

1956

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Recommended Citation

James V. Joy, *The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 Fordham L. Rev. 11 (1956).

Available at: <https://ir.lawnet.fordham.edu/flr/vol25/iss1/2>

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THE DISPUTES CLAUSE IN GOVERNMENT CONTRACTS: A SURVEY OF COURT AND ADMINISTRATIVE DECISIONS

JAMES V. JOY*

THE subject of this article is a standard clause, or "boilerplate" provision, which is included in virtually all supply and construction contracts awarded by the United States Government. The present day Disputes clause reads substantially as follows:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the determination of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; *provided that*, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."¹

I. COMPARISON WITH ARBITRATION

The procedure set forth in the Disputes clause resembles arbitration in many respects. A more basic question might be considered, which often has been asked—does the Disputes method amount to arbitration? This question is best answered in the affirmative. The Disputes method falls squarely into the general class of arbitration.²

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The views expressed herein are those of the author, and do not necessarily represent those of the Judge Advocate General of the Army or of the Department of the Army.

1. See, Armed Services Procurement Regulations (hereinafter referred to as "ASPR"), ¶ 7-103.12, 32 C.F.R. § 7.103-12. The clause quoted in the text of this article is subparagraph (a) of the Disputes clause contained in the revision of Standard Form 32 which is presently being circulated for criticism and comments among industry and the Government departments. Subparagraph (b) of the proposed revised clause reads as follows:

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; *Provided*, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

2. "The word 'arbitration' is normally applied to all extrajudicial determinations of controversies by judges chosen by the parties to the dispute or their appointees." 6 Williston,

This latter statement may appear overly broad in view of the provision that appeals shall be decided by the Secretary "or *his* duly authorized representative." (Emphasis added.) This may seem an undue departure from customary arbitration practice. Determinations are made not by third party umpires, but by a representative of only one of the contracting parties. In *private* contracts, however, the vast majority of American courts have permitted the representative of a single party, usually an architect or engineer, to decide finally certain questions of fact arising thereunder.³

Accordingly, the requirement that decisions under the Disputes clause be rendered by a representative of one, and one only, of the parties may be viewed as being without substantial *legal* significance⁴ and little *practical* significance.

Until recent times it was generally accepted that in the absence of permission contained in a specific act of Congress (such as the Contract Settlement Act of 1944⁵) no officer acting for the United States has the authority to submit a claim or controversy to the decision of *third party* arbitrators.⁶ Two fairly recent decisions of the United States Supreme

Contracts § 1918 (rev. ed. 1938); *Rueda v. Union Pacific*, 180 Ore. 133, 175 P.2d 778 (1946); *San Antonio v. McKenzie Const. Co.*, 136 Tex. 315, 150 S.W. 2d 989 (1941); *McMahon v. New York & Erie R.R.*, 20 N.Y. 463 (1859); *Bertram Garden Apts. v. DeMartini*, 108 N.Y.S. 2d 483 (Sup. Ct. 1951).

3. *Martinsburg & Potomac Railroad Co. v. March*, 114 U.S. 549 (1885) (Engineer); *Sheffield & B. Coal I & R Co. v. Gordon*, 151 U.S. 285 (1894) (Superintendent); *Chicago S. F. & C. R. Co. v. Price*, 138 U.S. 185 (1891) (Chief Engineer); *Southern New England R. Corp. v. Marsch*, 45 F. 2d 766 (1st Cir. 1931) (Chief Engineer or Substitute); *Cranford v. City of New York*, 38 F. 2d 52 (2d Cir. 1930) (Engineer); *Chatfield Co. v. O'Neill*, 89 Conn. 172, 93 Atl. 133 (1915); *Hathaway v. Stone*, 215 Mass. 212, 102 N.E. 461 (1913); *Frolich v. Klein*, 160 Mich. 142, 125 N.W. 14 (1910); *Landstra v. Bunn*, 81 N.J.L. 680, 80 Atl. 496 (1911); *Adinolfi v. Hazlett*, 242 Pa. 25, 88 Atl. 869 (1913); 3 Corbin, Contracts § 652 (1951). See also cases cited note 2 *supra*.

4. "[The Disputes] . . . article provides that, in case of dispute, the decision should be made by the contracting officer, subject to the contractor's right to appeal to the head of the department, whose decision should be final. That is a sort of arbitration, albeit by agents of one party to the contract." *George J. Grant Construction Co. v. United States*, 124 Ct. Cl. 202, 207, 109 F. Supp. 245, 247 (1953).

5. 41 U.S.C.A. § 113(e).

6. *United States v. Ames*, 24 Fed. Cas. 784 No. 14441 (C.C.D. Mass. 1845); *James McCormick v. United States*, 36th Cong., 1st Sess., Vol. 1, Rep. C.C. No. 199 (Ct. Cl. 1859); 33 Ops. Att'y Gen. 160 (1922); 32 Comp. Gen. 333 (1953); 7 Comp. Gen. 541 (1928). See 31 U.S.C.A. § 673, which provides that no part of any appropriation shall be used to pay the expenses of any council or board unless its creation has been authorized by an act of Congress, and further provides that the executive departments shall not detail any employees to such council or board. See also, Note, *Arbitration and Government Contracts*, 50 Yale L.J. 458 (1941); Braucher, *Arbitration under Government Contracts*, 17 Law & Contemp. Prob. 473 (1952).

Court⁷ involving the Disputes method (but decided on principles derived from third party arbitration cases) have prompted the Court of Claims to hold that third party arbitration may now be generally provided for in contracts awarded by the executive departments.⁸

The Comptroller General has ruled to the precise contrary.⁹ Since the Comptroller General has the power of disallowing all public vouchers (prior to, and in the absence of, court judgments) it is believed that his opinion, and not that of the Court of Claims, will be followed by the executive departments.

Attempts to distinguish between arbitration and the Disputes method have unduly hampered endeavors to comprehend and understand the latter. The rules of law respecting arbitration are uniformly applied to legal questions arising under the Disputes method. In a leading law review article on this subject, Judge Leslie L. Anderson observed:

"The similarities between arbitration and the administrative method provided by the "disputes" article are so substantial that, on principle, the law covering both ought to be the same generally on this subject except as statutes or the language of agreements may compel a different conclusion."¹⁰

At the time of Judge Anderson's article, it was thought that questions of law could not be finally decided under the Disputes method. The Supreme Court, in *United States v. Moorman*,¹¹ brought the Disputes method into line with a sizeable group of third party arbitration cases which permit such questions to be finally decided extrajudicially.¹²

II. HISTORICAL FOUNDATIONS

The roots of the Disputes method reach back to the 1868 case of *United States v. Adams*,¹³ in which an award of a board, created after the making of the contract and to whose jurisdiction the contractor submitted voluntarily, was upheld as being conclusive.

7. *United States v. Wunderlich*, 342 U.S. 98 (1951); *United States v. Moorman*, 338 U.S. 457 (1950).

8. *George J. Grant Construction Co. v. United States*, 124 Ct. Cl. 202, 109 F. Supp. 245 (1953).

9. 32 Comp. Gen. 333, 337 (1953): "In this connection, it is also significant that while several bills have been introduced in Congress which proposed to grant such general authority [for third party arbitration], no such legislation has ever been enacted. See . . . H.R. 3665, 78th Cong., 1st Sess.; H.R. 7163, 77th Cong., 2d Sess.; S. 2350, 77th Cong., 2d Sess." The Comptroller General, however, has acquiesced in third party "appraiserships," 20 Comp. Gen. 95 (1940); 22 Comp. Gen. 140 (1942). The Comptroller General heads the General Accounting Office. Accordingly, the expressions "Comp. Gen." and "G.A.O." are synonymous for most purposes.

10. Anderson, *The Disputes Article in Government Contracts*, 44 Mich. L. Rev. 211, 220 (1945).

11. 338 U.S. 457 (1950).

12. See 112 A.L.R. 865 (1937).

13. 74 U.S. (7 Wall.) 463 (1868).

In *Kihlberg v. United States*,¹⁴ a War Department contract for transportation of supplies provided that the ascertainment and "fixing" of distances traveled by the contractor should be made by the "Chief Quartermaster of the District of New Mexico." The Supreme Court held that the determination of the Chief Quartermaster was, in the absence of fraud or bad faith, conclusive on both the contractor and the Government. Other cases followed closely on *Kihlberg*, reaffirming its principal holding.¹⁵ It took 73 years for the Supreme Court to indicate how closely it wanted the standard for judicial review, fraud, to be adhered to by the lower courts.¹⁶ *Kihlberg* represented the first major step in the development of the Disputes method. Representatives of the Government could render final and conclusive decisions on, at least, limited questions of fact.

In order of time the next development was judicial approval of provisions for appeals to the Secretary. The Court of Claims in *Barlow v. United States*¹⁷ considered a limited disputes provision which, in the case of a dispute as to the meaning and effect of any passage in the contract, permitted the Barlow Company to appeal to the Secretary of the Navy from the decision of the Chief of the Bureau of Yards and Docks (who was also the contracting officer) whose decision otherwise would be final. The Court of Claims recognized the necessity in building contracts that an architect or engineer pass upon:

"the fitness of the material, the sufficiency of the workmanship, the quality of the work performed, etc."

Inasmuch as the Secretary of the Navy, in the words of the court, had "no personal knowledge of the matter in dispute," the court invalidated the provision for appeal. The Supreme Court, on appeal, expressly reserved decision on the validity of the clause since such a ruling was unnecessary to its holding.¹⁸ However, a similar clause was again before the Supreme Court in *Plumley v. United States*¹⁹ and was approved, thereby overruling the Court of Claims dictum in *Barlow*.

During World War I a clause began to appear in War Department contracts which permitted a contractor, at *his* option, to petition the Secretary for a decision on:

14. 97 U.S. 398 (1878).

15. *Sweeney v. United States*, 109 U.S. 618 (1883); *United States v. Gleason*, 175 U.S. 588 (1900).

16. *United States v. Wunderlich*, 342 U.S. 98 (1951). But see *Ripley v. United States*, 223 U.S. 695 (1912); *United States v. Smith*, 256 U.S. 11 (1921).

17. 35 Ct. Cl. 514 (1900).

18. 184 U.S. 123 (1902).

19. 226 U.S. 545 (1913). See also *Merrill Ruckgaber Co. v. United States*, 241 U.S. 387 (1916); *Saalfeld v. United States*, 246 U.S. 610 (1918).

"any claims, doubts or disputes which may arise under the contract or as to its performance or non-performance. . . ."20

The decision could be rendered by a "duly authorized representative" as well as by the Secretary. In those cases where the contractor exercised his option, the decision whether by the Secretary or his representative, was final and conclusive. An administrative board, the War Department Board of Contract Adjustment,²¹ was established to act for the Secretary and continued in existence until June, 1921²²—when a great measure of informality again attached to the administrative disposition of disputes within the War Department.

As early as September, 1921, contract forms of the War Department were again revised to require the submission of all disputes, under so-called "Adjustment of Claims and Disputes" clauses, to the "Chief of the Branch" involved, subject to the contractor's right of appeal to the Secretary.²³ The contractor no longer had a right of election. The clause required him either to accept the Chief's decision or to appeal. By this time the Interdepartmental Board of Contracts and Adjustments had been created as a part of the Bureau of the Budget.²⁴ Composed of representatives of the Attorney General, the War, Navy, Treasury, Interior, Agriculture, Labor and Commerce Departments, the Comptroller General and the Postmaster General, this latter Board was given the task of standardizing all government contract forms. The Interdepartmental Board, on June 8, 1923, tentatively adopted a Standard Form of Building

20. War Dep't Supply Circular No. 88, September 7, 1918, quoted on p. XXXVIII of Vol. 1, Dec. WDBC Adjustment.

21. War Dep't General Order 103, November 6, 1918; see page XXXIII of Vol. 1, WDBC Adjustment. This Board became the Appeal Section, War Claims Board, by reason of War Dep't Gen. Order 40, June 26, 1920, p. IV of Vol. 7, B.C.A. Reports. Although the Board of Contract Adjustment determined informal and implied contract cases under the since repealed "Dent Act," Act of March 2, 1919 (40 Stat. 1272), its jurisdiction included obligations under formal contracts.

22. Smith, *The War Department Board of Contract Appeals*, 5 Fed. B.J. 74, 77 (1943). Nineteen years after its dissolution, the Board of Contract Adjustment received the following high praise from Professor Wigmore. "The Board of Contract Adjustment was vested with powers to adjudicate upon post-war claims mounting into billions of dollars, and its volumes of opinions expounding the findings of fact and law are models of clarity and directness,—refreshing in their contrast to the futile display of technique upon Evidence rules so often seen in the opinions of Supreme Courts upon everyday cases of mercantile disputes over broken contracts." 1 Wigmore, *Evidence* § 4(c) (3d ed. 1940).

23. War Dep't Gen. Order 10, September 1, 1921. The writer has emphasized the evolution of the War Department Disputes method because later, when Government contract forms were standardized, the then prevalent War Department forms served as the starting points for the standardizations.

24. See Vol. 1, *Review of Proceedings, Interdepartmental Board of Contracts and Adjustments*, meeting of January 19, 1922.

Contract which included a provision for "Adjustment of Claims and Disputes" that closely resembles the present day Disputes clause.²⁵ All Government Departments and Agencies, by January, 1927, were required²⁶ to use Standard Forms 23 (Construction Contract) and 32 (Supply Contract), each of which included Disputes articles.

In this period between Wars, the newer and more general form of Disputes clause continued to receive the approval of the Supreme Court.²⁷

During the first year of the Second World War, the Supreme Court decided *United States v. Callahan Walker Co.*,²⁸ in which it said that the Disputes clause was a Government Contractor's "only avenue of relief." In *United States v. Blair*,²⁹ decided shortly thereafter, the Court reaffirmed *Callahan Walker* and remarked that contractors should appeal decisions ". . . so flagrantly unreasonable or so grossly erroneous as to imply bad faith. . . ." Otherwise, the Government would lose its opportunity of mitigating and avoiding damages by administrative correction of errors or excesses of subordinate officers.

A breakdown in the administrative disputes method then in vogue occurred at the beginning of World War II. At the outset of the war the Secretary of War, and the Assistant Secretary did not have time to discharge the quasi-judicial duties required of them by the Disputes article. In *Penker Construction Co. v. United States*,³⁰ the Court of Claims ruled that the failure of the Assistant Secretary to give personal consideration to an appeal, perfunctorily affirming the decision of lower echelon officers, was a breach of contract. Under such circumstances a contractor was entitled to *de novo* judicial consideration of his claim on the merits. For a short time numerous Boards came into existence in the various branches (or technical services) of the Army.³¹ These boards were displaced on August 8, 1942, by the War Department Board of Contract Appeals³² which was to determine appeals under all War Department Contracts. The technical services were given the right to establish intermediate

25. See Vol. 2, Review of Proceedings, Interdepartmental Board of Contracts and Adjustments, meeting of June 8, 1923.

26. Bureau of the Budget Circular No. 197, November 19, 1926. See Vol. 5, Review of Proceedings, Interdepartmental Board of Contracts and Adjustments, meeting of December 30, 1926. See also *Pfotzer v. United States*, 111 Ct. Cl. 184, 226, 77 F. Supp 390, 399, cert. denied, 335 U.S. 885 (1948).

27. *United States v. Mason & Hanger Co.*, 260 U. S. 323 (1922); *United States v. John McShain, Inc.*, 308 U.S. 512 (1939). See *Goltra v. Weeks*, 271 U.S. 536 (1926).

28. 317 U.S. 56 (1942).

29. 321 U.S. 730, 736 (1944). See *United States v. Beuttas*, 324 U.S. 768 (1945); *United States v. Holpuch Co.*, 328 U.S. 234 (1946).

30. 96 Ct. Cl. 1 (1942).

31. Smith, *The War Department Board of Contract Appeals*, 5 Fed. B.J. 74, 76 (1943).

32. *Id.* at 77; Memorandum, Secretary of War, August 9, 1942.

boards of contract appeals.³³ The Navy Board of Contract Appeals³⁴ was created on December 1, 1944. In 1947 the WDBCA changed its name to the Army Board of Contract Appeals.³⁵ The Army and Navy Boards were merged in May, 1949 into the Armed Services Board of Contract Appeals which became the designated representative of the Secretaries of the Army, Navy and Air Force to determine appeals under contracts of each of the respective departments.³⁶

In the years that followed the creation of these boards, many similar boards were created in other Departments and Agencies of the Federal Government. Like the ASBCA, some of these boards have the power to render final decisions for the Secretary or Agency head.³⁷ Others advise the Secretary or Agency chief, who is free to reject or approve the decision of his board.³⁸

A. *Moorman and Wunderlich Decisions*

Going back at least as far as *Barlow*,³⁹ it is possible to observe in Court of Claims decisions a marked trend, *i.e.*, a disposition to review Disputes determinations in an ever-widening arc of decisions. In *Ripley v. United States*,⁴⁰ the Supreme Court held that the fraud test of *Kihlberg* would be satisfied by a showing that the decision of the contracting officer was "so grossly erroneous as to imply fraud." The Court of Claims would take jurisdiction thereafter when the contracting officer's decision was arbitrary, capricious, or not supported by substantial evidence.⁴¹ In addition the lower court ruled that no Secretary had power to determine finally a question of law, which included the interpretation of drawings and specifications.

33. 32 C.F.R. § 7.103-12; Smith, *The War Department Board of Contract Appeals*, 5 Fed. B.J. 74, 77 (1943).

34. 1 CCH Gov't Contracts Rep., ¶ 10,741.

35. 1 CCH Gov't Contracts Rep., ¶ 10,731.

36. Joint Directive, Secretaries of the Army, Navy, and Air Force, May 1, 1949; 1 CCH Gov't Contracts Rep., ¶ 10,721. See Cuneo, *Armed Services Board of Contract Appeals: Tyrant or Impartial Tribunal?*, 39 A.B.A.J. 373 (1953).

37. Department of Interior Board of Contract Appeals, December 29, 1954; Contract Disputes Board for Commodity Credit Corporation, April 4, 1946; Corps of Engineers Claims & Appeals Board, August 9, 1946 (designated representative of the Secretary of the Army to determine finally appeals involving civil works; has intermediate jurisdiction in appeals involving military construction); various overseas commands of the Army have Boards with final jurisdiction up to \$50,000, e.g., AFFE/8A BCA, USAREUR BCA.

38. Atomic Energy Commission Advisory Board of Contract Appeals, April 28, 1948; General Services Administration Board of Review, March 7, 1950; Veterans Administration Construction Contract Appeals Board, April 8, 1949; Veterans Administration Supply Contract Appeals Board, March 12, 1954.

39. See note 17 *supra*.

40. 223 U.S. 695 (1912).

41. *Needles v. United States*, 101 Ct. Cl. 535 (1944).

In *United States v. Moorman*,⁴² the Court gave effect to a paragraph of the specifications which made the Secretary of War the final arbiter as to what was "outside the requirements of the contract."⁴³ The Court expressly refused to draw any distinction between the power to decide finally questions of law and fact. The Court of Claims, on the other hand, in a long line of decisions had held that under no circumstances could questions of law be finally decided under the Disputes method.⁴⁴

Two years later, in *United States v. Wunderlich*, the Supreme Court defined "fraud" as the standard of review of Disputes determinations:

"Despite the fact that other words such as 'negligence,' 'incompetence,' 'capriciousness,' and 'arbitrary' have been used in the course of the opinions, this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract."⁴⁵

Ripley v. United States and *United States v. Smith*,⁴⁰ if not overruled, were to be restricted closely to the facts present in each.

B. Remedial Legislation

Immediately after the *Wunderlich* decision, demands were made on Congress for remedial legislation. Congress responded by appending a rider to the Defense Department Appropriation Acts of 1953 and 1954, which forbade use of appropriated funds for the purpose of entering into contracts containing "Article 15" unless the Article was amended to provide for further appeal by the contractor to the Court of Claims.⁴⁷

42. 338 U.S. 457 (1950).

43. "If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. . . ." 338 U.S. 457, 458-59 n. 1.

44. *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538, 616 (1940). See *Pfotzer v. United States*, 111 Ct. Cl. 184, 227, 77 F. Supp. 390, 400, cert. denied, 335 U.S. 885 (1948) and authorities cited therein.

45. 342 U.S. 98, 100 (1951).

46. See note 16 supra.

47. "Sec. 635. No funds contained in this Act shall be used for the purpose of entering into contracts containing article 15 of the Standard Government Contract until and unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within ninety days of the date of decision by the Department concerned, authority for which appeal is hereby granted." 66 Stat. 537; 67 Stat. 356.

Administratively, application of the rider was limited to construction contracts, and not supply contracts, for the reason that Article 15 is not the Disputes provision in the latter type of standard form contract.⁴⁸ Congress may have intended that this rider would restore the Court of Claims' pre-*Wunderlich* standards of judicial review.⁴⁹ However, the wording of the rider appears to be rather explicit. The best deduction that can be made therefrom is that the Court of Claims was to exercise a power of review as broad and complete as that of the Departmental Boards of Contract Appeals.

When Congress came to consider legislation of a more permanent nature, it found that the Comptroller General was as active an opponent of the *Wunderlich* and *Moorman* decisions as the contractors.⁵⁰ His power of reviewing public vouchers had been limited to the same extent as had been the jurisdiction of the courts.⁵¹ The contractors also found support in several law review articles.⁵²

As a consequence Public Law 356 was adopted by the 83d Congress. It reads:

"§ 321. Limitation on pleading contract-provisions relating to finality; standards of review

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

"§ 322. Contract-provisions making decisions final on questions of law

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."⁵³

48. Comp. Gen. Dec. No. B-112635, Nov. 7, 1952; 1 CCH Gov't Contracts Rep. ¶ 11,021.

49. Schultz, Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case, 67 Harv. L. Rev. 217, 235 (1953).

50. 2 U.S. Code Cong. & Ad. News 2191-97 (1954).

51. *Sunroc Refrigeration Co. v. United States*, 104 F. Supp. 131 (E.D. Pa. 1952); *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951).

52. See note 49 supra; Braucher, Arbitration under Government Contracts, 17 Law & Contemp. Prob. 473 (1952); Mulligan, The Disputes Clause of the Government Construction Contracts: Its Misconstruction, 27 Notre Dame Law. 167 (1952); Cable, The General Accounting Office and Finality of Decisions of Government Contracting Officers, 27 N.Y.U.L. Rev. 780 (1952); Note, 37 Cornell L.Q. 493 (1953); Note, 4 Baylor L. Rev. 160 (1952).

53. 41 U.S.C.A. §§ 321, 322. In *Adinolfi v. Hazlett*, 242 Pa. 25, 88 Atl. 869 (1913) a statute was declared unconstitutional which itself purported to invalidate any contract containing a provision that the award of an architect or engineer was to be conclusive (or a condition precedent) to a suit on the contract. The statute was deemed an unreasonable legislative interference with the right to contract. The Pennsylvania statute, since it involved

III. SCOPE OF JUDICIAL REVIEW

The Disputes method serves two main purposes: *first* it keeps a government contract moving ("Pending final decision of a dispute hereunder, the Contractor *shall* proceed diligently. . . .") and *second* it provides a relatively inexpensive and rapid method of settling controversies. Since passage of Public Law 356 both a contractor⁵⁴ and the Government have been rebuffed by the Court of Claims in their efforts to have the court *preliminarily* determine the existence of Public Law 356 criteria for judicial review. The court will permit both parties to litigate again the issues decided by the departmental board of contract appeals, even to the extent of introducing evidence, previously available, but not presented to the executive board.⁵⁵ The position of the Court of Claims results in considerable added expense to both parties. It stems possibly from a reluctance on the part of the court to consider twice the same case or perhaps a genuine desire to accord both parties their "day in court."

A. Question of Law

The provision as to questions of law is prospective. *Moorman* is still the law for contracts containing either an "all" Disputes clause or a "Claims Protests and Appeals" provision, which were entered into prior to May 11, 1954. As to contracts awarded after that date, a contractor is under no obligation to appeal a decision on an unmixed question of law.⁵⁶ In declining to appeal a contractor, of course, places himself in peril of having a court later decide that he had misconceived the question and that, after all, the question was either one of fact or a mixed question of fact and law.

Public Law 356 draws a sharp line between questions of law and questions of fact. The latter standing alone are somewhat rare. It would seem that, in those cases where the question is a mixed one of fact and law, the executive department should be given the opportunity to declare

contracts between private persons, is distinguishable from Public Law 356. Congress is the source of the funds for the contracts of the executive branch. It should be permitted to place reasonable restraints on their expenditure.

54. *Oliver Finnie Co. v. United States*, Ct. Cl. No. 473-53 (1955) (unreported court order).

55. *John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. 698 (1955).

56. See 41 U.S.C.A. § 322.

57. "A question of 'law' is not a 'claim' of which the court acquires immediate jurisdiction before the administrative fact finding process is completed. Questions of law usually arise only after the disputed questions of fact relegated to administrative determination have been resolved. If a claim arising under a disputes clause involves *solely* questions of law, then immediate jurisdiction may properly be held to be present." *Atlantic Carriers Inc. v. United States*, 131 F. Supp. 1, 5 n. 1 (S.D.N.Y. 1955).

itself on the law of the case.⁵⁷ Assuming an executive board correctly determines the law, its application of the law so determined to the facts of the particular appeal should be left undisturbed but subject to the other limitations of Public Law 356. The decision of the board of contract appeals on a mixed question should not be upset unless (a) the law portion is severable and (b) the expression of law is erroneous.⁵⁸

In those cases where a contracting officer refuses to consider a claim on the ground that the contractor has presented a question of law only, or a claim for damages for breach of contract, the contractor has an option. He may administratively appeal⁵⁹ or he may sue in court. This election exists even if the contracting officer erred in mistaking a question of fact for a question of law.⁶⁰

The ASBCA has taken jurisdiction in cases normally looked on as involving questions solely of law, controversies as to interpretations of writings, controversies as to the effect to be given admitted or wholly stipulated facts.⁶¹ As to Army and Air Force appeals, this is done not only by virtue of the Disputes clause, but also under an early memorandum of the Secretary of War which allowed the WDBCA to:

“ . . .

“b. Consider and administratively pass on appeals not specifically or impliedly authorized by the contract where the ruling appealed from is not thereby made final and conclusive, and the appeal is taken within the time fixed in the contract for appeals.

“c. Find and administratively determine the facts out of which a claim by a contractor arises for damages against the Government for breach of contract, without expressing opinion on the question of the Government's liability for damages.”⁶²

In view of the existence of a remedy for deciding certain questions of law (*i.e.*, in cases involving unmixed questions of law) one might ask whether

58. “The finding of an administrative department upon such a question of fact committed to it for determination is conclusive on the courts if it is supported by substantial evidence; and that rule applies in cases where there is a mixed question of law and fact, unless the court is able to separate the question in such manner as to see clearly in what manner a mistake of law occurred. A court may review the question only where there was no substantial evidence to sustain the finding, or where the administrative officers committed a material error of law” *United States v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 101 F.2d 156, 159-60 (10th Cir. 1939).

59. See, e.g., *The O'Brien Dieselelectrics Corp.*, ASBCA No. 2697 (1956).

60. *Thomas Earle & Sons, Inc. v. United States*, 100 Ct. Cl. 494 (1944).

61. *Waterman Steamship Corp.*, ASBCA No. 362 (1951); *General Dry Batteries, Inc.*, ASBCA No. 641 (1951). See also cases cited in notes 116, 117 *infra.* and *Blake Construction Co.*, ASBCA No. 2918 (1956).

62. Memorandum, 4 July 1944. See *Forest Box & Lumber Co.*, ASBCA No. 2916 (1956). The Secretary of the Navy has not made any comparable delegation of extra-Disputes clause authority. Accordingly, the Navy panel of the ASBCA will usually, in its discretion, decline taking jurisdiction in cases where the only question is one of law. *Minneapolis-Moline Co.*, ASBCA No. 1961 (1954).

a contractor is placed under any duty to exhaust this administrative remedy before he may proceed in court. The cases have uniformly held that this avenue need not be exhausted for much the same reason that the remedy available in the General Accounting Office need not be exhausted.⁶³ The courts will look to the contract (as limited by Public Law 356) to learn if a contractual remedy is provided and also will look to the Tucker Act⁶⁴ to ascertain its own jurisdiction. No provision in Government Contracts, as now written, prevents *de novo* judicial consideration of questions of law arising thereunder. It is, therefore, more accurate to say that a contractor must exhaust his *contractual* remedies, omitting mention of his broader *administrative* remedies.

B. Fraud

Although *United States v. Blair*⁶⁵ indicates that a decision involving a mistake so grossly erroneous "as necessarily to imply bad faith" should be appealed, the obligations of a contractor victimized by a fraudulent decision present an open question. This problem should be resolved by looking to whether the contractor, during the entire 30 day period following the fraudulent decision, had knowledge of the fraud. Where such knowledge was had the contractor should look to the Secretary for relief. In the absence of such knowledge, it is safe to say there would be universal agreement that the contractor has no duty of pursuing his contractual remedy. Under the latter circumstances he would be free to sue in court.

The *Wunderlich* decision spelled out the rather exacting elements of proof necessary before a contractor will avoid a disputes determination on the ground of fraud. In a case where a decision is not appealed from and where the other criteria of Public Law 356 seem satisfied, this difficult avenue, nevertheless, may be the sole means of relief open to a contractor.

Despite some of the language in *Wunderlich*, it is possible for a contracting officer to render a fraudulent decision without *himself* being guilty of fraud. When his decision is based on material evidence fraudulently presented by one of the parties, the fraudulent intent of the witness will vitiate the otherwise final decision.⁶⁶

63. See Anderson, *supra* note 10, at 216.

64. 28 U.S.C.A. § 1491; 28 U.S.C.A. § 1346.

65. 321 U.S. 730 (1944).

66. In *Forrest City Box Co. v. Sims*, 208 Fed. 109 (8th Cir. 1913), defendant's inspector marked certain logs as rejected. Later, before the logs were delivered to defendant, plaintiff removed the markings. The Circuit Court ruled that the fraud of the plaintiff vitiated the decision of the inspector, whose decision by the terms of the contract was otherwise to be final and conclusive. The trial court's judgment for plaintiff for the price of the logs accordingly was reversed. *Frolich v. Klein*, 160 Mich. 142, 125 N.W. 14 (1910), involved an architect's certificate which was shown to be a fraud on the building owner.

C. *Quasi Fraud*

Decisions that are "capricious," "arbitrary," "so grossly erroneous as to imply bad faith," or "not supported by substantial evidence" must be appealed to the head of the department.⁶⁷ An exception exists where the machinery for such appeals is inadequate. A close reading of Public Law 356 will reveal that the decision of the department head must not be "capricious," "arbitrary," etc. As for the contracting officer, apparently he needs only to avoid finally deciding questions of law.

In *Needles v. United States*, the Court of Claims suggested possible grounds for holding a decision arbitrary:

"A decision or finding may be held to be arbitrary when existing important facts, conditions, and express contract provisions should obviously have been considered and given due and proper weight, but were not. A decision may be found to be arbitrary when the facts show that the person given authority to decide took the position that the matter involved was a matter to be disposed of in his discretion when such obviously was not the case and he was required by the contract to consider and weigh facts, circumstances, and conditions, as well as to interpret and be governed by certain standards contained in the terms of the contract. Such actions, under proof sufficient to show that if the contracting officer had properly and reasonably considered the facts and contract provisions he should and probably would have reached a different conclusion, would not be consistent with good faith . . . [and with] the position of the officer as a fair and impartial arbiter."⁶⁸

Many of the subdivisions contained in Public Law 356 are somewhat redundant. It is hard to imagine a "capricious" decision, or a decision "so grossly erroneous as to imply bad faith" which will not be at the same time "arbitrary."

The substantial evidence test was borrowed from the Administrative Procedure Act (whose criteria for judicial review of administrative determinations, have no application to boards of contract appeals⁶⁹) which provides that rulings of administrative agencies shall be supported by "substantial evidence"⁷⁰:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁷¹

The Federal rule, contrary to that of many states,⁷² allows a record made up wholly of hearsay to stand as supported by substantial evidence, provided the reviewing court finds the hearsay evidence to be reliable.⁷³ The

67. 321 U.S. at 736.

68. 101 Ct. Cl. 535, 603 (1944).

69. R.F. Clifton, WDBCA No. 1201 (1947).

70. 5 U.S.C.A. § 1009.

71. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1933).

72. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916), requires that a "residuum" of legally competent evidence support the administrative determination.

73. Art Metals Const. Co. v. NLRB, 110 F. 2d 148, 149-50 (2d Cir. 1940); International

substantial evidence must remain so when considered in the light of the entire record.⁷⁴

The substantial evidence test was made a part of Public Law 356 in an indirect effort to make available to contractors interdepartmental memoranda unavailable to contractors but which supposedly were being used in reaching disputes determinations.⁷⁵ The application of this test in the Disputes area has produced a problem which has been encountered in no other area of the law. No provision is made in Public Law 356 for decisions in cases where there has been a failure of proof.⁷⁶

The ASBCA and other similar boards of contract appeals do not always impose the burden of proof upon a contractor as sometimes appears from the decisions.⁷⁷ In cases where the Government is making a claim or chargeback the boards require that the Government carry the burden.⁷⁸ Language in a good number of cases may indicate that there is a presumption of correctness or regularity inhering in the contracting officer's decision.⁷⁹ These cases—as well as cases speaking of the contractor's burden of appeal, as if there always was such a burden—should be examined closely in the light of the claims being made in each.

Should "substantial evidence" be divorced from burden of proof, an absurd situation will result. Assume a case where the contractor has the burden of proof. A good example would be where he alleges receipt of defective government furnished property. The contractor after appealing remains silent and refuses administratively to present a case. In order for the Government to succeed, must *it* present substantial evidence disproving the claim of the contractor? Assume it must, and that a board decides against the Government for failure to introduce such evidence. The decision *against* the Government in such a case will not be supported by substantial evidence as required by Public Law 356. The only other solution would be to require the board to itself secure substantial evidence so that *its* decision could be adequately supported.

Ass'n of Machinists v. NLRB, 110 F. 2d 29, 35 (D.C. Cir. 1939), aff'd, 311 U.S. 72 (1940); NLRB v. Remington Rand, Inc., 94 F. 2d 862 (2d Cir. 1938). See Cooper, Administrative Agencies and the Courts, Mich. Legal Studies, 194-98 (1951).

74. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

75. 2 U.S. Code Con. & Ad. News 2194-95 (1954).

76. For burden of proof: under the Administrative Procedure Act, see 5 U.S.C.A. § 1006(c); in the Tax Court, see 26 U.S.C.A. §§ 6902(a), 7454, 6902(a), T. C. Rule 32; before the Interstate Commerce Commission, 49 U.S.C.A. § 15(7).

77. A.E. Ratner Chemical Co., ASBCA No. 474 (1950).

78. Capitol Laundry, ASBCA No. 2576 (1955) (laundry shortage); Skanacid, ASBCA No. 798 (1951) (cause of swollen cans of herring); Federazione Italiana dei Consorzi Agrari, ASBCA No. 848 (1952) (excess costs accruing after termination for default); Pittston Stevedoring Corp., ASBCA No. 948 (1952) (contractor negligence in unloading a ship).

79. Imparato Stevedoring Corp., ASBCA No. 2266 (1954); McKinnon, IBCA No. 4 (1955).

There are several ways of resolving this problem. One method would be merely to say that the failure of proof is itself a sufficient substitute for substantial evidence. Another way would be to look on the contractor's failure of proof as a failure on his part to exhaust his contractual remedy. Originally, substantial evidence found its way into the Disputes area as a step-child of the arbitrary test.⁸⁰ A Secretary's decision was arbitrary *in that* it was not supported by substantial evidence. A third way would be to say that the substantial evidence test is applicable only when the decision is *also* arbitrary.

IV. DE NOVO JUDICIAL CONSIDERATION

On questions of law, as stated previously, the contractor has the option of appealing administratively⁸¹ or of immediately suing in court.⁸² In either instance there can be no *finality* inhering in any administrative determination. In a case where the contracting officer denies having authority to pass on the merits of a question, the same election exists, even in cases where the contracting officer erroneously viewed the limitations placed on him.⁸³

Upon the request of the contractor for findings of fact and a decision, the contracting officer has a reasonable time in which to communicate his written decision to the contractor. After passage of a reasonable time in which the contractor has not heard from the contracting officer, he has a three-way election of:

(a) continuing to await the decision of the contracting officer, in the hope that it will be favorable, or

(b) treating the failure to find as being itself a decision denying the claim and appeal to the Secretary,⁸⁴ or

(c) treating the failure to find as a breach of contract and waiver by the Government of the Disputes clause, and initiating suit immediately.⁸⁵

If the contracting officer should expressly refuse to make a decision, the

80. *Wagner Whirler & Derrick Corp. v. United States*, 128 Ct. Cl. 382, 386, 121 F. Supp. 664, 666-67 (1954), and cases cited therein.

81. See note 59 *supra*.

82. See note 60 *supra*.

83. *Ibid*.

84. See the *O'Brien dielectric Corp.*, ASBCA No. 2697 (1956); for an analogous proposition. No cases have been found which expressly pass on the authority of boards or department heads under these circumstances.

85. *Universal Power Corporation v. United States*, 112 Ct. Cl. 97 (1948). "As we have many times held, the contract placed upon the contracting officer and the Secretary of War the duty of making decisions, and their failure to do so is a breach of contract, which authorizes plaintiff to bring suit in this court to recover the amount to which it is entitled under the contract." *Cape Ann Granite Co. v. United States*, 100 Ct. Cl. 53, 71 (1943), cert. denied, 321 U.S. 790 (1944).

contractor may follow (b) or (c) without waiting for the expiration of even a reasonable time.⁸⁶

Once the contractor has filed his appeal, the contracting agency has at most a reasonable time in which to forward the appeal file for action by the Secretary, who in turn has a reasonable time to determine the appeal. The various steps should be looked on merely as being parts of a whole. The question should be whether the overall administrative process will be completed in a reasonable time.

As a rule of thumb the Court of Claims⁸⁷ and certain of the District Courts⁸⁸ have said that two years is a reasonable time in which to complete all the steps of the disputes procedure, the two years commencing on the day of filing of the notice of appeal and ending on the day of decision by the Secretary or his representative. The courts will treat a delay beyond that time as a breach of contract and accord a contractor a hearing on the merits of his case.

In August, 1955, the ASBCA revised its Rules to provide, among other things, that a contracting officer should forward all notices of appeal received by him within ten days thereafter.⁸⁹ At least one suit has been filed in the Court of Claims wherein the contractor alleged that a delay of 95 days⁹⁰ in forwarding his appeal was a waiver of the Disputes clause. It will be of some interest to see what disposition the court makes of this case. The proposition that rules and regulations confer a contractual right, even though not incorporated into the contract by reference, is somewhat novel.

It is possible to obtain *de novo* judicial consideration of the merits of a dispute by showing that the purported decision of the contracting officer is a nullity and is without effect.⁹¹ In the past this has been accomplished in a number of ways:

(a) proof that the contracting officer did not himself sign the decision.⁹²

(b) it appearing on the face of the decision that the contracting officer

86. *Cape Ann Granite Co. v. United States*, 100 Ct. Cl. 53 (1943), cert. denied, 321 U.S. 790 (1944).

87. *Southeastern Oil Florida v. United States*, 127 Ct. Cl. 480, 115 F. Supp. 198 (1953).

88. *Wessel Duval & Co. v. United States*, 126 F. Supp. 79 (S.D.N.Y. 1954).

89. ASPR, app. A, pt. 2, Rule 4; 32 C.F.R. § 1.301; 1 CCH Gov't Contracts Rep. ¶ 10,721.

90. *James Kennedy, Trustee for Greenstreet Inc. v. United States*, Ct. Cl. No. 425-55 (filed 1955).

91. *John A. Johnson Contracting Corp. v. United States*, — Ct. Cl. —, 132 F. Supp. 698 (1955).

92. *King v. United States*, 37 Ct. Cl. 428 (1902); *Zweig Co. v. United States*, 92 Ct. Cl. 472 (1941).

has attempted to delegate his authority to make decisions under the Disputes clause, an authority which can not be delegated.⁹³

(c) proof that the decision of the contracting officer was not based on his independent judgment, but in fact represents the decision of his superiors.⁹⁴

(d) where the contracting officer has not acted “. . . impartially in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge.”⁹⁵

(e) the decision reveals an “. . . utter lack of basic findings [of fact] required to support it.”⁹⁶

(f) when the decision reflects a “. . . complete unawareness of the problem on the part of the deciding officer.”⁹⁷

It would seem that the last three grounds represent arbitrary actions on the part of the contracting officer, which following *Blair* (and Public Law 356) should be appealed to the Secretary.

The ASBCA has permitted contractors to rely on decisions of officers superior to the contracting officer as being appealable decisions.⁹⁸ These superiors have themselves been contracting officers and the board has impliedly called attention to the contractual definition of “contracting officer,” which allows for more than one “contracting officer.”⁹⁹ On the other hand, the Government has not been permitted to rely on the decision of a superior to the contracting officer¹⁰⁰ and allege failure to exhaust the contractual remedy.

Quite often decisions are made by “successor” contracting officers, who are contemplated in the contract. The courts, it seems certain, will not permit the Government to replace a contracting officer for the sole pur-

93. *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603 (1937); *Hirsch v. United States*, 94 Ct. Cl. 602 (1941).

94. *Standard Dredging Co. v. United States*, 71 Ct. Cl. 218 (1930).

95. *Penner Installation Corp. v. United States*, 116 Ct. Cl. 550, 563, 89 F. Supp. 545, 547, aff'd by an equally divided Court, 340 U.S. 898 (1950); cf. *Silas Mason Co. v. United States*, 90 Ct. Cl. 266 (1940).

96. *Climatic Rainwear Co. v. United States*, 115 Ct. Cl. 520, 560, 88 F. Supp. 415, 421 (1950).

97. *Id.* at 566, 88 F. Supp. at 425, citing *Henry Ericsson Company v. United States*, 104 Ct. Cl. 397, 62 F. Supp. 312 (1945), cert. denied, 327 U.S. 784 (1945).

98. *Waterman Steamship Corp.*, ASBCA No. 371 (1951). See *Keith S. Merritt*, ASBCA No. 85 (1949).

99. General Provision 1, Standard Form 32 (Supply Contract) reads, in part, “(b) The term ‘Contracting Officer’ means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer” See also General Provision 1(b), Standard Form 23A (Construction Contract).

100. *John A. Johnson Contracting Corp. v. United States*, — Ct. Cl. —, 132 F. Supp. 693 (1955).

pose of having the new contracting officer render a decision which the old contracting officer has refused to make.¹⁰¹

A final situation in which a contractor will obtain judicial consideration of his claim on the merits occurs when the Government and the contractor waive the Disputes clause. Such waiver can be *implied* from the conduct of a United States Attorney.¹⁰²

V. JUDICIAL RELIEF FOR THE GOVERNMENT

Only the contractor may appeal to the Secretary from a decision of a contracting officer made pursuant to the Disputes clause. When a contractor sues the Government, a counterclaim may be pleaded alleging either a fraudulent disputes determination or one containing material errors of law.¹⁰³ During the committee hearings on Public Law 356, the Comptroller General submitted a bill, which the Judiciary Committees of both the House and Senate stated in their report became in substance, Public Law 356.¹⁰⁴ There can be no question that the Comptroller General wanted the right to review Disputes determinations of contracting officers that were either arbitrary or capricious. It will take a good deal of judicial construction to reach this latter result. Public Law 356 says that it is the decision of the *head of the department* that should not be arbitrary or capricious, and does not speak of the contracting officer. Parenthetically, it should be added that there are still certain decisions of contracting officers that may not be appealed—the so-called satisfaction cases¹⁰⁵ (*i.e.*, each is final unless determined by the department head to be arbitrary).

The ordinary method by which the Government obtains judicial review is somewhat roundabout. The Comptroller General will refuse payment on a voucher which is to pay the amount owing by reason of a Disputes decision. Thereafter the contractor usually will sue for payment under the Tucker Act, relying on either the decision of the contracting officer or the Secretary.¹⁰⁶ The Government then defends the suit by pleading the

101. *Ibid.*

102. *United States v. Lennox Metal Manufacturing Co.*, 131 F. Supp. 717 (E.D.N.Y. 1954), *aff'd*, 225 F. 2d 302 (2d Cir. 1955).

103. See *Bell Aircraft Corp. v. United States*, 120 Ct. Cl. 398, 100 F. Supp. 661 (1951), *aff'd* by an equally divided Court, 344 U.S. 860 (1952).

104. 2 U.S. Code Cong. & Ad. News 2191 (1954).

105. *Ideal Vans*, ASBCA No. 2724 (1955); *Harry A. Dundore*, ASBCA No. 579, 5 CCF 61134 (1950). See *Goltra v. Weeks*, 271 U.S. 536 (1926). In such cases a board of contract appeals will not substitute its decision for that of the Government officer. It will merely review his decision to determine whether it was arbitrary or capricious.

106. See note 103 *supra*. See also Cable, *The General Accounting Office and Finality of Decisions of Government Contracting Officers*, 27 N.Y.U.L. Rev. 780-91 (1952). In the last cited article the statement at 781 that disputes as to allowable costs made up the bulk of the work of the NBCA and the WDBCA, is not completely accurate.

limitations of Public Law 356. In *Northrop Aircraft Inc. v. United States*,¹⁰⁷ the Court of Claims sustained the Comptroller General's withholding of an amount previously determined to be due a contractor by the ASBCA. The question involved was solely one of law, the construction of *Treasury Decision 5000* as to the reimbursability of recovered taxes under a Cost-Plus-A-Fixed-Fee contract. It represents the first time that any court since *Wunderlich* has reversed a disputes determination which was *favorable* to the contractor.

VI. COMPLIANCE WITH THE DISPUTES CLAUSE

The thirty day appeal period closely resembles a statute of limitations. Illness of an appellant affords no excuse for failure to appeal within the prescribed period.¹⁰⁸ The fear of a contractor, that by appealing, he will incur the enmity of the contracting officer likewise does not excuse a failure to appeal.¹⁰⁹ This is true even if the contract has many months more to run and the contractor views as essential his good relations with the contracting officer.

In a 1955 case, *Design Center Inc.*,¹¹⁰ the ASBCA held as premature, on somewhat confusing and unclear grounds, a contracting officer's decision which was not appealed from for seven weeks. Within six days after receiving the decision, the contractor requested that the contracting officer furnish a second copy of the decision since the first decision had been misplaced soon after being received. The contractor received the second copy three weeks after its time for appeal had expired. In ruling that the appeal was premature, the board said:

"There undoubtedly can be situations where the Government has caused an appellant to delay the filing of an appeal and thus be precluded from asserting that the appeal is not timely. In our opinion this is not such a case."¹¹¹

This decision, it is believed, indicates that the ASBCA will break with the thirty day rule when sufficiently strong facts are presented. The writer has not been able to find any decisions as to the effect of the thirty day rule in the face of genuine physical impossibility, such as internment in time of war, insanity, physical unconsciousness.

A contractor will not be required to appeal before:

- (a) a disputed question of fact exists between the parties, *and*
- (b) he receives a "final" decision of the contracting officer.

107. 130 Ct. Cl. 626, 127 F. Supp. 597 (1955).

108. *Fraser Engineering Co.*, ASBCA No. 3001 (1955); *MacLean Industries, Inc.*, ASBCA No. 1964 (1955).

109. *Perry McGlone v. United States*, 96 Ct. Cl. 507, 540 (1942); *American Bridge Co. v. United States*, 25 F. Supp. 714 (W.D. Pa. 1938).

110. ASBCA No. 2325 (1955).

111. *Id.* at 3.

In *Esmond Chemical Co., Inc.*, the ASBCA said:

"The decision from which the appeal is required to be taken must be of a dispute involving questions of fact. The word 'dispute' means . . . 'verbal controversy; contest by opposing argument or expression of opposing views or claims . . .'"¹¹²

A. *Premature Appeals*

The rule that a contractor may not appeal prior to the rendering of a decision by the contracting officer is generally recognized and frequently applied by boards of contract appeals.¹¹³ The application of this rule to particular factual situations, however, is often a difficult matter. Quite obviously the contracting officer can not accompany his decision with a finding of fact relative to each element of evidence relied on by the contractor. Issues of fact are presented to the contracting officer for his determination along with evidence supporting the position of both parties. The issues must be narrowed somewhat beyond the mere categorical assertion of a claim. Later, before the board of contract appeals, the parties will pursue the issues presented to the contracting officer with more elaborate and thorough evidence. Such boards do not restrict an appellant to the *evidence* presented to the contracting officer, but only restrict him to the *issues* so presented.

In giving reconsideration to its original opinion in *Maudlin & Son Mfg. Co., Inc.*, the ASBCA observed:

"At the outset, it should be noted that this Board's jurisdiction is appellate. We do not have jurisdiction over a disputed question unless it is a question which, because it could not be decided by agreement between the contractor and contracting officer, has been decided by the contracting officer."¹¹⁴

". . . .

"The Board finds nothing in its opinion that can be construed to mean that 'a specific determination by the contracting officer is required as to every possible contention which may be inferred from a contractor's appeal.' On the contrary, what the Board has said is that an issue, and not an inference that an undisclosed issue exists, must be presented to and decided by the contracting officer before it can be presented to this Board."^{114a}

B. *Absence of a Disputes Clause: Appeals by Subcontractors*

The Federal Government does award a limited group of contracts, usually for small amounts of money, which do not contain Disputes pro-

112. ASBCA No. 938 (1952).

113. *S. Patti Constr. Co.*, ASBCA No. 1934 (1954); *Wind Turbine Co.*, ASBCA No. 2528 (1955); *Cornelia Garment Co.*, ASBCA No. 1673 (1954); *Society Brand Hat Co.*, ASBCA No. 235 (1951); *A.L. Kornman Co.*, ASBCA No. 282 (1950). After being rendered, a decision must be communicated to the contractor before he may appeal.

114. ASBCA No. 2027, at 3 (1955) (motion for reconsideration).

114a. *Id.* at 6.

visions.¹¹⁵ Also, in awarding a major contract, the Disputes provision may be omitted through inadvertence. In either instance a contractor who is unable to settle his dispute with the contracting officer has his judicial remedy and may not seek relief before a board of contract appeals.^{115a}

The ASBCA has taken limited jurisdiction in certain cases to determine whether a contract had come into existence between an appellant and the Government. This may come about because of an allegation of vague and uncertain specifications,¹¹⁶ or upon an allegation that the purported award of the Government was only a qualified acceptance of, or counter offer to, the bid made by the appellant.¹¹⁷ In the latter instance, unless the contractor subsequently accepts the qualification either expressly or through its conduct in commencing performance, there can be no contract between the parties and, hence, no Disputes clause.

In one notice of appeal, the contractor stated:

"This appeal is not taken pursuant to any specific provision of the contract in question, it being the Contractor's conception that Article 12 [Disputes] of the General Provisions is not applicable here. Rather, this appeal is taken pursuant to the general equities inherent in the case. . . ."118

The ASBCA, in dismissing the appeal for want of jurisdiction, stated:

"This Board has no general equitable powers. It depends upon the specific terms of the contract for its power to act and its charter for authority to represent the Secretary of the Army."¹¹⁹

A subcontractor is not in privity of contract with the Government and has no right to appeal *in its own name* under the Disputes clause of the prime contract.¹²⁰ However, it is possible for a prime contractor to appeal in behalf of its subcontractor. This latter principle is subject to one significant exception. A prime contractor may not appeal (nor maintain a legal action) for additional compensation if the subcontract (or any general or special release) contains a clause waiving claims against the prime contractor for expenses or losses to the subcontractor accruing because of some act on the part of the Government.¹²¹ The Government,

115. Purchase Orders of the military departments for \$5,000.00 or less may contain disputes provisions but need not. See ASPR 7-102 and, e.g., APP 7-102.

115a. Eugene Dietzgen Company, WDBCA No. 445 (1944).

116. Joseph Vinal, ASBCA No. 866 (1952).

117. Kilgore Sales Co., ASBCA No. 2778 (1955). See California Bag Co., ASBCA No. 2679 (1955).

118. South River Coat Co., ASBCA 2492, at 2 (1954).

119. Ibid.

120. St. Louis Lighting Protection Co., ASBCA No. 163 (1949). See Hawthorn Manufacturing Co., ASBCA No. 722 (1952) which included an attempted appeal by a surety company. See also Forrest Box & Lumber Co., ASBCA No. 2916 (1956).

121. *Severin v. United States*, 99 Ct. Cl. 435 (1943), cert denied, 322 U.S. 733 (1944); James

as well as the prime contractor, may avail itself of these exculpatory provisions, whether the claim be made under the Disputes clause or as the basis for a suit in the Court of Claims. In the absence of such exculpatory provisions, the prime contractor may consent to having the subcontractor prosecute the appeal, the appeal being taken, at all times, in the *name* of the prime contractor.^{121a} This permission may be provided for at the time of drafting the subcontract,¹²² so that the prime contractor is relieved of all active participation in the future appeal.

C. "Final" Decisions

The decision of the contracting officer, as well as the notice of appeal of the contractor, may be premature. The issuance of a decision, before a dispute has actually arisen, will not compel the contractor to appeal.¹²³ However, it must be borne in mind that the fact of existence of a dispute may be shown by oral evidence and may even be implied from conduct.

Although the decision of the contracting officer need not follow any precise formula of words, it must fairly and reasonably inform the contractor that a determination under the Disputes clause is intended.¹²⁴ Regulations of each of the three armed services require that the decision of the contracting officer make specific reference to the Disputes clause and, in addition, remind the contractor of his right of appeal.¹²⁵ Where a contracting officer fails to follow such regulations, a serious question arises as to whether he intended to render a final decision.

A sharp distinction must be drawn between written communications from the contracting officer, which may be relied upon by the contractor for purposes of taking an appeal, and communications which the Govern-

Stewart & Co. v. United States, 105 Ct. Cl. 284, 63 F. Supp. 653 (1946); Continental Ill. Nat'l Bank v. United States, 126 Ct. Cl. 631, 115 F. Supp. 892 (1953); Charles H. Tompkins Co., ASBCA No. 2661 (1955).

121a. General Installation Co., ASBCA No. 2061 (1954). See Warren Brothers Roads Co. v. United States, 123 Ct. Cl. 48, 83-84, 105 F. Supp. 826, 831 (1952).

122. See General Motors Corp., WDBCA No. 174 (1943); Chrysler Corp., WDBCA No. 39 (1943). The latter case is susceptible of various interpretations. Certain language in the opinion indicates that the subcontractor, which was permitted to appeal in its own name, was treated by the WDBCA as being in privity of contract with the Government since its "major" subcontract was approved by the Government at the time of execution of the prime contract with the Glenn L. Martin-Nebraska Company.

123. Esmond Chemical Co., ASBCA No. 938 (1952).

124. Climatic Rainwear Co. v. United States, 115 Ct. Cl. 520, 88 F. Supp. 415 (1950); Allied Contractors v. United States, 129 Ct. Cl. 400, 407, 124 F. Supp. 366, 370 (1954); cf. Poloron Products Inc. v. United States, 126 Ct. Cl. 816, 825-26, 116 F. Supp. 588, 593-94 (1953).

125. APP 7-103.12(3) (a); AFPI 54-505-06; NPJ 40-201.1(b).

126. Acme Chair Co., ASBCA No. 2019 (1955); Chemical Service Corp., ASBCA No. 734 (1951); Hubbell & Miller Co., ASBCA No. 1111 (1953); Townsco Contracting Co., ASBCA No. 1169 (1953).

ment wishes to rely on as being final decisions as a part of its overall contention that the contractor has not exhausted his contractual remedy. The rule of interpretation that a writing is to be construed against the author has wide application in this area and explains why one letter appealed from will give jurisdiction to a board of contract appeals while the same letter, not appealed, will not be considered a final decision.

During the thirty days after the contractor has received an otherwise final decision, the contracting officer may take some action which will deprive his decision of its original finality. The parties may resume negotiations for a settlement.¹²⁶ The contractor makes out a clear case when he can point to some letter or memorandum received in the thirty day period from the contracting officer which indicates that the decision is being reconsidered. It is customary for boards of contract appeals to read together the decision and *all* written communications passing between the parties in the thirty day interval following receipt of the decision by the contractor to ascertain whether at the end of that period the contracting officer still intended his decision to be final.

It is not unusual for a contractor to request that the contracting officer reconsider his decision. Such a request does not, in and by itself, qualify as a notice of appeal.¹²⁷ A contracting officer who within the thirty day period writes to invite the contractor to a conference, has probably done enough to deprive his decision of its original finality. In some of the older cases it was said that a contracting officer has no power to extend the appeal period because he may not waive a right that has already vested in the United States.¹²⁸ In *Radio and Television Corp.*,¹²⁹ the ASBCA held that the extension to 45 days of a contractor's time to appeal indicated an intention on the part of the contracting officer that his decision not become final for the first fifteen days.

In *Jacob Kleinman*,¹³⁰ the contracting officer orally promised the contractor that he would give reconsideration to a decision provided the contractor would write him before expiration of the thirty day period. The contractor did write within the specified period. The contracting officer did not issue his second decision until some four months later. The WDBCA upheld the timeliness of the appeal taken within thirty days of the *second* decision.

It is well settled that a contracting officer is without power to issue a

127. *A.L. Kornman Co.*, ASBCA No. 282 (1950); *Trimore Clothes, Inc.*, ASBCA No. 736 (1951); *Star Fastener, Inc.*, ASBCA No. 1603 (1954).

128. *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *Pacific Hardware Steel Co. v. United States*, 49 Ct. Cl. 327 (1914); *Thompson, Trustee*, WDBCA No. 1075 (1945); *H.R.H. Construction Corp.*, WDBCA No. 1058 (1945).

129. ASBCA No. 2570 (1955).

130. WDBCA No. 939 (1945).

new decision, replacing a prior final decision from which no appeal was taken within the thirty day period (noting the *Jacob Kleinman* exception).¹³¹ The prior decision is a right vested either in the Government or the contractor which may not be waived without payment of consideration. Contractors often will attempt to appeal from a letter of the contracting officer reiterating his position taken in an unappealed decision. Such appeals are untimely, even in instances where the contracting officer has not cited his prior decision.¹³²

In one situation, however, a new decision by the contracting officer will revive a right of appeal previously lost by the contractor. In his notice terminating a supply contract for default, the contracting officer may have recited that specific causes of delay were not excusable within the meaning of the "Default" article.¹³³ If later, assuming the Government has a continuing need for the items which were to be delivered under the defaulted contract, the Government places a repurchase contract, the contracting officer will send the defaulted contractor a notice of excess costs (viz., for the difference in contract prices). At this time the contractor may raise a dispute as to excusable causes of delay in its performance, even including the specific causes recited in the unappealed decision of the contracting officer terminating the contract. If the ASBCA finds for the contractor on these questions, the termination for default is converted into a "Termination for the Convenience of the Government" which means that the Government (a) loses its excess costs and (b) pays termination costs to the contractor.¹³⁴ Only in the case of *supply* contracts with the *military* departments may terminations for default be administratively converted into terminations for convenience.¹³⁵ It is questionable whether this theory of revival of the right to appeal would be upheld by the courts which, in the form outlined, have not ruled on it.

In a case where the ASBCA has previously ruled on specific allegations of excusable causes of delay, upon an appeal from the default termination, it will treat such allegations as *res adjudicata* and will allow the contractor to contest only the reasonableness and propriety of the repurchase contract.¹³⁶

The filing of a timely appeal, of course, prevents the decision of the contracting officer from becoming a final decision. During the interval between the filing of the appeal and the decision of the Secretary, the

131. *Grasty Pallet Co.*, ASBCA No. 920 (1951).

132. *Ibid.*

133. *DeLisser Manufacturing Corp.*, ASBCA No. 1002 (1952); *James Lumber Co.*, ASBCA No. 986 (1952); *Bockmier Lumber Sales Agency, Inc.*, ASBCA No. 1235 (1953).

134. *Fulford Manufacturing Co.*, ASBCA No. 2143 (1955); *John Peterson*, ASBCA No. 1633 (1954).

135. General Provision 11(e), Standard Form 32 (Supply Contract).

136. *Aero-Land Supply Co.*, ASBCA No. 1869 (1954).

contracting officer may amend his decision and either settle with the contractor or he may find certain issues against the contractor which, in his original decision, he had decided in the contractor's favor.¹³⁷ Also, the contracting officer may amend his decision in the initial thirty day period even without an appeal by the contractor.¹³⁸

When the appeal is presented before the Secretary or board of contract appeals, Government counsel has the right of attacking the contracting officer's decision as being too *generous* to the contractor.¹³⁹ The contractor, in *Charles H. Tompkins Co.*,¹⁴⁰ appealed to the ASBCA from a decision of the Corps of Engineers Claims and Appeals Board, thereby vacating the decision of the C & A board. As to one issue the ASBCA held that the lower board had improperly found for the appellant. An appeal, therefore, searches the *whole* record.

D. Requisites of an Appeal

There is only one case in which an *oral* appeal will satisfy the requirements of the Disputes clause. At the time of a hearing before a board of contract appeals on a *premature* appeal, the contracting officer may make an oral decision denying the contractor's claim. It is sufficient if thereafter, during the course of the hearing, the contractor appeals orally.¹⁴¹ A reporter transcribes both the decision and appeal which become parts of a verbatim transcript of the hearing. A board of contract appeals in such cases may elect to decide the merits of the dispute, or, in its discretion, it may refuse to render a decision.¹⁴²

Several apparently mandatory requirements of the Disputes clause are merely permissive. An appeal need not be addressed to the Secretary, provided an appeal is intended. Appeals addressed to the ASBCA, the contracting officer,¹⁴³ and the purchasing office of the contracting officer¹⁴⁴ have been held to be sufficiently addressed. The addressing of a pur-

137. Sentinel Aircraft Inc., ASBCA No. 886 (1951).

138. *Ibid.*

139. Montgomery Construction Co., ASBCA No. 2556 (1956); Jeneckes, IBCA 44, 62 I.D. 449 (1955). In Wichita Engineering Co., ASBCA No. 2522 (1955) the contracting officer unilaterally fixed a new and lower contract price after performance but pursuant to a price redetermination article of the contract. The contractor then appealed asking a higher price. The contracting officer next reconsidered his original decision and reduced the contract price still further. The contractor thereafter appealed asking a price higher than that claimed in his original appeal. The ASBCA, on appeal, fixed the price above the contracting officer's second decision and slightly below his first.

140. ASBCA No. 2661 (1955).

141. Sam Tour & Co., ASBCA No. 2375 (1955).

142. *Ibid.*

143. New York Engineering Co., ASBCA No. 289 (1950); Raylaine Worsteds, Inc., ASBCA No. 1842 (1955).

144. National Magnet Wire Corp., ASBCA No. 539 (1950).

ported notice of appeal to the Secretary, if done, will, however, have an important bearing on the question of intention to appeal.

The following letter from an attorney was held by the ASBCA to be sufficient as a notice of appeal in *New York Engineering Co.*:

"Your letter, addressed to the New York Engineering Company, terminating the aforesaid contract, together with your findings of fact upon which the notice of termination is based, were received by it on September 9, 1948, and have been referred to me.

"Under date of September 7, 1948, the Secretary, of the Department of the Army, was advised that, by reason of the breach of the contract, on the part of the Government and its failure or refusal to cure the same, the New York Engineering Company elected to terminate the contract and will look to the Government for such damages as it may sustain. A copy of such communication was mailed to you [the contracting officer].

"It is *my* observation, however, that there is no basis for the action taken by you. That the conclusion reached by you is erroneous because, in the main, the pertinent findings of fact are contrary to the actual facts and inconsistent with the facts theretofore found and reported, and important facts relative thereto have been omitted."¹⁴⁵

An even stronger case for the Government was *Lehigh-Portland Cement Company*, in which the WDBCA upheld, as a sufficient notice of appeal, a letter which ended:

". . . .

"We can see no reason why we should have to make an appeal to the Secretary of War for an adjustment which is specifically contained in a Contract and Change Order which have been formally and properly executed by both the Government and ourselves.

"In our opinion, we are clearly entitled to payment at \$2.095154 per barrel f.o.b. shipping point and we respectfully request that payment be so made."¹⁴⁶

Also, in *National Magnet Wire Corporation*, the following letter was held by the ASBCA to constitute an appeal:

"We beg to advise you that pursuant to Section 20 of the contract entitled 'Disputes,' we are preparing presently an appeal from your decision, which will be submitted within 30 days from this notice."¹⁴⁷

Accordingly, it is accurate to say that an appeal need follow no fixed or precise formula of words and that ambiguous appeals will be construed in favor of the author rather than against him. Inasmuch as the thirty day provision effects a forfeiture, boards of contract appeals will liberally interpret all letters sent by a contractor to the Government in the thirty days after the decision of the contracting officer.¹⁴⁸ If a contractor makes reference to the decision and indicates dissatisfaction

145. ASBCA No. 289 (1950) at 6. (Emphasis added.)

146. WDBCA No. 355 (1944).

147. See note 144 *supra* (Emphasis added).

148. Cases cited notes 143-46 *supra*.

therewith, he stands a good chance of having his letter later treated as an appeal.

There is a counterrule, however, against which a notice of appeal, not fully labeled, may run. A request for reconsideration by the contracting officer of his decision is *not* a notice of appeal.¹⁴⁹ A board of contract appeals will read such an instrument as a whole to determine if reconsideration *only* is desired.¹⁵⁰ A "request for review by higher authority" or an expression of dissatisfaction accompanied by resignation to the fact that the contracting officer has made up his mind, will remove the letter from this latter category.

E. Proof of Mailing

In order to establish that a given letter of appeal is untimely, the Government must show both the date of receipt of the decision of the contracting officer (usually this is done by a Registered or Certified mail return receipt) and the date on which the notice of appeal was deposited in the mails. Proving this latter date usually presents the greatest problem, especially where the contractor has sent his letter of appeal by *ordinary* mail. The postmark does not allow for a presumption that the letter was *deposited* on its date but merely that the letter was *forwarded* on that date.¹⁵¹ It should be remembered that in doubtful cases the contractor will be contending that the letter was forwarded *before* the date of the postmark.

In *Schroeder Tool & Engineering, Inc.*,¹⁵² the Air Force trial attorney was successful in proving that the appeal was mailed on the 31st day after the decision was received by the contractor. Through extensive depositions of postal employees, it was shown that the president of the appellants corporation had given the letter to a registry clerk one day late. The ASBCA said, in an often-repeated statement:

"The time within which an appeal may be taken is fixed by contract between the parties, and if not taken within that time the contracting officer's decision becomes final and conclusive so far as we are concerned. We could no more extend the time by one day than by one month."¹⁵³

Time is computed in the usual manner. The first day of the stated period is excluded while the final day is included. If the last day is a Sunday or holiday, the contractor is given until the end of the next working day.¹⁵⁴ Saturdays as such do not qualify as holidays. Although the

149. Cases cited note 127 *supra*.

150. *Ibid*.

151. *Boyd Contracting Co.*, ASBCA No. 2243 (1955), which cites 25 A.L.R. 21 (1923).

152. ASBCA No. 351 (1952).

153. *Id.* at 3.

154. *Id.* at 2; *J.A. Ross & Co.*, ASBCA No. 2326, at 26 (1955).

ASBCA will not presume that a letter was mailed on the day it was post-marked, the board will indulge in a rebuttable presumption that a given letter was not sent earlier than the date placed thereon by the contractor.¹⁵⁵ Where the Government proves the date of receipt and is able to show an untimely postmark, the contractor usually will have the duty of coming forward with affirmative evidence of mailing. A delay involving several weeks or months before the appeal is received by the Government places on the contractor an almost insurmountable burden of proving a timely mailing.

VII. SCOPE OF APPELLATE JURISDICTION UNDER THE DISPUTES CLAUSE

Questions of "timelieness," "prematurity" and "privity of contract" have already been discussed. There yet remain a number of other categories of cases in which boards of contract appeals, since the fact Disputes clauses allow only limited submission of controversies, have declined jurisdiction.

A. *Accord and Satisfaction*

If, prior to an appeal, the contractor and contracting officer have already made an agreement settling the matter in dispute, there can be no appeal by reason of the express wording of the Disputes clause. A settlement must be distinguished from a compromise. Only the General Accounting Office, or the Attorney General when the matter is in suit, may compromise a claim against, or in behalf of, the United States.¹⁵⁶ A compromise implies a yielding of fixed belief or principle after giving consideration and substantial weight to the element of expected success or failure in litigation.¹⁵⁷

This latter principle may raise the further question of whether the executive departments and agencies have *any* power to settle or adjudicate disputes. The right to *amend* contracts by Supplemental Agreements and unilateral Change Orders has long been recognized.¹⁵⁸ It is but an incident to the power originally to let public contracts. Likewise, the power to agree on methods of settling future disputes is but an incident to the power to amend contracts.¹⁵⁹

The acceptance by a contractor, without protest, of an amount less than that claimed against the Government will not operate as a final settle-

155. Pocono Apparel Manufacturing Co., ASBCA No. 2400 (1954).

156. 18 Comp. Gen. (1939); 4 Comp. Gen. 404 (1924).

157. See 38 Ops. Atty. Gen. 98 (1934).

158. *McCord v. United States*, 9 Ct. Cl. 155 (1873).

159. See *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1875). See also notes 14-45 *supra*.

ment of his account.¹⁶⁰ The contractor may either appeal or sue for the balance, depending on the nature of the claim. He may accept what is awarded him by a board of contract appeals and thereafter sue in the Court of Claims, relying on Public Law 356. His signing a release or supplemental agreement, however, will bar his claim¹⁶¹ unless he can show that fraud or duress, including economic duress,¹⁶² vitiated his consent. The same result is reached in cases where the contractor has signed a unilateral change order received from the contracting officer.

B. Final Payment

Final payment standing alone, under the Miller Act, has a peculiar significance which, in recent years, has not been carried over into other subdivisions of Government Contracts Law.¹⁶³ During its first years, the WDBCA held that final payment under a contract would deprive the board of jurisdiction since, by that time, the contract would be fully executed. In *Reed & Prince Manufacturing Co.*,¹⁶⁴ the WDBCA reversed its prior holdings and assumed jurisdiction after final payment. The General Accounting Office¹⁶⁵ and the courts¹⁶⁶ similarly hold that claims may be made *under* contracts after final payment and until final settlement.

The question therefore is as to when final settlement occurs. It can come about in a variety of ways. A general release executed by the parties is one example.¹⁶⁷ A Settlement Certificate,¹⁶⁸ issued by the GAO after submission to it of data on a claim by both the contractor and the executive department or agency, is another, and probably the best, example.

160. *St. Louis, Brownsville & Mexico Ry. Co. v. United States*, 268 U.S. 169 (1925).-

161. *Hargrave v. United States*, 80 Ct. Cl. 642 (1955); *Irwin v. United States*, 104 Ct. Cl. 84 (1945); *Sanders v. United States*, 104 Ct. Cl. 1, 60 F. Supp. 483 (1945); *Euclide J. Ouellette*, ASBCA No. 2596 (1955), in which the contractor was held bound by the following: "Except as hereby modified all terms and conditions of said contract, . . . shall remain unchanged and in full force and effect."

162. *Fruhauf Southwest Garment Co. v. United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953); *B. Fischer Co.*, ASBCA No. 505 (1951); *Parkside Clothes, Inc.*, ASBCA No. 261 (1951), holding existence of economic duress against the Government; *True Quality Shoe Co.*, ASBCA No. 2332 (1955); *National Construction Co.*, ASBCA No. 2383 (1955).

163. *Globe Indemnity Co. v. United States*, 291 U.S. 476 (1934).

164. WDBCA No. 1265 (1946). For cases following *Reed & Prince* see *Marshall Sportwear, Inc.*, ASBCA No. 577 (1951); *Production Line Manufacturers, Inc.*, ASBCA No. 816 (1951); *Boyd Contracting Co.*, ASBCA No. 1504 (1953); *Woodcraft Corp.*, ASBCA No. 2660 (1955).

165. 30 Comp. Gen. 335 (1951); 33 Comp. Gen. 93 (1953).

166. *Albert & Harrison, Inc. v. United States*, 1 CCF 658 (S.D.N.Y. 1943).

167. *J.G. Menihan Corp.*, Army BCA No. 1759 (1948).

168. 31 U.S.C.A. § 74.

C. *Statutes of Limitations and Laches*

After ten years, the GAO is barred by statute from considering any claim.¹⁶⁹ The six year statute of limitations,¹⁷⁰ which bars court actions, pertains to jurisdiction of the subject matter and need not be pleaded by the Government as an affirmative defense.

It is significant to note that the ASBCA has ruled that it is not bound by *any* statute of limitations,¹⁷¹ a ruling which assumes considerable importance when viewed in connection with the rule that final payment does not terminate jurisdiction under the Disputes clause. The board will accept jurisdiction even though after its decision a contractor can receive payment only under a private bill in Congress. In one case a District Court has taken jurisdiction following such a decision of the ASBCA, under facts indicating that the six year statute of limitations of the Tucker Act may have been tolled, on equitable grounds.¹⁷²

In another case, after appealing, the contractor did not request a hearing for twelve years.¹⁷³ The ASBCA, in denying a motion to dismiss which cited several alternative grounds, did not discuss the question of laches on the part of the contractor. The WDBCA, in a case decided before *Reed & Prince Manufacturing Co.*, found that the Government was barred by laches from asserting a claim against a contractor one year after final payment.¹⁷⁴ It would appear that the equitable doctrine of laches is not the solution to the problem. Ordinarily, laches can be pleaded after expiration of the analogous statute of limitations,¹⁷⁵ which in the disputes area would be the statute governing the GAO. However, laches may not be pleaded against the Government which likewise is not bound by any statute of limitations.¹⁷⁶ The Government in appearing before boards a contract appeals does not do so in its *sovereign* capacity but rather as an equal of the contractor. Imposition of the laches defense on the contractor alone would seem to work an unfair result.

169. 31 U.S.C.A. § 71(a).

170. 28 U.S.C.A. § 2401(a). See *Finn v. United States*, 23 Ct. Cl. 486, *aff'd*, 123 U.S. 227 (1887).

171. *Conro Manufacturing Co, Inc.*, ASBCA No. 769 (1951).

172. *Conro Manufacturing Co., Inc., v. United States* (E.D. Pa. No. 78-62-46 1955) (unreported court order).

173. *Raylaine Worsteds, Inc.*, ASBCA No. 1842 (1955).

174. *Randall Construction Co.*, WDBCA No. 675 (1944).

175. *Bowman v. Wathen*, 42 U.S. (1 How.) 189 (1843). See *Holmberg v. Armbricht*, 327 U.S. 392 (1946).

176. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 318, 325 (1824); *United States v. Thompson*, 98 U.S. 486 (1878); *United States v. Wurts*, 303 U.S. 414, 416 (1938); *Goltra v. United States*, 119 Ct. Cl. 217, 252, 96 F. Supp. 618, 624 (1951).

D. *The Comptroller General*

The Budget and Accounting Act of 1921 provides in part:

"Balances certified by the General Accounting Officer, upon the settlement of public accounts shall be final and conclusive upon the Executive Branch of the Government. . . ."¹⁷⁷

In the event that a contractor and an executive department submit a controversy to the GAO for settlement, usually believing that it is outside the scope of the Disputes clause, a board of contract appeals may not later redetermine the questions thereafter decided by the Comptroller General.¹⁷⁸

In a number of cases contractors have been able to persuade the Comptroller General to refer a case back to the executive department for a decision and appeal under the Disputes clause. Even after the Settlement Certificate has been received the Comptroller General may indicate, in a subsequent letter, that he did not mean finally to decide any questions of fact. In such cases the executive department reacquires jurisdiction to determine, under the Disputes clause, the questions of fact in the case.¹⁷⁹

The contractor does not lose his rights under the Disputes clause in cases where an executive department *unilaterally* forwards an appeal to the Comptroller General.¹⁸⁰ However, the contractor may lose his right to appeal to the Secretary if he asks the Comptroller General to reconsider his decision. In the case where the executive department unilaterally forwards an appeal to GAO, the contractor may treat the action of the department as a waiver of the Disputes clause and bring immediate suit.¹⁸¹

The courts have never permitted the Comptroller General to act as the "authorized representative" of a Secretary to determine appeals under the Disputes clause. The limited standards of judicial review of Public Law 356 do not pertain to any decision of the Comptroller General.

E. *Res Adjudicata*

In *Lennox Metal Manufacturing Co.*,¹⁸² the ASBCA considered itself bound by a decision of a District Court, affirmed on appeal,¹⁸³ finding

177. 31 U.S.C.A. § 74.

178. *Brooks-Callaway Co. v. United States*, 97 Ct. Cl. 689, 704 (1942); *H.P. Andrews Paper Co.*, ASBCA No. 2486 (1955).

179. *Cornelia Garment Co.*, ASBCA No. 1673 (1954); *Woodcraft Corp.*, ASBCA No. 2660 (1955).

180. *Woodcraft Corp.*, ASBCA No. 2660 (1955).

181. *Brooks-Callaway Co. v. United States*, 97 Ct. Cl. 689 (1942).

182. ASBCA No. 2453 (1955), accord, *Haggar Co.*, ASBCA No. 1469 (1953), which cites 28 U.S.C.A. § 2519 (1952) as to effect of Court of Claims judgment against plaintiff.

183. 131 F. Supp. 717 (E.D.N.Y. 1954), aff'd, 225 F. 2d 302 (2d Cir. 1955).

that a contractor was not in default on the date of termination of his contract. The Government had intervened in bankruptcy proceedings to preserve, what the court termed, an equitable title to certain work in process and which the Court indicated it would have protected but for the improper termination. *Lennox* points up the possibility that administrative boards will find themselves bound by prior court decisions on questions of fact in cases where the Attorney General has waived the Disputes clause.

Boards of contract appeals in a few instances have cited prior decisions of their own as being determinative of later disputes.¹⁸⁴ A contractor may wish to reappeal on a question already decided or he may wish further reconsideration after the time for asking reconsideration has passed. Although it does not appear that boards of contract appeals have passed on this question, there is a good deal of general arbitration law on the subject. The majority view is that once the arbiters have finally rendered their decision, they become *functus officio* and no longer have any standing under the contract to decide the dispute.¹⁸⁵ At least one case holds that where an engineer is to render decisions on questions during the life of a contract, he has the power of correcting his decision up to the time of completion of the contract.¹⁸⁶

This problem is further complicated by questions of newly discovered evidence. The contractor under such circumstances may be able successfully to contend that the new evidence has shaped the controversy into a new dispute. Assuming a contractor decides to follow this latter route, he should first approach the contracting officer for a new decision because otherwise, under this theory, an appeal would be premature.

If the Secretary is held to be *functus officio* to consider newly discovered evidence, which is being presented after the decision on appeal, it would seem that the contractor should be allowed a full judicial hearing inasmuch as he has no Disputes clause under which to present his new evidence.

F. Breach of Contract: Unliquidated Damages

The two most difficult areas in the field of jurisdiction under the Disputes clause are "premature" appeals and "breach of contract."

The Comptroller General and the Attorney General, when a matter is in suit, are the only administrative officials of the Government who have the power to settle a claim for breach of contract.¹⁸⁷ The present day

184. Aero-Land Supply Co., ASBCA No. 1869 (1954); Adams Manufacturing Co., ASBCA No. 2665 (1956), citing ASBCA No. 2555 (1955) (same appellant).

185. 6 Williston, Contracts § 1927(A) (rev. ed. 1938). See Aero-Land Supply Co., ASBCA No. 1869 (1954).

186. *Palmer v. Clark*, 106 Mass. 373, 389 (1871).

187. See notes 156, 157 *supra*.

Standard Forms of Government contracts have been drafted to bring a maximum number of disputes under the Disputes clause. The "Changes" clause is the leading example.¹⁸⁸ Additional costs become liquidated under the clause in the form of an "equitable adjustment" which is made a question of fact between the parties. "Equitable Adjustments" are also provided for in the "Changed Conditions,"¹⁸⁹ "Inspection,"¹⁹⁰ "Suspension of Work"¹⁹¹ articles. Specific provision is made in the "Termination for Convenience"¹⁹² article for an appeal under the Disputes clause in the event that the parties are unable to agree on settlement costs.

Despite the broadness of coverage of the Standard Forms there still remain certain claims which arise *in connection with* but *not under* the contract. These claims are generally denominated as being for breach of contract or for "unliquidated" damages. Boards of contract appeals lack jurisdiction to determine the *liability* of the Government in such cases. Although the Secretary of War, in his July 4, 1944 memorandum, granted the WDBCA power to render findings of fact in such cases without expressing an opinion on liability (a grant of authority under which the Army and Air Force Panels of the ASBCA continue to operate), the GAO and the courts have indicated they consider such findings as being at best merely advisory.¹⁹³

A good example of breach of contract might seem to be a case where the Government has refused to pay a contractor. However, the ASBCA has taken jurisdiction over the question of whether a discount was earned¹⁹⁴ and the question of withholdings by the Government of payments to be received by a bank under the Assignment of Claims Act of 1940.¹⁹⁵

A change order is proper only if it was reasonably contemplated at the beginning of the contract as inhering in the work to be done. The issuance of a change order requiring work beyond the scope of the original contract renders the Government liable for damages for breach of contract.¹⁹⁶ A contractor's proper forum for relief in such cases is in the

188. General Provision 2, Standard Form 32 (Supply Contract); General Provision 3, Standard Form 23A (Construction Contracts).

189. General Provision 4, Standard Form 23A (Construction Contracts).

190. General Provision 5(b), Standard Form 23A (Construction Contracts).

191. General Condition (9), Corps of Engineers, U.S. Army Construction Contract.

192. See ASPR 8-703, 32 C.F.R. 8.703.

193. *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1943); *Langevin v. United States*, 100 Ct. Cl. 15, 31 (1943), 34 Comp. Gen. 20 (1954).

194. *Control Engineering Corp., ASBCA No. 772 (1951)*; *Shirtcraft Co., ASBCA No. 2819 (1955)*.

195. *Adams Manufacturing Co., ASBCA No. 2555 (1955)*; cf. *Scott Tent and Awning Co., ASBCA No. 1591 (1954)*; *Oakland Truck Sales, Inc., ASBCA No. 560 (1952)*.

196. *Severin v. United States*, 102 Ct. Cl. 74, cert. denied, 322 U.S. 733 (1943).

courts and not before an administrative board. The Changes article impliedly gives the Government the right to suspend the work for periods reasonable in length of time without payment of any additional compensation.¹⁹⁷ Should the delay be protracted into an unreasonable length of time, the Government will be held to have breached the contract. In neither case is the contractor entitled to any administrative relief unless the contract contains a "Suspension of Work" provision.¹⁹⁸

At one time the ASBCA took the position that the late delivery of Government Furnished Property was a breach of contract.¹⁹⁹ The ASBCA, under the amended Government Furnished Property clause, now holds that a contractor in such a case is entitled to an equitable adjustment,²⁰⁰ equating the late delivery of GFP to a delivery of defective GFP.

An irreconcilable conflict exists between decisions of contract appeal boards and those of the courts on the characterization of various acts as breach of contract or a "change" within the meaning of the Changes clause. The two concepts are almost mutually exclusive. The decision of a tribunal can be expected to favor its own jurisdiction. In clearcut cases, however, the administrative panels are forced to yield to the jurisdiction of the courts.

The rule is often stated that a Secretary may not determine, or compromise, general or unliquidated damages or damages for breach of contract.²⁰¹ Liquidated damages were once highly favored in Government contracts. Today, however, it is becoming increasingly rare to find such provisions in Government contracts. The reason is quite simple. In view of the interaction with the broad form excuses provision of the Default article, virtually every assessment of liquidated damages results in an expensive appeal under the Disputes clause, an appeal which in a high percentage of cases is successful. The expression "unliquidated damages" is not really used as the opposite of "liquidated damages" but rather is meant to distinguish "equitable adjustments" or other amounts fixed by the Disputes method.

The standard Default article provides that the contractor shall be liable for actual damages to the Government in addition to excess costs. Regulations of the various executive departments require the contracting

197. *United States v. Rice*, 317 U.S. 61 (1942).

198. *Pressed Steel Car Co.*, ASBCA No. 2432 (1955); *F.H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

199. *Franklin Iron & Metal Co.*, ASBCA No. 194 (1949); *B. & G. Sales Co.*, ASBCA No. 204 (1949); *Quipco Associates*, ASBCA No. 841 (1951).

200. *Carteret Work Uniforms*, ASBCA No. 1015 (1952); *The Foster Co.*, ASBCA No. 975 (1952); *L.T.H. Mfg. Co.*, ASBCA No. 1312 (1953); *Cornelia Garment Co.*, ASBCA No. 1673 (1954).

201. *William Cramp & Sons v. United States*, 216 U.S. 494 (1910). See *District of Columbia v. Bailey*, 171 U.S. 161 (1898).

officer to initiate withholding of monies due the contractor to offset such damages.²⁰² The contractor has no right to appeal under the Disputes clause such withholdings of "general" damages. His remedy is in either the GAO or the courts.

G. *Quasi Contractual and Equitable Remedies*

No authority exists under the Disputes clause to reform or rescind a contract.²⁰³ The Court of Claims on occasions has undertaken to reform certain writings²⁰⁴ as well as to make the Government pay for benefits conferred on it as unjust enrichment.²⁰⁵ In one case where there seemed to be possibly an unjust enrichment, the ASBCA expressly declined jurisdiction and suggested that the contractor seek his remedy in the courts.²⁰⁶ These questions, as well as problems of breach of contract, have arisen in one significant body of cases, those involving sales of surplus property "by lot." The contract expressly says that the "lot" is offered for sale "as is and where is" without any warranty or representation by the Government, even as to the description of the goods to be sold.²⁰⁷ In a long line of cases the ASBCA has held surplus property cases to be beyond its jurisdiction since the appellant usually is seeking reformation, rescission, unliquidated damages and the like.²⁰⁸

Title II of the First War Powers Act²⁰⁹ is the only instrument which provides equitable relief within the military departments and the agencies associated with the national defense. The ASBCA and similar boards have no authority to review a denial of relief under Title II.²¹⁰ Such claims are finally determined by the Contract Adjustment Boards of the Army, Navy and Air Force, and comparable boards within the administrative agencies.²¹¹

As for mistakes in bid, the General Accounting Office has the primary

202. See, e.g., Army Regulations AR 35-3220, ¶ 43, 18 July 1952.

203. Motive Parts Co. of America, Inc., ASBCA No. 2213 (1954); Harrison Iron Works, ASBCA No. 2269 (1954); Magnolia Lumber Sales Co., ASBCA No. 1402 (1953); Forgee Metal Products, ASBCA No. 2220 (1955).

204. Harrison Engineering and Construction Corp. v. United States, 107 Ct. Cl. 205, 68 F. Supp. 350 (1946).

205. United States v. Georgia Marble Co., 106 F. 2d 955 (5th Cir. 1939).

206. Williams Sales Co., ASBCA No. 1840 (1954).

207. General Sale Term and Condition 2, Standard Form 114 (Sale of Government Property).

208. Goodwin Novelty Co., ASBCA No. 727 (1951); Paul Tavetian, ASBCA No. 2429 (1954); Tulsa Army & Navy Store, ASBCA No. 2192 (1954).

209. 50 U.S.C.A. app. § 611.

210. Fenton Industries, ASBCA No. 2685 (1955); Radio Frequency Laboratories, Inc., ASBCA No. 1730 (1953).

211. See, e.g., APP ¶ 30-403.2e(4), f(1).

jurisdiction,²¹² an authority which has been delegated to certain of the technical services within the military departments (in limited cases) but which has not been delegated to the ASBCA.²¹²

VIII. CONCLUSION

The face and form of the Disputes method has changed many times since *Kihlberg*. Some of these changes have taken place gradually and almost imperceptibly. Others, like the changes of the past seven years, have been incisive.

Whether the remaining years of this decade will see any changes of the magnitude of *Moorman*, or *Wunderlich*, or Public Law 356, will depend in great measure on the solution to, or failure to solve, a number of problems. These problems perhaps can best be stated in a series of questions:

(a) Are the courts to be limited to statutory criteria in their review of Disputes decisions?

(b) Will a contractual or statutory period of limitations be placed on the power to entertain Disputes?

(c) Is the bar on administrative consideration of breach-of-contract-unliquidated-damages cases to continue?

(d) Are the executive department heads to be allowed to enlist the aid of the District Courts on subpoena and contempt matters?

(e) Is it possible for Congress, in the light of the fourteen years' experience of the Boards of Contract Appeals within the military departments, to enact an omnibus bill paralleling the Administrative Procedure Act?

The Disputes method, with or without further refinements, will, it seems safe to say, be with us for many years to come. As a house, for its continued existence, needs a foundation, so it is with systems to regulate human affairs. The necessary foundation for the preservation of the Disputes method is summed up in a single word, confidence. The Government, the contractors, and most important of all, the taxpayers must continue to have confidence in the Disputes method. This confidence, which the writer believes presently exists, will continue, provided the membership of each of the various appeal boards remain objective and fair, determining each controversy in the light of the decisions of the courts, and not omitting some measure of equity and a great measure of understanding.

212. See Morrow, *Principals Applicable to Mistakes in Bids on Federal Construction Contracts*, 25 *Fordham L. Rev.* 1 (1956) (p. 1, this issue).