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O S. Hiestand Jr

William C. Parler

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THE DISPUTES PROCEDURE UNDER GOVERNMENT CONTRACTS: THE ROLE OF THE APPEALS BOARDS AND THE COURTS

O. S. HIESTAND, JR.*
WILLIAM C. PARLER**

I. INTRODUCTION

After several landmark corrective efforts by Congress and the Supreme Court, interesting and important questions still remain unresolved concerning the standard disputes clause of government contracts and the status of administrative determinations under that clause during subsequent judicial actions.

Disputes clauses, which have long been included in most government contracts, serve two main purposes: first, they prevent the stoppage of work pending the resolution of a dispute; and, second, they provide a relatively inexpensive and rapid method of settling controversies. In order to accomplish these objectives, the standard disputes clause provides that disputes as to questions of fact arising under the contract are to be decided by the contracting officer. The decision of the contracting officer is final as to both parties, but the contractor has a right of appeal which may be exercised within thirty days. Once appeal has been made to the head of the agency or his representative (the Board of Contract Appeals), the resultant decision is final and binding

* A.B., Indiana University, 1941; LL.B., Northwestern University, 1947; Member, Tennessee, Illinois, and U.S. Supreme Court Bars; Assistant General Counsel for Operations, Atomic Energy Commission.

** B.S., U.S. Naval Academy, 1951; LL.B., University of South Carolina, 1958; LL.M., Harvard University, 1959; Member, South Carolina and U.S. Supreme Court Bars; Member, American Bar Association, Federal Bar Association; Attorney, Office of the General Counsel, Atomic Energy Commission. The opinions expressed by the writers are their own, and do not necessarily represent the views of the Atomic Energy Commission.

on both parties, subject to the standards of review contained in the Wunderlich Act.[1]

It would appear from the all-inclusive language of this clause that there is but one avenue of relief for a contractor, and that facts found administratively with respect to a dispute would be binding, subject, of course, to judicial review of the administrative record. This clause, however, has not been so interpreted. Consequently, decisions regarding the scope of the clause and the effect of administrative rulings rendered thereunder have created considerable uncertainty and confusion. This vagueness weakens the well-established policy of the Government to settle, without expensive litigation, disputes arising under its contracts.

It is the purpose of this article to examine some of the causes of the existing problems and to suggest certain corrective actions which would eliminate many of these causes. Particular emphasis will be placed on two recent decisions of the U.S. Supreme Court.[2]

II. Background

A. *Contractual Basis for Dispute Determination—Judicial Sanction*

The Supreme Court has held that the parties to a contract may provide for some designated person or persons, even if employed by one of the contracting parties, to make final determinations of fact which will be conclusive upon both parties.[3] A basic principle of government contract law, going back to *Kihlberg v. United States*,[4] is that when both parties to the contract have entrusted the Government's contracting officer with the power to settle disputes arising between the parties, the contracting officer's decision shall be final and cannot be rejected by a court unless it is shown that he acted fraudulently, failed to exercise honest judgment, or was so grossly mistaken as necessarily to imply bad faith.

In *United States v. Joseph A. Holpuch Co.*,[5] the Court held that unless a contractor has pursued the administrative remedy of appeal granted by the disputes clause, he will not acquire standing to sue in the Court of Claims.

The Court of Claims, apparently seeking equitable results in particular cases, expanded the grounds for appeal established by the *Kihlberg* decision. To the formula sanctioned by the Supreme Court, the Court of Claims added the criterion that the departmental decision

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[1] 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964).

[2] United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); United States v. Anthony Grace & Sons, 384 U.S. 424 (1966).

[3] Kihlberg v. United States, 97 U.S. 398 (1878).

[4] Ibid.

[5] 328 U.S. 234 (1946).

must be supported by substantial evidence. The Supreme Court first indicated its disapproval by a per curiam reversal in 1939[6] and again, several years later, in *United States v. Moorman*.[7] Despite this explicit rejection by the Supreme Court, the Court of Claims continued to follow its own criteria.[8]

In *United States v. Wunderlich*,[9] the Supreme Court handed down a ruling which might have been the final word on the subject of review of government contract cases. *Wunderlich* held that decisions of government officers rendered pursuant to the standard disputes clauses in government contracts are final absent fraud on the part of such government officers.[10]

B. *The Wunderlich Act*

Following the *Wunderlich* decision, Congress enacted what is known as the Wunderlich Act.[11] This act, in substance, provides that the decision of the head of a department or a duly-authorized representative or board "in a dispute involving a question arising under [a government] . . . contract . . . shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[12] It also prohibits clauses which make the decision of a government officer final on questions of law arising under the contracts.

In reporting favorably on the bill subsequently enacted, the House Judiciary Committee said:

> The purpose of the proposed legislation . . . is to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich* . . . .
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> Prior to the Supreme Court decision in the *Wunderlich* case it was generally understood that administrative decisions

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[6] United States v. John McShaine, Inc., 308 U.S. 512 (1939).

[7] 338 U.S. 457 (1950).

[8] See, e.g., Wunderlich v. United States, 117 Ct. Cl. 92 (1950).

[9] 352 U.S. 98 (1951).

[10] Id. at 100. The consequences expected to flow from the majority decision in *Wunderlich* are described in two dissenting opinions. Mr. Justice Douglas' trenchant protest warns that "the rule we announce . . . makes a tyrant out of every contracting officer." Id. at 101. In a separate dissenting opinion, Mr. Justice Jackson argued that

> one who undertakes to act as a judge in his own case or, what amounts to the same thing, in the case of his own department, should be under some fiduciary obligation to the position which he assumes. He is not at liberty to make arbitrary or reckless use of his power, nor to disregard evidence, nor to shield his department from consequences of its own blunders at the expense of contractors.

Id. at 103.

[11] 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964).

[12] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1964).

> rendered under the disputes clauses were final and would not be reviewed by the courts unless the decision was fraudulent, or arbitrary, or capricious, or so grossly erroneous as necessarily to imply bad faith.
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> . . . .
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> The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence. The requirement that administrative action be supported by substantial evidence is found in the Administrative Procedure Act . . . . As understood by the Committee and as interpreted by the Supreme Court in *Edison Company v. Labor Relations Board* (305 U.S. 197, 229) "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[13]

The House Judiciary Committee's report of the bill indicates that the purpose of the legislation was more than merely to overcome the Supreme Court's *Wunderlich* decision. By adding the substantial evidence test, Congress expected agencies to modify their administrative hearing procedures so that a record would be available for judicial review. Neither the Wunderlich Act nor the report, however, indicates the nature of the judicial review to be given to administrative decisions.[14]

C. *Judicial Review Subsequent to the Wunderlich Act*

Following passage of the Wunderlich Act, the Court of Claims held, in *Wagner Whirler & Derrick Corp. v. United States*,[15] that the congressional intent was to restore the *status quo ante* the decision of the Supreme Court in *United States v. Wunderlich*.[16] What the Court of Claims did not decide in the *Wagner* case was whether they would restore their pre-*Wunderlich* policy of admitting de novo evidence upon review. That question was decided in *Volentine & Littleton v.*

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[13] H.R. Rep. No. 1380, 83d Cong., 2d Sess. 1-5 (1954).

[14] The importance of the nature of the judicial review was called to the attention of the House Judiciary Committee during hearings on the proposed legislation. Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st & 2d Sess. 51, 59, 79, 113 (1954). One witness had reservations about the use of the substantial evidence test, "unless Congress provides appropriate legislation for setting up administrative appeals found within all the procurement agencies and appropriate legislation for conferring appellate jurisdiction on the Court of Claims and the district courts, insofar as they act concurrently." Id. at 119. See generally Schultz, Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case, 67 Harv. L. Rev. 217 (1953).

[15] 128 Ct. Cl. 382, 121 F. Supp. 664 (1954).

[16] Supra note 9.

United States,[17] where the Court of Claims explicitly held that restoration of the *status quo ante* the *Wunderlich* decision must include the court's admission of de novo evidence.

In *Volentine*, the contractor exhausted his administrative remedies and a decision was issued. On appeal to the Court of Claims, the contractor alleged that the decision was not valid because it was arbitrary, capricious, fraudulent, and was not based on substantial evidence. He introduced evidence tending to show that the Government had breached its contract. The Government declined to introduce any evidence, taking the position that the only evidence relevant to this stage of the case was the administrative record, and the contractor had failed to produce it.[18] The Government argued that the Wunderlich Act standards cannot be applied to an administrative decision unless one knows the evidence on which the administrative decision was based.[19] The majority of the court rejected the Government's position:

> It would require two trials in many cases involving this question. The first trial would include the presentation of the "administrative record" and its study to determine whether, on the basis of what was in it, the administrative decision was tolerable. But the so-called "administrative record" is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them.[20]

Judge Littleton's concurring opinion added that the Wunderlich Act does not change the jurisdiction of the Court of Claims from a court of original jurisdiction to an appellate court, nor does it give the court jurisdiction to render an administrative rather than a judicial decision.[21] As Judge Littleton pointed out, the court's jurisdiction in contract suits is found in 28 U.S.C. § 1491,[22] and all suits brought under that section are "in the nature of original proceedings based on competent evidence adduced by both parties in open court."[23] The Wunderlich Act, he asserted, is merely a statutory limitation on the authority of contracting agencies to finalize their own decisions in contract disputes.[24] In Judge Littleton's view, the administrative record

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17 136 Ct. Cl. 638, 145 F. Supp. 952 (1956).

18 Id. at 641, 145 F. Supp. at 953.

19 Id. at 641, 145 F. Supp. at 954.

20 Id. at 641-42, 145 F. Supp. at 954.

21 Id. at 644, 145 F. Supp. at 955.

22 28 U.S.C. § 1491 (1964) provides that the Court of Claims shall have jurisdiction to render judgment "upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . ." See generally Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1267-68 (1961).

23 136 Ct. Cl. at 644, 145 F. Supp. at 955.

24 Id. at 644-45, 145 F. Supp. at 955.

was simply "former testimony" which may or may not be admissible in evidence.[25]

Judge Laramore's dissent agreed with the Government's position.[26] A "common sense application" of the Wunderlich Act, according to his opinion, would be to

> apply the usual administrative review rule and determine the question of arbitrariness, etc., and lack of substantial evidence on the record made before an appeals board, unless the contractor alleges and proves that because of the procedures available in the Appeals Board as applied to him, he was unable to adequately present his case. That is to say, because of the failure of the Government to produce documents or witnesses or inability of the plaintiff to compel the attendance of witnesses or other procedures that would prevent plaintiff from adequately establishing material facts with reference to his claim, or if the board considered evidence not in the record. Further, he must allege and prove the additional material facts which were not before the board.[27]

III. The Bianchi Case

In 1946, Carlo Bianchi contracted with the Corps of Engineers for the construction of a flood-control dam, including a tunnel for the diversion of water. After the tunnel had been drilled, Bianchi asserted that unforeseen conditions had created extreme hazards for his workmen, requiring permanent protection for them, and that the company should be compensated.[28] The contracting officer rejected the claim, and an appeal was taken to the Board of Claims and Appeals of the Corps of Engineers. An adversary hearing was held before this Board. A record was kept, and each party offered its evidence and had an opportunity to cross-examine. In December 1948, the Board issued a decision against Bianchi.

In December 1954, Bianchi sued in the Court of Claims. He alleged breach of contract based upon the administrative rejection of his "changed conditions" claim. Bianchi argued that the decisions of the contracting officer and the Board were "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not

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[25] Id. at 649-50, 145 F. Supp. at 958.

[26] Id. at 650, 145 F. Supp. at 959.

[27] Id. at 650-51, 145 F. Supp. at 959.

[28] The contract contained a standard "changed conditions" clause, authorizing the contracting officer to provide for an increase in cost if the contractor encountered subsurface conditions materially different from those indicated in the contract or reasonably to be anticipated.

supported by substantial evidence."[29] In 1956, appearing before a Commissioner of the Court of Claims, the Government contended that the only evidence admissible on the question of whether the Board's decision should be considered final was the administrative record made below. The Commissioner accepted de novo evidence, made extensive findings, and concluded that Bianchi was entitled to recover. In January 1959, the Court of Claims accepted the Commissioner's findings and conclusions, ruling that "on consideration of all the evidence, the contracting officer's decision [as affirmed by the Board] cannot be said to have substantial support," and thus "does not have finality."[30]

The Supreme Court reversed,[31] holding "that in its consideration of matters within the scope of the 'disputes' clause in the present case, the Court of Claims is confined to review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence."[32] In support of this conclusion, Mr. Justice Harlan states that

> this court long ago upheld the validity of clauses in government contracts delegating to a government employee the authority to make determinations of disputed questions of fact . . . to be given conclusive effect in any subsequent suit in the absence of fraud or gross mistake implying fraud or bad faith . . . . Thus the function of the Court of Claims in matters governed by "disputes" clauses was in effect to give an extremely limited review of the administrative decision . . . .
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> It is our conclusion that, apart from 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. This conclusion is based both on the language of the statute [the Wunderlich Act] and on its legislative history.[33]

Mr. Justice Harlan notes that the Wunderlich Act "is designated as an Act 'To permit review' and that the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it was based."[34] His opinion goes on to state:

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[29] See note 12 supra and accompanying text.

[30] Carlo Bianchi & Co. v. United States, 144 Ct. Cl. 500, 506, 169 F. Supp. 514, 517 (1959).

[31] United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963).

[32] Id. at 718.

[33] Id. at 713-14.

[34] Id. at 714-15.

> Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held . . . . *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 [1943] . . . . [T]he function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal.[35]

The majority points out that the standards of review in the Wunderlich Act have

> frequently been used by Congress and have consistently been associated with a review limited to the administrative record . . . . The term "substantial evidence" . . . goes to the reasonableness of what the agency did *on the basis of the evidence before it*, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.[36] (Footnote omitted.)

Although legal scholars expressed some hope that *Bianchi* might end the "confusion in the courts,"[37] the case failed to resolve the difference of opinion between the Court of Claims and the Supreme Court. The Court of Claims continued its pre-*Bianchi* procedure of holding de novo hearings, until the Supreme Court handed down two recent decisions: *United States v. Utah Constr. & Mining Co.*[38] and *United States v. Anthony Grace & Sons.*[39]

IV. The Utah Case

The contract in *Utah* was between the United States, acting through the Atomic Energy Commission (AEC), and the Utah Construction and Mining Company. It contained the standard disputes clause providing for the resolution by the contracting officer of "all disputes concerning questions of fact arising under this contract." It

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[35] Id. at 715.

[36] Ibid. This statement of the substantial evidence test should be compared with the application of the test by the Court of Claims. See, e.g., *Volentine & Littleton*, supra note 17, where the Court of Claims decided whether the substantial evidence test was met only after admitting de novo evidence.

[37] Compare Harrison, Eight Years After Wunderlich—Confusion in the Courts, 28 Geo. Wash. L. Rev. 561 (1960), with Schultz, Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes, 29 Law & Contemp. Prob. 115 (1964).

[38] 384 U.S. 394 (1966).

[39] 384 U.S. 424 (1966).

provided further for an appeal to the duly authorized representative of the Commission, "whose decision shall be final and conclusive upon the parties."

Work on the contract was completed on January 7, 1955. During and subsequent to the performance of the contract, Utah had submitted to the contracting officer various claims for relief. All but four of these claims were settled.[40] In three of the unsettled claims, Utah had requested extensions of time and compensation for increased costs, including costs incurred by reason of delays caused by the Government. This relief was sought under the "changed conditions" and "delays-damages" clauses of the contract.[41] Utah sought relief for the fourth claim under the "changes" clause of the contract.[42] Three of these claims were heard before a panel of the AEC's Advisory Board of Contract Appeals. This Board heard each claim at a hearing on the record, with exhibits, briefs, testimony, cross-examination, and argument. Jurisdiction was noted in each instance, and decisions were rendered with full discussion and findings. The fourth claim was heard on appeal by an AEC hearing examiner,[43] who decided that the claim by Utah was untimely.[44]

In 1961, approximately six and one-half years after the events under the contract occurred, Utah entered the Court of Claims to sue the United States for damages. In its petition, Utah alleged substantially the same facts as those which had supported its claims for ad-

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[40] The four controversies were appealed to the AEC Advisory Board of Contract Appeals, which was at that time the designated representative of the AEC for hearing appeals under the disputes clause. These claims were designated in the litigation as the "pier drilling" claim, the "concrete aggregate" claim, the "shield window" claim, and the "shield door" claim.

[41] Under the "changed conditions" clause, the contracting officer must grant additional time to the contractor and reimburse him for costs resulting either from subsurface or latent conditions differing from those shown in the contract specifications or from unknown conditions of an unusual nature. This clause imposes certain notice requirements on a contractor.

If a contractor fails to complete his work on time, and the delay results from specified causes beyond his control, the "delays-damages" clause allows additional time and excuses the contractor from liquidated damages.

[42] This clause calls for an equitable adjustment in the contract price and an extension in the time for performance, if the changes ordered by the contracting officer in the drawings or specifications add to the cost or time of performance.

[43] The hearing examiner appeal procedure temporarily replaced the Advisory Board of Contract Appeals in 1959. AEC Rules of Procedure in Contract Appeals, 24 Fed. Reg. 726 (1959) (superseded September 11, 1964). Under the new procedure, contract appeals were heard by a hearing examiner, with discretionary review by the Commission. In 1964, the Commission returned to the use of a board for hearing contract appeals. Rules of Procedure in Contract Appeals, 10 C.F.R. §§ 3.1-.23 (Supp. 1966).

[44] The claim before the hearing examiner was the "concrete aggregate" claim. See note 40 supra. This claim was made three years after Utah became aware of the alleged changed condition. The "changed conditions" clause required that the contracting officer be notified immediately.

ministrative relief. In addition, Utah asserted two claims, not asserted administratively, for increased costs due to delay.

The case was referred to a Commissioner who directed the parties to file briefs arguing the question of the extent to which he was bound by the *Bianchi* decision. Utah contended that the claims it was presenting to the court did not "arise under" the contract within the meaning of the standard disputes clause. Consequently, *Bianchi* did not bar a de novo trial of the underlying facts. The Government asserted that Utah's claims did fall within the disputes clause. It also argued that *Bianchi* precluded a trial de novo as to relevant facts previously determined pursuant to proper administrative disputes procedures. Any review of such facts should be confined to a review of the administrative record. The Commissioner ruled that Utah, with the exception of one part of one claim, was entitled to a trial de novo.[45]

The Government then sought review of the Commissioner's order in the Court of Claims. The court ruled that the language providing an administrative remedy for "disputes concerning questions of fact arising under this contract" refers to "a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract."[46] Facts underlying claims for breach of contract do not "arise under" the contract and are not within the scope of the disputes clause.[47] Consequently, the court concluded that even though these facts may have been properly resolved in an administrative proceeding under the disputes clause, they should not be accorded finality in a suit for breach of contract. In such a suit, all facts have to be determined de novo by the court.

There was a strong dissent on the ground that the administrative determination of factual disputes, properly made with a full hearing under the disputes clause, should be binding upon the parties in subsequent actions for breach of contract.[48] As to any relevant facts which were not actually litigated and determined administratively, the dissent agreed with the majority that the contractor should have a de novo trial.[49]

In March 1966, the case was argued before the Supreme Court. The Justice Department claimed that the province of administrative fact-finding under the disputes clause was very broad and did not depend on whether such facts related directly to claims on which administrative relief could be given under a specific contract clause. The

[45] Commissioner's Order and Memorandum Re Applicability of *Bianchi* Decision, filed February 16, 1964.

[46] Utah Constr. & Mining Co. v. United States, 168 Ct. Cl. 522, 527, 339 F.2d 606, 610-11 (1964).

[47] Id. at 528, 339 F.2d at 610.

[48] Id. at 539, 339 F.2d at 617.

[49] Id. at 537-38, 339 F.2d at 615-16.

Court was asked to decide two issues: (1) whether factual disputes, administratively resolved pursuant to the standard disputes clause of government contracts, may be tried de novo by a court in a suit for breach of contract; and, (2) whether factual disputes underlying claims for breach of contract are generally subject to administrative resolution under the standard disputes clause of government contracts.[50]

On June 6, 1966, the Supreme Court issued its decision in *Utah*,[51] rejecting the contention of the Government that all factual findings relating to government contracts had to be made administratively. For the first time, the Court ruled that the disputes clause was mandatory in only those cases where administrative relief could be given under specific contract adjustment provisions.[52] The Court's decision was based on

> an examination of uniform, continuous, and long-standing judicial and administrative construction of the disputes clause . . . [which established] . . . that the jurisdiction of the Boards of Contract Appeals under the disputes clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly . . . the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action.[53]

Assuming, *arguendo*, that the clause is susceptible of the broad interpretation given it by the Government, the Court said that the question before it "is what the parties intended, not whether the construction on which they relied was erroneous."[54] In view of the long-established understanding that the disputes clause did not encompass pure breach of contract claims (a claim for which there is no contractual basis for administrative relief), these parties could not have understood the clause to include such claims.[55] The Government contended, however, that even though there is no administrative jurisdiction to grant relief in breach of contract cases, the disputes clause permits the administrative board to make binding fact findings which would be reviewable under Wunderlich Act standards rather than de novo. This argument was rejected.[56]

The Court reversed the Court of Claims insofar as it failed to

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[50] Brief for Petitioner, p. 2.
[51] 384 U.S. 394 (1966).
[52] Id. at 404.
[53] Id. at 404-05.
[54] Id. at 407.
[55] Id. at 404.
[56] Id. at 412.

accept those fact findings properly made on the administrative level, stating:

> It would disregard the parties' agreement to conclude, as the Court of Claims did, that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.[57]

V. The Anthony Grace Case

The contract in the *Anthony Grace* case[58] was initiated by an invitation from the Department of the Air Force for bids on the construction of military housing units. The bid form advised that wages to be paid to laborers and mechanics would equal the prevailing wage as determined by the Secretary of Labor not more than ninety days prior to the commencement of construction. The form also explained that any differences between the minimum wage schedule attached to the invitation and the schedule finally issued by the Secretary of Labor might require an adjustment of the bid price in an amount to be determined by the Federal Housing Commissioner.

Grace submitted the low bid and was issued a Letter of Acceptability.[59] Grace then requested the Secretary of Labor to make an appropriate wage determination. The Secretary made two determinations, one for general construction of the houses, the other for heavy and highway construction. The latter rates were lower than those for building construction. Grace contended that the determinations required it to pay the higher building construction rates for a greater portion of the work than provided in the specifications. Both the Federal Housing Commissioner and the Air Force denied Grace's request for an increase in contract price. Thereafter, Grace declined to begin work until resolution of this dispute. The Air Force, acting pursuant to the contract, cancelled the award. When Grace requested the return of its bid deposit, the Air Force refused, and Grace filed a notice of appeal.

The Armed Services Board of Contract Appeals granted the Government's motion to dismiss the appeal as untimely. Grace thereafter sued in the Court of Claims for damages for breach of contract. Grace's position was that the wage determinations of the Secretary of Labor constituted a breach of contract because they unilaterally altered

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[57] Id. at 419.

[58] Supra note 39.

[59] The invitation provided that "upon issuance of the Letter of Acceptability" the bidder "becomes obligated to carry out its terms within the times therein stated."

the provisions of the specifications defining the scope of the work to be performed by the higher paid building construction personnel.

The Commissioner of the Court of Claims, after finding that the appeal to the Armed Services Board *was* timely, held that there were factual issues remaining to be tried in the case, and that *Bianchi*[60] was inapplicable because Grace's claim involved an alleged breach of contract and hence was not covered by the disputes clause.

Upon review of the Commissioner's findings, the Court of Claims agreed that the administrative appeal was timely. However, there was disagreement on the question of whether the case should be returned to the administrative board for a hearing or retained for a judicial trial. The majority held that the case should be retained, relying on prior decisions[61] which held that "failure of the contracting officer to perform his adjudicatory functions" entitled the contractor to "immediate resort to the courts."[62] A stay of judicial proceedings to permit administrative findings is warranted, in the opinion of the majority, only "where the suspension will actually expedite handling of the litigation or where the Supreme Court has indicated that a stay of court proceedings is justified."[63] The court did not believe that *Bianchi* was applicable since that case did not involve "a situation where a contract appeals board . . . refused jurisdiction."[64] According to the court, *Bianchi* expressed a policy against delay in government contract litigation, and, in the instant case, this policy required a judicial rather than an administrative trial of the facts.[65]

On writ of certiorari, the Supreme Court addressed itself to the issue of "whether a reviewing court which rules that factual disputes should have been resolved administratively pursuant to a standard government disputes clause may nonetheless require that they be resolved in a judicial trial rather than administratively."[66]

The Government contended that the Court of Claims decision violated the Wunderlich Act, and that the *Bianchi* decision committed questions of fact under the disputes clause to administrative determination, subject, of course, to judicial review.

The Supreme Court reversed the Court of Claims,[67] holding that the Board of Contract Appeals—not the reviewing court—should make the original record on an issue which the Board did not resolve be-

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60 Supra note 31.
61 170 Ct. Cl. at 692-94, 345 F.2d at 810-12.
62 Id. at 693-94, 345 F.2d at 812.
63 Id. at 695, 345 F.2d at 812.
64 Id. at 695, 345 F.2d at 813.
65 Ibid.
66 Brief for Petitioner, p. 2.
67 384 U.S. 424 (1966).

cause it had disposed "of the appeal on another ground."[68] The Court felt that its decision was consistent with *Bianchi* and would result in the utilization of administrative procedures to which the parties had contractually agreed. In addition, the Court considered its decision reflective of both the congressional intent in the Wunderlich Act and a long line of Supreme Court decisions. Resort to administrative procedures, the Court noted, is an "expeditious way to settle disputes" and could "enhance the possibility of harmonious agreement" while leading "to greater uniformity in the important business of fairly interpreting government contracts."[69]

The Court noted that there may be occasions when the parties will not be required to exhaust the administrative procedure, but "these circumstances are clearly the exceptions rather than the rule and the inadequacy or unavailability of administrative relief must clearly appear before a party is permitted to circumvent his own contractual agreement."[70]

VI. The Present Situation

A. *Court of Claims Review*

Both prior and subsequent to the Wunderlich Act, the Court of Claims in its review of administrative decisions under the disputes clause had acted as a trial rather than appellate court.[71] In recent years, the court has attempted to outline a judicial procedure which accords with the letter and spirit of both the Wunderlich Act and the *Bianchi* decision. Quite frequently, the initial procedural question is whether *Bianchi* applies to the case under review.[72] This question is considered by a Commissioner who makes findings and submits an opinion for the approval of the court. The history of the "*Bianchi* rulings" by the court, however, did not result in criteria that could be applied uniformly and with certainty. Whether *Bianchi* applied and the extent of its application depended on facts such as the following: whether there had been a "waiver"; whether a question of law was involved; whether the dispute was one "arising under the contract" or "outside of the contract"; whether the majority of the claims involved breaches of contract; and whether a party was bound by the doctrine of estoppel.

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[68] Id. at 430.

[69] Id. at 429.

[70] Id. at 430. The Court also said that its holding necessarily disapproved of cases in which the Court of Claims retained the issue of damages (not previously considered administratively) after it reversed the administrative finding of no liability. Id. at 430-31 n.6.

[71] See, e.g., Volentine & Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956).

[72] See note 45 supra and accompanying text.

Prior to the decision in *Bianchi*, the court had permitted de novo evidence on questions of fact, regardless of whether the relevant claim had been decided under the disputes clause. At that time, the administrative record made was not of primary importance; rather, the significant factor was that there had been no failure to exhaust administrative remedies under the disputes clause.[73] The *Bianchi* decision changed this by precluding the Court of Claims from taking de novo evidence on issues covered by the disputes clause. The Supreme Court's *Utah* and *Anthony Grace* decisions clarify the *Bianchi* doctrine and establish that, for cases within the scope of the disputes clause, the facts are to be found administratively.[74]

In its decisions since *Utah* and *Anthony Grace*, the Court of Claims has apparently recognized that when relief is available to a contractor under a disputes clause, he is not entitled to a trial de novo on factual questions decided administratively.[75] In some of its recent proceedings, the Court of Claims has required the plaintiff to file a detailed statement assigning errors of law allegedly committed by the Board of Appeals. The court has also required a declaration of the specific findings which the plaintiff contends were not supported by substantial evidence.[76]

The Court of Claims has recognized that as a result of the *Utah* and *Anthony Grace* decisions, it may be necessary to return pending cases to administrative boards for a determination of the amount of damages due the contractor.[77]

These recent Court of Claims decisions indicate that the court has changed its position regarding the manner in which the *Bianchi* decision should be applied. Hopefully, the guidance given by the Supreme Court in *Utah* and *Anthony Grace* has ended the need in practically every contract case in the Court of Claims to litigate the procedural issue of whether there should be a de novo hearing.

Utah and *Anthony Grace* have eliminated much of the uncertainty regarding the finality to be accorded those facts which have been properly determined by the administrative body. Now it is clear

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[73] See, e.g., United States v. Blair, 321 U.S. 730 (1944); United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942).

[74] Even prior to *Utah* and *Anthony Grace*, the Court of Claims recognized this limitation in Morrison-Knudsen Co. v. United States, 170 Ct. Cl. 757, 345 F.2d 833 (1965).

[75] See, e.g., Midwest Spray & Coating Co. v. United States, Ct. Cl. No. 354-64 (July 15, 1966); Jefferson Constr. Co. v. United States, Ct. Cl. No. 67-65 (July 15, 1966); Banks Constr. Co. v. United States, Ct. Cl. No. 17-64 (July 15, 1966); Allied Contractors, Inc. v. United States, Ct. Cl. No. 255-61 (July 15, 1966).

[76] See Keco Indus., Inc. v. United States, Ct. Cl. No. 277-56 (July 15, 1966).

[77] See, e.g., Robertson Elec. Co. v. United States, Ct. Cl. No. 12-64 (July 15, 1966); Mauricio Hochschild, Inc. v. United States, Ct. Cl. No. 276-63 (July 15, 1966). Compare Thompson Ramo Wooldridge, Inc. v. United States, 361 F.2d 222 (Ct. Cl. 1966).

that if administrative relief is available under the terms of the contract, the disputes procedure is mandatory, and all fact findings relating to the claim must be made administratively. Such findings (subject to Wunderlich Act standards)[78] bind a court in any future litigation involving the same facts. If no relief is available administratively, the contractor can seek a judicial remedy.

This distribution of responsibility between the courts and the boards has resolved one major problem and accentuated another. Faced with the prospect of having their court actions dismissed for failure to exhaust administrative remedies, contractors feel compelled to present all claims relating to the contract first to the contracting officer and then to the appeals board.[79] To the extent that the contract does not allow administrative relief, presentation to the administrative body is clearly useless, since the contractor's only remedy would be a judicial one. This division of claims has been referred to as "fragmentation of remedies."[80] The *Utah* and *Anthony Grace* decisions vividly indicate the necessity of avoiding this problem by providing a contractual basis that allows an administrative remedy. These two cases should, however, end the "fragmentation" that resulted from de novo trials which were granted simply because a claim was couched in breach of contract language. Both the *Bianchi* and *Utah* decisions recognized that the purpose of the Wunderlich Act "would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding."[81] The judicial relitigation of an issue decided administratively frustrates the use of the disputes clause as a "mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created."[82]

The *Utah* and *Anthony Grace* decisions notwithstanding, there are circumstances in which the Court of Claims can grant a de novo hearing. The court presumably has the authority to determine what constitutes a claim for breach of contract and the extent to which that claim overlaps with those more appropriate for administrative relief. The court would also have the authority to determine whether given administrative findings were relevant to a claim within the jurisdiction

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78 Supra pp. 3-4.

79 United States v. Holpuch, 328 U.S. 234 (1946); United States v. Blair, 321 U.S. 730 (1944); Henry E. Wile Co. v. United States, 144 Ct. Cl. 394, 169 F. Supp. 249 (1959); Southeastern Oil Fla., Inc. v. United States, 127 Ct. Cl. 480, 115 F. Supp. 198 (1953). Compare Universal Ecsco Corp. v. United States, 170 Ct. Cl. 809, 345 F.2d 586 (1965).

80 See generally Crowell and Anthony, Practical Problems Facing Contractors' Counsel as a Result of Fragmentation of Remedies, 18 Ad. L. Rev. 128 (Fall 1965).

81 United States v. Carlo Bianchi & Co., 373 U.S. 709, 717 (1963).

82 United States v. Holpuch Co., supra note 79, at 239.

of the appeals board. Claims, however, do not come in packages neatly labeled "breach" and "contract," and there may be some difficult cases.[83] In addition, there is nothing to prevent a contractor from electing to bypass the disputes procedure when an alleged breach is involved, or when there are no "facts" in dispute. Since the disputes clause is not applicable in these situations, the Court of Claims would conduct a de novo hearing.

B. *Some Potential Problems*

Basis for Administrative Jurisdiction. Government contracts typically contain a number of clauses which permit certain actions that would constitute a breach of contract to be treated administratively under the disputes clause.[84] In *Utah*, the Supreme Court makes it clear that the parties may contractually agree to apply the disputes clause procedure to breach of contract situations, subject to the limitations imposed by the Wunderlich Act. In fact, the Court discusses with apparent approval past and present efforts to develop standard clauses which would encourage an administrative rather than judicial remedy for what would otherwise be a breach of contract.[85] In addition, Contract Appeal Boards have developed doctrines which afford a contractor administrative relief for many types of Government conduct which

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[83] It is often argued, for example, that the failure to order a change and grant an equitable adjustment, when a change in fact has been required by the contracting officer, constitutes a breach of contract. In some instances, the boards have ordered the contracting officer to make the adjustment, treating the requirement of the contracting officer as a constructive change. E.g., Noonan Constr. Co., 1963 B.C.A. ¶ 3638 (ASBCA); Aero Serv. Corp., 1958-1 B.C.A. ¶ 1683 (ASBCA). The Court of Claims has treated similar claims as a change or a changed condition and granted an equitable adjustment. E.g., Jack Stone Co. v. United States, 170 Ct. Cl. 281, 344 F.2d 370 (1965); E. H. Sales, Inc. v. United States, 169 Ct. Cl. 269, 340 F.2d 358 (1965); Hoffman v. United States, 166 Ct. Cl. 39, 340 F.2d 645 (1964); Globe Indem. Co. v. United States, 102 Ct. Cl. 21 (1944), cert. denied, 324 U.S. 852 (1945). See generally Leventhal, Public Contracts and Administrative Law, 52 A.B.A.J. 35 (1966); Spector, An Analysis of the Standard "Changes" Clause, 25 Fed. B.J. 177 (1965).

[84] These clauses include: "Changes"; "Changed Conditions"; "Suspension of Work"; "Government-Furnished Property"; "Delay-Damages"; "Termination for Convenience." The net result of these clauses is a diminishing number of claims that are not considered to arise under the contract.

[85] 384 U.S. at 417-18. There was a "suspension of work" clause in the Utah contract, but apparently the contractor and the AEC Advisory Board on Contract Appeals considered that the clause had no application to any of the claims presented. That clause, however, authorizes the contracting officer to pay the costs incurred by the contractor as a result of delays caused by the Government. Only Judge Cowen, concurring in the Court of Claims' opinion, noted that a decision as to the application of that clause might have an important bearing on the questions to be decided. He stated that since only the Commissioner's order was being reviewed, "this case in its present posture [does not present] . . . the proper vehicle for laying down hard and fast rules to resolve all of the important issues urged upon us by the parties." 168 Ct. Cl. at 536-37, 339 F.2d at 615.

could be considered a breach of contract.[86] With some exceptions,[87] however, the boards have usually refused to grant relief on "pure" breach of contract claims.[88]

The fact that the boards have continued to recognize the dichotomy between administrative relief and breach of contract relief for certain claims contributes to the existing problem. There are several reasons why they decide that certain claims are not subject to administrative determination.

The instances in which boards most often say they have no jurisdiction to grant monetary relief are claims for unliquidated damages due to delay caused by the Government. The refusal of boards to grant such relief is primarily a reflection of what is known as the "*Rice* doctrine," which developed from several Supreme Court decisions.[89] The doctrine has been stated as follows:

> For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made . . . . [W]ithout any such provision he must be held to have taken the risk of the prices of the labor and materials which he was bound to furnish, as every other contractor does who agrees to do a specified job at a fixed price. It is one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices.[90]

Although there is great variance in the administrative application of the *Rice* doctrine, the majority of the board decisions have cited it as a basis for refusing to allow damages for delay caused by the Government.[91] The Court of Claims, on the other hand, has construed

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[86] See Cuneo and Crowell, Parallel Jurisdiction: If the Court of Claims Can, Why Not the Administrative Boards? 33 Fordham L. Rev. 137 (1964).

[87] The National Aeronautics and Space Administration Board of Contract Appeals apparently asserts jurisdiction over certain claims for breach of contract. Doyle & Russell, Inc., NASABCA No. 51, 1965-2 B.C.A. ¶ 4912. See Fick Foundry Co., AECBCA No. 10, 1965-2 B.C.A. ¶ 5052.

[88] See, e.g., Metrig Corp., ASBCA No. 8455, 1963 B.C.A. ¶ 3658; Simmel-Industrie Meccanchie Societa per Azioni, ASBCA No. 6141, 1961-1 B.C.A. ¶ 2917.

[89] United States v. Howard P. Foley Co., 329 U.S. 64 (1946); United States v. Blair, 321 U.S. 730 (1944); United States v. Rice, 317 U.S. 61 (1942); H. E. Crook Co. v. United States, 270 U.S. 4 (1926); Chouteau v. United States 95 U.S. 61 (1877).

[90] Id. at 68.

[91] See, e.g., Electronic & Missile Facilities, Inc., ASBCA No. 9866, 1966-1 B.C.A. ¶ 5307; Model Eng'r & Mfg. Corp., ASBCA No. 7490, 1962 B.C.A. ¶ 3363; Craig Instruments Corp., ASBCA No 6385, 1961-1 B.C.A. ¶ 2875. Compare A. L. Harding, Inc., DCAB No. PR-44, 1965-2 B.C.A. ¶ 5261; Northeastern Eng'r Inc., ASBCA No. 5732, 1961-1 B.C.A. ¶ 3026.

the doctrine to present no obstacle when relief is sought in that court.[92] In any event, the *Rice* doctrine is based upon an interpretation of language used in contract clauses,[93] and it need not be a basis for limitations on administrative jurisdiction over delay claims.[94]

Another reason why boards refuse to consider pure breach of contract claims is their fear that the agencies may lack authority to pay such claims should they favorably decide them. The Supreme Court has held that the general authority of executive departments to enter into and administer contracts includes the authority to settle and pay claims for breach of contract.[95] The Court of Claims, in recent decisions, has also held that executive departments have general authority to settle claims for breach of contract.[96] The Comptroller General of the United States, however, has taken the position that his office has sole authority to settle claims for breach of contract.[97]

The role of the General Accounting Office in contract disputes is not always understood. Under the Budget and Accounting Act of 1921[98] and the Budget and Accounting Procedures Act of 1950,[99] the Comptroller General of the United States, as head of the General Accounting Office and an agent of Congress, has authority to examine and audit the financial transactions of the Government. Section 305 of the 1921 act provides that all claims and demands by or against the Government and all accounts in which the Government is interested either as a debtor or creditor shall be settled and adjusted in the Gen-

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[92] See, e.g., J. D. Hedin Constr. Co. v. United States, 347 F.2d 235 (Ct. Cl. 1965); F. H. McGraw & Co. v. United States, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

In one recent decision, the court said:

> Time and events have somewhat eroded the much-maligned doctrine of United States v. Rice, 317 U.S. 61 (1942) . . . but even granting its continued health and vitality its restriction of a contractor to a mere time extension as full contract payment for the financial consequences of reasonable delay flowing from a change order does not apply to preclude monetary damages for that part of a delay found to be unreasonable.

Gardner Displays Co. v. United States, 346 F.2d 585, 588-89 (Ct. Cl. 1965).

[93] See United States v. Rice, supra note 89, at 66.

[94] See Clark, Government Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses, 22 Military L. Rev. 1 (1963); Shedd, The Rice Doctrine and the Ripple Effects of Changes, 32 Geo. Wash. L. Rev. 62 (1963); Speck, Delays-Damages on Government Contracts: Constructive Conditions and Administrative Remedies, 26 Geo. Wash. L. Rev. 505 (1958). The General Services Administration has recently coordinated an interagency study which, among other things, recommends contract clause changes to alleviate the impact of the *Rice* doctrine.

[95] United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875).

[96] E.g., Brock & Blevins Co. v. United States, 170 Ct. Cl. 52, 343 F.2d 951 (1965).

[97] 44 Decs. Comp. Gen. 353 (1965). In this opinion, the Comptroller General relied on the decision of the Court of Claims in Utah Constr. & Mining Co. v. United States, 168 Ct. Cl. 522, 339 F.2d 606 (1964).

[98] Ch. 18, 42 Stat. 20 (1921) (codified in scattered sections of 31 U.S.C.).

[99] Ch. 946, 64 Stat. 832 (1950) (codified in scattered sections of 16, 24, 31, 39 U.S.C.).

eral Accounting Office.[100] Section 304 of the same act authorizes disbursing offices, and the heads of departments and establishments, to apply to the Comptroller General for a decision on any question involving a payment to be made by them or under their authority. The provisions of 31 U.S.C. § 81 authorize certifying officers to obtain a decision of the Comptroller General on any question of law involved in the payment on any vouchers presented to them for certification.

There are apparently two practical reasons why the General Accounting Office feels that its rules against administrative settlement of breach of contract claims are necessary and proper to protect the Government's interest.[101] First, whether there has been an actionable breach on the part of the Government is an unusually difficult question. Second, the procedure provided for administrative settlement is inadequate, since such claims must be settled under the disputes procedure which is a "one-way street" in that it protects only the rights of the contractors.

In view of the authority which the General Accounting Office may exercise, its opinion that there is no administrative authority to settle breach of contract claims certainly would not encourage boards to expand their jurisdiction into that area.

Government contracts typically contain several standard clauses that permit the Government to take certain action which would otherwise be a breach of contract. These clauses explicitly authorize the contracting officer to make an equitable adjustment with the contractor. No one has questioned the right of the agencies to enter into contracts with such clauses. It would therefore appear that contracting agencies have the authority to grant relief from a breach of contract by the Government. In any event, there should be administrative jurisdiction to make factual determinations in these breach of contract matters, and if there is any question as to the agency's authority to pay, the case can be referred to the General Accounting Office for resolution on the basis of the administrative findings.

Another possible source of confusion is the failure of some boards, despite the broad scope of their charters, to recognize that jurisdiction and finality are separate and distinct matters.[102] The standards of review set out in the Wunderlich Act and incorporated into the disputes clause have nothing to do with administrative jurisdiction. These

[100] When the Department of Justice assumes responsibility for the defense of a suit, it has the unquestioned authority to settle the case. See Exec. Order No. 6166 (June 10, 1933).

[101] Address by J. E. Welch, Deputy General Counsel, General Accounting Office, before Government Contracts Committee, District of Columbia Bar Association, Jan. 13, 1966.

[102] See Joy, The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions, 25 Fordham L. Rev. 11, 20-22 (1956).

standards concern only the *degree of finality to be accorded a board's findings*. Administrative decisions on questions of law are permitted where necessary for the complete adjudication of the issue.[103]

Administrative Due Process. The Administrative Procedure Act[104] does not apply to disputes procedures and there is no government-wide standard for administrative due process in these proceedings. The legislative history of the Wunderlich Act indicates that one of the reasons for including the standard "not supported by substantial evidence" was to encourage improvement in administrative proceedings under the disputes clause.[105]

Many of the Boards of Contract Appeals have published detailed rules of procedure. Despite the apparent adequacy of these procedures, they have been challenged by the Court of Claims. In its *Utah* holding,[106] the court emphasized that

> . . . neither the contracting officer nor the head of the department, or his representative, is a judicial tribunal created by Act of Congress; they derive their authority solely from the contract between the parties, and their authority is limited by the terms of the contract . . . .
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> . . . .
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> [T]here is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to agree to accept the contract drawn by the Government . . . . An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms.[107]

This lack of government-wide standards to assure administrative due process in disputes cases may have been another reason for the court's efforts to provide de novo judicial trials in many cases.

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[103] See, e.g., Morrison-Knudson Co. v. United States, supra note 74. See generally Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959); Spector, "Law" Is Where You Find It, or "Fact" Is in the Eyes of the Beholder, 19 Fed. B.J. 212 (1959).

[104] 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1964). Rulemaking in the field of government contracts is specifically exempted from section 1003 of the act; section 1004 of that act, covering adjudication, does not apply because there is no separate statute invoking it.

[105] H.R. Rep. No. 1380, 83d Cong., 2d Sess. 4-5 (1954).

[106] Utah Constr. Co. v. United States, supra note 97.

[107] Id. at 528-30, 339 F.2d at 611-12.

VII. Possible Solutions and Some Specific Suggestions

A. *Some Points of Departure*

In view of the differences of opinion concerning the extent to which the disputes clause authorizes Government agencies to make binding determinations of fact, and the diverse interests which are affected, it should be recognized that anyone suggesting changes in this area may be engaged in a "dangerous game."[108] The general situation examined in this article suggests the need for consideration of revisions in the present system that would be beneficial to all parties. The fundamental principles guiding any change should be: (1) the preservation of the basic objectives of the disputes procedure—the resolution of the dispute at *one* trial in which administrative due process affords a fair determination of the issues involved; and, (2) the maintenance of the necessary safeguard of judicial review.

Others have suggested changes ranging from abolition of the present system to a continuation of the *status quo*, with increased action by the boards themselves to achieve their own parallel jurisdiction with the Court of Claims.[109]

B. *Current Congressional Study*

The United States Senate Select Committee on Small Business, through its Subcommittee on Government Procurement, conducted a recently published study of the effectiveness of contract appeals procedures.[110]

Among other things, the congressional study focused on the

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[108] See Spector, Is It "Bianchi's Ghost"—or "Much Ado About Nothing," 29 Law & Contemp. Prob. 87, 114 (1964).

[109] See, e.g., Note, Government Contracts Disputes: An Institutional Approach, 73 Yale L.J. 1408, 1454 (1964). One proposal made in this note would abolish appeals boards' and Court of Claims' jurisdiction, and substitute a hearing officer and an appellate court unaffiliated with any department or agency.

It has been argued that administrative boards can now, without anything being done, assume parallel jurisdiction with the Court of Claims. Cuneo and Crowell, supra note 86. Also, legislation has been proposed in the House of Representatives, H.R. 8402, 89th Cong., 2d Sess. (1966), which would overcome the effects of the *Bianchi* case by providing that "no provision of any contract entered into by the United States . . . shall serve to limit in any manner any judicial proceeding in a court of competent jurisdiction relating to" a dispute arising under a contract.

[110] Operation and Effectiveness of Government Boards of Contract Appeals, S. Doc. No. 89, 89th Cong., 2d Sess. (1966) [hereinafter cited as S. Doc. No. 89]. The study was under the direction of Professor Harold C. Petrowitz of the Washington College of Law of American University. The Subcommittee held hearings on March 8 and 9, 1966, at which witnesses from both inside and outside the Government gave their recommendations on steps needed to improve the disputes procedure. Hearings Before a Subcommittee on the Operation and Effectiveness of Government Boards of Contract Appeals of the Senate Select Committee on Small Business, 89th Cong., 2d Sess. (1966).

amount of responsibility that should be entrusted to an administrative body engaged in adjudication. The composition of boards, and the procedures followed by them, were examined to see whether parties are afforded a fair and complete hearing and whether an adequate case record is developed for judicial review.[111]

In general, witnesses appearing before the subcommittee indicated that boards of contract appeals have been functioning well, as judged by the quality of the hearings conducted and the decisions rendered. Witnesses urged that board hearings be consistent with administrative due process. In this regard, several suggestions were made: board members should not be associated with the agency's General Counsel; boards should be given the authority to issue subpoenas; reasonable discovery proceedings should be available to the parties as a matter of right; efforts should be made to have the rules of the various boards of contract appeals made more uniform; and boards should adopt a rule of procedure, similar to that contained in Rule 52 of the Federal Rules of Civil Procedure, which requires that all facts be found specially and be stated clearly and succinctly. The testimony of most witnesses confirmed that the *Bianchi* decision has done much to alert both contractors and the Government to the importance of disputes procedures.[112]

The report of the investigating staff, after comprehensive survey of government officials and private contractors, concluded that existing boards are "doing a pretty good job and that appeals are handled with reasonable fairness."[113]

The study recommended certain procedural changes in the existing board structure.[114] These relatively minor changes concerned board composition, methods of recruiting and compensating board members, and procedures for handling appeals and discovery. The only recommended change that would require statutory authorization is the granting of the subpoena power to the boards.[115] The study considered and rejected both a transitional and a statutory approach which could result in an entirely new administrative structure.[116]

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111 Remarks by Senator Montoya, Chairman, Senate Select Committee on Small Business, at Opening of Hearings, March 8, 1966.

112 The most far-reaching recommendations were offered by the General Accounting Office whose representative said that his office would support legislation designed to: replace the present appeals boards with two or three government-wide boards; have board members appointed by the Civil Service Commission rather than by the contracting agencies; and provide for a right of appeal on behalf of the Government. See also Note, Bianchi, The Court of Claims, and Trial De Novo, 54 Geo. L.J. 644 (1966).

113 S. Doc. No. 89 at 131.

114 Id. at 147.

115 Id. at 156.

116 Id. at 147.

C. *Some Specific Suggestions*

It is submitted that implementation of the following proposals will substantially improve the established system for the orderly resolution of contract disputes.

1. *Expand the Contractual Basis for Administrative Determination and Relief.* The disputes procedure apparently has been accepted by contractors, and there has been no significant criticism of the process. Approximately 1000 cases are handled annually under the disputes procedure, but only a small percentage of these are appealed administratively, and an even smaller percentage reach the courts. The problems discussed in this article arise primarily in litigation, and this results in comparatively few cases. Since the disputes procedure has apparently served its function well, it should be preserved and improved as necessary to protect the interest of both the Government and the contractor.

The fragmentation of remedies problem could be avoided, at least to the extent practical, if the Government and the contractor initially agreed to resolve all factual issues, including those relating to breach of contract, through the disputes machinery. An administrative trial has an undeniable advantage in timing, and increases the possibility of settlement. Issues will be heard sooner, so witnesses should be able to recall facts more clearly than if their testimony had to be delayed until a full judicial trial.

It was suggested earlier in this article[117] that the differentiation between administrative relief and breach of contract relief may be a reason for the attitude of the Court of Claims toward de novo hearings. In order to minimize this dichotomy, government contracts should include clauses clearly committing to administrative jurisdiction the resolution of all disputes connected with the contract, subject of course to judicial review under the Wunderlich Act. This modification would permit administrative settlement of many disputes which must now be heard at the court level.

This recommendation can be accomplished by: revising the "changed conditions" and "changes" clauses so that they clearly provide a contractual basis for the payment of damages resulting from government-caused delays; including a "suspension of work" clause in all contracts; and developing other clauses which may be needed to provide a contractual basis for complete administrative relief. To ensure full implementation of the objective—administrative resolution of contract claims—the disputes clause itself should be revised to eliminate any ambiguity regarding the scope of administrative jurisdiction. One alternative would be the removal of the phrase "con-

[117] Supra p. 16.

cerning a question of fact arising under this contract." This would clarify the basis for administrative jurisdiction, yet not affect the finality rule as enunciated in the Wunderlich Act.

2. *Establish Guidelines for Administrative Due Process.* If there is to be but one administrative trial, there must be well-established guidelines to assure that it is a fair one. As was suggested earlier, the Court of Claims' apparent concern about inadequacies in the administrative decisional process may be a factor behind that court's preference for de novo trials.[118] In some situations a similar concern may influence the contractor whose claim fails before a contract appeals board. In other circumstances, an allegation of inadequate administrative processes may be merely a tactical maneuver used in presenting a claim to the court. These problems could be minimized by implementation of government-wide standards with respect to the creation, membership, and status of appeals boards, together with appropriate procedural guidelines assuring administrative due process in the conduct of disputes proceedings. Establishment of uniform rules to govern the boards, their membership, and status, would require careful study,[119] but the basic requirements for fair and complete administrative hearings have been developed in the Administrative Procedure Act.[120]

The foundation of the disputes procedure is—and should remain—the agreement of the parties to the contract. This should not, however, inhibit the adoption of the suggested rules and standards. Nor would such rules and standards need to be the subject of specific legislation, since the departments involved could themselves introduce the desired improvements. The boards could develop and institute some new procedures; the Court of Claims could furnish in its decisions guidelines for administrative due process; the Department of Justice could establish guidelines for agencies and departments to follow; and the General Services Administration could provide guidance through the Federal Procurement Regulations.[121]

A variation on these recommendations would be the creation of a completely separate contract appeals board for handling disputes under all government contracts, regardless of the agency involved. This might minimize some of the problems (real or fancied) associated

118 Supra p. 21. Although the Court of Claims has generally been critical of the administrative due process followed in disputes cases, it has dealt with the problem only rarely. One such instance occurred when the court adopted the Commissioner's opinion in Allen & Whalen, Inc. v. United States, 347 F.2d 992 (Ct. Cl. 1965). In this case, the court severely criticized the procedures followed by an appeals board. See Roberts v. United States, 357 F.2d 938 (Ct. Cl. 1966); Crowell & Anthony, supra note 80, at 132-33.

119 See the recommendations in S. Doc. No. 89, at 147-62.

120 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1964).

121 41 C.F.R. ch. 1 (1966).

with individual agency boards, and might accelerate implementation of the appropriate due process requirements. Such a consolidation, however, would pose other problems, and might well destroy the basic virtues of the disputes procedure by extending the decision time and removing the agency involved from direct participation in the disputes process. The general acceptability of existing procedures, considered in terms of decisions subsequently litigated, does not indicate the need for such a drastic departure from the present system.

3. *Clarify the Function of Judicial Review of Administrative Decisions.* Giving an agency full authority to decide disputes administratively should resolve many of the existing jurisdictional problems which have resulted in unnecessarily duplicative trials. If the administrative trial is to be at all conclusive, the reviewing court must act in an appellate capacity and not as a court of original jurisdiction. An appellate proceeding is designed to correct errors made in the court below and not to review generally the entire case. The appellate court must make its decision based on the "record," without considering new facts, and without imposing its own judgment on conflicting evidence reasonably resolved by the tribunal below.[122]

Obviously a court of review should not be unconditionally limited to "a frozen record from below"[123] when a contractor alleges fraud on the part of the deciding body. If fraud is alleged, the administrative record is meaningless. If a contractor claims that a decision is capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, a court should not be limited to the record from below. However, a court should not completely ignore that record and commence a de novo trial. The court should require the contractor to apply for leave to adduce additional evidence and to establish to the satisfaction of the court that such additional evidence would be material to the allegations.

If a contractor alleges that the decision of the administrative tribunal is not supported by substantial evidence, the appellate court should be restricted to the "frozen record from below," since in deciding the question it would be acting solely in an appellate capacity.

As a corollary to broadening the authority of the agencies, the rules of practice of the Court of Claims should be revised to reflect the appellate nature of its review of agency decisions.[124] It would appear that the Court of Claims, under its broad rulemaking power,[125] could do this on its own initiative.

It is submitted that if these recommendations are implemented,

122 Llewellyn, The Common Law Tradition—Deciding Appeals 28 (1960).
123 Ibid.
124 See Crowell and Anthony, supra note 80, at 143-44.
125 28 U.S.C. § 2071 (1964).

the role of the appeals boards and of the courts in resolving disputes cases will be greatly clarified. This clarification should result in the more orderly disposition of disputes under government contracts, while retaining the objectives of the established procedure—a speedy but fair and complete administrative remedy which preserves the necessary safeguard of judicial review of the administrative record.