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The following articles on Government Contracts are based on addresses delivered at the Institute on "Some Practical Aspects of Government Construction Contract Law," sponsored by the Fordham University School of Law, in conjunction with the Federal Bar Association (Empire State Chapter), held at Fordham University on December 2, 1955.

Subsequent issues of the REVIEW will contain articles on the same subject.

The views expressed in these articles are those of the authors and do not necessarily express the views of any department of the Government.

CONTRACT PROCEDURES FOR OBTAINING ADDITIONAL COMPENSATION UNDER GOVERNMENT CONSTRUCTION CONTRACTS

THEODORE H. HAAS*

IN solving problems in the administration of contracts, members of two and sometimes three ancient and honorable professions must constantly combine their special skills. A familiar illustration of this is the handling of contract problems that arise in Government construction projects, where Law, Engineering and Architecture meet. The contribution of lawyers to public works are not carved in concrete or stone; their decisions often gather dust in law libraries. Yet, without contracts, statutes, rules, and courts, there would be no public buildings, no public dams, and no public works.

I. THE IMPORTANCE OF LAWYERS AND PROCEDURE IN CONTRACT ADMINISTRATION

Many laymen, including some contractors, regard administrative and judicial rules of procedure as too technical and as a cause of unnecessary red tape and paper work as well as expense and delay. Their denunciations are vehement when by failing to follow certain procedural requirements of a contract, or a Government agency's rules and regulations, they lose basic substantive rights, often costing them thousands of dollars. Examples of such failures are neglect to file a written protest with-

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in the time specified by the contract,¹ or a timely written appeal from the findings of fact and decision of the contracting officer,² or the signing of a full release without stating exceptions and accepting final payment under a contract.³ A great majority of the contract claims denied by Government officials and by the courts have not been denied on their merits but because there had not been appeals and protests as contemplated and required by the terms of the contract. Moreover, less than ten per cent of claims are appealed. The remainder are won or lost in negotiations with the project engineer or the contracting officer.

In many cases, if the contractor had retained competent and experienced counsel, the consequent losses might not have occurred. However, one caveat must be added: when a claim involves a sizeable sum, the contractor should consult counsel, *at an early stage*. It is most important that he be on hand prior to or at least as soon as a dispute arises.

Lawyers by their training are better equipped than laymen to know what types of claims should be allowed and how best to develop sound claims. Hence, contractors should not wait until it is necessary to appeal to an administrative board or to institute judicial proceedings before consulting counsel. It should be noted also that lawyers usually have the last word in a contract dispute, whether they are advisors of the contractor, members of a contract appeal board, commissioners, or members of the Court of Claims⁴ or even where a final appeal is made to the Congress for a private relief law.⁵ Adjudicative administrative proceedings involving complicated legal and engineering questions of law and fact require the professional ability of lawyers fully as much as judicial proceedings.

Able counsel realize that definite, orderly, and simplified rules of procedure, clearly and accurately reflecting actual practices, are essential to the proper administration of justice.⁶ Economy in Federal Govern-

1. *United States v. Madsen Constr. Co.*, 139 F. 2d 613, 615-16 (6th Cir. 1943). If the contracting officer considers a claim involving a question of fact or of mixed fact and law, he cannot invoke the requirement of timely protest to disallow a claim. *R. P. Shea Co.*, IBCA-37 (1955).

2. *Mac Exploration Co.*, 61 I.D. 237, 243-44 (1953).

3. *Shepherd v. United States*, 125 Ct. Cl. 724, 113 F. Supp. 648 (1953). This rule is inapplicable if economic duress is present when the release is signed. *Fruhauf Southwest Garment Co. v. United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953).

4. The Federal District Court has concurrent jurisdiction for contract claims not exceeding \$10,000 Act of March 3, 1911, 36 Stat. 1093, 28 U.S.C.A. § 1346(2) (latest amendment, 1949).

5. The judgment of legal members on such questions is usually decisive in committees. For the importance of counsel in criminal cases, see *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

6. Legal Services and Procedures, Committee on Organization in the Executive Branch of the Government, A Report to the Congress, 46, March 1955.

ment operations through improvements in legal procedures is an end earnestly sought, but procedural safeguards cannot be sacrificed for the sake of economy or expediency. "The history of liberty," Mr. Justice Felix Frankfurter stated in *McNabb v. United States*,⁷ "has largely been the history of observation of procedural safeguards." The same aphorism is applicable to the protection of property rights, including contractual rights.

Administrative procedures provided in Government rules and standard contract forms are the result of the need for economy, celerity, flexibility, and efficiency in the resolution of contract disputes. The ability of administrative proceedings to solve litigious issues without forensics has caused the administrative process to be stigmatized by some lawyers, who keep insisting that they want to try a case in court. Some jurists, like Justice Cardozo, believe that activities of Government which are not the immediate province of the courts ought not be circumscribed by formalities historically appropriate to the courts.⁸ James M. Landis feels that one of the purposes sought to be satisfied by the invention of administrative agencies was the avoidance of procedures dominated by stringent rules of evidence and pleadings.⁹

II. COMPLIANCE WITH THE CONTRACT

Having stressed the importance of experienced lawyers and sound procedures in contract administration, what steps should be taken by a contractor to protect himself in the event that he has a claim under the standard form of Government construction contracts?

A cardinal rule is that the provisions of the contract and specifications should be carefully studied, and any procedural requirements, such as the giving of written notice of excusable delay, should be scrupulously observed.

There are times when the court will overlook technical failures such as slight deviations from certain provisions of the contract, in order to avoid what the court believes would be an injustice. In such cases some judges will seek a way to justify a decision for the contractor even though a strict construction of the contractual provisions would require a different result. For example, if a notice which under the contract must be given to the contracting officer is orally given to a resident engineer, the courts will often regard the notice as properly given.¹⁰ Moreover, it has

7. 318 U.S. 332, 347 (1943).

8. Frankfurter, Cardozo and Public Law, 52 Harv. L. Rev. 440, 459 (1939).

9. The Development of the Administrative Commission, an address quoted in Gellhorn, *Administrative Law: Cases and Comments* 7 (2d ed., 1947).

10. See *Shepherd v. United States*, 125 Ct. Cl. 724, 731, 113 F. Supp. 648, 651 (1953).

been held that failure to comply with some procedural requirements may be waived by the contracting officer.¹¹

Nevertheless, it is always much easier for a lawyer to win a case before an administrative board or a court if the contractor has complied with the letter of the contract. Hence, a good rule for the contractor is to attempt to comply strictly with provisions for notice to the contracting officer. Even if he has named an authorized representative for some purposes, the contracting officer himself should be sent a duplicate of such written notice.

III. AUTHORITY OF OFFICIALS

Most Government agencies hold a conference with the successful bidder shortly after the award of the contract. In this informal conference the contracting officer and his chief aides on the construction project go over the contract, specifications and drawings with the contractor and his chief aides. If the contracting officer is to have an authorized representative on the job, such as a construction engineer, this representative is usually present and the written evidence of his authority is given to the contractor. The limitations of such authorizations as well as the limitations on the authority of the contracting officer should be carefully scrutinized. For instance, in the old form No. 23 the contracting officer's authority to approve alterations of the contract was limited, and changes exceeding a certain amount required the written approval of the head of the Government bureau or department.

There is considerable variation among federal agencies as to the extent of the authority of the local officer in charge. Generally the construction engineer is designated as the contracting officer's representative and is given considerable authority to make decisions necessary to prevent delay in the work. He is, however, subject to the general supervision of the contracting officer, who usually retains authority for major decisions such as change orders. The construction engineer is required to keep the contracting officer informed by telephone and correspondence of the instructions which he issues.

Careful note should be made by the contractor of the authority of each contracting officer, and his authorized representative or representatives, including the construction engineer, and any changes of such authority which might be made during the course of the work.¹²

Government inspectors, like the construction engineer, are usually resident on the job. The inspectors generally work under the direction

11. R. P. Shea Co., IBCA-37 (Nov. 28, 1955).

12. Sometimes the construction engineer supervises several projects and the chief engineer for the job is called a project or resident engineer.

of the construction or project engineer and do not have any final authority. Frequently, when approving some work before final acceptance by the contracting officer, the engineer may condition his approval, "subject to all contract requirements," or "subject to the approval of the contracting officer." In case of a subsequent dispute involving this phase of the work, such provisos will be stressed.¹³ It should never be forgotten that generally the contractor must show that the representative of the Government, on whose order he relied, was acting within his authority.¹⁴

IV. THE CONTRACTING OFFICER'S HEARING

In almost every large construction job, at one time or another, a serious dispute arises between the contracting officer and the contractor. The number of disputes usually is increased if the contract turns out to be unprofitable. However, differences of opinion regarding contractual obligations or the quality of performance or other matters are almost certain to arise in any event. If agreement cannot be reached after conferences with the authorized representative of the contracting officer, a conference, sometimes called a hearing, with the contracting officer is generally sought by the contractor. In the past most Government agencies preferred to wait until the completion of construction before requiring contracting officers to pass on the disputes. For example, in the General Services Administration contracts, the contractor is notified of such a practice. However, under unusual circumstances, many agencies will allow a conference with the contracting officer before the completion of the contract. Recently several federal agencies have agreed to determine the disputes with contracting officers more expeditiously.

Prior to the conference the contracting officer usually has had the advice of at least one counsel, who normally is an expert in Government contract law. If the contractor is an astute business man, he will be

13. Roel Construction Co., Corps of Engineers, C & A 866 (1955).

14. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941); Sutton v. United States, 256 U.S. 575 (1921); The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 676 (1868); Whiteside v. United States, 93 U.S. 247, 257 (1876); United States v. Willis, 164 F. 2d 453 (4th Cir. 1947); Nuss v. United States, 127 Ct. Cl. 197, 117 F. Supp. 413 (1954); Mock v. United States, 183 F. 2d 174 (10th Cir. 1950); Continental Illinois Nat. Bank & Trust Co. of Chicago v. United States, 126 Ct. Cl. 631, 115 F. Supp. 892 (1953); Curtis v. United States, 2 Ct. Cl. 144 (1866); S. J. Groves & Sons Co., IBCA-8, 62 I.D. 145, 6 CCF ¶ 61, 649 (1955); 18 Comp. Gen. 114 (1938); Ryal Engineering Co., IBCA-1, 62 I.D. 118, 6 CCF ¶ 61, 639 (1955); Pugsley, IBCA-5, 62 I.D. 54, 6 CCF ¶ 61, 622 (1955); Campbell Construction & Equipment Co., IBCA-2, 62 I.D. 6, 6 CCF ¶ 61, 625 (1955); Brown, The Responsibilities, Functions and Duties of a Contracting Officer, 12 Fed. B.J. 236 (1952).

similarly represented, especially if the claim or claims involve a sizeable amount. As a rule, a claim from a contractor for additional compensation is not fully stated initially, and the Government lawyers help the engineers draft letters seeking additional data in order to obtain a full and precise statement of each claim. In this way the basis and amount of each claim can be ascertained. At the hearing both principals are generally flanked by their project engineers, inspectors, and other aides. Often the contractor is also accompanied by his office manager or an accountant to substantiate the reasonableness of the claims. If a subcontractor is involved in the dispute he will usually be present. However, in most agencies, the subcontractor can only act through the prime contractor because he has no privity of contract with the Government.¹⁵

Frequently, the Government lawyer plays an important role in the meeting by answering some of the questions on behalf of the Government and generally seeing that the Government's position is presented in the most favorable light. However, in some Government agencies, the Government counsel may absent himself from the hearing before the contracting officer, if the contractor is not represented at the conference by counsel.¹⁶ Often counsel for both parties do not attend the hearing but advise the parties before the meeting and by telephone calls during the meeting. These hearings may last several hours or days and are usually held in the office of the contracting officer. Sometimes, however, they take place at the site of the work.

Despite the conflict a friendly atmosphere frequently prevails among the conferees. Though on opposite sides of the controversy, the contractor's superintendent, for example, may ask the project engineer for factual information requested by the contracting officer. Interrogation of representatives of one side by the other is common throughout the conference. There is no limitation placed on the number of such questions. If lawyers are present they may occasionally interpose answers to questions addressed to the contracting officer, engineers or inspectors, or give instructions on how questions should be answered.

In order to retain a very informal atmosphere and encourage a free and open exchange of views, no one is under oath and no minutes of the meeting are usually taken by either party. Any notes taken may become the basis for a memorandum summarizing the conference for the files of the Government or of the contractor.

After the contractor's representatives present a claim and the Gov-

15. One exception is the Atomic Energy Commission which by contract permits the subcontractor to present a claim in his own name. 10 CFR 3.3(c).

16. This is the practice of the Office of the Regional Solicitor, Denver Region, Department of the Interior, which represents the Chief Engineer, Reclamation Bureau, in contract disputes.

ernment representatives state their objections, an agreement is sometimes hammered out. Such agreement is somewhat akin to a settlement, though it is not strictly such since administrative officials cannot grant extra-contractual relief. The contracting officer may ask for additional time to consider a claim because certain facts brought out at the hearing change his original conception of the problem.

V. PREPARATION FOR APPEAL

If the contractor is not satisfied with the results of the conference, he should request that written findings of fact and decision be prepared. Such findings and decisions are sometimes issued as a trial balloon and are supplemented or amended as a result of the contractor's objections. There is often considerable disparity between the type of findings of fact prepared by an agency engaged in large complex construction projects, such as the Army Engineers or the Bureau of Reclamation, and other agencies. The former prepare detailed findings of fact and decisions to which supporting exhibits are frequently appended. Other agencies may simply issue a brief letter decision.

Although the initial drafts of such findings of fact and decisions are usually made by engineers who specialize in contract administration, lawyers are frequently consulted prior to and during their drafting. The extent of the lawyers' participation varies with the attitude of the administrators of an agency toward lawyers and the number and ability of available lawyers. The attorneys are responsible for seeing that administrative policies are followed and that legal and factual findings are adequately and accurately spelled out. They review the file in order to ascertain whether the proposed findings contain all the essential facts necessary for a legal determination of the issues. Factual data is obtained from the Government construction engineer and inspectors, who are frequently consulted for their views. Sometimes, the lawyers and engineers preparing the draft of the findings of fact will visit the site and discuss the issues with field personnel of the Government and the contractor to obtain information firsthand and to examine project records. They are also assisted in large construction jobs by liaison engineers of the contracting officer who have made reports to the contracting officer as the work progresses, based on personal observations. By discussions with engineers, the lawyers gain an understanding of construction methods employed and technical and engineering data, which may have an important bearing on the legal issues. If the findings involve principally questions of law they will almost always be prepared in the first instance jointly by a lawyer and an engineer who advises on the technical and engineering aspects of the specifications, drawings or plans. In such

cases the final decision is left to the lawyer, though in some instances the administrators may not be pleased with the result. However, the findings of fact and decision are those of the contracting officer who has the duty of using his knowledge and judgment before he signs them.¹⁷

If the claim involves a breach of contract by the Government of an express or implied condition, or in other words, a claim in the nature of unliquidated damages, an administrative official cannot decide the issue,¹⁸ and no findings of fact need be prepared by the contracting officer.¹⁹ A letter to that effect is sent to the claimant. Contracting officers of the Defense Department, however, prepare findings of fact in such cases, which may be appealed to the Armed Services Board of Contract Appeals. This Board under its charter has authority to review findings of fact in such cases but not to pass on questions of the Government's liability.²⁰

Performance of Work Pending Appeal

In any case of disagreement, whether the contractor considers the work demanded of him to be outside the requirements of the contract, or the ruling of the contracting officer or inspectors as to the amount of an equitable adjustment to be unfair, he should immediately file a written protest and ask for written instructions, along with findings of fact and decision. Upon receipt thereof he should file a written appeal to the head of the department through the contracting officer.

If a disagreement exists as to whether certain work was an extra not required of the contractor, or as to the proper amount of payment for a change, the contractor should insist on a written order from the contracting officer or his authorized representative before beginning work. It is fruitless to contend subsequently that the contractor did not request a written order fearing he might impair relations with Government personnel. The issuance of a written order is required by the con-

17. For discussion of cases see Braucher note 20, *infra*, 495-96. See *John A. Johnson Contracting Corp. v. United States*, — Ct. Cl. —, 132 F. Supp. 698 (1955); *Livingston v. United States*, 101 Ct. Cl. 625 (1944); *John McShain Inc. v. United States*, 88 Ct. Cl. 284 (1939), modified in part 308 U.S. 512 (1939); *Penn Bridge Co. v. United States*, 59 Ct. Cl. 892 (1924); *Cable, The General Accounting Office and Finality of Decisions of Government Contracting Officers*, 27 N.Y.U.L. Rev. 780-91 (1952).

18. *Cramp v. United States*, 216 U.S. 494, 500 (1910); *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. United States*, 126 Ct. Cl. 631, 640, 115 F. Supp. 892, 897 (1953); *R. P. Shea Co., IBCA-37* (1955); *Carson Construction Co., IBCA-12*, 62 I.D. 311, 6 CCF ¶ 61, 693 (1955); *Tungsten Metals Corp., ASBCA 2256* (1954).

19. Contractual provisions often authorize additional compensation, which may be liquidated in amount by agreement, unilateral determination or by appeal.

20. Braucher, *Arbitration Under Government Contracts*, 17 *Law & Contemp. Prob.* 473, 493-94 (1952). Only the Comptroller General or the courts can reform contracts or grant equitable relief.

tract,²¹ and the authority of certain boards to order the issuance of a change order by the contracting officer in proper cases²² will not be exercised if the work was voluntarily undertaken.²³ Once a written order is issued by an authorized officer the change or extra work should be performed even though a satisfactory equitable adjustment has not been effected.

Notice of Appeal

The time in which the findings of fact and decision are issued varies considerably. Some agencies try to issue both these papers simultaneously, or at least issue the findings of fact within a brief and definite period after the issuance of the decision. The contractor who feels aggrieved should file a written notice of appeal, setting forth the portion of the findings of fact from which he appeals and the basis for his appeal. This appeal is directed to the head of the department or his authorized representative which is usually a board.

Regulations, which are frequently sent to the contractor with the findings of fact,²⁴ prescribe the procedure. Often they contain the form for a notice of appeal, and provide that the notice shall be filed with a board directly or through the contracting officer, who then shall forward the notice and the appeal file to the board. This file is compiled by the contracting officer with the help of administrative and legal assistants. It consists usually of all the documents upon which the contracting officer has relied in making his findings of fact or decision, including the contract, specifications, plans, amendments, change orders, correspondence and other data pertinent to the appeal. The contractor may usually indicate the reasons for his appeal in the notice of appeal, or if he prefers, in a subsequent memorandum or brief.

21. Metalcraft Engineering Corp., ASBCA 1906 (1955); cf. Guthrie Electrical Construction Co., IBCA-22, 62 I.D. 280, 6 CCF ¶ 61, 687 (1955). A change order usually must be approved by the contracting officer. See § 12(a) General Conditions, Standard Form No. 23 (revised 1942). The new form is discussed in Gantt, *Selected Government Contract Problems, Construction Standard Forms, "Mistakes in Bids," Revisited*, 14 Fed. B.J. 383 (1954). Frequently a letter is sent to the contractor directing him to proceed with the work and stating that a formal order will be issued as soon as practicable.

22. Walter J. Harding, ASBCA 2477 (1955); Ryall Engineering Co., IBCA-1, 6 CCF ¶ 61, 639 (1955). See also *Globe Indemnity Co. v. United States*, 102 Ct. Cl. 21, cert. denied, 324 U.S. 852 (1944).

23. See also *Merchants Exc. Co. v. United States*, 15 Ct. Cl. 270 (1879); *Murphy v. United States*, 13 Ct. Cl. 372 (1877); *Kingsbury v. United States*, 1 Ct. Cl. 13 (1863).

24. This is the procedure with the Atomic Energy Commission. Some agencies, for example the Reclamation Bureau, remind the contractor of its right to appeal at the same time.

Appeals Boards

Each of the boards of contract appeals which hear construction contract disputes was created by administrative order without a statutory requirement. Under the disputes clause of the standard form of construction contract, a contractor is entitled to present his case de novo before the head of a Government department or his authorized representative. The first contract appeals board, known as the Army Board of Contract Appeals, was established by the War Department in 1942. The board was conceived by some representatives of the contractors and the Government during World War II.²⁵ The Report of the Select Committee on Small Business of the House of Representatives in 1950²⁶ helped stimulate the establishment of similar boards. In that year the Board of Review of the General Services Administration and the Atomic Energy Commission Advisory Board of Contract Appeals were established and the Army Board became part of an Armed Services Board. An Interior Board was established in December 1954. The National Advisory Committee for Aeronautics Board of Contract Appeals is the newest board of appeals for construction contract disputes. It was established on November 14, 1955. The Veterans Administration also has a construction appeals board, which is known as the Construction Contract Appeals Board.²⁷

Basis of Appellate Procedures

The appeal procedure in Government contract cases including the right to a hearing on disputes involving questions of fact before the head of the agency or his authorized representative is not based on the provisions of the Administrative Procedure Act.²⁸ Such appellate pro-

25. 9 Williston, Contracts §§ 228-43 (rev. ed. 1945); Smith, The War Department Board of Contract Appeals, 5 Fed. B.J. 74 (1943).

26. H.R. Rep. No. 1576, 81st Cong. 2d Sess. 13 (1950).

27. Rules for functioning of boards of appeals on construction contracts. In most cases the boards also determine appeals from disputes arising out of procurement contracts. Sometimes there is a separate board for such disputes. Armed Services Board of Contract Appeals, 32 CFR § 30.1, part II (1954), CCH Gov't Contracts Rep. ¶ 10, 721.01; General Services Administration Board of Review, CCH Gov't Contracts Rep. ¶ 10, 751; Interior Department Board of Contract Appeals, 43 CFR §§ 4.1-4.16; 1.1-1.7 (1954), CCH Gov't. Contracts Rep. ¶ 10, 765; Atomic Energy Commission Advisory Board of Contract Appeals, 10 CFR, part 80 (1949), CCH Gov't. Contracts Rep. ¶ 10, 761; Corps of Engineers Claims and Appeals Board, 33 CFR 210.4 (Supp. 1955) rev. 20 F.R. 4129; Veterans Administration Construction Contract Appeals Board, 38 CFR §§ 1.750-1.755 (Supp. 1955); National Advisory Committee for Aeronautics, Gen. Regs. No. 6, November 14, 1955. The Board of the Agriculture Department has little or no construction appeals. An Appeals Board of the Commerce Department determines several types of appeals, including appeals involving Public Roads Administration (Dept. Order No. 105 amended 1953).

28. 5 U.S.C.A. §§ 1001-11 (1949).

cedures are based on provisions of the contract and on rules promulgated by heads of Government agencies which usually authorize an appeal by the contractor to a board of appeals which is established by the head of the agency.²⁹

Moreover, the boards generally go beyond the limitation of the contractual provisions and determine not only questions of fact but also incidental questions of law.³⁰ The distinction between questions of law and questions of fact is arbitrary and most contract appeals involve mixed questions of law and fact.³¹

However, regardless of their origin, the administrative proceedings in most Government contract appeals follow in many particulars the requirements of the Administrative Procedure Act. Thus, although the board membership is not appointed from the list of examiners qualified under the act, the separation of the administrative judicial function from that of enforcement is generally observed.

Unlike some boards which are advisory,³² the Secretaries of Defense and Interior have each designated a departmental board as the final administrative tribunal for the determination of contract appeals.³³ The

29. Prior to 1921 each department of the Government had its own type of construction contract and there were also variations among bureaus within departments. From 1921 to 1926 an Inter-departmental Board in Contracts and Adjustments prepared standard construction form of contract No. 23, which became the form used in most Government construction contracts until it was revised in 1953. History and development of disputes article of Government construction contracts: *United States v. Moorman*, 338 U.S. 457 (1950); *United States v. Holpuch Co.*, 328 U.S. 234 (1946); *United States v. Beuttas*, 324 U.S. 768, 770 (1945); *Plumley v. United States*, 226 U.S. 545 (1913); *Kihlberg v. United States*, 97 U.S. 398 (1878); Anderson, *The Disputes Article in Government Contracts*, 44 Mich. L. Rev. 211 (1945); Braucher, *Arbitration Under Government Contracts*, op. cit. supra, 473, 486 et seq. (1952); Mulligan, *The Disputes Clause of the Government Construction Contract, Its Misconstruction*, 27 Notre Dame Law. 167 (1952); Cuneo, *Armed Services Board of Contract Appeals, Tyrant or Impartial Tribunal*, 39 A.B.A.J. 373 and 435 (1953); Spencer, *Power of Direction and Determination under Construction Contracts*, 41 Va. L. Rev. 343 (1955).

30. For practice in Navy Department see *Navy Contract Law*, Bureau of Naval Personnel 220 (1949). Also see General Services Administration Board of Review, *Appeal Procedure* Preface to Rules, ¶ 4, CCH Gov't Contract Reporter ¶ 10, 751.

31. For a view that the distinction between law and fact is not fixed see, Dickinson, *Administrative Justice and the Supremacy of Law* 52 (1927).

32. The G.S.A. Review Board may be specifically authorized to render decisions on appeals instead of making recommendations. *Appeal Procedure*, Preface to Rules, par. 5, CCH Gov't Contracts Reporter ¶ 10, 751.

33. The Corps of Engineers Board of Claims and Contract Appeals consists of eleven members. Other Boards are smaller in membership, the smallest having three members. The decision of the Corps of Engineers Board is final for disputes involving civilian contracts but it is an intermediate board for disputes involving military contract appeals. Though civilian contracts comprise less than fifty percent of the Board's cases, they amount

decisions of these boards are final and exhaust the administrative remedy of the contractor. This procedure must be followed before judicial action is initiated. The exceptions are the rare cases when only a question of law is involved in a dispute³⁴ or the frequent cases in which the boards clearly lack jurisdiction.³⁵ Each of these boards is independent of the controversy which they determine and have independent responsibility for their decision. Neither of them has been subject to pressure from within its department in the formulation of its decisions.

The Armed Services Board of Contract Appeals is an example of successful unification of the three armed services. Each service has its own panel. There are ten members on the Army panel, four members on the Navy panel, and three members on the Air Force panel. All seventeen members comprise the Armed Services Board of Contract Appeals. The President of the Board rotates annually, the Chairman of the Army, Navy, or Air Force panel taking turns in this post. A member of one panel may be assigned to another panel in order to equalize the work load but such assignments are rarely made. The members of the Armed Services Board are all lawyers, although some of them are military officers and some are civilians.

The Chairmen of the three panels rarely draft a decision. They are too busy reviewing the files of the decisions prepared by the other members of the panel. Usually two members of a panel will agree on a decision before it is presented to the Chairman for signature. If the Chairman of any panel is in doubt as to a decision presented by two members of his panel or signed by two or three members of another panel, he asks the full board of seventeen to pass on the appeal. In such a case, as a rule, each member merely indicates whether he concurs in or dissents from the decision. A dissenting opinion, is rarely written.³⁶

to over eighty percent of the dollar amount. The Armed Services Board of Contract Appeals constitutes its appellate court for military contractual disputes.

34. *United States v. Joseph A. Holhuch Co.*, 328 U.S. 234 (1946); *United States v. Blair*, 321 U.S. 730 (1944); *Etheridge*, *Appeals from Administrative Decisions in Government Contract Disputes*, 31 *Texas L. Rev.* 552 (1953).

35. For example, claims in the nature of unliquidated damages, *William Cramp & Sons v. United States*, 216 U.S. 494, 500 (1910); *Continental Illinois Nat'l Bank and Trust Co. of Chicago v. United States*, 126 Ct. Cl. 631, 640, 115 F. Supp. 892, 897 (1953); or for reformation of contract because of mutual mistakes or for other equitable relief, *L. D. Shilling Co.*, IBCA-23 (1955); 15 *Comp. Gen.* 240 (1935).

36. However, in the claim of *Great Lakes Dredge & Dock Co.*, Engineers C & A Board Decision No. 501 (1954), three joined in the minority opinion, against five in the majority. The Rules of the Contract Appeals of the National Advisory Committee for Aeronautics, established November 14, 1955, expressly provide for a minority opinion in NACA Regs. No. 6, § 7. Boards use dissents rarely, in part because if the dissent favors the appellant, it might be the basis for a suit in the courts. The Justice Department does not wish to be handicapped in its defense. It has been said that dissents should be reserved

The Interior Department Board of Contract Appeals consists of three members of the Solicitor's Office, one of whom is the Assistant Solicitor, Claims and Contract Appeals. There are four alternate engineer members, who may be designated by the Chairman to serve in place of the regular members. Such designation is rare. The rules provide that a majority of the Board may make a decision, but in practice a full Board usually acts on each appeal. The Board of the National Advisory Committee for Aeronautics, Defense Department, consists of the Committee's Legal Advisor and two ad hoc lawyers. Some of the regular members of several boards are engineers, or a member of another non-legal profession. Examples of boards so constituted include the General Services Administration Board of Review, the Corps of Engineers Claims and Appeals Board, and the Veterans Administration Construction Contract Appeals Board. The Atomic Energy Commission Advisory Board of Contract Appeals is composed of five scattered members, none of whom are regular employees. All of them are engaged primarily in private work, such as teaching at a law school, architecture, or business administration. Three are lawyers. The locations of these consultants are widely scattered, but a single member may be authorized to act for the Board. Thus in many instances the members of the boards, both in and out of the Government, perform other functions besides acting as administrative judges.

Who May Appear

The contractor may appear in person or be represented by counsel or any other authorized person not prohibited from appearing by the rules of the board in question. The boards neither appoint nor have supervision over the Government attorneys who appear on behalf of the contracting officer who represent the Government in the same way as a private counsel represents the contractor. While the board members are generally designated by the heads of these agencies, Government counsel are generally under the supervision of a general counsel of the agency. Thus there is a complete separation of functions between the Government attorney who serves as advisor to the contracting officer at the hearing before the contracting officer or as trial counsel at a board hearing and those who serve as administrative judges as members of ap-

for serious questions, for much of the power of objection is dissipated when exercised on trivial matters. Chief Justice Hughes felt that the minority opinion should be used with the utmost restraint. Hughes, *The Supreme Court of the United States*, 63 (1928); 1 Pusey, Charles Evans Hughes, 283 (1951). Justice William Johnson did much to originate the practice of free dissent in the Supreme Court. See Morgan, *Justice William Johnson* (1954). That Justice Harlan's dissents were important, see Abraham, *John Marshall Harlan, A Justice Neglected*, 41 *Va. L. Rev.* 871 (1955); Beth, *Justice Harlan and the Uses of Dissent*, 49 *Am. Pol. Sci. Rev.* 1085 (1955).

peal boards. This separation makes it more likely that the contractor will have his appeal decided by ". . . a body independent of the controversy . . . [so as to give him] protection against passionate obstinacy, irrational conduct and incompetency of an official."³⁷

Some courts have assumed that practice before an administrative agency does not constitute the practice of law.³⁸ Agencies which adopt this view will allow any authorized representative to appear for the contractor, whether or not he is an attorney.³⁹ The formality of the procedure and pleadings vary greatly. The Armed Services Board in the revised rules of procedure, August, 1955, provide for a complaint and an answer. None of the other boards use these procedural devices. It is slowly being realized by some federal agencies that appearances in adversary adjudicatory proceedings constitute the practice of law. Thus the Armed Services Board's new rules promulgated August, 1955, further limit appearances by laymen. Section 26 of the new rules provides as follows:

"An individual appellant may appear before the Board in person, a corporation by an officer thereof, a partnership or joint venture by a member thereof, or by an attorney at law duly licensed in any State, Commonwealth, Territory, or in the District of Columbia. The Board may authorize a contractor to appear by a duly authorized representative other than those mentioned in a special case, but for the purposes of that case only."⁴⁰

Appearances before the Interior Department Board of Contract Appeals are governed by the same rules which govern appearances in other proceedings in the Department.⁴¹ Generally lawyers represent contractors before the Board. However, lay officers or employees may represent their corporations.

37. Justice Douglas in a dissenting opinion in *United States v. Wunderlich*, 342 U.S. 98, 102 (1951). The union of investigatory, advocacy and appellate functions has been criticized frequently. Likewise, the nonseparation of accusatory or enforcement functions from adjudication. The lawyers who give advice on the contract should not have an opportunity to influence the decision except by briefs and arguments filed with the administrative judge which the private party has seen and has had an opportunity to refute. Ex parte material not seen by both sides should not be considered. A fair hearing requires an opportunity to test, explain, or refute; also knowledge of the evidence on which the Government relies. See *The New England Divisions Case*, 261 U.S. 184 (1923). *Finality Clauses in Government Contracts*, H.R. Rep. No. 1380, 83d Cong., 2d Sess. (1954).

38. *Carr v. Stringer*, 171 S.W. 2d 920, 922 (Tex. Civ. App. 1943); *Public Service Practice Bureau, Inc. v. Haworth Marble Co.*, 40 Ohio App. 255, 259, 178 N.E. 703, 705 (Ct. App. 1931).

39. Atomic Energy Commission, 10 CFR § 3.23(g) (Supp. 1955); National Advisory Committee for Aeronautics, 7(d) Corps of Engineers, General Services Administration para. 13.

40. 32 CFR § 30.1, par. 2 (1954), rev. June 1955, CCH Govt. Contracts Rep., ¶ 10721.01.

41. 43 CFR § 1.1.

Burden of Proof

The appellants bear the burden of proof to establish a valid claim for additional compensation or to demonstrate the error of the contracting officers. The failure to meet this burden will result in a denial of his claim. Moreover, if the record is inadequate for an intelligent disposition of the claim the appeal may be denied on that ground.⁴²

The Appeal File, Discovery Proceedings and Interrogatories

The contractor or his counsel is afforded an opportunity to see the appeal file which may be found in the offices of the boards, in Washington, D. C. and also, in the Interior Department, at the office of the Government counsel,⁴³ whose members are frequently field attorneys.

The boards follow the modern trend prevalent in the federal district courts and the Court of Claims. Hence, they are liberal in granting requests by the contractor that the Government produce certain documents. With the leave of the board, written interrogatories and requests for admission of specified facts may be served on either party. The Atomic Energy Commission Board is authorized in its discretion, and upon application and with notice to the opposing party, to receive evidence in affidavit form.⁴⁴

Submission

In some boards at least, a hearing is a matter of right for the presentation of evidence on any disputed questions of fact in the findings.⁴⁵

42. *Allis-Chalmers Mfg. Co. v. United States*, 79 Ct. Cl. 453 (1934). See also *Loftis v. United States*, 110 Ct. Cl. 551, 76 F. Supp. 816 (1948). "There is a certain presumption of validity attaching to a contracting officer's decision, not patently erroneous, which requires the appellant to come forward with evidence showing it to be fallacious, if such is the case. *Imparato Stevedoring Corp.*, ASBCA 2266 (1954); *McKinnon*, IBCA-4, 62 I.D. 104, 6 CCF ¶ 61, 653 (1955). See also Atomic Energy Commission Rules, 10 CFR § 3.23(c) (Supp. 1955). In the absence of supporting data and evidence of the appellant, the contracting officer's findings of fact must be accepted unless, on the face of the record, they appear to be erroneous. *Lowdermilk Bros.*, IBCA 10, 6 CCF ¶ 61, 628 (1955). The contractor must show that any performance was done in excess of the contract requirements. *A. Belanger & Sons, Inc.*, ASBCA 2272 (1955). The burden of proving excuses which permit a contractor to avoid the consequences of a default determination is the contractor's responsibility. *Precision Scientific Co.*, ASBCA 2804 (1955). This is based on the theory that for one to enjoy the benefits of an exculpatory clause it is incumbent on him to establish his rights thereto. *Vevier Loose Leaf Company, Inc.*, ASBCA 1500 (1954). Appellant must prove changed conditions. *Charles H. Tompkins Co. Corps of Engineers, C & A* (1955). Appeal of H. R. Hensler, ASBCA 1991 (1955): "It is, of course, understood that the burden of establishing a claim, the relief for which has within the power of this Board to consider, lies on the shoulders of the appellant. The present record affords us insufficient evidence to enable us to make that determination." Also see *Hardwick Woolen Mills, Inc.*, ASBCA 2917 (1955).

43. 43 CFR 4.7(b) (1954).

44. 10 CFR 3.23(f).

45. 43 CFR 4.10 (1954).

In deciding whether a hearing should be held, counsel for the contractor should carefully study the appeal file to ascertain whether there is sufficient evidence in the record to meet the burden of proof which is imposed upon him. Occasionally the Government requests the hearing. Sometimes Government counsel wants to supplement the evidence because he doubts that the contracting officer's findings of fact are supported by the sufficiency of evidence required by Public Law 356.⁴⁰

The rules of the Corps of Engineers Claims and Appeals Board provide that a case shall be considered submitted unless the Board is advised that a hearing is desired within fifteen days after the contractor is notified of the docketing of the appeal.

In about five or ten per cent of the appeals to the Armed Services Board the contractor and the Government submit on the record without a hearing. If no hearing is requested or if a hearing date and time is fixed by the usual required notice of at least fifteen days and the contractor fails to appear, his case is regarded by the Board as submitted, and determined on the record, unless the Board of its own motion requires a hearing because the record is inadequate.

VI. SETTLEMENT

Until a contract appeal is finally disposed of by a board, the contracting officer is generally permitted to modify his findings by a change order or by supplementary findings. In some cases a board is requested by one side or the other to suspend proceedings because the party requesting the suspension believes that a settlement of the appeal may be secured without action of the board. Such settlement might result from a pre-trial conference, but sometimes counsel for the Government or appellant, in preparing his case, finds weaknesses which stimulate an attempt to reach an agreement with the other side on one or more of the claims. The board will, if requested, suspend proceedings for a reason-

46. 41 U.S.C.A. §§ 321, 322 (Supp. 1954). See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *John A. Johnson Contracting Corp. v. United States*, — Ct. Cl. —, 132 F. Supp. 698 (1955). See also Report of the Select Committee on Small Business, H.R. Rep. No. 1576, 81st Cong., 2d Sess. 13 (1950); Schultz, Proposed Changes in Government Contract Disputes Settlement; The Legislative Battle over the Wunderlich Case, 67 Harv. L. Rev. 217-50 (1953); Kennedy, The Conclusiveness of Administrative Findings in Disputes Arising under Government Contracts, 4 Baylor L. Rev. 160-80 (1952); Hayes, Judicial Review of Disputes Law Boon to Contractors, Government, The Constructor, July, 1954, pp. 46-48; Note, 37 Cornell L.Q. 493 (1952); Legis. Note, 40 Cornell L.Q. 355-61 (1955); *General Casualty Co. v. United States*, 130 Ct. Cl. 520, 127 F. Supp. 805 (1955); *United Foundation Corp. v. United States*, 130 Ct. Cl. 666, 127 F. Supp. 798 (1955); *Russell H. Williams v. United States*, 130 Ct. Cl. 435, 127 F. Supp. 617, cert. denied, 349 U.S. 938 (1955); *Allied Contractors, Inc. v. United States*, 129 Ct. Cl. 400, 124 F. Supp. 366 (1954); *Wagner Whirler and Derrick Corp. v. United States*, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954).

able time, but if the party requesting the suspension proves too optimistic, the board will restore the case on the docket without loss of time.

It is interesting to note that, unlike general practice, the nearer the hearing approaches the less appears to be the chance of settlement.

VII. PROCESS OF THE APPEAL

Pre-Trial Conferences

There are fashions in judicial and administrative proceedings. For example, considerable emphasis is being placed by the federal district courts on expediting justice and saving time and expense by the device of a pre-trial conference.⁴⁷ This is an informal preliminary examination of the issues of fact by the court or a board member in the presence of counsel for both parties. The purpose of this conference is to clarify the issues by stipulations of fact and admissions of documents sometimes subject to objections of relevance and materiality, to limit the number of expert witnesses, to agree on what official notice can be taken, and thus to reduce the area of conflict. The results of the conference are incorporated into a pre-trial order, which frequently lists the essential points in controversy to be tried at the hearing which is governed by the order. The effectiveness of this procedural device is enhanced by holding the conference prior to any hearing with its contentious atmosphere.⁴⁸

As in litigation, counsel for both parties in contract appeals frequently have effective pre-trial conferences without the issuance of a formal order. Perhaps just about as often, one party or the board will ask for such a conference, either just before the hearing or earlier. In such instances the rules of some boards provide for the issuance of a pre-trial order which governs the hearing. Except for the extent of the informality and greater willingness not to insist on compliance with evidentiary rules, such as the best evidence rule, there is considerable resemblance between a pre-trial conference before a federal district judge and a board hearing official.

47. The Attorney General's Committee on Administrative Procedure has expressed the optimistic opinion that the most fruitful possibilities of expediting and simplifying formal administrative proceedings may lie in the area of pre-hearing techniques. The Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 64 (1941). See also report of March, 1955, *supra* note 6, at 57; Prettyman, *Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel*, 39 A.B.A.J. 966 (1953). The British Appellate Courts have used pre-trial conferences for a long time. The Federal Communications Commission for a few years placed great emphasis on pre-trial conferences, but then decided to abandon such procedure.

48. Mayers, *The American Legal System*, 269-70 (1955).

Place of Hearings and Visit to the Site

Generally the boards prefer the hearings to be held at their headquarters in Washington, D. C., but as with fixing the time, the convenience of the parties will be considered in fixing the place.⁴⁹ To minimize expenses a single member of the Armed Services, Corps of Engineers and Interior Boards will occasionally go on the circuit to hear cases in places fixed by the Board, based on recommendations by Government and private counsel.⁵⁰ Such recommendations are made and followed if most of the witnesses and the counsel are located outside of Washington, D. C. In such cases it is less costly from the standpoint of the Government to hold a hearing in the field than to bring the Government counsel and witnesses into Washington, D. C. A similar saving accrues to the appellant.

Prior to the hearing the member of the board conducting the hearing will, at the request of either party, visit the site if such a trip is feasible. He is accompanied on this inspection by counsel for both parties and, if they wish, by lay witnesses. If the hearing is held at the seat of the Government some appeal boards, like the Interior Board, will generally have the full Board present during the hearing.

Hearing Officer

The integrity of the administrative judicial process depends primarily upon the impartiality and ability of the examiner or hearing officer. The hearing officer of a contract appeal board, has a special responsibility.⁵¹ He is gathering facts for the entire board. Like a judge, one of his main functions is to observe the demeanor of the witnesses whom he has previously sworn in. Moreover, if the contractor is not represented by counsel, the hearing officer has the additional responsibility of seeing that the contractor's case is adequately presented.

Prior to the hearing the hearing officer attempts to familiarize himself with the issues of the appeal. His work is greatly eased when both parties are represented by able counsel experienced in the specialized field of Government construction contracts. When the contractor or Government is represented by less able or less experienced counsel, the hearing officer must supplement the presentation of counsel by asking many questions in order to see that the record contains sufficient proba-

49. The Atomic Energy Commission Board ordinarily holds its hearing at the location of the contracting officer of the commission administering the contract.

50. Sometimes a member will make a trip to hear a single appeal, especially if it will be long and complex.

51. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 *Cornell L.Q.* 281 (1955).

tive evidence to support the board's decision, for he has the responsibility of obtaining an adequate record. The board member who hears the case is required to draft the board's decision, unless his colleagues overrule his view of the case.

Atmosphere of Hearing

Witnesses at the hearings are generally sworn⁵² and under the rules of some boards, their attention is directed to the provisions in the federal criminal law penalizing the knowing and willful making of false statements in any claim against the Government.

Usually the hearing is very informal. The hearing official generally announces at the outset that smoking is permitted and that the rules of evidence are not binding. The hearing officer functions like a trial court sitting without a jury. There may be a tendency, therefore, as in the case of a court hearing testimony without having a jury present to admit some irrelevant or immaterial evidence, and such evidence is not regarded as a prejudicial error, unless improper use is made of it. Also, the hearsay and other exclusionary evidentiary rules are not strictly followed.⁵³ Under these circumstances it depends to a great degree on the ability and experience of the hearing officials as to whether there is an orderly presentation of evidence and an exclusion of that which is irrelevant and worthless. Unless there are some restrictions the record will become needlessly inflated by testimony without probative value with the result that an additional burden is placed on both parties.⁵⁴

The full Board of the General Services Administration, which usually holds its hearings in the capital, conducts very informal round table hearings. Any one of the parties or Board members may ask questions of the other party. At its conclusion the presiding officer fixes a time for the submission of additional evidence or argument.

52. There is no statutory authority for this practice, which is not observed by the boards of the General Services Administration and the Corps of Engineers.

53. "It is the opinion of this Board that in the hearing of an appeal (or subsequent thereto when reservation has been made) it is proper to receive in evidence any oral or documentary evidence which is (1) relevant and material to an issue; (2) the kind of evidence on which responsible persona are accustomed to rely in serious affairs; and (3) does not deny to either party the opportunity of cross-examination, if that be necessary to adduce the truth. The strict rules of evidence relating to competency are not for application.

"The documents offered by the Government clearly meet those requisites provided the appellant is given an opportunity to file reports, graphs, or similar documents." *Chris Berg, Inc.*, C & A 522 (1955). The rules of evidence are neutralized in trials before judges and by the treatment of assignments of evidence points an appeal. See *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 288 (1924).

54. Mayer, *The American Legal System*, 86 (1955); cf. *Phelps Dodge Refining Corp. v. Federal Trade Comm'n*, 139 F. 2d 393, 397 (2d Cir. 1943).

Transcript

The rules of procedure of some boards provide for a summary transcript. A full transcript is generally taken by a court reporter, or, if none is available, by a Government stenographer, or occasionally by a recording devise. This record may be generally purchased for the cost of recording, if a public stenographer is used. The Atomic Energy Commission Board gives the contractor a copy without charge. The provision in some rules of practice that the procedure may be summarized is rarely used.

Though final arguments may be made at the conclusion of the hearings, if desired, such arguments are not generally included in the transcript. The Armed Services Board however, under its new regulations, is authorized to provide for the recording of oral arguments, if made.

The board may, if the parties desire, or on its own motion fix a time for the filing of post-hearing briefs.

VIII. THE DECISION

Occasionally, though very rarely, the contractor not only loses the appeal but is in a worse position than if no appeal had been taken. The Armed Services and Interior Boards have held that an appeal opens up the whole record and that the Board may disallow a claim, or reduce an extension of time previously granted by the contracting officer.⁵⁵ Contractors will be cheered by the knowledge that in about forty per cent of the cases the Armed Services Board reverses the contracting officer in whole or in part and grants some relief.

The backlog of the different contract boards varies greatly as well as the speed with which decisions are reached. Although sometimes masked by the term quasi-judicial, the board in fact is an administrative court. A welding of the abstract law to the concrete facts and a comparison with prior decisions is a creative task which cannot usually be done well under great pressure.⁵⁶ That is why a proposal by the Associated General Contractors to fix a rigid time limitation for the disposition of appeals will not be regarded with favor by most administrative judges. However, if the board refuses to decide the facts of a controversy, or unduly delays the decision, the courts may review the facts if a suit is brought.⁵⁷

Unlike most of the other boards the decisions of the Interior Board of Contract Appeals are issued *per curiam*. Summaries of all the deci-

55. *Fox Sport Emblem Corp.*, BCA 87 (1943). See also *Jeneckes'*, IBCA-44, 6 CCF ¶ 61, 732 (1955).

56. Mixed considerations of logic, common sense, practice, policy and precedent are said to enter into judicial decisions. See *Scott v. Simms*, 188 Va. 808, 51 S.E. 2d 250, 253 (1949).

57. *Heid Bros., Inc. v. United States*, 69 Ct. Cl. 704 (1930).

sions of the Interior Board and most of the decisions of the Armed Services Board may be found in the Commerce Clearing House, Government Contract Reporter Service.

Roswell M. Austin has digested the decisions of the Armed Services Board in *Digest of the Decisions of the Armed Services Board of Contract Appeals 1950-1953* (1953) and *Digest of the Army Board of Contract Appeals 1942-1950* (1950). Mimeographed copies of the Board decisions may be obtained from the Board or at least seen at their offices. Selected decisions of the Interior Board appear in full in *Interior Decisions* which is now being published annually. The headnotes of all decisions appear in the Department's *Cumulative Digest* published several times a year by the Office of the Solicitor. Mimeographed copies of all the Board's decisions may be secured by subscription shortly after the decisions are handed down. The decisions and recommendations of the Board of Review of the General Services Administration are neither printed nor available to the general public.⁵⁸

Reconsideration

Most of the boards permit a request for reconsideration within thirty days.⁵⁹ The General Services Administration provides that a motion for reconsideration must be filed within a reasonable period of time from the date of receipt of the Administrator's decision. As a rule such requests are denied by the board on the grounds that no additional evidence nor reason was brought to the attention of the board that was not fully considered in the original decision.⁶⁰

IX. CONCLUSION

Successful contract administration requires the merger of the skills of the lawyer and engineer. Construction contractors have frequently lost considerable sums of money in sound claims because of failure to observe procedural requirements of Government contracts. Private contractors should follow the example of the Government and retain a lawyer at an early stage of a contract dispute.

Contract appeal boards have been established in major federal agencies with large construction programs. Although in some boards engineer members join with legal members in deciding questions of fact and law, the oldest and largest board, the Armed Services Board, is composed exclusively of lawyers. It is submitted that practice before the boards constitutes practice of law. From the standpoint of most of

58. General Services Administration Appeal Procedure, § 15.

59. 43 CFR § 4.15 (1954).

60. Cf. Fulford Manufacturing Co., ASBCA 2143 and 2144 (August 26, 1955).