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THE COURT OF CLAIMS—REVIEW OF ADMINISTRATIVE DECISIONS

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Clauses providing for the finality of administrative determinations of disputes between the government and one of its contractors have been a part of government contracts for the better part of a century. The current disputes clause for supply contracts[1] provides:

> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.
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> (b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for

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[1] The clause used in the latest standard government construction contract form has been modified to paraphrase the Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321, 322 (1958) as follows:

> The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representatives or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

> in paragraph (a) above: provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

In what is perhaps the earliest case involving a disputes clause, *Kihlberg v. United States*,[2] the clause involved was limited to a final determination of a single question of fact. In that case the parties agreed that the chief quartermaster of the district of New Mexico would ascertain and fix the distances upon which payment for the transportation of government stores and supplies would be based.

Later clauses made the administrative decision final not only on questions of fact, but on all disputes concerning questions arising under the contract.[3] Clauses providing for appeals to the head of the department from an adverse decision of the contracting officer appear in contracts as early as 1912.[4]

Although government contracts may have provided for finality of administrative determinations, contractors were not thereby precluded from going to the courts for a further adjudication of their claims after an adverse administrative decision. Since many, if not most, of the claims are within the exclusive cognizance of the Court of Claims,[5] we should look principally to the decisions of that court to ascertain what finality has been accorded administrative determinations upon judicial review.

Although the Supreme Court, in *Kihlberg v. United States*[6] and in a subsequent case,[7] stated that an administrative determination of a question of fact would be final and conclusive in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, the Court of Claims did not take such a restricted view of its authority to review such administrative determinations. The court came to hold that, if the determination were arbitrary, capricious or so grossly erroneous as to imply bad faith,[8] it could not stand and that, where a ruling was not supported by substantial evidence, it must be treated as having been arbitrary, capricious, or so grossly erroneous as to imply bad faith.[9] Moreover, in cases

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[2] 97 U.S. 398 (1878).

[3] Bein v. United States, 101 Ct. Cl. 144 (1943).

[4] Plumley v. United States, 226 U.S. 545 (1913).

[5] For claims exceeding $10,000, the Court of Claims has exclusive jurisdiction. For claims not exceeding $10,000 the Court of Claims and the United States District Court have concurrent jurisdiction. 28 U.S.C. § 1491 (1958).

[6] Supra note 2.

[7] Sweeney v. United States, 109 U.S. 618 (1883).

[8] Needles v. United States, 101 Ct. Cl. 535 (1944); Penner Installation Corp. v. United States, 116 Ct. Cl. 550, 89 F. Supp. 545, aff'd per curiam, 340 U.S. 898 (1950).

[9] Wagner, Whirler & Derrick Corp. v. United States, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954).

involving claims for delays caused by the government the court refused to accord any finality to administrative decisions on questions of fact incident thereto, since the claims were for damages for breach of contract and any dispute thereon was not one arising under the contract.[10] The court further took the position that the parties could not agree that any administrative determination would be final on questions of law, since such an agreement would be contrary to the law conferring jurisdiction in this area on the Court of Claims.[11]

Such was the status of the decisions of the Court of Claims when the Supreme Court rendered its decisions, first in *United States v. Moorman*,[12] and then in *United States v. Wunderlich*.[13] In *Moorman* the Supreme Court sustained the validity of a clause providing for finality of an administration determination of a question of law. In *Wunderlich* the Supreme Court put an end, at least temporarily, to the liberal review by the Court of Claims of administrative determinations of questions of fact. The finality of such an administrative determination, the Court said, would have to be upheld unless it was founded on fraud, alleged and proved. Fraud alone was the exception to finality. Accordingly, at this juncture, absent fraud, an administrative determination of questions of fact and law would, under an appropriate contract clause, have to be treated by the Court of Claims as final.[14]

The limited scope of review established by the *Wunderlich* decision and the validity of a finality provision on questions of law under *Moorman* were not to last for long. In May 1954, Congress, heeding voices particularly from industry, enacted legislation primarily intended to overcome the effect of the *Wunderlich* decision and incidentally having that effect upon *Moorman*. The Act provided:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same

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[10] Langevin v. United States, 100 Ct. Cl. 15 (1943); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944).

[11] Beuttas v. United States, 101 Ct. Cl. 748 (1944). The decision was reversed in part by the Supreme Court sub nom. B-W Constr. Co. v. United States, 324 U.S. 768 (1945), without any decision on this contention.

[12] 338 U.S. 457 (1950).

[13] 342 U.S. 98 (1951).

[14] The Court of Claims was quick to apply this standard to question of fact in Palace Corp. v. United States, 124 Ct. Cl. 545, 110 F. Supp. 476 (1953).

> is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.[15]
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.[16]

The Act was drawn by Congress with a threefold purpose.[17] The principal change to be effected was to restore the standards of review based on capriciousness and arbitrariness. Secondly, the Act added the additional standard that administrative determinations of questions of fact must be supported by substantial evidence. It was hoped that the inclusion of this standard would correct inadequacies in appellate procedures under the disputes clause in the various departments and agencies and give rise to records of hearing officers which would contain all the testimony and evidence which had entered into their decision. Lastly, it prohibited the inclusion in a government contract of a provision making final a decision of a contracting officer on a question of law. Thus the "all disputes clause" could no longer be inserted in government contracts.

The Wunderlich Act, it appeared, established the kind of administrative determination which would be accorded finality and the standards which would be applied upon a judicial review. It also appeared to have prescribed that judicial review would be limited to a consideration of the administrative record where the contractor alleged arbitrariness, capriciousness or a failure of substantial evidence. This last matter was not in issue in the *Wunderlich* case.

The Court of Claims after the Wunderlich Act followed a dual approach in considering cases which had been decided adversely to the contractor by the administrative agency or department. Each case is examined in the first instance to determine if the ultimate issue involved in the administrative decision concerns a question of fact or one of law. The fact that the Court of Claims has recognized that such a distinction is difficult to make in many cases[18] has not caused it to hesitate in following such approach. Where it decides that the ultimate issue in the case is a question of law, such as the interpretation of a contract or of a specification,[19] the Court of Claims does not consider

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[15] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1958).

[16] 68 Stat. 81 (1954), 41 U.S.C. § 322 (1958).

[17] 2 U.S. Code Cong. & Ad. News, 83d Cong., 2d Sess., 2194-95 (1954).

[18] River Constr. Corp. v. United States, Ct. Cl. No. 13-56 (Nov. 7, 1962). In some instances the basis for placing a decision in one category rather than in another is difficult to perceive. See Spector, Wile Co. v. United States and Associated Traders, Inc. v. United States, 19 Fed. B.J. 212 (1959).

[19] Callahan Constr. Co. v. United States, 91 Ct. Cl. 538 (1940); Union Paving Co. v. United States, 126 Ct. Cl. 478, 115 F. Supp. 179 (1953); Associated Traders, Inc. v.

that it is required to give any heed to the administrative record regardless of the sometimes extensive findings of fact appearing in that record.[20]

On the other hand, the Court of Claims has held administrative determinations of fact, where the ultimate issue was a question of fact, to be final unless they failed to meet the Wunderlich Act standards upon its review. The Court of Claims, however, in its review did not restrict itself to the administrative record, but considered that it should base its decision on evidence received at a trial *de novo* before that court.[21] This view was not generally shared by United States Circuit and District Courts which, after the Wunderlich Act, limited their review to a consideration of the administrative record.[22] A resolution of these widely divergent approaches was finally made by the Supreme Court in *United States v. Bianchi*.[23] Bianchi, a contractor for the Corps of Engineers, submitted a claim to the contracting officer for extra compensation for installing permanent protection throughout a tunnel. Such protection was not required by the contract, but unforeseen conditions created extreme hazards for workmen and made such installation necessary. The contract contained a changed conditions and a disputes clause. The claim was denied by the contracting officer and his decision was affirmed on appeal by the Board of Claims and Appeals of the Corps of Engineers. Almost six years after the adverse Board decision, the contractor filed suit in the Court of Claims alleging that the decisions of the contracting officer and the Board were capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith or were not supported by substantial evidence. Over objections of the government, the Commissioner of the court heard evidence *de novo*,[24] made extensive findings of fact and concluded that the contractor was

United States, 144 Ct. Cl. 744, 169 F. Supp. 502 (1959); Edwards Eng'r Corp. v. United States, Ct. Cl. No. 218-59 (April 15, 1963). For a similar view by the United States Court of Appeals, see Blake Constr. Co. v. United States, 296 F.2d 393 (D.C. Cir. 1961); Kayfield Constr. Corp. v. United States, 278 F.2d 217 (2d Cir. 1960).

[20] A categorical division of questions into those purely of law and those purely of fact would ignore realities. See Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959). It does not appear that the Court of Claims would deny that most questions are mixed questions of law and fact. Their concern is whether the ultimate issue is a question of law or fact.

[21] Volentine & Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956); Fehlhaber Corp. v. United States, 138 Ct. Cl. 571, 151 F. Supp. 817, cert. denied, 355 U.S. 877 (1957). In P.L.S. Coat & Suit Corp. v. United States, 148 Ct. Cl. 296, 180 F. Supp. 400 (1960), the Court of Claims seems to deviate somewhat from this position.

[22] Wells & Wells, Inc. v. United States, 269 F.2d 412 (8th Cir. 1959); West Lumber Sales v. United States, 270 F.2d 12 (9th Cir. 1959); Mann Chemical Labs., Inc. v. United States, 174 F. Supp. 563 (D. Mass. 1958); Langoma Lumber Corp. v. United States, 140 F. Supp. 460 (E.D. Pa. 1955), aff'd, 232 F.2d 886 (3d Cir. 1956).

[23] 373 U.S. 709 (1963).

[24] At the hearing before the Engineer Board the contractor presented 4 witnesses; before the Commissioner he presented 15 witnesses.

entitled to recover. The court accepted the Commissioner's findings and ruled that, on consideration of all the evidence, the contracting officer's decision as affirmed by the Board could not be said to have substantial support and thus did not have finality. The court received additional evidence to establish the amount of the contractor's recovery.

The Supreme Court, emphasizing that it had only one issue before it, held that, apart from the questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a disputes clause must rest solely on consideration of the record before the department.[25]

The first case involving the applicability of *Bianchi* was soon forthcoming in the Court of Claims in *Stein Bros. Mfg. Co. v. United States*.[26] At the hearing before the Commissioner evidence which was not before the Armed Services Board of Contract Appeals was introduced, without objection, by both the government and the contractor. The court held that the Wunderlich Act standard, as interpreted by *Bianchi*, is a rule of evidence or procedure and is waived, as it was in this case, if not objected to by the party who is benefited by it. The court rejected the government's argument that the court is without jurisdiction to hear new evidence. The court went on to hold that it could decide the amount of damages on evidence to be introduced before the court and that it need not remand the case to the agency for that purpose.[27] This, it held, was not prohibited by *Bianchi* since *Bianchi* requires only that review be limited to the administrative record and here there was no administrative record on the amount of damages. It does not appear that much disagreement can be had with this latter holding by the court.

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[25] The Court went on to emphasize its prohibition against the receipt of new evidence. Should the administrative record before the court be defective or inadequate or contain some prejudicial error, an evidentiary hearing still could not be held. Rather, judgment might be granted to the contractor on the basis of the administrative record, if warranted, or, if not so warranted, and the departmental decision could not be sustained under the Wunderlich Act standards, the court could stay its proceedings pending some further action before the department involved. "[If] . . . the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court." 373 U.S. at 718.

[26] 32 U.S.L. Week 2050 (Ct. Cl. July 12, 1963). The case in the Court of Claims was tried and the Commissioner's report filed before the Bianchi decision. On the same day as the Stein decision, the court in Bar Ray Prods., Inc. v. United States, Ct. Cl. No. 382-61 (July 12, 1963), returned the case to the Commissioner to determine on the basis of the administrative record and the contract provisions whether the decision of the Board of Contract Appeals meets the Wunderlich Act standards.

[27] Stein's claim for extra compensation for complying with the contract specifications as interpreted by the contracting officer was denied by the latter and the denial was affirmed on appeal. Accordingly, no administrative action was taken to determine an amount. Appeal of Stein Bros. Mfg. Co., A.S.B.C.A. No. 3870 (1958).

Of perhaps more interest than the decision in *Stein* is the Memorandum of Law, submitted to the court by the Department of Justice, discussing the impact of *Bianchi* on *Stein* and in general. The main thrust of the government's argument is that all administrative determinations of fact must be accorded finality under Wunderlich Act standards and that no new evidence thereon may be received by the court whether or not the facts so determined underlie a question of law, a question of fact or a mixed question of law and fact. Thus, the government would have the court put an end to its practice of dividing cases into those in which the ultimate issue is one of fact and those in which it is one of law and according finality to administrative determinations of fact in the former while denying it in the latter. The Court of Claims was not required to meet this problem in view of its basis for decision. It did indicate, however, that it was not prepared to abandon the distinction to which it has long adhered. The court stated that the ultimate issue in *Stein* was one of law and not of fact and, accordingly, it might not be precluded "by the Bianchi decision or, the Wunderlich Act . . . from considering any evidence bearing on that legal issue, no matter what the Board of Contract Appeals determined or what was in the record before it."

In spite of its dictum on *Stein* it would appear that the time has come for the Court of Claims to accord finality under Wunderlich Act standards to all administrative determinations of questions of fact in cases involving contracts containing a disputes clause. The Supreme Court seems to have so decided in *Bianchi*.[28] Moreover no more reason appears, other than the somewhat legalistic distinction between questions of fact and those of law, for according finality in one case and not in the other. Where an administrative hearing has been held and determinations of facts made, it would appear that the orderly administration of government contracts and of justice would not be served by rendering such hearing a nullity in some cases on the basis of such a distinction. Unlike its approach, however, on administrative determinations of fact prior to *Bianchi*, where it stood alone at odds with the United States Circuit and District Courts, the Court of Claims is not without support in its division of cases into those in which the ultimate question is one of law and those in which it is one of fact.[29] It is likely that the Court of Claims, notwithstanding

[28] In its Memorandum of Law in the Stein case, the Department of Justice observed that the Supreme Court commented that Bianchi did not argue that the underlying controversy was beyond the scope of the disputes clause, a significant comment since Bianchi did argue, both in its opposition to the petition for certiorari and in its brief on the merits, that its claim involved questions of law and that therefore the taking of evidence de novo should be sustained as proper.

[29] Blake Constr. Co. v. United States, 296 F.2d 393 (D.C. Cir. 1961). See, however, McKinnon v. United States, 178 F. Supp. 913 (D. Ore. 1959); Allied Paint & Color Works, Inc. v. United States, 199 F. Supp. 285 (S.D. N.Y. 1960); aff'd, 309 F.2d 133

Bianchi, will adhere to the distinction when the question is presented to it. A decision by the Supreme Court on this question has been sought and certiorari has been granted.[80] Meanwhile contractors in their own best interests should present their entire case in every instance before the administrative tribunal and not reserve evidence for the court. The former may not prove to be just a way station.

(2d Cir. 1962) which would have questions of law decided on the administrative record and not allow the introduction of new evidence because a question of law is involved.

[80] Allied Paint & Color Works, Inc. v. United States, supra note 29.