or unwarranted advantage is risked. In the final analysis the relative relationships of contractor, bidder, and the public are recognized as completely as in a judicial forum.

Where in the past, contract volume or disproportionate bargaining power have permitted a failure to constructively address the deficiencies of the public contract remedial structure, the increased volume of contracting and the intruding federal presence¹⁸⁵ will stimulate, if not dictate, a re-

seriously delay filing documentary evidence, or ask for a hearing, but cannot be ready for six months!

Id. at 3. The Commission on Government Procurement ascribed the low volume of usage of the accelerated federal board procedures to two causes: The inclination of board members to extend full procedural due process to the proceedings, and the, perhaps subtle, choice of litigants for the "higher class" remedy, *i.e.*, the full formal board meeting. 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 18 (1972).

185. Intrusion is occurring not only as an express concomitant of federal grants and revenue sharing (See note 8 *supra*) but more recently in an extension of its auditing responsibilities the General Accounting Office has adopted procedures for hearing bid disputes arising out of efforts to contractually expend grant funds. *Review of Complaints Concerning Contracts Under Federal Grants* 40 Fed. Reg. 42,406 (1975). Recently the GAO exercised its grant bid procedures and held the federal-grantor agency (HEW) and the grantee-state of Florida responsible for proper enforcement of procurement policies and procedures in a service contract award by the State's subgrantee. *Trinity Services, Inc.*, Comp. Gen. Decision B-184899, (1977) 663 FED. CONT. REP. A-2 (BNA).

Even prior to publishing such procedures the General Accounting Office had opted to

evaluation and reformation of an archaic and inadequate claims vehicle. The Proposed Act, if employed in good faith by all parties as it is structured to require, could afford a solution that will not only protect the rights and interests of the public, contractors, and public entities, but might prove to be at the vanguard in the evolution of similar solutions in other states¹⁸⁶ and even in the federal government claims practice.

exercise a similar jurisdiction at the instance of a federal district court confronted with adjudicating a bid protest of the award of a grant funded construction contract under the Urban Mass Transportation Administration. 55 Comp. Gen. Decision B-183497 (1975).

186. Although it departs from the ABA drafting premises, the PROPOSED ACT with commentary has been submitted to the ABA Coordinating Committee with a recommendation that the Committee consider the PROPOSED ACT as a conceptual alternative to the remedies provisions of the MODEL CODE. Letter from the author to R.D. Wallick, Chairman of the Remedies Committee, Jan. 4, 1977 (copy on file at the *Pacific Law Journal*).

APPENDIX A

PROPOSED PUBLIC CONTRACT ADJUDICATIONS ACT*

ARTICLE 1: INTRODUCTION

Section 1000

This Chapter may be cited as the Public Contract Adjudications Act and shall apply to any state entity, including: boards; commissions; departments; agencies; the state university and colleges; and the University of California.

Comment to Section 1000:

Governmental entities at all levels could be encompassed by the Act if such were deemed legislatively desirable. Differences in contracting practices, procedures, and legal and contractual administration impede the state-wide mobility of contractors with a consequent adverse, economic effect on contractors, individually and collectively, and an anticompetitive effect on pricing public contract work. By extending the procedure to all jurisdictions an adequate remedy would be available to the contracting community even in those jurisdictions too small to support any meaningful superstructure of remedies. Limitation of the act to the state level, however, does not impair its viability.

Section 1001

Failure to pursue the procedures provided in this Chapter for any dispute subject to those procedures shall be an absolute bar to any judicial action on the matters which constitute the basis for the dispute.

Comment to Section 1001

This limitation on the right to sue an entity will provide leverage to ensure exclusivity of the procedure. It is in effect another way of stating the rule on exhaustion of administrative remedies.

* The author wishes to express his thanks to Mr. Richard Martland of the Office of the California Attorney General, Mr. Jordan Dreifus of Schwartz & Dreifus in Los Angeles, and Mr. Gregory Thompson, Director of the California Medi-Cal Procurement Project, for their personal and professional courtesy in reviewing the PROPOSED ACT. The views of these individuals do not necessarily represent the views of any particular employer or client; furthermore, the views contained herein are solely the responsibility of the author.

Section 1002

The provisions of this Chapter constitute the exclusive rights and procedures applicable to controversies concerning public contracts.

Comment to Section 1002

All existing statutory provisions applicable to public contract disputes would be superceded by enactment of this act. [*See e.g.*, CAL. GOV'T CODE §§900 *et. seq.*, 4200 *et seq.*, 14378, 14379, 14380, 14404.]

Section 1003

(a) Any public entity not expressly subject to the provisions of this chapter may elect to submit for adjudication pursuant to this chapter any controversies concerning the public contracts of that entity. The public entity shall adopt an ordinance or include a contract provision in its contracts conferring jurisdiction in accordance with such an election.

(b) The parties to any public contract in existence on the effective date of this Act and not otherwise subject to the provisions of this Chapter may by mutual agreement confer jurisdiction to hear controversies concerning that contract on the Board established in Section 2001.

(c) The Board shall contract with any public entity to effectuate the election or contract, respectively, under (a) or (b) above.

(d) Notwithstanding any other law, the Board shall be the sole state entity with authority to contract to conduct adjudications of public contract controversies.

Comment to Section 1003

Since entities other than state entities are not expressly included under the Act, this provision would provide the authority and means for such entities to take advantage of the Board's expertise and procedures.

ARTICLE 2: CONTRACT ADJUDICATIONS BOARD

Section 2001

There is in this state a Contract Adjudications Board consisting of five members and any additional members, either full or part time, as the Governor may appoint based on workload necessity and the public interest. Board members are administrative judges.

Comment to Section 2001

A five member board was conservatively selected by an anti-

pated level of case load and comparison to work load standards of comparable organizations. The case load per board member for the Armed Services Board of Contract Appeals is 31.2 based on appeals pending. [Memorandum from Richard C. Solibakke, Chairman, Armed Services Board of Contract Appeals, to Secretaries of Defense, Navy, Army, and the Air Force, REPORT OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS FOR THE FISCAL YEAR ENDING 30 JUNE 1976 (July 29, 1976)]. A somewhat higher figure is derived from data developed by the Federal Procurement Commission. Based on appeals on docket as of July 1, 1972, and then existing staffing the case load per board member was 39.18 [4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 14 (1972)]. While that figure may appear low it is consistent with the number of cases terminated per administrative law judge for other federal hearing agencies. The range for the principal agencies conducting formal hearings was 6-10 cases for the Civil Aeronautics Board and 150-180 for the Social Security Administration. [Halloran, FEDERAL AGENCY HEARINGS—A UNIFORM CASELOAD ACCOUNTING SYSTEM, report prepared for the Administrative Conference of the United States, at 8 (1974)]. This compares with a workload standard for OAH of 189 cases per year. The federal district court caseload per judge was 265-275. [*Id.* at 8] As noted in the Halloran report the variation between boards and from the courts can be accounted for by differences in the sophistication of the proceedings, the presence of counsel, and research staff, and the necessity for formal opinions. [*Id.* at 9] The ASBCA is a full time board with a jurisdiction comparable to that proposed for the Contract Adjudications Board and the caseload statistics could be expected to be a reasonable threshold for projecting the staffing under this Section.

If the case load of the Department of Water Resources, Cal-Trans, and the Office of State Architect as reflected in claims data for 1974 and 1975 are considered [See text *supra*, notes 10, 11, 12], 4.0 and 3.65 administrative judges would be warranted. That computation excludes management functions and is, of course, reflective of claims under the State Contract Act [CAL. GOV'T CODE §14250 *et seq.*] only.

Considering the restrictive time periods for Board decisions, the management function, and the scope of the Board's jurisdiction, a membership of five is conservative and readily justified (in other jurisdictions with a smaller projected case load a three member board would be appropriate).

Section 2002

The Governor shall appoint all Board members, subject to confirmation by

the senate. Each Board member shall be an active member of the bar of this state for five years immediately preceding appointment.

Comment to Section 2002

Confirmation will dampen the political impact of appointments and constitute a legislative check on the composition of the Board.

The requirement of bar membership and five years' experience is to ensure a background necessary to the substantial rights affected and the character of the proceeding.

Section 2003

(a) Two Board members shall have extensive experience in the practice of law representing government agencies in construction contracting, purchasing, leasing, or consulting.

(b) Two Board members shall have extensive experience in the practice of law representing industries or individuals in matters relating to contracting with public entities.

(c) One Board member shall be appointed as a public member whose experience shall not be strongly aligned with either area represented by subsections (a) and (b) above.

(d) The experience prescribed in (a), (b), or (c) shall not be combined in a single individual. A member shall be appointed from each area represented in (a), (b), and (c) before a second member is appointed from any area.

Comment to Section 2003

(a) This subsection insures representation by individuals who are conversant with the problems of government.

(b) This subsection insures representation by individuals who are conversant with the contractor's perspective.

(c) This position corresponds to representation of the taxpayer's interest.

(d) The intent is to balance the views of the board and maintain the representational balance.

Section 2004

The terms of Board members shall be staggered and shall be for a fixed period of six years. The terms of the initial appointees shall be for one, two, three, four and five years respectively in order of appointment.

Comment to Section 2004

The term is selected to dampen political effects on the Board, i.e., the term straddles a gubernatorial term.

Section 2005

The Governor shall designate the Presiding Administrative Judge who shall have experience in management and who shall serve in that capacity at the pleasure of the Governor. The Presiding Administrative Judge shall designate an Acting Presiding Administrative Judge to act in the absence of the Presiding Administrative Judge.

Comment to Section 2005

The emphasis is to ensure a consciousness of economic operation and to facilitate effective integration into the executive budgeting and management process.

Section 2006

(a) The Governor in appointing additional Board members under Section 2001 shall appoint equally representatives of the public, industry, and government commencing with the public.

(b) This Section shall not require the appointment of more members than necessary to handle projected workload in order to maintain the relative experience represented on the Board.

Comment to Section 2006

It is intended that additional members be appointed from each representational category corresponding to those enumerated in Section 2003.

Section 2007

The Presiding Administrative Judge and each member shall receive an annual salary equivalent to —.

Comment to Section 2007

The significance of the program would suggest salaries at a level comparable to the lowest levels of the judiciary and consistent with the most responsible commissions. Tying the salary to that of the Energy Resources Conservation and Development Commission appears to meet this standard. It would afford some cushion between the salaries of examiners or administrative law judges if employed by the Board.

Section 2008

The Board as it deems necessary may employ assistants, examiners, officers, experts, reporters, and other employees, including legal counsel to advise the members individually or collectively and to represent it in any

judicial proceedings to enforce the orders of the Board or to review a decision of the Board. All employees of the Board shall be appointed pursuant to the Civil Service Act of this state.

Comment to Section 2008

Provision for legal counsel is intended to avoid conflicts which could arise if the attorney general represented the Board, since the attorney general would be representing a party before the Board in most instances. On matters involving local jurisdictions it is anticipated that the attorney general would represent the Board. Also, the relatively short response times on most proceedings might be logistically awkward for the attorney general to accommodate.

Section 2009

The Board may adopt rules and regulations implementing the procedures of this Chapter. The adoption or amendment of any rule or regulation shall be reported annually to the legislature which may on majority vote reject such rule, prospectively, within 30 days following the date of filing the annual report.

Comment to Section 2009

This enables adoption of procedures in accordance with the Administrative Procedures Act [CAL. GOV'T CODE §11570 *et seq.*] to most effectively achieve the purpose of this Act. The grant does not extend to rules or regulations concerning substantive matters. The annual report is a check suggested to control the exercise of legislatively delegated powers.

Section 2010

(a) The Board's decision on any preliminary or discretionary matter under this Act is final, absent an abuse of discretion.

(b) The Board's decision on any controversy subject to its jurisdiction is final, except for rehearing, if there is no error of law and if the findings of fact are supported by substantial evidence.

Comment to Section 2010

This provision is essential to ensure finality and credibility of the administrative claims procedure [See text accompanying note 173, *supra*].

Section 2011

The Board shall have power to contract for or lease space, materials and services necessary to implement the purposes of this Chapter.

Section 2012

(a) Periodically, the Board shall publish for distribution to the public, at no more than the cost of publication, the complete text of its decisions under Articles 3, 4, 5, 6 and 7 of this Chapter.

(b) The Board shall publish and distribute copies of all rules and regulations and any standard forms to be used in proceedings under this Chapter.

Comment to Section 2012

This provision will foster understanding of the law by those subject to it and will be promotive of precedential development of the law. The limitation on cost is to encourage the broadest dissemination of materials.

(b) The intent is to encourage education and communication to ensure fair exercise of rights.

Section 2013

The Board shall, in addition to adjudications, be responsible for communicating with all interested segments of the public the purpose, scope, nature, and substance of proceedings under this Chapter. The Board shall research ways to improve the procedures for the resolution of disputes affecting the selection of contractors on public contracts and the performance thereof, and shall report its recommendations to the legislature annually.

Comment to Section 2013

This Section supplements Section 2012. It encourages evolution of responsive improvements in the law. Self-criticism should stimulate a dynamic organization.

Section 2014

The Board shall maintain records of the number and amount of claims, their disposition, the length of time from filing to disposition, the number and basis of continuances or delays in resolving proceedings, the number of hearing hours, the cost of each proceeding including separate identification of the expenses of Board members or hearing personnel, of reporting, and of case management, and other information relevant to the Board's operation.

Comment to Section 2014

This ensures availability of necessary management data. The Board must be conscious of the need to effectively manage its program to avoid unwarranted increases in cost and personnel and the kind of allegations leveled at the judicial system. Also, this

provision provides control data for the legislature. The reference to continuance data is to foster a visibility of the operation which will deter deviation from the goal of expedition in the procedure.

Section 2015

The Board shall be funded from the general funds of this state, except for the Board's activities under Section 2013 which shall be funded principally from filing fees.

Comment to Section 2015

The general funding deviates from the Office of Administrative Hearings practice. With this approach a valuable management tool, hourly cost, may be lost, but the substitutes in Section 2014 may mitigate that loss. Counterbalancing it is the recognition that the cost of adjudications should not be borne by either party any more so than in judicial litigation. Also, general funding is justified in part by the savings to the general fund due to the elimination of personnel now existing as claims adjudicators, within the internal procedures of individual state agencies.

Section 2016

(a) The Board may direct that a dispute be heard by an individual member or group of members. No decision shall be adopted without the concurrence of three members of the Board.

(b) Any member of the Board on proper application may issue necessary orders to avoid impairment of any party's rights pending the resolution of a dispute. Any Board member may on proper application issue subpoenas and subpoenas duces tecum.

(c) Failure of any person to obey a lawful order of the Board or refusal to respond to a subpoena, or to take an oath or affirmation or to be examined after an oath, shall constitute contempt which the Board may certify to the trial court in the county in which the hearing is being conducted, for appropriate enforcement action.

Comment to Section 2016

(a) This subsection permits individual members to divide up the caseload, but retains the check against arbitrary action by requiring endorsement of the individual's decision.

(b) This subsection is necessary to ensure that due process requirements are met.

(c) This subsection provides the vehicle for enforcement of Board orders through the appropriate forum, the judiciary.

Section 2017

The Board shall have exclusive administrative jurisdiction to adjudicate all disputes concerning the solicitation or selection of a public contract, or concerning the performance or nonperformance of a public contract by any party thereto, and any proceeding for relief of a bid mistake.

Comment to Section 2017

The jurisdiction of the Board could be expanded to include other matters relative to public contracting laws such as, the adjudication of penalties for violation of the Subletting and Subcontracting Fair Practices Act [CAL. GOV'T CODE §§4100 *et seq.*, 4110].

Section 2018

A decision of the Board shall contain findings of fact and law in a written opinion succinctly stating the issues in the proceeding, the basis for their resolution, and any appropriate orders to secure the relief petitioned for or to ensure implementation of the Board's decision.

Comment to Section 2018

This Section will ensure a format which conveys the rationale of the decision to the parties and to the court on review.

Section 2019

The Board may within 15 days of any decision, except a decision under Article 3 of this Chapter, reconsider its decision on application of any party to the petition or on its own motion. The application shall be granted only if:

- (a) The Board acted in excess of its powers or jurisdiction;
- (b) The decision was procured by fraud;
- (c) New evidence not available at the hearing has been discovered by the applicant which reasonably could not have been discovered at the time of the hearing;
- (d) The findings do not support the order or decision;
- (e) The evidence does not support the findings of fact; or
- (f) The decision is contrary to law.

Comment to Section 2019

The power of reconsideration is consistent with other administrative adjudication agencies of the state. The Section permits avoidance of unnecessary imposition on the parties of judicial review if a ground for reconsideration exists. It also avoids unnecessary expenditure of judicial time.

Section 2020

A party does not have to file a motion for reconsideration as a condition of exhaustion of administrative remedies prior to filing an appeal of a Board decision.

Section 2021

An appeal from a decision of the Board may be taken by filing a writ of mandate in the superior courts of this state within 180 days of the date of issuance of the Board's decision or decision on reconsideration.

Comment to Section 2021

For California, the review proceedings would be under CAL. CODE CIV. PROC. §1094.5. The generalized language is to permit other states to consider adoption of this Act and to integrate the Act into the procedures and statutory law of their jurisdiction.

Section 2022

Any party to a proceeding before the Board shall be entitled to:

- (a) Notice of any action substantially affecting the interests of that party;
- (b) Pleadings adequate to inform the party of the nature of the proceeding;
- (c) A public hearing at which:
 - (1) All evidence relevant to the proceeding shall be presented in full;
 - (2) The party may examine and cross-examine witnesses;
 - (3) The party may present evidence in support of the party's interests and evidence contravening that adverse to the party's interests; and
- (d) Discovery equivalent to that available in a civil action in the trial courts of this state.

Comment to Section 2022

The intent is to state rights satisfying due process.

- (d) With a judicialized claims procedure discovery is essential to promote a full presentation of relevant matters at the hearing.

ARTICLE 3: SOLICITATION PROTESTS

Section 3000

Any interested party may file a petition, designated a "Solicitation Protest," with the Board to contest a public contract solicitation on the grounds that:

(a) The public entity has failed to comply with or threatens to fail to comply with a required contract mode, format, policy or procedure.

(b) The public entity has not stated proper standards for selecting a proposed contractor.

(c) The public entity is according or is failing to accord a bidder or product a preference required or prohibited by law.

(d) The proposed contract for goods, services, supplies, advice or construction is contrary to the interests of the entity or the public. These interests shall include: a failure to secure quantity discounts where the quantity might reasonably be utilized by the entity in a fiscal year; specification of a quality in excess of that required by the entity or which arbitrarily restricts the number of potential contractors, or a quality below that reasonably necessary to the entity; and procurement by contract of services available within the civil service system.

(e) The solicitation is ambiguous in any material particular and the entity, after proper notice, has failed or refused to clarify the ambiguity.

(f) The entity is failing to advertise or otherwise adequately notify potential contractors of the solicitation, including a failure to notify any prequalified contractor or person who has requested in writing notices of specific categories of contract solicitation. With respect to a specific solicitation, the entity shall comply with requests for solicitation notices received by the entity not less than 240 hours prior to the date responses to the solicitation are due, provided, that a request for a copy of a specific solicitation shall be honored if made at any time prior to the response due date. Any request for a specific solicitation within 240 hours of the response due date shall be at the person's own risk if a reply is not received by the means designated by the requestor in sufficient time to permit timely preparation and submission of a response.

Comment to Section 3000

This Article is to permit contesting the modes or method of contracting selected by the contracting entity. The proceeding will permit early resolution of matters which should produce greater competition. Creation of this proceeding will permit market policing of the procurement process, *i.e.*, the critical scrutiny of competitors within the industry will forestall collusive practices and act as a control on the public procurement process.

(d) This ground is an extension into the policy arena to the extent of subjecting the necessity of the procurement to adjudicatory review. Perhaps accountability in this regard is best left to legislative vigilance. On the other hand inclusion of this ground of review might minimize arbitrary expenditures.

(e) This subsection is a check on an arbitrary refusal to clarify the solicitation and should assist in a clearer understanding of the procurement by all potential contractors. The necessity of a notice of the ambiguity and request is intended to avoid dilatory petitions. The limitation to material particulars, too, is intended to avoid unwarranted disruption of the contracting process.

(f) This subsection could be separately amended into the law since it relates to the details of the bidding/selection process.

Section 3001

The burden of proving the alleged ground for the petition is on petitioner. The petition shall clearly state the grounds for the petition and shall state sufficient facts to establish the grounds alleged.

Comment to Section 3001

The requirement of factual allegations is to facilitate prompt Board action.

Section 3002

Grounds for a petition in protest of a solicitation shall not be alleged subsequently as a ground for a petition in protest of award unless new, material evidence has been discovered by petitioner which was previously not known and could not with reasonable diligence have been discovered prior to the protest of award.

Comment to Section 3002

This provision is necessary to avoid repetitious assertion of the same grounds as a delaying tactic.

Section 3003

The Board shall decide the petition in protest of solicitation based on the pleadings, evidence both oral and documentary adduced at a hearing, and any oral argument.

Section 3004

A petition in protest of solicitation shall have priority over all matters pending before the Board except other such petitions. The Board shall hear and issue a written decision on any petition in protest of a solicitation within 20 working days of the date on which the petition is filed with the Board, unless for good cause set forth in the record or with the consent of all parties a longer period shall be provided.

Comment to Section 3005

Calendar priority is essential to avoid delays in orderly prosecution of the procurement. The short period for decision is also intended to avoid delays to the procuring agency and other bidders.

Section 3006

Pending a decision on a solicitation petition the response date is suspended until a new date, not less than 10 days after the Board's decision, which shall be established by the Board's decision and which the entity shall notice in the same manner as the original solicitation was noticed.

Comment to Section 3006

Maintenance of the status quo will permit protection of the petitioner's rights. The ten-day period should afford a meaningful response by the petitioner or modification of responses by other bidders to account for the Board's decision.

Section 3007

In acting on a petition the Board shall either:

- (a) Dismiss the petition; or
- (b) Grant the petition and issue orders to the entity to eliminate the ground for protest.

Section 3008

If a petition protesting the solicitation is granted, the Board in its decision may award hearing costs including attorney's fees to the petitioner.

Comment to Section 3008

Since the entity can avoid the grounds and is the source of the grounds for action on a solicitation petition, it should bear the costs of its delinquency.

Section 3009

If the petition is denied, the Board may find that the petition was so lacking in merit or petitioner was so lacking in good faith that the action was specious. Upon making such finding the Board shall award the entity hearing costs including attorney's fees and other costs of opposing the petition.

Comment to Section 3009

To protect the entity from a multiplicity of specious proceedings

the petitioners should be subject to the sanction of bearing the entity's costs of defending the matter. A further step could be taken by creating a right in the entity to recover as damages any costs attendant on delays due to the petitioner's specious proceeding. [*Compare* Lee C. Hess Co. v. City of Susanville, 176 Cal. App. 2d 594, 1 Cal. Rptr. 586 (1959).] The gravity of that right seems an unnecessarily stringent deterrent absent a historical pattern of specious claims.

Section 3010

Any party awarded hearing costs shall establish to the satisfaction of the Board the costs to be awarded.

ARTICLE 4: SELECTION PROTESTS

Section 4000

Any interested party may file with the Board a petition, designated, "Selection Protest," protesting the award or proposed award of a contract by a public entity.

Section 4001

A notice of protest shall be filed:

- (a) Within 24 hours after notice of intent to award has been posted; or
- (b) For any party who has requested notice of award, within 72 hours of service of notice on such party.

Pending the filing of notices of protest the entity shall defer final award action.

Comment to Section 4001

To implement this Section a separate provision must be enacted to require public agencies to publish a notice of awards prior to actually awarding a contract. The notice would be required for all kinds of contracts including purchases, services, consultations, grants and construction. The statutory provision should allow participants in the contracting process to request a notice of award to be served on them rather than mere posting. This special notice is consistent with their direct interest in the procurement in contrast to the general interest of the public.

Publishing could occur simply by posting in a conspicuous public place. In the case of local entities, inclusion as an agenda item for action by the governing body consistent with the Brown Act [CAL. GOV'T CODE §54950 *et seq.*] would be compliant.

A minimum advance period for publishing would be 24 hours

unless a party had specifically requested notice of the award, in which case 72 hours should be made available to that party to permit actual receipt of notice and a period of time to review the proposed award. The assumption is that if someone requests notice of award, the person has a special interest in reviewing the solicitation and selection process and should be afforded an adequate opportunity for review consistent with the entity's interest in proceeding with the contract. Entities typically require bids to be firm for a minimum of 30 days to afford an opportunity to evaluate and select the successful contractor. To require a maximum of three days of that time for possible protests does not seem unreasonable.

The volume of requests is unlikely to be onerous since only the "bidders" would be entitled to request the notice. "Bidders", however, should be understood to include those who were directly solicited to participate, prequalified bidders on bidders lists, those who requested invitations to bid or to submit proposals, as well as actual bidders. The term, "bidder" also is intended to apply to non-formally advertised procurements. That is, the protest procedure is not limited to traditional instances of competitive bidding, but would include negotiated or competitively negotiated procurements and even sole source procurements.

The analog for this Section is CAL. GOV'T CODE §14813 regarding purchases for the state. That Section provides for notice to the lowest bidder whenever an award is to be made to any other bidder, and public posting of the notice of a proposed award in any instance if any bidder so requests in writing.

Section 4002

A selection protest shall be filed no later than five days after the posting or service of notice of award.

Comment to Section 4002

Relatively short time periods are specified in this Section and Sections 4001, 4006 and 4007. These time periods are intended to avoid impeding the contracting process unnecessarily while still recognizing the rights and interests of the potential contractors.

Section 4003

The grounds for a selection protest are:

- (a) Petitioner was the lowest, responsible and responsive bidder in a formally advertised procurement;
- (b) Petitioner's response to a solicitation, or petitioner, was improperly

rejected for any reason including nonconformity to the requirements of the solicitation or lack of qualifications to perform the work;

(c) The public entity is according or is failing to accord a bidder or product a preference required or prohibited by law;

(d) The public entity is failing to comply with or threatens to fail to comply with a required contract mode, format, policy or procedure; or

(e) The public entity has failed to give any required preaward notice of intent to award, if requested in accordance with law.

Comment to Section 4003

(a) This is the generally recognized standard of award in a competitive bidding context. [*See, e.g.*, CAL. GOV'T CODE §§14807 (state purchases); 14330, 14332 (state public works); 25541.5 (public works of general law and charter cities); 25457 (purchases of furnishings, materials, supplies, and employment of independent contractors by counties).]

This Section recognizes that failure to conform to any of the three facets of the standard of award—lowest price, responsiveness, and responsibility—for a competitively bid contract is a ground for protest.

(b) Since statutory standards of award are generally not available in non-bidding contexts, this subsection expressly recognizes two grounds for protest if either resulted in rejecting the petitioner's proposal. The ground for protest is not limited to an individual who would otherwise be the successful contractor since that may not be determinable at the stage at which rejection occurs.

(c) This subsection is in reality a specific instance of the grounds specified generally in subsection (d). The kind of preferences intended to be tested here include small business preference [CAL. GOV'T CODE §14835 *et seq.*], recycled paper products [CAL. GOV'T CODE §14784.1], and low emission vehicles [CAL. GOV'T CODE §14808.1]. An example of a negative preference is the prohibition against contracting with a violator of state or federal air or water pollution laws. [CAL. GOV'T CODE §4477.]

(e) This ground is intended to be available only to an individual who has requested notice of award [*See* comment to Section 4001].

Section 4004

The petition shall state the grounds for the petition and shall allege sufficient facts to establish the grounds asserted.

Section 4005

The Board, on its own motion or motion of the entity or the proposed

contractor identified in the notice of intent to award, may authorize the entity to proceed with a proposed award if, on review of the petition and response, the Board finds that the selection protest is dilatory.

Comment to Section 4005

A principal danger to the public and to the entity in bid protest procedures is that the procedure will be used as an affirmative tactic to delay contracting for necessary goods or services. The thought is that protests are sometimes made in the hope that the entity will deem a reprocurement to be less costly in time and money than defending the protest. The attendant result is to afford the protestor another opportunity to compete. Such a use of the protest mechanism would be destructive of fair and competitive public contracting. This Section provides a summary control over abuses of the protest process by permitting the entity on proper motion to proceed with an award if the protest is found to be dilatory. This does not deprive the protestor of the right to a protest and a decision after a hearing but negates the impediment to an award recognized in Section 4001.

Section 4006

The public entity or any interested party shall file a response to the selection protest not more than five days from the filing and service of the selection protest.

Section 4007

(a) The Board shall hear and decide the selection protest within 30 days of the notice of award. The decision shall be based on the pleadings, oral and documentary evidence adduced at the hearing, and any oral or written argument.

(b) The Board may orally announce a decision under (a) provided that a written decision shall be issued within 30 days incorporating the oral decision.

Comment to Section 4007

(b) This provision is, again, recognition of the need for expedition in resolving contractor selection disputes. The subsection is intended to encourage the Board to issue decisions without having to defer until they had been reduced to writing. Depending on the calendar and the complexity of the issues, that might take several days.

Section 4008

If the Board grants the selection protest, the Board may:

- (a) Order the entity not to proceed with the award as proposed;
- (b) Order such other relief as necessary to implement the Board's decision including, if appropriate, an award to the bidder entitled to the contract in accordance with the solicitation.

Comment to Section 4008

(b) The express recognition that the Board could make a substitute award is a departure from existing law as construed. It is regularly stated that because of the entity's retained discretionary power to reject all bids a low bidder does not have a right to an award [*See Rubino v. Lolli*, 10 Cal. App. 3d 1059, 89 Cal. Rptr. 320 (1970); *Judson, Pacific Murphy Corp. v. Durkee*, 144 Cal. App. 2d 377, 301 P.2d 97 (1956); *Cameron v. City of Escondido*, 138 Cal. App. 2d 311, 292 P.2d 60 (1965); *Charles L. Harney, Inc. v. Durkey*, 107 Cal. App. 2d 570, 237 P.2d 561 (1951)]. While that rationale may well be valid prior to the entity's attempt to award [*Universal By-Products, Inc. v. City of Modesto*, 43 Cal. App. 3d 145, 117 Cal. Rptr. 525 (1974)], it is indefensible if an improper or ineffectual attempt to award has been made. At that point the entity has unequivocally demonstrated that it has exercised its discretion in favor of an award and having done so, that discretion must be deemed to be exhausted if the expectations of those who participated in the contracting process are to be vindicated [*Compare Swinerton & Walberg Co. v. City of Inglewood—Los Angeles County Civic Center Auth.*, 40 Cal. App. 3d 98, 114 Cal. Rptr. 834 (1974) recognizing the potential for recovery of damages by a frustrated low bidder based on a RESTATEMENT (SECOND) OF CONTRACTS §90 (1964) rationale].

Express recognition of the principle that the Board could effect an award if the selection protest is sustained and the determination of the contractor is ministerial, will prevent a public entity from leveraging a bidder into withdrawing a protest by the threat that if the protest is successful the entity would reject all bids and rebid. Such a tactic thwarts a protester who otherwise might be the successful bidder. The exercise of the authority must be discretionary to avoid the situation of an award contrary to law or the public interest [*See Section 4009*].

An example is where an award would be at a price in excess of available, budgeted funds. The burden of proving that an award should not be made under Section 4008(b) would be on the entity.

Section 4009

An award under Section 4008(b) shall be appropriate only if the award would not be contrary to law or the public interest, and identification of the bidder to whom an award shall be made can readily be accomplished by the Board.

Comment to Section 4009

This provision makes explicit the basis for the Board acting under Section 4008(b).

Section 4010

Hearing costs including attorney's fees and other expenses of presenting or opposing the petition shall be awarded:

(a) To petitioner if the petition is granted and petitioner was the party entitled to the contract;

(b) To the entity and the proposed contractor if the Board makes a finding that the award protest was so lacking in merit or petitioner was so lacking in good faith that the action was specious.

Comment to Section 4010

The provision for attorneys' fees is express recognition of the rights of low bidders to recover damages in some instances when deprived of an award of a public contract. [*See Swinerton & Walbert Co. v. City of Inglewood-Los Angeles County Civic Center Auth.*, 40 Cal. App. 3d 98, 114 Cal. Rptr. 834 (1974)]. This provision would codify that right for the successful petitioner who would have been entitled to the contract had the agency acted properly. Correspondingly, this provision extends to the entity and the proposed contractor an analogous right to "damages" if the petitioner was improperly using the protest process. Such a provision only partially recompenses the entity and the contractor for the "costs" of a protest proceeding. The "costs," which in many cases may be speculative from a proof of damages standpoint, include inconvenience to the public from the lack of the thing being contracted for [*See Six Cos. v. Joint Highway Dist. No. 13*, 24 F. Supp. 346 (N.D. Cal. 1938), *aff'd*, 110 F.2d 620 (9th Cir. 1940), *rev'd, in part, on other grounds*, 311 U.S. 180 (1940) (public inconvenience due to a longer congested highway route)] and cost escalations of suppliers, subcontractors, or personnel [*Compare Lee C. Hess Co. v. City of Susanville*, 176 Cal. App. 2d 594, 1 Cal. Rptr. 586 (1959)].

Section 4011

Any party awarded hearing costs shall establish to the satisfaction of the Board the costs to be awarded.

Comments to Section 4011

Consistent with the special nature of the relief provided under Section 4010, the party claiming the benefit must bear the affirmative burden of proving the extent of the benefit.

ARTICLE 5: VALIDATION PROCEEDINGS

Section 5000

Any interested party may file a petition, designated a “Validation Petition,” to determine the validity of a public contract.

Comment to Section 5000

Although validation adjudications are not normally construed as disputes in the same sense as the matters under Articles 3, 4, 6 and 8, the expertise necessary to adjudicate the validity of a public contract is the same. Consequently, as part of a complete restructuring of public contract adjudicatory procedures, these matters seemingly should be vested in the Board’s jurisdiction.

Section 5001

Any validation petition shall be filed within one (1) year of the latest of:

- (a) Final payment for contract performance; or
- (b) Discovery of any fraud in securing the contract.

Section 5002

The grounds for a validation petition are that:

- (a) The public entity is proceeding in excess of its powers;
- (b) The contract is contrary to law or adopted public policy; or
- (c) The contract was fraudulently entered into.

Section 5003

(a) The petition shall clearly state:

- (1) The grounds for the petition;
- (2) Sufficient facts to establish any ground alleged; and
- (3) The relief sought.

(b) Failure to exhaust other remedies pursuant to this Chapter is not a ground for denial or dismissal of the petition.

Comment to Section 5003(b)

The provision that non-exhaustion of remedies is not a defense to the validation petition is in recognition that the significant public interest in the use and expenditure of public funds should not be defeated except in the rarest of circumstances. However, to encourage use of the other protest procedures which can resolve the rights of the parties to a public contract at a stage where the damages will be minimal and the options to the entity broadest, a failure to exhaust remedies precludes the successful petitioner under Section 5016 from recouping either bid preparation costs or damages for lost profits. This sanction should encourage petitioners not to sit on their rights.

Section 5004

Prior to a hearing the Board, on a showing of good cause, may order the cessation of performance on the challenged contract, in whole or in part, unless the public entity clearly shows irreparable injury in any delay in performance and the public entity posts a bond to cover both the petitioner's costs and one half the amount of any damages alleged in the petition.

Comment to Section 5004

This Section seeks to accommodate the competing interests of the petitioner in halting an invalid contract, of the contractor in avoiding damages for tardy or non-performance if he ceases operations pending resolution of the petition, and of the public in having necessary public work performed without unnecessary delays. The condition on continuation of the contract is the posting of a bond by the entity to ensure the petitioner's costs and any appropriate damages if successful. If the contract is adjudged invalid but permitted to be completed under Section 5011, the petitioner will be assured of payment of costs and damages from funds by which the contract price is reduced. If the contract is invalidated and performance is not permitted to continue, the entity will have funds available to pay these same amounts. The costs of completing the partially performed work are likely to be higher and available funds may be insufficient absent the bond. This danger is particularly real if the contractor is unable to respond to the entity in damages under Section 5009. The rationale for requiring the entity to post the bond is that to the extent a ground for invalidation exists, it presumably is a matter which was within the control of entity.

Section 5005

Preliminary to a hearing on the petition, the Board may order:

- (a) The entity to post a bond to cover the petitioner's costs in the proceeding;
- (b) The petitioner to post a bond to cover the costs in the proceeding of the public entity and the contractor; or
- (c) The petitioner to post a bond, where appropriate, to ensure payment of any potential escalation of the costs of performing the contract due to delays caused by the validation proceeding.

Comment to Section 5005

This provision is intended as a control over arbitrary or spurious proceedings and to protect against the delay costs which might result if the petitioner is unsuccessful in challenging the contract [See *Lee C. Hess Co. v. City of Susanville*, 176 Cal. App. 2d 594, 1 Cal. Rptr. 586 (1959) for an example of the latter].

Section 5006

The public entity or any interested party shall respond to a validation petition:

- (a) By filing an answer within 30 days of the filing date of the petition if the petition is to validate or invalidate the entity's contract or to recover payments made pursuant to an allegedly invalid contract of the entity.
- (b) By appearance before the Board within 10 days of the filing date if the petition seeks to enjoin a payment pursuant to an allegedly invalid contract.

Section 5007

If a contractor posts a bond with the Board equal to any payment sought to be enjoined, the entity or official responsible to make payments under the contract may release the funds for payment.

Comment to Section 5007

To avoid interruption of the contractor's cash flow, which on a large contract can be significant, this provision provides a mechanism for releasing amounts due while ensuring recoupment of the funds if the contract is ultimately invalidated.

Section 5008

- (a) The Board shall hear and decide a validation petition:
 - (1) Within 45 days if the petition requests the enjoining of contract payments; or
 - (2) Seasonably following completion of discovery and a preliminary hearing conference.

(b) Any validation petition which is filed prior to commencement of work shall be accorded a calendar preference subject only to petitions under Articles 2 and 3 and petitions seeking injunctive relief.

(c) A validation petition shall be decided no later than one year following filing except for good cause shown and set forth in the record.

Comment to Section 5008

(a)(1) The short decision period is consistent with the significance of the impact on contract financing if payments are interrupted.

(b) The priority in calendaring is intended to minimize the impact of any delays due to the proceeding by minimizing the time until decision.

Section 5009

If the petition is granted on the ground of fraud and the contract is wholly or partially executory, the Board shall invalidate the contract; provided, however, that such action shall not relieve the contractor from responsibility for any damages to the entity to complete the remaining contract performance, including the costs of readvertising, bidding, procuring a completion contractor, any increased costs due to delays, and expenses in proceedings before the Board.

Comment to Section 5009

When fraud is found, the Board's discretion is limited to invalidating the contract, which is consistent with the import of existing law. The Section expressly recognizes the continuing liability of the contractor to the entity for the damages resulting from the fraud. The enumeration is not intended to excuse the contractor from liability to the entity to restore all payments made under the contract [Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942)]. The rule precluding any quantum meruit recovery also would not be changed.

Section 5010

If the Board invalidates a contract under Section 5009, the Board may, after a hearing on the issue, assess the contractor a penalty of up to ten percent of the contract price bid which shall be paid into the general funds of the entity.

Comment to Section 5010

The penalty is intended to be a civil monetary penalty. It is an added inducement for contractors to avoid fraudulent activities in their public dealings.

Section 5011

If the petition is granted on any ground other than fraud, the Board need not invalidate the contract notwithstanding that grounds for such action have been established, but the contractor may be permitted to perform the contract if the record establishes and if the Board finds that the contractor's continued performance is in the public interest.

Comment to Section 5011

This Section significantly modifies the existing law which holds invalid contracts to be void and unenforceable. The Board would be given authority to authorize continued performance in the public's interest.

Section 5012

If the Board permits the continued performance of the contract under Section 5011, the Board shall order that the contract price which would otherwise be paid to the contractor shall be reduced by:

- (a) The petitioner's costs in the validation proceeding;
- (b) The petitioner's lost profits if the petitioner would otherwise have been the party entitled to selection as the contractor but for the intervention of the circumstances constituting the grounds for invalidation;
- (c) The petitioner's bid preparation costs if the petitioner is unable to satisfactorily establish lost profits under (b) or if petitioner would not otherwise have been entitled to selection as the contractor; and
- (d) The entity's costs for the validation proceeding and any damages arising out of delays due to the validation proceeding unless the Board finds that the entity materially contributed to and the contractor was not aware of or should not have been aware of the existence of grounds for invalidation.

The Board shall issue appropriate orders for payment of any sums by which the contract price is reduced under this Section.

Comment to Section 5012

As in Section 5011, this provision would significantly change existing law which not only precludes any payment for work under the contract, including quantum meruit compensation, but also requires the contractor to repay amounts previously paid for work performed. The latter is true even though the entity may have received the full benefit of performance and is unable to return the benefit rendered.

Although the purpose of the rule when it evolved was laudable, in seeking through an extreme sanction to ensure absolute propriety in expending public funds, a more moderate but equally effica-

cious rule seems worthy of consideration, particularly in this era of multimillion dollar procurements. For example, few, if any vendors, could sustain the financial burden of the invalidity of a contract for a complex data processing system or for construction of a multi-story office building or hydro-electric facility. Under existing law, damages for being deprived of a public contract are only beginning to evolve [*Swinerton & Wahlberg Co. v. City of Inglewood-Los Angeles County Civic Center Auth.*, 40 Cal. App. 2d 98, 114 Cal. Rptr. 834 (1974)]. The rule against such damages is stated in *Rubino v. Lolli* [10 Cal. App. 3d 1059, 89 Cal. Rptr. 320 (1970)] and results in the entity receiving a double windfall in that it receives the contract performance and the funds appropriated and encumbered to procure the performance. If the bidder improperly deprived of the contract is not accorded damages, the expectation which induced participation in the contracting process is frustrated. Recognizing a right to damages would serve only as a reduction in the entity's monetary windfall.

A more equitable rule which recognizes the supremacy and significance of the public interests is stated in this Section. It differs from a quantum meruit recovery in that the value of the work received is disregarded except as originally defined by the total contract price. Instead of compensating the contractor for the benefit conferred, the premise is to compensate several interests from funds encumbered for the contract, and the net balance, if any, is paid to the contractor; this may or may not be adequate to compensate for any benefit conferred.

Subsections (b) and (c) recognize petitioner's right to lost profits, if provable, or in the alternative the costs of bid preparation. Logically, lost profits are available only if the petitioner would have been the successful contractor but for the grounds for the invalidation.

Subsection (d) provides for compensation to the entity for damages and costs in the proceeding but recognizes that the entity may have culpably contributed to the invalidity while the contractor was innocent.

Section 5013

The burden of proving lost profits under Section 5012 is on petitioner.

Comment to Section 5013

This Section and Sections 5014 and 5015 set forth the burden of proving the respective entitlements under Section 5012.

Section 5014

The burden of proving under Section 5012 that the entity materially contributed to the existence of the grounds for invalidation is on the contractor.

Comment to Section 5014

See comment to Section 5013.

Section 5015

The burden of proving under Section 5012 that the contractor was aware of or should have been aware of the existence of the grounds for invalidation is on the contracting entity.

Comment to Section 5015

See comment to Section 5013.

Section 5016

A petitioner is not entitled to and the contract price shall not be reduced by the sums set out in Section 5012(b) and 5012(c) unless the petitioner affirmatively establishes that protest procedures under other Articles of this Chapter were seasonably exhausted prior to initiating a validation proceeding.

ARTICLE 6: DISPUTES ADJUDICATION

Section 6000

Any party to a public contract may file a petition with the Board, designated a "Disputes Petition" to adjudicate a controverted interpretation of the contract provisions, or the party's entitlement to a contract adjustment in time and compensation, or damages for performance or nonperformance, including liquidated damages.

Comment to Section 6000

This Article is intended to be applicable to entities and contractors as the moving parties. The provision extends to breach and non-breach claims whether by the contractor or the entity. Also, within the scope of a dispute is a controverted interpretation of the contract. The latter is in the nature of a petition for declaratory relief. Provision for adjudications of this character should permit the parties to minimize their damages consistent with the obligations as adjudicated. Early resolution of a disputed interpretation may permit avoidance of the impact of an adverse decision through rescheduling or ordered changes in the work.

Section 6001

(a) A disputes petition shall be filed within 45 days after service of a written decision of the public entity. The failure of a public entity to issue a written decision to the contractor within 30 days after a written request by the contractor for a decision, shall be deemed an adverse decision and the period for filing a disputes petition shall commence on the 31st day.

(b) A party to the contract shall be obligated to continue performance on the disputed portion of the contract, pending an adjudication by the Board if the public entity has issued a written decision within 30 days of a written request by the party for a decision.

(c) A party may suspend performance on a disputed portion of the contract work on service of a notice of suspension on the public entity if the entity fails or refuses to issue the party a written decision in 30 days after a written request for a decision. A suspension shall seasonably terminate on issuance of a written decision by the public entity.

Comment to Section 6001

(a) The language of the Section recognizes that before a dispute can be initiated the contracting entity must issue a decision in writing. To protect against frustration of a contractor's right to an adjudication through inaction of the entity, the failure to issue a decision for a specified period after written request is deemed a denial permitting the contractor to proceed with a disputes petition [For a similar provision regarding Board of Control proceedings see CAL. GOV'T CODE §912.4].

(b) The intent is to statutorily state a common contractual obligation. The provision is necessary to avoid the effect of the contractor's right in breach situations to opt for discontinuance of performance. The interest of the public in securing completed performance is superior to the individual contractor's right when the public welfare is at stake. In effect, this rule is a part of the *quid pro quo* for the remedial procedures afforded the contractor. Limiting what may otherwise be a contractual obligation to proceed is consistent with the right of suspension expressly recognized in subsection (c). Although seemingly a significant advantage to the contractor, it would seldom be an available action and then it would be one which the entity might avoid by affirmative action to issue a decision. The 30 day period should be adequate in most, if not all, instances for the entity to issue a decision.

(c) This subsection states a right of the contractor to suspend work if a requested decision has not been issued. In some instances, such as a controverted interpretation, the contractor's position might seriously be affected if performance were to continue. The provision simply recognizes what would otherwise be

the contractor's right if the entity breached its obligation to timely issue a decision when requested. Under general law the right to cease performance would depend on the materiality of the breach. This Section eliminates the potential argument and uncertainty in determining whether a breach is material. The Section merely establishes that the failure to issue a decision after the specified period is a breach of the character justifying suspension. In this regard, this provision is similar in operation to the request for additional assurances of performance in sales contracts [CAL. COMM. CODE §2609].

Two conditions are attached to the contractor's right. The right to suspend is first qualified in that it is co-extensive with the period in which the decision remains unissued plus a reasonable period for resumption of performance. The other qualification is that the contractor must give notice of his intent to suspend so that the entity can avoid the impact of its tardiness.

Section 6002

The petition shall state:

- (a) The parties to the dispute;
- (b) The facts of the dispute to be adjudicated;
- (c) The provisions of law or the contract at issue or affording the grounds for the petitioned-for relief; and
- (d) The specific relief requested in the adjudication.

Section 6003

If the Board grants the petition, the Board may:

- (a) Award damages provided by law;
- (b) Order an adjustment in time or compensation in accordance with the contract terms;
- (c) Grant extensions of the time for performance; and
- (d) Construe controverted contract provisions, which shall be final absent gross error.

Comment to Section 6003

The enumerated forms of relief parallel the kinds of causes which may be the subject of a disputes petition.

Section 6004

The Board shall hear and decide the petition seasonably following completion of discovery and a preliminary hearing conference, but in any event decision shall be issued in no more than 180 days from the filing of the

petition unless extended on a showing of good cause set forth in the record. The stipulation of the parties or convenience of the Board alone shall not constitute good cause.

Comment to Section 6004

The priorities afforded other controversies may force some delays in adjudicating disputes petitions. Further, the complexity of such claims is likely to require longer, more detailed preparation for hearing. Additionally, the degree of pressure for a decision in terms of the interests affected is somewhat less than in other forms of petition. Thus, the standard of expedition in processing is merely "seasonable" subject only to the maximum decisional period of six months. Even then some latitude for delay is recognized by permitting continuances for good cause. The latter is often subject to much abuse and the last sentence is added as a limitation to avoid abuses. The requirement that the good cause be stated in the record will hopefully limit the assertion of all but the clearest examples of good cause.

ARTICLE 7: BID MISTAKE PETITION

Section 7000

Any person who submits a bid to a public entity and who believes that the bid submitted was erroneous, may file a petition requesting relief designated "Bid Mistake Petition," with the Board.

Comment to Section 7000

This Article is largely a restatement and extension of the judicial bid relief provisions in CAL. GOV'T CODE §4200 *et seq.* and CAL. GOV'T CODE §14350 *et seq.* Both of those chapters are limited to public works contracts which are competitively bid. The former sections encompass state contracts not subject to the State Contract Act [CAL. GOV'T CODE §14250 *et seq.*], or to the State University and Colleges Act [CAL. EDUC. CODE §25200 *et seq.*]. Those sections also extend to all public works contracts of local entities except those of charter cities or charter counties. The remedy afforded under this Article would not be limited to competitively bid contracts nor to those solely for public works. With enactment of this Article the aforementioned chapters of the CAL. GOV'T CODE should be repealed.

Section 7001

"Bid" means any proposal submitted to a public entity for consideration by

the entity in selecting a person to perform a public contract, whether a result of formal advertised competitive procurement or not.

Comment to Section 7001

The provision is intended to extend the relief provided beyond formally advertised procurements by defining "bid" to include more than the traditional response in competitive bidding.

Section 7002

A bidder shall not be relieved of a bid except by consent of the awarding authority, nor shall any change be made in a bid because of mistake; but, if the Board grants the bidder's petition, the bidder may recover the amount of any bid security forfeited, or if no security was required, may be relieved from any liability to the entity for damages arising from the bidder's failure to execute a contract in accordance with the bid submitted.

Comment to Section 7002

Two forms of relief are stated. An entity may consent to relieve a contractor of the bid or the Contractor Adjudications Board may grant relief from any forfeiture or responsibility for damages. Any change in the bid is prohibited to avoid fraud and collusion in the bidding process. Procurements outside the competitive bidding format usually do not require submission of a bid bond. With extension of the mistake proceeding into the area of such procurements a variant form of relief is provided.

Section 7003

The bond of an admitted surety insurer shall be filed with the petition in such sum as the Board may fix, but not less than five hundred dollars (\$500); provided that, if the Board fails to grant the petition, petitioner shall pay all costs incurred by the public entity in the proceeding including a reasonable attorney's fee to be fixed by the Board.

Comment to Section 7003

This conforms to CAL. GOV'T CODE §§4201, 14350.

Section 7004

The petition shall be filed with the Board, and served on the director of the department or other head of the public entity under which the work is to be performed, within 90 days after the opening of the bid; otherwise, the petition shall be dismissed.

Comment to Section 7004

This conforms to CAL. GOV'T CODE §§4202, 14351.

Section 7005

The petition shall establish to the satisfaction of the Board that:

- (a) A mistake was made;
- (b) The public entity was given written notice within five days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred;
- (c) The mistake made the bid materially different than intended; and
- (d) The mistake was due to clerical error in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or to carelessness in reading the plans or specifications.

Comment to Section 7005

This is effectively a restatement of *M. F. Kemper Const. Co. v. City of Los Angeles* [37 Cal. 2d 696, 235 P.2d 7 (1951)] and its progeny as reflected in existing law [See CAL. GOV'T CODE §§4203, 14352].

Section 7006

A public entity consenting to relieve a bidder of an allegedly erroneous bid shall advise the Board in writing of that action and the basis on which it was taken.

Comment to Section 7006

This Section has no direct counterpart in existing law but is intended as a safeguard against arbitrary, unwarranted, or collusive action to relieve a bidder. While the Board would have no power to modify the entity's action, the statistics and facts of instances of consensual relief are intended to be included in the Board's records under Section 2014. These would be available for analysis and recommendation by the Board under Section 2015. Such analysis would include evaluation for conformity to the precedents of the Board.

ARTICLE 8: ACCELERATED DISPUTES ADJUDICATION

Section 8000

A party may elect to file an "Accelerated Disputes Petition" under this Article if the amount claimed does not exceed \$25,000. Except as otherwise provided in this Article the provisions of Article 6 and Article 9 shall apply.

Comment to Section 8000

The procedure of this Article is in lieu of the more formal disputes adjudication and is intended to facilitate easy, economical and speedy resolution of monetarily small disputes. The monetary limitation is intended to apply to each claim rather than to an aggregate of claims under the contract. This ceiling is low enough to avoid claims splitting for jurisdictional purposes. Further, Section 8002 authorizes the Board to consolidate petitions under this Article and remove the consolidated matter for consideration under Article 6 as a disputes adjudication. That power should be a significant deterrent to claims splitting which in any event would be subject to principles of law regarding splitting of causes of action. The concept of applying the monetary limit to each claim is based on the observation that consolidating a number of distinct small claims would not normally alter the character of individual claims. Each may still be most expeditiously and most effectively presented if only minimally impeded by the formal panoply of legalities. This recognizes that in the circumstances of the accelerated procedure the legalities can best be effected by the administrative judge during the hearing.

Section 8001

An accelerated disputes petition may not be filed to adjudicate a controverted interpretation of the contract provisions.

Comment to Section 8001

Interpretations of contract provisions are excluded from the accelerated procedure because the potential impact of a decision is speculative and ordinarily not directed to determination of the quantum of relief due. Interpretations of contracts also tend to entail the catechism of legal construction. Hence, one of the factors warranting short form relief is absent, *i.e.*, the diminished role of the attorney in adequately representing either party's interest. Further, short form contract interpretations would be likely to entrap the administrative board in the day-to-day administration of the contract which properly is a function of the contracting entity.

Section 8002

A party filing a petition under this Article is not precluded from filing petitions under Article 6 on other claims under a contract; provided that in the sole discretion of the Board, for good cause shown and to avoid a multiplicity of proceedings, the Board may order the consolidation of accelerated disputes petitions or an accelerated disputes petition and a disputes petition for adjudication as a disputes petition.

Comment to Section 8002

This provision is to further strengthen the intent that the short form proceeding not be limited to the aggregate of claims relating to a contract. The power of the Board to consolidate and remove matters has been commented on under Section 8000, and it is necessary to maintain the integrity of the accelerated claims process as well as the effective management of the claims forum.

Section 8003

An accelerated disputes petition shall be entitled to priority in setting for hearing over disputes petitions, validation petitions, and bid mistake petitions.

Comment to Section 8003

This provision on calendar preference and the next section setting the maximum decisional period are designed to ensure that expeditious decisions are realized.

Section 8004

An accelerated disputes petition shall be heard and decided within 45 days after an answer to the petition has been filed or after expiration of the period for filing an answer.

Section 8005

At any time 15 days prior to a hearing on the petition a party may make written request of another party. Upon such request, the other party shall (1) furnish to the requesting party the names and addresses of witnesses to the extent known to the party on which request for disclosure has been made, including, but not limited to, those intended to be called to testify at the hearing, and (2) afford an opportunity to the requesting party to inspect and copy any of the following in the possession, custody, or control of the other party:

- (a) Any statement pertaining to the subject matter of the proceeding made by any party to another party or person;
- (b) Statements of witnesses intended to be called and of other persons having personal knowledge of the acts, omissions or events which are material to the determination of the controversy, not included in (a) above;
- (c) All writings intended to be offered in evidence; and
- (d) Any other writing or other thing which is relevant and would be admissible in evidence.

The foregoing constitutes the sole and exclusive discovery as a matter of right in proceedings under this Article.

Comment to Section 8005

This section provides the limited discovery available in proceedings under the Administrative Procedures Act [CAL. GOV'T CODE §11370] and it is consistent with *Shively v. Stewart* [65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966)] [See CAL. GOV'T CODE §11507.6].

Section 8006

All parties shall appear only through lay or technical representation in hearings on petitions filed under this Article.

Comment to Section 8006

The limitation on the right to counsel should not be lightly regarded. However, it is believed that the provision is warranted, constitutional, and essential to the character of the proceedings sought to be fostered. In effect, any remedy for contract disputes is an outgrowth of the government's waiver of sovereignty. Matters such as requiring exhaustion of administrative remedies are legitimate conditions to that waiver. Similarly, the provision for preferential consideration of claims is a conditional right and election by the claimant to take advantage of the benefits of that preference can be deemed a waiver of alternative rights. Even a constitutional right can be waived or qualified if appropriate competing public interests are prevalent [*Merco Const. Eng., Inc. v. Los Angeles Unif. School Dist.*, 274 Cal. App. 2d 154, 79 Cal. Rptr. 23 (1969)]. In the circumstances of the accelerated procedure the limitation on counsel is particularly inoffensive because the procedure is optional to one in which full recognition of the party's rights is available. The election by the opting party similarly constrains the opposing party. That is necessary if the procedure is to approach its full potential, since public entities would invariably be represented by house counsel absent such a provision. The chilling effect of that circumstance on the decision to opt for the accelerated procedure would be total.

Section 8007

The petition and answer, the rules of evidence, and all rules applicable to the proceeding shall be liberally construed to ensure the petition is expeditiously and economically adjudicated with a maximum informality consistent with the rights of the parties.

Comment to Section 8007

The intent in this Section is to reinforce the overall character of the proceeding. The intent of this entire Article is to achieve a reasonable balance between the need for due process and the need for a cost-effective remedy in special circumstances.

Section 8008

Evidentiary proceedings under this Article need not be reported.

Comment to Section 8008

Elimination of a record might make the procedure vulnerable to due process objections. However, this Section must be read in conjunction with Section 8011 which automatically triggers a corrective mechanism if either party appeals. The intent is to eliminate the record as a cost expedient in most instances. However, the Section permits the making of a record if some extraordinary factors would dictate the logic of such action.

Section 8009

The decision on the petition may be orally issued at the end of the hearing on the claim on motion of the petitioner. The oral decision shall be reported and the parties will be furnished a written copy of the decision within 30 days of the oral decision.

Comment to Section 8009

Authorizing an oral decision is again intended to foster rapid disposition of an accelerated proceeding. The requirement for reporting is designed to ensure the parties receive a written copy of the decision.

Section 8010

The decision on the petition shall consist only of summary findings of fact and conclusions.

Comment to Section 8010

This shortened form of decision is in keeping with the character of the proceedings.

Section 8011

(a) If the decision is appealed, the decision shall be returned to the Board for proceedings de novo as a disputes petition under Article 6.

(b) If the appellant was the petitioner in the accelerated disputes proceed-

ing, the appellant shall pay all costs of the de novo proceeding including the opposing party's reasonable attorney's fees, witness fees or costs, and the cost of Board personnel.

Comment to Section 8011

The intent in these subsections is to circumscribe efforts at appeal once the accelerated procedure has been elected and run its course. While an appeal is not foreclosed, the appellant must accept certain impediments imposed by this Section as inherent in the initial option to use the accelerated procedure. The automatic return of the matter for a de novo hearing as a full fledged dispute is intended to avoid a potentially fatal constitutional deficiency [See the comment to Section 8008]. The imposition of costs of the new proceeding is intended to deter appeals for the purpose of a second bite at the apple after an adverse short form decision. Whether the opting person subsequently reneges on the decision to commit the dispute to the accelerated procedure or whether the opposing party is motivated to circumvent the accelerated procedures, the moving party should be constrained to pursue appellate action only when the fiscal consequences fully warrant.

ARTICLE 9: PROCEDURES

Section 9000

Except as otherwise specifically provided by law, the procedures of this Article shall apply to all proceedings under this Chapter.

Section 9001

(a) "Party" means a contractor of a public entity or the entity, either as a petitioner or respondent, except that under Articles 3, 4, and 5 party shall include "interested party".

(b) "Interested party" means a contractor, public entity, bidder, or potential bidder.

Section 9002

(a) "Petitioner" means a party who has initiated a proceeding under this Chapter by filing a petition with the Board.

(b) "Respondent" means a party against whom a petition has been filed or other person with standing to participate in opposition to the proceeding initiated by the petition.

Section 9003

A "necessary party" includes:

(a) The entity if a petition is filed by a contractor, and the contractor if the petition is filed by the entity;

(b) The bidder named as recipient in a notice of intent to award or after award, the bidder selected as the contractor if the petition is filed by an interested party other than such bidder;

(c) The entity and the contractor on any public contract which is the subject of a validation petition.

Section 9004

Any interested party, not a necessary party, may be permitted to participate in proceedings before the Board, on motion which shall establish to the Board's satisfaction the direct interest of such party which would be affected by a decision in the proceeding, and that participation will not unduly delay expeditious resolution of the proceeding.

Section 9005

The Board shall set the time and place for all proceedings and shall serve written notice on all parties of record 5 days prior to the noticed proceeding.

Section 9006

(a) A petitioner may amend a petition by filing and serving an Amended Petition prior to the filing of an answer in a claims adjudication, a validation or a bid mistake proceeding.

(b) A petitioner may amend a petition in a solicitation protest, selection protest, or after the filing of an answer in a claims adjudication, validation or bid mistake proceeding only on motion to and order of the Board.

Section 9007

(a) The respondent may file an answer to the petition within 15 days of filing and service of the petition.

(b) The answer shall state any objections to the petition and any defenses to the petition including affirmative defenses, which shall be deemed denied.

(c) Any allegation of the petition which is not denied in the answer shall be conclusively admitted and evidence to controvert the admitted allegation shall be inadmissible.

Section 9008

The grounds for an objection to a petition are:

(a) The petition does not state facts sufficient to constitute a basis for relief.

- (b) The petition is ambiguous, unintelligible, or uncertain.

Section 9009

All objections to the form of the petition are waived unless alleged in the answer.

Section 9010

(a) The failure or refusal of respondent to file an answer is cause for holding the respondent in default.

(b) The failure or refusal of a party of record to:

(1) Timely appear at a hearing on the merits after due notice; or

(2) Comply with any lawful order of the Board at the hearing, is cause for holding such party in default.

(c) The Board shall serve on all parties written notice of entry of default and the defaulting party, within 5 days, may file a motion requesting that the default be set aside and stating the grounds relied on.

Section 9011

On request of any party or on its own motion the Board may order a prehearing conference to consider matters which will simplify the issues or expedite the proceedings or to permit settlement discussions. Any matter ordered, stipulated, or settled at a prehearing conference shall be incorporated in writing in the record.

Section 9012

All motions shall be in writing, unless made on the record during hearing, and shall clearly state the action requested and the grounds relied on.

Section 9013

Continuances or extensions of time may be granted only for good cause.

Section 9014

(a) Oral testimony shall be taken on oath or affirmation.

(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence, including hearsay, shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions; provided, however, hearsay evidence shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil

actions. The rules of privilege shall be effective to the same extent recognized in civil actions. Irrelevant and unduly repetitious evidence shall be excluded.

Section 9015

The Board may take official notice of any relevant fact.

Section 9016

The proceedings at the hearing shall be reported.

Section 9017

On payment of the costs of preparation, the Board, on request by any party, shall prepare a certified copy of the portion of the record of the proceedings requested. The complete record includes the pleadings, all notices and orders issued in the case, the decision, a transcript of all proceedings, the exhibits admitted, the written evidence, and other papers in the case.

Section 9018

Service of the initial document establishing jurisdiction under this Chapter may be made and proved in the manner provided for service of summons in civil actions.

Section 9019

Petitions shall be heard:

- (a) At the site of the contracting entity's principal office;
- (b) In the county in which the contract is or was performed; or
- (c) On stipulation or for good cause at any other designated location.

General Comment to Article 9

No separate comments are provided for the sections of this Article. The procedural provisions are largely modeled after those applicable to the determination of rights proceedings. This Article would not necessarily have to be enacted in statutory form but could be adopted as regulations under the authority of Section 2009 and in accordance with the Administrative Procedures Act. The provisions are included for illustrative purposes in the event that the solution advocated might find favorable consideration in other jurisdictions as well.