

ADMINISTRATIVE DETERMINATION AND JUDICIAL REVIEW OF CONTRACT APPEALS

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I. INTRODUCTION

As the national budget has increased in recent years, so also has government contracting. The Navy Department alone, spending close to \$8 billion in procurement annually, in a recent year entered into more than 2½ million contracting actions. The items procured by the government are widely varied, from the bits and pieces by which it is operated—paper clips and carbon paper—to highly technical and sophisticated computers, aircraft, vessels and missiles.

Most of the problems that arise under the contracts will be handled by negotiation between the contracting parties. Where disputes do arise the government seeks to have work continue without delay while the dispute is resolved, and both parties generally try to resolve the dispute expeditiously and inexpensively. If negotiation has not produced an agreement between the parties, administrative appeals to the head of the department or agency, or to his duly authorized representative, are provided in the standard "disputes clause."¹ In fourteen government departments or agencies, boards have been established to render final decisions or advisory opinions in contract disputes. Other agencies make the decision by the head of the agency the final administrative action of that agency.

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The views expressed in this article are the sole responsibility of the author and do not necessarily represent the views of the Office of the General Counsel, Department of the Navy.

¹ (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his 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.

(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.

The authority of departments and agencies to resolve controversies is limited by statute, judicial interpretation, or administrative regulation, and in some matters it may be preferable to present a claim to the General Accounting Office for adjudication. Also, where an administrative determination of a contract dispute can be made by the contracting agency, the contractor who is dissatisfied with the agency's determination may present his claim to the General Accounting Office for final settlement binding upon the executive agency. In addition, if the contractor feels he has not received proper redress either by the contracting agency or by the General Accounting Office, he may seek judicial review in the Federal District Courts or in the Court of Claims. In the area of judicial review the recently decided *Bianchi* case² has greatly enhanced the importance of administrative determination of contract disputes by limiting the scope of judicial review generally to the administrative record. However, the position of the Court of Claims, which prefers receipt of evidence *de novo* in the judicial review of administrative decisions, may require further clarification of the Supreme Court's intent in the *Bianchi* case.

This article is a basic exposition of the procedures for handling contract disputes administratively, and of some of the problems confronting the parties in judicial review of administrative decisions. Such an exposition necessarily raises more questions than it purports to answer, and this, I feel, is appropriate in any area as dynamic and fluctuating as this one.

Administrative procedures for handling contract disputes have caused considerable controversy over the years, and some proposals have been made that would eliminate the finality of administrative decisions. But only a surprisingly small number of questions ever become contract disputes, and, of those disputes, a very small number result in a judicial reversal of the administrative decision made in the case. For instance, out of the millions of contracting actions entered into by the military services since the beginning of World War II, the Armed Services Board of Contract Appeals of the Department of Defense, together with its predecessor military boards of contract appeals, have been called upon to dispose of approximately 11,000 appeals since 1942. Of those, approximately 400, or three per cent, were reviewed by the courts, and of those reviewed, roughly two-thirds affirmed the decision of the boards. This is but one indication that the administrative process has generally succeeded in accomplishing its purpose.

II. HISTORICAL PERSPECTIVE

The establishment of administrative boards to hear and decide government contractors' claims against the United States appears

² United States v. Bianchi, 373 U.S. 709 (1963).

rooted in an *ad hoc* board created by the Secretary of War in 1861 to examine and report on all unsettled claims arising out of certain contracts under which payments had been suspended pending investigation of alleged fraud. In *United States v. Adams*,³ a Board had been created after a contract had been executed and the contractor submitted *voluntarily* to that Board in order to have his claim heard quickly and to avoid the delay and expense of petitioning Congress or litigating the issue before the Court of Claims. Ten years later, in *Kihlberg v. United States*,⁴ the Supreme Court upheld a contract provision which made the determination of distances by an employee of one of the contracting parties binding on them. This determination governed the payment price for transportation services rendered under the contract. The Court stated:

[I]t is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government.⁵

Subsequent Supreme Court cases have reaffirmed this rule in construing contract provisions which make an individual's decision final and conclusive,⁶ including contracts between private parties in which it was provided that an employee of one of the parties was to be the finder of fact in the event of a dispute between the parties.⁷

However, during the same period the Court of Claims at first followed, then expanded the *Kihlberg* rule, by reversing administrative decisions believed "lacking in impartiality" or having "no substantial basis," from which that court implied bad faith.⁸ In *Needles v. United States*,⁹ the Court of Claims stated:

[S]uch gross error will justify the court in upsetting the

³ 74 U.S. (7 Wall.) 463 (1868).

⁴ 97 U.S. 398 (1878).

⁵ *Id.* at 402.

⁶ *United States v. Wunderlich*, 342 U.S. 98 (1951); *United States v. Moorman*, 338 U.S. 457 (1950); *United States v. Blair*, 321 U.S. 730 (1944); *United States v. Callahan Walker Constr. Co.*, 317 U.S. 56 (1942); *Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 393 (1916); *Plumley v. United States*, 226 U.S. 545, 547 (1913); *Ripley v. United States*, 223 U.S. 695, 702, 704 (1912); *United States v. Gleason*, 175 U.S. 588, 602 (1900); *Sweeney v. United States*, 109 U.S. 618, 620 (1883).

⁷ *Chicago, Santa Fe & Cal. R.R. v. Price*, 138 U.S. 185 (1891); *Martinsburg & Potomac R.R. v. March*, 114 U.S. 549 (1885).

⁸ See, e.g., *Penner Installation Corp. v. United States*, 116 Ct. Cl. 550, 564, 86 F. Supp. 129, *aff'd per curiam*, 340 U.S. 898 (1950), rehearing denied, 340 U.S. 923 (1951); *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228, 247, 77 F. Supp. 498 (1948); *Loftis v. United States*, 110 Ct. Cl. 551, 630, 76 F. Supp. 816 (1948); *Bein v. United States*, 101 Ct. Cl. 144, 166 (1943).

⁹ 101 Ct. Cl. 535 (1944).

decision if the extent of the gross error and the character thereof is shown by proof of facts and circumstances known to or available to the officer to have been inconsistent with good faith—that is, wholly inconsistent with the kind of a decision which a fair-minded person would have reached upon a candid, reasonable, and impartial consideration of all the known and available relevant facts and data.¹⁰

The court stated that unless a decision is “supported by substantial evidence, it must be treated as having been arbitrary, capricious or so grossly erroneous as to imply bad faith, and, therefore, lacking in finality.”¹¹ The reluctance of the Court of Claims to accord finality to administrative records was stated in *Volentine & Littleton v. United States*.¹²

There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant.

Further, the Court of Claims has held that under no circumstances could questions of law be decided with finality pursuant to disputes procedures.¹³

The Supreme Court, however, has continued to give literal effect to Disputes clauses. In *United States v. Moorman*¹⁴ the Court expressly refused to distinguish between the power to decide finally questions of fact and of law, approving an “All-Disputes” article that encompassed all disputes that might arise under the contract, including determination as to what was “outside the requirements of the contract.”

¹⁰ Id. at 606-07.

¹¹ *Wagner, Whirlor & Derrick Corp. v. United States*, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954).

¹² 136 Ct. Cl. 638, 642, 145 F. Supp. 952, 954 (1956). See also, *Fehlhaber Corp. v. United States*, 138 Ct. Cl. 571, 151 F. Supp. 817, cert. denied, 355 U.S. 877 (1957).

¹³ *Edwards Eng'r Corp. v. United States*, Ct. Cl. No. 218-59 (April 15, 1963); *Beacon Constr. Co. v. United States*, 314 F.2d 501 (Ct. Cl. 1963); *Guyler v. United States*, 314 F.2d 506 (Ct. Cl. 1963); *Callahan Constr. Co. v. United States*, 91 Ct. Cl. 538, 616 (1940); *McShain v. United States*, 88 Ct. Cl. 284, rev'd per curiam, 308 U.S. 512, amended, 308 U.S. 520 (1939).

¹⁴ 338 U.S. 457, 463 (1950).

Shortly thereafter, in *United States v. Wunderlich*,¹⁵ the Supreme Court temporarily halted the expansion of judicial review of administrative decisions, upholding "the finality of the department head's decision unless it was founded on fraud, alleged and proved."¹⁶ The Court explained:

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.¹⁷

In the controversy following the *Wunderlich* case, remedial legislation was enacted in the Act of May 11, 1954,¹⁸ the so-called "Wunderlich Act," which established standards of judicial review of administrative decisions similar, although not necessarily following, those developed by the Court of Claims prior to the Supreme Court's decision in *Wunderlich*. The Act provides:

1. 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]¹⁹ or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

The House Judiciary Committee report²⁰ on the *Wunderlich* legislation stated that it understood "substantial evidence" to mean that test established by the Supreme Court in *Consolidated Edison Co. v. NLRB*,²¹ wherein "substantial evidence" was defined as "such relevant

¹⁵ 342 U.S. 98 (1951).

¹⁶ *Id.* at 100.

¹⁷ *Ibid.*

¹⁸ 68 Stat. 81 (1954), 41 U.S.C. §§ 321-322 (1958).

¹⁹ Legal precision stuffily perpetuates the misspelling of this word as it appears in the original. Possibly it should read "froadulent."

²⁰ H.R. Rep. No. 1380, 83d Cong., 2d Sess. 4 (1954).

²¹ 305 U.S. 197 (1938).

evidence as a reasonable mind might accept as adequate to support a conclusion.²² In the same report, the Committee further commented:

It has been brought to light in public hearings that it is the exception rather than the rule that contractors in the presentation of their disputes are afforded an opportunity to become acquainted with the evidence in support of the Government's position. It is believed that if the standard of substantial evidence is adopted this condition will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal.²³

*Volentine & Littleton*²⁴ was the first court decision, after enactment of the Wunderlich Act, that held that that Act did not proscribe the court's receipt of *de novo* evidence in review of administrative decisions. Shortly thereafter, a conflict arose when Federal District Courts and Courts of Appeals uniformly concluded that the court must confine its review to the administrative record, and new evidence could not be introduced, on the issue of substantial evidence, to reverse an administrative determination of fact.²⁵

III. SURVEY OF ADMINISTRATIVE PROCEDURES FOR HANDLING CONTRACT DISPUTES

An informal survey of government agencies and departments, conducted by the author, revealed that there are presently fourteen administrative tribunals established to hear and consider contract appeals.²⁶ The Department of State, which has no formal procedure

²² *Id.* at 229.

²³ *Supra* note 20, at 5.

²⁴ *Supra* note 12.

²⁵ *Allied Paint & Color Works, Inc. v. United States*, 309 F.2d 133, 138 (2d Cir. 1962); *Wells & Wells, Inc. v. United States*, 269 F.2d 412, 415 (8th Cir. 1959); *M. Berger Co. v. United States*, 199 F. Supp. 22, 26 (W.D. Pa. 1961); *United States v. Hamden Co-operative Creamery Co.*, 185 F. Supp. 541, 545 (E.D.N.Y. 1960), *aff'd*, 297 F.2d 130 (2d Cir. 1961); *United States Nat'l Bank of Portland v. United States*, 178 F. Supp. 910, 912 (D. Ore. 1959); *Mann Chemical Labs., Inc. v. United States*, 174 F. Supp. 563, 565-66 (D. Mass. 1958).

²⁶ (1) Department of Defense, ASBCA, Rules of Practice, 32 C.F.R. § 30.1 (Supp. 1963), as amended, 28 Fed. Reg. 9348-51 (1963).

(2) Army Corps of Engineers Board of Contract Appeals, Rules of Practice, 33 C.F.R. § 210.4 (1962).

(3) Department of the Interior Board of Contract Appeals, Rules of Practice, 43 C.F.R. §§ 4.1-16 (Supp. 1963).

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for handling contract disputes, but has dealt with them in the past on an *ad hoc* basis, is understood to be preparing to establish a board of contract appeals modelled after other boards which have authority to render final decisions in contract appeals. In some agencies, boards are not established because there is an insufficient volume of contracts to warrant such a board. The Small Business Administration, the National Science Foundation, the United States Information Agency and the Saint Lawrence Seaway Development Corporation are among such agencies. The National Science Foundation and the United States Information Agency have made arrangements with the Armed Services Board of Contract Appeals (ASBCA) to have cases referred to the ASBCA for findings and recommendations, usually subject to final decision by the head of the agency. In the Tennessee Valley Authority, while the three-man Board of Directors has delegated authority to the Head of the Purchasing Division to make initial decisions, the final decision, on appeal, is made by the General Manager. Similarly, contract appeals are referred to the head of the agency in the National Mediation Board and the District of Columbia Redevelopment Land Agency. The Department of Health, Education and Welfare is in the process of establishing procedures, but presently handles contract appeals by appointment of an *ad hoc* board by the Administrative Assistant Secretary, for report and recommendations to him for final decision. Likewise, the Coast Guard Board of Contract Appeals, while having published rules, renders only an advisory opinion, final decision being made by The Assistant Secretary of the Treasury. The Maritime Administration uses a hearing examiner who

(4) Post Office Department Board of Contract Appeals, Rules of Practice, 39 C.F.R. §§ 201.101-121 (1962).

(5) General Services Administration Board of Contract Appeals, Rules of Practice, 41 C.F.R. § 5-60.2 (1963), as amended, 28 Fed. Reg. 1770, 28 Fed. Reg. 11689 (1963).

(6) Atomic Energy Commission, Rules of Procedure, 10 C.F.R. §§ 2.400-2.440, 2.700-2.780 (1963).

(7) Department of Agriculture, Contract Disputes Board, Commodity Credit Corporation, 6 C.F.R. § 400 (1963).

(8) Department of Agriculture, Procurement Board, Rules of Practice, 7 C.F.R. §§ 1.101-1.106 (Supp. 1963).

(9) National Aeronautics & Space Administration Board of Contract Appeals, Rules of Practice, 14 C.F.R. §§ 1209.100-1209.303 (1963).

(10) Veterans' Administration Contract Appeals Board, Rules of Practice, 38 C.F.R. §§ 1.750-1.756 (Supp. 1963).

(11) Agency for International Development Board of Contract Appeals, Rules of Practice, 27 Fed. Reg. 891; Charter, 27 Fed. Reg. 903 (1962).

(12) Federal Aviation Agency Contract Appeals Panel, Rules of Practice, 41 C.F.R. § 2-60 (1963), as amended, 28 Fed. Reg. 6268 (1963).

(13) Department of Commerce Appeals Board—No Rules of Practice.

(14) Coast Guard Board of Contract Appeals, Rules of Practice, 33 C.F.R. § 116.04 (Supp. 1963).

makes a report and recommendation to either the Subsidy Board or the Administrator for final decision.

Hearings before the enumerated tribunals, and before the Department of Health, Education and Welfare, the Maritime Administration, appeals of the United States Information Agency and the National Science Foundation which are handled by the ASBCA, and the proposed State Department Board are adversary hearings. *Ex parte* proceedings or presentations are held before the National Mediation Board, the District of Columbia Redevelopment Land Agency and the Tennessee Valley Authority.

Adversary proceedings before administrative tribunals are quite similar, informally following the procedures used in non-jury federal civil trials. Pleadings, briefs, depositions, some motions prior to hearing, oral examination and cross-examination, prehearing conferences and motions for reconsideration are generally available to the parties. Most board decisions are final, except, as previously noted, those of the Coast Guard, the Department of Health, Education and Welfare, the Maritime Administration and decisions by the ASBCA for the National Science Foundation and the United States Information Agency.

IV. PROCEDURES OF THE ASBCA AND THE AEC

Below is a summary of the contract appeals procedures of two agencies, those of the Department of Defense's Armed Services Board of Contract Appeals (ASBCA) and of the Atomic Energy Commission. The rules of the ASBCA are generally representative of the rules and methods of handling contract appeals in most departments and agencies providing appeals from contracting officers' final decisions. By way of comparison, the AEC employs a unique procedure modelled after the Administrative Procedure Act, providing for hearing examiners to hear, consider and make initial decisions of contract appeals. The two procedures are summarized here in order to compare two methods for handling similar problems.

Armed Services Board of Contract Appeals

Charter. The Armed Services Board of Contract Appeals has been designated as the authorized representative of the Secretary of Defense and the three service Secretaries "in hearing, considering and determining, as fully and finally as might each of the Secretaries," appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions.²⁷ While most appeals will be from decisions of contracting officers, the

²⁷ ASBCA, 32 C.F.R. § 30.1, Part II (Supp. 1963), as amended, 28 Fed. Reg. 9348 (1963).

ASBCA is authorized to hear appeals taken pursuant to the provisions of any directive whereby a right of appeal not contained in the contract has been granted by one of the Secretaries.²⁸ The Board's Charter provides that "[W]hen an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue."²⁹ Where the claim is not cognizable under the terms of the contract, such as for breach of contract,³⁰ for unliquidated damages³¹ or equitable relief,³² the Board may make findings of fact with respect to the claim without expressing an opinion on the question of liability.³³

Rules

(1) Notice of Appeal. The disputes procedure presupposes that a dispute has arisen between the contracting officer and the contractor which they have not been able to resolve by agreement. In such a case, the contracting officer must make a final decision, giving the contractor notice that it is final and alerting him to his contractual right to appeal the decision.³⁴ Under new rules made effective on August 1, 1963, the contractor must file a notice of appeal within the time specified in the contract or allowed by applicable provision of directive or of law.³⁵ The notice of appeal should indicate that an appeal is intended, should identify the contract, the cognizant department, bureau or office and the decision from which the appeal is taken.³⁶ Board rules require that the contracting officer forward the notice of appeal to the Board within ten days of receipt,³⁷ with the complaint, if one is filed with the notice of appeal. In advising the contractor that his appeal has been docketed, the Board sends a copy of its rules.

(2) Complaint. A complaint "... setting forth simple, concise and direct statements of each of his claims, alleging the basis, with appropriate reference to contract provisions, for each claim, and the dollar amount claimed . . ." must be filed within thirty days of receipt of notice of the docketing of the appeal by the Board.³⁸ "This pleading shall fulfill the generally recognized requirements of a com-

²⁸ Id. at § 30.1(I)(b).

²⁹ Supra note 27.

³⁰ E.g., *Rosenthal & Son, Inc.*, A.S.B.C.A. No. 7833, 61-2 B.C.A. ¶ 3150 (1961). See note 136, *infra*.

³¹ See note 137, *infra*.

³² *Murray-Sanders & Associates*, A.S.B.C.A. Nos. 6725, 6941, 7030, 61-1 B.C.A. ¶ 2981 (1961); see note 135, *infra*.

³³ Supra note 27.

³⁴ ASPR, 32 C.F.R. § 1.314 (Supp. 1963).

³⁵ ASBCA (Rule 1), 28 Fed. Reg. 9347 (1963).

³⁶ ASBCA (Rule 2), *id.* at 9349.

³⁷ ASBCA (Rule 3), *id.* at 9349.

³⁸ ASBCA (Rule 6[a]), *id.* at 9349.

plaint, although no particular form or formality is required.³⁹ The new rules give the Board discretion to treat the notice of appeal as the complaint, if the complaint is not received within thirty days, and if, in the Board's opinion, the issues before the Board are sufficiently defined.⁴⁰

(3) Answer. Counsel for the government must prepare its answer within thirty days after service of the complaint. The answer, like the complaint, shall set forth simple, concise and direct statements of the government's defense to each claim asserted by the contractor and fulfill the generally recognized requirements of an answer.⁴¹ The rules provide that defenses which go to the jurisdiction of the Board may be included in the answer or raised on motion.⁴²

Under the old Board rules, the government would file documents enumerated below when it filed its answer. The new rules require submission to the Board by the contracting officer within thirty days after receipt of a notice of appeal, the findings of fact and the decision from which the appeal was taken, documents of claim in response to which the decision was issued, the contract, pertinent plans, specifications, amendments, change orders, correspondence between the parties pertinent to the appeal, transcripts of any testimony taken during the course of proceedings and such additional information as may be considered material.⁴³

(4) Motions. Provision is made for motions to dismiss for lack of jurisdiction which may be heard and determined before oral hearing on the merits, upon application of either party, unless the Board defers determination pending oral hearing on the merits and the motion.⁴⁴

(5) Prehearing Procedures. Prehearing procedures available in appeals before the Board include taking depositions,⁴⁵ service of written interrogatories on the opposing party,⁴⁶ orders to produce and permit inspection of designated documents,⁴⁷ requests for admission of specified facts⁴⁸ and prehearing conferences.⁴⁹

(6) Depositions. Depositions are not taken in accordance with the Federal Rules of Civil Procedure,⁵⁰ but according to the Board's rules as stated in Rule 14. Either party may take the deposition of any

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ ASBCA (Rule 6[b]), *id.* at 9349.

⁴² *Ibid.* See also ASBCA (Rule 5), *id.* at 9349.

⁴³ ASBCA (Rule 4), *id.* at 9349.

⁴⁴ ASBCA (Rule 5), *id.* at 9349.

⁴⁵ ASBCA (Rule 14), *id.* at 9350.

⁴⁶ ASBCA (Rule 15), *id.* at 9350.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ ASBCA (Rule 10), *id.* at 9350.

⁵⁰ Fed. R. Civ. P. 26.

person after an appeal has been docketed by the Board.⁵¹ The new rules make express what was informally understood previously, that is, leave to take depositions will not ordinarily be granted unless the deponent cannot appear at the hearing or unless a hearing is waived.⁵² The deposition is taken under oath, either upon written interrogatories or upon oral examination.⁵³ The deposition is not an instrument of pre-trial discovery in appeals before the ASBCA. If the deposition is upon written interrogatories, cross-interrogatories may be served upon the party proposing to take the deposition within fifteen days after service of the interrogatories.⁵⁴ If it is upon oral examination, fifteen days written notice of the time and place of taking, and the name and address of the witness and the person before whom it is proposed to take the deposition is required.⁵⁵

Applications for service of written interrogatories, inspection of documents and admission of specified facts will not be permitted by the Board as a matter of course, but such applications will be approved only if they are, in the Board's determination, consistent with the securing of just and inexpensive determination of appeals without unnecessary delay.⁵⁶ Note that the Board's rules permit discovery only of "designated documents."⁵⁷ Unlike the Federal Rules of Civil Procedure,⁵⁸ the applicant for discovery must designate the documents he wishes to inspect and show that those documents have materiality and relevancy to the issues of the appeal.⁵⁹

(7) Prehearing Conferences. The Board may, in its discretion, on its own or upon application of one of the parties, call for a prehearing conference to consider (1) simplifying issues; (2) stipulation of facts and of documents; (3) limitation of number of expert witnesses; (4) the possibility of agreements disposing of all or any of the issues in dispute; and (5) anything else to aid disposition of the appeal. After such a conference the presiding Board member reduces the results of the conference to writing in the presence of the parties, which writing constitutes a part of the record.⁶⁰

(8) Optional Accelerated Procedure. In keeping with the Board's desire for expeditious and informal handling of contract appeals, the Board permits the contractor to choose an optional accelerated

⁵¹ ASBCA (Rule 14[a]), 28 Fed. Reg. 9350 (1963).

⁵² *Ibid.*

⁵³ ASBCA (Rule 14[c]-[e]), *id.* at 9350.

⁵⁴ ASBCA (Rule 14[d]), *id.* at 9350.

⁵⁵ ASBCA (Rule 14[c]), *id.* at 9350.

⁵⁶ ASBCA (Rule 15), *id.* at 9350.

⁵⁷ *Ibid.*

⁵⁸ Fed. R. Civ. P. 34.

⁵⁹ Cuneo, Development of the Administrative Record, 1 Gov't Contracts Rev. 12 (1957).

⁶⁰ ASBCA (Rule 10), 28 Fed. Reg. 9350 (1963).

ated procedure in appeals amounting to \$5,000 or less.⁶¹ Such appeals are handled on an expedited basis, without regard to their normal position on the docket. The parties may elect to waive pleadings, to waive a hearing, or both, and submit the appeal on the record; but in all other respects the Board's rules apply to the proceedings.⁶²

(9) Hearings. Hearings before the Board are normally held in Washington, but may be held at other locations.⁶³ Provision is made for submission of a party's case upon the Board record without a hearing.⁶⁴ If so submitted, the record may be supplemented by oral argument, by briefs or both. Ordinarily, simultaneous briefs will be submitted within twenty days after receipt of the transcript of any hearing that is transcribed, or such other terms as agreed upon by the parties and the presiding member.⁶⁵ However, unexcused absence of a party at a hearing will not cause delay, and the hearing will proceed without the absent party, whose case will be regarded as submitted.⁶⁶

Hearings are informally conducted, generally before a single member of the Board. A verbatim transcript of the proceedings is taken by a court stenographer.⁶⁷ Witnesses testify under oath or affirmation, unless the facts are stipulated.⁶⁸ Evidence is generally admissible under rules of evidence applied in courts of the United States in non-jury trials, but is subject to the "sound discretion" of the presiding member in supervising the extent and manner of presentation.⁶⁹ Admissibility generally hinges on "relevancy and materiality."⁷⁰ The weight to be attached to the evidence presented in any particular form will be in the discretion of the Board.⁷¹ Stipulations of fact and stipulated testimony of absent witnesses may be regarded and used as evidence at the hearing.⁷² The hearings are as informal as may be "reasonable and appropriate" under the circumstances.

(10) Decisions. Decisions of the Board are in writing, *based solely on the Board record*, and authenticated copies are sent to the parties.⁷³ While a hearing will usually be conducted before one member of the Board, three members, called a division, will decide the case. The decision of a majority of the division constitutes the decision of

⁶¹ ASBCA (Rule 12), *id.* at 9350.

⁶² *Ibid.*

⁶³ ASBCA (Rule 17), *id.* at 9350.

⁶⁴ ASBCA (Rule 11), *id.* at 9350.

⁶⁵ ASBCA (Rule 23), *id.* at 9351.

⁶⁶ ASBCA (Rule 19), *id.* at 9350.

⁶⁷ ASBCA (Rule 24), *id.* at 9351.

⁶⁸ ASBCA (Rule 21), *id.* at 9350.

⁶⁹ ASBCA (Rule 20), *id.* at 9350.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ ASBCA (Rule 28), *id.* at 9351.

the Board, provided that the Chairman and two Vice Chairmen jointly signify their approval of the decision.

Atomic Energy Commission

The Atomic Energy Commission provides unique procedures for the handling of contractors' appeals, which couple speed in making decisions with the formality of the Administrative Procedure Act.⁷⁴ Since 1959 the AEC has used hearing examiners, qualified under Section 11 of the Administrative Procedure Act, in deciding contractors' appeals. While encouraging informal procedures,⁷⁵ the Commission's rules governing procedures in all adjudications initiated by a notice of appeal provide a higher degree of formality than those of the ASBCA.

The Commission's preliminary proceedings are similar to those of the ASBCA, an appeal from a contracting officer's decision being initiated by serving a notice of appeal upon the contracting officer within thirty days after service of the contracting officer's decision.⁷⁶ The contents of the notice of appeal are similar to those required for appeals to the ASBCA.⁷⁷ A complaint can either be filed with the notice of appeal, or within twenty days of service of the notice of appeal on the contracting officer,⁷⁸ and must identify the contract, set forth the text of contract articles in dispute, identify other contract articles relevant to the dispute, identify the decision from which the appeal is taken and specify the allegedly erroneous portions of the decisions, with a brief statement of the grounds of the appeal.⁷⁹

The contracting officer prepares a file similar to that required by the ASBCA,⁸⁰ which, however, he must file with the Secretary of the Atomic Energy Commission within twenty days (unless extended) after service of the complaint. The answer shall admit or deny each material allegation, allege any matters of fact or law constituting a complete or partial defense, state affirmative defenses separately and may assert in the answer, or on motion, lack of jurisdiction or failure to state a claim on which relief can be granted.⁸¹ Pleadings may be amended,⁸² the complaint may be dismissed⁸³ or a decision may be made by the hearing examiner without a hearing.⁸⁴ However, a hearing may be demanded by any party, or ordered by the hearing examiner, and a notice of hearing will be issued at least thirty days prior to the

⁷⁴ 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1958). See 10 C.F.R. §§ 2.400-2.440 (1963).

⁷⁵ 10 C.F.R. § 2.410 (1963).

⁷⁶ 10 C.F.R. § 2.411 (1963).

⁷⁷ 10 C.F.R. § 2.412 (1963).

⁷⁸ 10 C.F.R. § 2.413 (1963).

⁷⁹ 10 C.F.R. § 2.413 (1963).

⁸⁰ 10 C.F.R. § 2.414 (1963). See note 43 *supra*.

⁸¹ 10 C.F.R. § 2.416 (1963).

⁸² 10 C.F.R. § 2.417 (1963).

⁸³ 10 C.F.R. § 2.418 (1963).

⁸⁴ 10 C.F.R. § 2.419 (1963).

hearing date.⁸⁵ The hearing itself is conducted as a trial *de novo* of relevant issues of fact and law, the party making a claim generally having the burden of proof.⁸⁶

The Commission's procedures differ markedly from those of most boards of contract appeals in that (1) subcontractors are permitted a direct appeal to the Commission,⁸⁷ (2) persons whose interests may be affected by a proceeding are permitted to file a petition for leave to intervene,⁸⁸ (3) subpoenas may be issued requiring the attendance and testimony of witnesses or the production of evidence⁸⁹ and (4) the initial decision of the presiding officer is final thirty days after its date, unless within twenty days of its date a party files a petition for review, or the Commission directs that the record be certified to it for final decision.⁹⁰ On such review, the Commission may take into consideration (1) the propriety of the award on its face or the size of the award, (2) compliance by the contractor, contracting officer and hearing examiner with the requirements of law and of the contract and (3) substantial and important questions of law, policy or discretion presented by the record, in determining whether it will grant the appeal.⁹¹

Commentary

(a) Decisions. The AEC has formal, yet expeditious, procedures in the consideration and determination of contract appeals. Of particular note in the goal to achieve expeditious disposition of contract appeals is the Commission's provision for a single hearing examiner to hear, consider and determine such appeals; his decision to be final within thirty days, subject only to certification to the Commission for review. Under the ASBCA's present division system the presiding member hearing or considering an appeal will write his decision, based upon the Board record. The whole record and the proposed decision are then reviewed by a majority of the members of the same division, who concur or dissent. The decision of a majority of the division constitutes the decision of the Board provided that the chairman and two vice-chairmen *jointly* signify their approval of the decision.

To the extent that review of the initial decision may be deemed necessary, the present review by the chairman and two vice-chairmen of the ASBCA appears adequate, without the intervening and time-

⁸⁵ 10 C.F.R. § 2.430 (1963).

⁸⁶ 10 C.F.R. § 2.431 (1963).

⁸⁷ 10 C.F.R. § 2.401(a) (1963) defines "contractor" as including subcontractors.

⁸⁸ 10 C.F.R. § 2.401(c)(3) (1963).

⁸⁹ 68 Stat. 948 (1946), 42 U.S.C. § 2201(c) (1958).

⁹⁰ 10 C.F.R. § 2.433(c) (1963).

⁹¹ 10 C.F.R. § 2.440(b) (1963).

consuming step of review by other members of a division. The members of the Board are generally trial lawyers with considerable experience in military procurement. Their experience and skill, coupled with the need for expeditious handling of appeals, warrant reposing in the individual members the responsibility for making Board decisions, subject to review only by the Board chairman and vice-chairmen, and to reconsideration by the whole Board upon proper motion, as provided by the present rules.

(b) Subcontractors' Appeals. Whereas the AEC rules permit a direct appeal to the AEC by subcontractors, Section 3-903.5 of the Armed Services Procurement Regulation (ASPR) provides that contracting officers should not consent to subcontract clauses purporting to give a subcontractor a direct right to appeal to the ASBCA. The rationale of this position is that the government is entitled to the prime contractor's management services in adjusting disputes between the prime contractor and his subcontractors. However, he *can* approve a clause permitting the subcontractor to appeal *indirectly* to the ASBCA (i) by asserting the prime contractor's right to take such an appeal or (ii) by having the prime contractor prosecute such an appeal on behalf of the subcontractor. Note that the government will only agree to be obligated to decide disputes arising between the government and the prime contractor, cognizable under the "disputes" clause, and will not be obligated to deal directly with the subcontractor. The contractor and subcontractor may agree to settle their disputes by arbitration. However, the results and costs resulting from arbitration are not binding upon the contracting officer, but are subject to independent review and approval under the prime contract.

(c) Subpoenas. By statute, any head of a department or bureau in which a claim against the United States is properly pending may apply to any judge or clerk of any United States court to issue a subpoena for the appearance of any witness within the jurisdiction of that court. The procedure involved is administratively cumbersome, limited and infrequently used by the government. However, in two unrelated pending contract appeals by the same company, the one before the Department of Interior Board of Contract Appeals and the other before the ASBCA, the government has invoked the authority under that statute⁹² in applying to two District Courts for subpoenas.

⁹² Rev. Stat. § 184 (1875), 5 U.S.C. § 94 (1958). A subpoena ad testificandum was issued in the one case, Appeal of Merritt-Chapman & Scott, Inc., Department of Interior Board of Contract Appeals No. 365, and a subpoena duces tecum in the other, Appeal of Merritt-Chapman & Scott, Inc., A.S.B.C.A. No. 8293. The statute does not expressly provide for a subpoena of documents and records, and the question might be raised whether the power granted a department head to apply for a subpoena for a witness should be extended by the District Court to include any subpoena that could be issued by the court under Rule 45 of the Federal Rules of Civil Procedure.

V. REMEDIES OF CONTRACTORS BEFORE THE GENERAL ACCOUNTING OFFICE

The standard "disputes" clause provides only for an appeal of a contract dispute to the head of the department or his duly authorized representative. However, the General Accounting Office, acting under the Budget and Accounting Act of 1921,⁹³ has authority to settle, compromise and adjust "all claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor. . . ."⁹⁴

Certain claims against the United States are adjudicated by the Claims Division of the General Accounting Office, including: (1) claims which involve doubtful questions of law or fact, except those which have been the subject of an advance Comptroller General decision,⁹⁵ (2) all claims required by statute, Comptroller General regulation or decision to be settled in the General Accounting Office before payment is made⁹⁶ and (3) claims which appear to be barred by the statute of limitations when received by an administrative agency.⁹⁷

There are several factors to be considered before deciding whether to file suit in a court, appeal administratively or to present a claim to the Comptroller General. If a decision on a matter has been rendered by a court of competent jurisdiction, the General Accounting Office will not consider a contractor's claim.⁹⁸ However, if a contractor's claim is refused by the General Accounting Office, he is not precluded from seeking judicial relief⁹⁹ if the six-year statute of limitations for filing suit against the United States has not passed.¹⁰⁰ Claims may be filed in the General Accounting Office up to ten years after a cause of action arises.¹⁰¹

Submission of Claims to the General Accounting Office

Claimants against the United States generally receive more expeditious determination if their claims are filed initially with the administrative department or agency out of whose activities they

⁹³ 42 Stat. 20 (1921), 31 U.S.C. §§ 71, 471, 581, 581a (1958).

⁹⁴ 42 Stat. 24 (1921), 31 U.S.C. § 71 (1958). See also General Accounting Office, Policy and Procedures Manual for Guidance of Federal Agencies (herein cited G.A.O.).

⁹⁵ 4 G.A.O. 2015.10(1) (1958).

⁹⁶ 4 G.A.O. 2015.10(2) (1958).

⁹⁷ 4 G.A.O. 2015.10(4) (1958).

⁹⁸ 30 Decs. Comp. Gen. 178 (1950).

⁹⁹ *Belcher v. United States*, 94 Ct. Cl. 137 (1941); *McCabe v. United States*, 84 Ct. Cl. 291, 293 (1936).

¹⁰⁰ 28 U.S.C. §§ 2401, 2501 (1958); *Cosmopolitan Mfg. Co. v. United States*, 297 F.2d 546 (Ct. Cl. 1962); *Fattore v. United States*, 312 F.2d 797 (Ct. Cl. 1963).

¹⁰¹ 54 Stat. 1061 (1940), 31 U.S.C. § 71(a) (1958).

arose,¹⁰² for the preparation of an administrative report.¹⁰³ However, if the ten-year statutory period of limitation will soon expire, claims should be submitted directly to the Claims Division of the General Accounting Office.¹⁰⁴

Should a contractor and an administrative agency together submit a controversy to the General Accounting Office for settlement, the decision of the Comptroller General may not be redetermined by the ASBCA¹⁰⁵ unless the Board reacquires jurisdiction to determine questions of fact through referral of the case to the department for decision and appeal under the "disputes" clause.¹⁰⁶ The ASBCA has further decided that contractors' rights under the "disputes" clause are not lost when a department unilaterally submits a contractor's appeal to the General Accounting Office.¹⁰⁷ However, a final settlement by the General Accounting Office is final and conclusive upon the department, and after such settlement the contractor may bring immediate suit in the Court of Claims without awaiting further administrative decision by the department.¹⁰⁸

While no particular form is required for submitting claims to the Claims Division of the General Accounting Office, the claim must be in writing and signed by the claimant or his authorized agent or attorney.¹⁰⁹ Claims are settled on the basis of the facts as established by the government agency concerned and by evidence submitted by the claimant.¹¹⁰ Absent evidence sufficiently convincing to overcome a presumption of correctness, when there is a conflict between the assertion of the claimant and the findings of the administrative agency concerned, the General Accounting Office's established rule is to accept as fact the report of the agency.¹¹¹ Settlements are based on a written record only and founded on a determination of the United States' legal liability under the factual situation as established by the written record.¹¹² The claimant has the burden of establishing his right to payment and to establish the liability of the United

¹⁰² 4 G.A.O. 2020.30 (1958).

¹⁰³ 4 G.A.O. 2030.20 (1958).

¹⁰⁴ 4 G.A.O. 2025.10 (1958).

¹⁰⁵ *Brooks Callaway Co. v. United States*, 97 Ct. Cl. 689, 704 (1942), rev'd, 318 U.S. 120 (1943); *Global Van Lines*, A.S.B.C.A. No. 5714, 60-1 B.C.A. ¶ 2498 (1960); *Gainesville Scrap Iron & Metal Co.*, A.S.B.C.A. No. 3460, 57-1 B.C.A. ¶ 1274 (1957); *H. P. Andrews Paper Co.*, A.S.B.C.A. No. 2486 (1955).

¹⁰⁶ *Cornelia Garment Co.*, A.S.B.C.A. No. 1673 (1954); *Woodcraft Corp.*, A.S.B.C.A. No. 2660 (1955).

¹⁰⁷ *Woodcraft Corp.*, A.S.B.C.A. No. 2660 (1955); *Kenmore Window Cleaning Co.*, A.S.B.C.A. No. 5877, 60-1 B.C.A. ¶ 2658 (1960).

¹⁰⁸ *Brooks Callaway Co.*, supra note 105. See 4 G.A.O. 2030.50, 2050.40 (1958).

¹⁰⁹ 4 G.A.O. 2020.10 (1958).

¹¹⁰ 4 G.A.O. 2040.10 (1958).

¹¹¹ 37 Decs. Comp. Gen. 568 (1958).

¹¹² 4 G.A.O. 2040.10 (1958).

States.¹¹³ The General Accounting Office has no formal hearing procedure or requirement,¹¹⁴ and while informal oral interviews are generally granted,¹¹⁵ any additional evidence must be submitted in writing.¹¹⁶ Settlements made by the Claims Division are final and conclusive upon the executive branch of the government unless revised by or at the direction of the Comptroller General.¹¹⁷

Settlements made by the Claims Division will be reviewed (1) in the discretion of the Comptroller General upon the written application of (a) a claimant whose claim has been settled or (b) the head of the department or government establishment to which the claim or account relates, or (2) upon motion of the Comptroller General at any time.¹¹⁸ Applications for review of claim settlements should state the errors that the applicant believes have been made in the settlement and which form the basis of his request for reconsideration.¹¹⁹

Review of Administrative Decisions

On occasion the General Accounting Office asserts authority to review the decisions of boards of contract appeals,¹²⁰ stating that neither the Senate nor House Committees on the Judiciary intended, by the Wunderlich legislation, to enlarge or restrict the jurisdiction of the General Accounting Office, but recognized the jurisdiction that that Office already had.¹²¹ However, the Comptroller General does not consider that he has a right to disturb such a decision unless it is "fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."¹²² The Comptroller General's review will be limited to the record before the Board.¹²³

Where the contractor has failed to pursue his remedies under the "disputes" clause, the General Accounting Office will not consider a contractor's claim,¹²⁴ unless the General Accounting Office decides

¹¹³ Ibid.

¹¹⁴ 21 Decs. Comp. Gen. 244 (1941).

¹¹⁵ Staff of Senate Select Committee on Small Business, 87th Cong., 1st Sess., A Primer on Government Contract Claims, p. 5 (Comm. Print 1961).

¹¹⁶ 4 G.A.O. 2040.10 (1958).

¹¹⁷ 4 G.A.O. 2060.10 (1958). See 28 Stat. 204 (1894), 31 U.S.C. § 74 (1958).

¹¹⁸ 4 G.A.O. 2065.10 (1958).

¹¹⁹ 4 G.A.O. 2065.20 (1958).

¹²⁰ See Ms. Comp. Gen. B-150173 (January 11, 1963) (unpublished).

¹²¹ Ibid. See H.R. Rep. No. 1380, 83d Cong., 2d Sess. 6-7 (1954).

¹²² Ms. Comp. Gen. B-146102 (July 24, 1961) (unpublished); Ms. Comp. Gen. B-142040 (April 2, 1962) (unpublished); Ms. Comp. Gen. B-142388 (May 24, 1960) (unpublished).

¹²³ Ms. Comp. Gen. B-150515 (July 1, 1963) (unpublished).

¹²⁴ Ms. Comp. Gen. B-142950 (Oct. 13, 1960) (unpublished); 37 Decs. Comp. Gen. 568 (1958); 38 Decs. Comp. Gen. 749 (1959).

that the board decision was on a question of law, in which case the board decision will not be considered to be binding on the Office.¹²⁵

VI. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

If an administrative decision is adverse to a contractor, he may seek judicial review of the decision either in a United States District Court or in the Court of Claims. The jurisdiction of the district court is limited by statute¹²⁶ to civil actions or claims against the United States, not exceeding \$10,000 in amount. The jurisdiction of the Court of Claims is concurrent with that of the district courts up to \$10,000, and is exclusive for claims in excess of \$10,000.¹²⁷ Both have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, any Act of Congress, any regulation of an executive department, upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort.¹²⁸

ASBCA Jurisdiction

Backtracking slightly, the borders of the jurisdiction of the ASBCA are sharply drawn; jurisdiction is limited to those matters that arise out of government contracts or to appeals taken pursuant to secretarial directive granting a right of appeal not contained in the contract.¹²⁹ When a claim is involved that is not cognizable under the terms of the contract, the Board may make findings of fact without expressing an opinion on the question of liability.¹³⁰ Although the Court of Claims¹³¹ and the General Accounting Office¹³² have not considered such findings to be binding upon them, the Board frequently will defer decisions on motions to dismiss for lack of jurisdiction until there has been a hearing on both the merits and the motion.¹³³ However, where a rule or motion is filed prior to a hearing on the merits, the Board may dismiss the appeal if it determines that it is without authority to grant relief and no useful purpose would be served by a hearing on the merits.¹³⁴ The Board has no equitable

¹²⁵ 34 Decs. Comp. Gen. 565 (1955).

¹²⁶ 28 U.S.C. § 1346(a)(2) (1958).

¹²⁷ 28 U.S.C. § 1491 (1958).

¹²⁸ Supra notes 126 and 127.

¹²⁹ Preface to Rules of the Armed Services Board of Contract Appeals, 32 C.F.R. § 30.1, Part II (Supp. 1963).

¹³⁰ Ibid.; but see note 134 infra.

¹³¹ *Miller, Inc. v. United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin v. United States*, 100 Ct. Cl. 15, 31 (1943).

¹³² 34 Decs. Comp. Gen. 20 (1954).

¹³³ See ASBCA (Rule 5), 28 Fed. Reg. 9349 (1963).

¹³⁴ *Simmel-Industrie Mecanniche Societa per Azioni*, A.S.B.C.A. No. 6141, 61-1 B.C.A. ¶ 2917 (1961); *Norair Eng'r Corp.*, A.S.B.C.A. No. 3527, 57-1 B.C.A. ¶ 1283 (1957).

authority, nor authority to rescind or reform a contract.¹³⁵ Unless the contract authorizes administrative price adjustment, the ASBCA has held that it has no authority to grant relief for damages for breach of contract.¹³⁶ Nor does the Board have jurisdiction to reform or to grant unliquidated damages.¹³⁷ By statute, no government contract can contain a provision making the decision of any administrative board final on a question of law.¹³⁸ It appears to be anyone's guess what the distinction is between questions of law and of fact, a subject that is often discussed in administrative¹³⁹ and court¹⁴⁰ decisions and by commentators.¹⁴¹ In recent years, however, efforts have been made to bring as many disputed questions as possible within the purview of the "disputes" clause, by providing in contract clauses, in effect, that disputes arising under a given clause will be deemed a dispute for the purposes of the "disputes" clause.¹⁴²

The ASBCA may dispose of an appeal in one of several manners: it may dismiss the appeal on the record, after all of the pleadings are filed; it may render a decision making findings of fact and of law on matters within its jurisdiction; or it may make findings of fact without an opinion on liability after a hearing on the merits as to questions outside the cognizance of the contract.

After dismissal of the appeal for lack of jurisdiction over the subject matter, without a hearing or finding of fact, the contractor has exhausted his administrative remedies, and can try the case *de novo* in the Court of Claims, if he can state a case on which relief could be granted. Where the Board hears an appeal and makes findings of fact without expressing an opinion as to liability, the Court of Claims

¹³⁵ Hyde Park Clothes, Inc. v. United States, 114 Ct. Cl. 424, 84 F. Supp. 589 (1949).

¹³⁶ Roscoe Eng'r Corp. & Associates, A.S.B.C.A. No. 5370, 61-2 B.C.A. ¶ 3148 (1961); Laburnum Constr. Corp., A.S.B.C.A. No. 5525, 59-2 B.C.A. ¶ 2309 (1959); George L. Fuller Constr. Co., A.S.B.C.A. No. 5617, 59-2 B.C.A. ¶ 2411 (1959); Croft-Mullins Elec. Co., A.S.B.C.A. No. 6113, 61-1 B.C.A. ¶ 2922 (1961); Larson-Ratto Constr. Co., A.S.B.C.A. No. 7468, 61-2 B.C.A. ¶ 3245 (1961).

¹³⁷ Tulsa Army & Navy Store, A.S.B.C.A. No. 2192 (1954); Paul Tavetian, A.S.B.C.A. No. 2429 (1954); Goodwin Novelty Co., A.S.B.C.A. No. 727 (1951).

¹³⁸ Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. § 322 (1958).

¹³⁹ See, e.g., Rogers Constr. Co., A.S.B.C.A. No. 4125, 58-1 B.C.A. ¶ 1657 (1958); Southland Co., A.S.B.C.A. No. 2078 (1956); Minneapolis-Moline Co., A.S.B.C.A. No. 1961 (1954); Blackwell Eng'r & Constr. Co., B.C.A. No. 370, 2 C.C.F. 713 (1944).

¹⁴⁰ W. H. Edwards Eng'r Corp. v. United States, 144 Ct. Cl. 158, 168 F. Supp. 955 (1963); Guyler v. United States, 314 F.2d 506 (Ct. Cl. 1963).

¹⁴¹ Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959). See also Louis L. Jaffe's trilogy: Judicial Review: Question of Law, 69 Harv. L. Rev. 239 (1955); Judicial Review: Question of Fact, 69 Harv. L. Rev. 1020 (1956); Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953 (1957).

¹⁴² E.g., Changes, ASPR, 32 C.F.R. §§ 7.103-2, 7.203-2 (1961); Inspection, ASPR, 32 C.F.R. §§ 7.103-5, 7.203-5 (1961); Default, ASPR, 32 C.F.R. § 8.707 (Supp. 1963); Termination for Convenience, ASPR, 32 C.F.R. § 8.701 (1961).

will still consider the findings advisory.¹⁴³ What has been less certain, however, is the scope of review in cases that are heard and decided on their merits by the Board, from which the contractor seeks review in the Court of Claims.

The Bianchi Case

In *United States v. Bianchi*,¹⁴⁴ the Supreme Court considered the sole issue "whether, in a suit governed by [the Wunderlich Act], the Court [of Claims] is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues."¹⁴⁵ The appeal below questioned whether the contract cost was to be increased because of unforeseen conditions in rock through which the contractor was to bore a 710-foot water diversion tunnel. These conditions required installation of permanent supports throughout the full length of the tunnel, rather than merely at the ends of the tunnel as provided in the contract specifications. Bianchi appealed the final decision of the contracting officer who had denied additional payment for the permanent tunnel protection that was needed to complete work under the contract. An adversary hearing was held before the Board of Claims and Appeals of the Army Corps of Engineers, before which a record was made, evidence introduced and four witnesses for Bianchi examined and cross-examined. The Board's decision was adverse to the contractor. Nearly six years after the Board's decision, Bianchi brought an action for breach of contract in the Court of Claims, seeking damages and alleging that the decisions of both the contracting officer and the Board were "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not supported by substantial evidence." A Commissioner of the Court, over government objection, received evidence *de novo*, including evidence that had not been before the Board. The Court of Claims concluded that "on consideration of all the evidence, the contracting officer's decision cannot be said to have substantial support."¹⁴⁶ It adhered to its decision in *Volentine & Littleton v. United States*,¹⁴⁷ the first Court of Claims case holding that the trial in the Court of Claims should not be limited to the record made before the contracting agency, but should be *de novo*. The Supreme Court concluded that

[A]part from questions of fraud, determination of the finality to be attached to a departmental decision on a ques-

¹⁴³ See cases cited in note 131, *supra*.

¹⁴⁴ 373 U.S. 709 (1963).

¹⁴⁵ *Id.* at 710.

¹⁴⁶ 144 Ct. Cl. 500, 506, 169 F. Supp. 514 (1959).

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

tion arising under a "disputes" clause must rest solely on consideration of the record before the department.¹⁴⁸

The question of fraud was not before the Court in *Bianchi*, the Court saying that such questions "normally require the receipt of evidence outside the administrative record for their resolution. . . ."¹⁴⁹ The Court's interpretation of the term "substantial evidence" describes the basis, the standard, upon which administrative records are to be judged by reviewing courts.

This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it*, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.¹⁵⁰ [Emphasis in original.]

The Court noted that the standards of review adopted in the Wunderlich Act had been frequently used by Congress, and associated with review limited to administrative records.¹⁵¹ The Court, in interpreting those Acts of Congress, has confined review to administrative records.¹⁵² Using the Court's dictum, it would appear that in determining whether legal error was committed by the administrative board, the reviewing court must determine, "on the basis of the evidence before it," whether the board properly adjudicated the appeal without acting capriciously or unreasonably, and whether the evidence on which the determination was based was substantial. The House Judiciary Committee, as noted previously, adopted the interpretation of "substantial evidence" set forth by the Supreme Court in *Consolidated Edison Co. v. NLRB*,¹⁵³ wherein the term was defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁵⁴ A court or administrative board must render

¹⁴⁸ United States v. Bianchi, *supra* note 144, at 714.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Id.* at 715.

¹⁵¹ *Ibid.*, citing Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958); Fair Labor Standards Act § 10, 52 Stat. 1065 (1955), as amended, 29 U.S.C. § 210 (1958); National Labor Relations Act § 10, 49 Stat. 453 (1936), as amended, 29 U.S.C. § 160 (1959). Other Acts include: Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(c) (1958); Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. §§ 70-70v (1958), as amended, 25 U.S.C. §§ 70s, 70v (Supp. IV, 1959-62). Where Congress intended a *de novo* review, it has so stated expressly: Renegotiation Act of 1951, 65 Stat. 21, as amended, 50 App. U.S.C. § 1218 (Supp. IV, 1959-62); Soil Bank Act, 70 Stat. 191 (1956), as amended, 7 U.S.C. § 1831 (Supp. IV, 1959-62).

¹⁵² *Ibid.*, citing National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943); Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930). Other cases include: O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 508-09 (1951); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938); FTC v. Eastman Kodak Co., 274 U.S. 619 (1927).

¹⁵³ 305 U.S. 197 (1938).

¹⁵⁴ *Id.* at 229.

a decision making a choice of possible interpretations. In exercising that choice in review of administrative decisions, according to *Bianchi*, the issue is whether there is substantial evidence in the record to support the choice or determination, not whether additional evidence might be introduced on review that was not considered below and which might produce an opposite result.

VII. COMMENTARY

The Court has obviously moved to strengthen, or to encourage the strengthening, of the administrative appellate process for handling contract disputes. However, the Court, by the limited scope of its grant of certiorari in *Bianchi*, left open many problems, some of which may require further resolution by the Court.

It would be unusual, indeed, if the Court of Claims were to give a broad construction to the *Bianchi* decision. In fact, it has, since *Bianchi*, indicated that it will narrowly construe any limitation upon its practice. In cases already tried, but not decided prior to *Bianchi*, the Court of Claims will continue to consider the *de novo* evidence introduced if the government did not object to introduction of that evidence in a timely manner. In *Stein Bros. Mfg. Co. v. United States*,¹⁵⁵ the Court of Claims so held, reasoning that the problem stated by *Bianchi* is "evidential or procedural, not jurisdictional," and may be waived.

... [The Wunderlich Act] is legislation governing suits by as well as against the United States and therefore more akin to a nonjurisdictional rule of procedural or substantive law which can usually be adduced or abandoned as the litigant sees fit.¹⁵⁶

Situations similar to those in *Stein Bros.* will be relatively easy to decide, the decision hinging upon the procedural action of the government to preserve its objection to the receipt of *de novo* evidence. However, because of divergent interpretations of the effect of the *Bianchi* case, one can expect controversy to arise shortly over the binding effect of administrative findings of fact in cases where it is determined that administrative tribunals do not have authority to determine liability. When it is determined that an administrative board has no jurisdiction to render an opinion as to liability, but the board has made findings of fact, the Court of Claims will probably continue to treat those findings as being merely advisory and not binding as to finality.¹⁵⁷ The contrary view, formally presented to the

¹⁵⁵ 32 U.S.L. Week 2050 (Ct. Cl. July 12, 1963).

¹⁵⁶ *Stein Bros. Mfg. Co. v. United States*, supra note 155, at 2050.

¹⁵⁷ See cases cited in note 131, supra.

Court of Claims by the Department of Justice, is that in any claim arising under a contract or incident to the performance of a government contract falls within the "disputes" clause, and all disputed questions of fact must be determined by the administrative tribunal or officer having authority to make final decisions. Under this position, no new evidentiary matter would be taken, on judicial review, in any lawsuit involving a contract that contains a disputes clause, including suits for breach of contract, reformation, rescission, unliquidated damages and any other suit in which it has previously been held that administrative tribunals do not have authority to render an opinion as to liability. This position leaves open the question of the desirability of having the parties go to one tribunal to try the facts and to another to decide the issues of law. If it is deemed desirable to have administrative tribunals be the triers of fact in all cases arising out of or incident to government contracts, then changes in the "disputes" clause to make this intention explicit should follow. Further, if that position were to be followed, it is all the more desirable that administrative tribunals be given a subpoena power.

In *Bianchi*, the Supreme Court noted that to the extent that the administrative record is insubstantially supported, the Court of Claims could stay its own proceedings pending further action before the agency involved. If the agency refused or failed to take further action to remedy a substantive or procedural defect or inadequacy, the lower court might impose the sanction of judgment for the contractor, despite the insubstantial record.

Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect.¹⁵⁸

The Court of Claims stated in *Stein Bros.* that "it may very well be" that in cases involving the interpretation of contract specifications [or other issues that are considered to be issues of law and not of fact] that that court is

not precluded by the *Bianchi* decision or the Wunderlich Act (41 U.S.C. §§ 321-322) from considering any evidence bearing on that legal issue, no matter what the Board of Contract Appeals determined or what was in the record before it.¹⁵⁹

¹⁵⁸ United States v. *Bianchi*, supra note 144, at 718.

¹⁵⁹ *Stein Bros. Mfg. Co. v. United States*, supra note 155. [Ed. note. This quotation was not printed as part of the condensed case report appearing in 32 U.S.L. Week 2050 (1963).] See also *WPC Enterprises, Ct. Cl. No. 256-59* (Oct. 11, 1963).

Later in the same case, the Court of Claims determined that it would try the damage issues where the administrative agency had not reached or passed upon that phase of the case.¹⁶⁰ There will be some cases in which Court of Claims action is stayed while the parties return to the department or agency for further substantive or procedural action. In those cases the departments or agencies may have to take action to remedy the defect or inadequacy, even in cases in which, in the past, they have declined to do so because they lacked authority to render an opinion on liability. This they may do in the belief that if they fail to act, judgment may be entered for the contractor based upon the record as it stands.

Indications are that the Supreme Court will, at some time, be asked to clarify its intent in the *Bianchi* case as further controversies arise. However in the meantime it can reasonably be expected that the Court of Claims will continue to construe the *Bianchi* case narrowly, resolving questions whenever possible in favor of its taking evidence *de novo* in their review of contract appeals.

VIII. CONCLUSION

While the aggrieved contractor will have an administrative remedy in filing a claim in the General Accounting Office, it is now the general practice of that Office to permit action by the agency involved, to the extent that there is a dispute under the "disputes" clause, before it will render a decision on the claim. Indeed, if the contractor wishes judicial review of his claim, he will have to exhaust his administrative remedies under the "disputes" clause. These requirements, plus the continuing state of flux and problems raised by *Bianchi*, make it perhaps appropriate to raise some questions about the disputes procedures before administrative tribunals.

When he wrote for the Court of Claims in *Volentine & Littleton*, Judge J. Warren Madden forcefully pointed out many weaknesses of administrative boards. Many of these have been cured by some of the boards, but many problems still exist and warrant correction. The work of the Administrative Conference of the United States was most notable in its studies and recommendations to the President for improvement of administrative procedures.¹⁶¹ Further

¹⁶⁰ Ibid. The Court of Claims cited the following cases, inter alia, as authority for courts to make determinations of damages in cases in which administrative authorities have failed or refused to determine a dispute: *Brister & Koester Lumber Corp. v. United States*, 188 F.2d 986 (D.C. Cir. 1951); *Maxon Dress Corp. v. United States*, 126 Ct. Cl. 434, 442, 115 F. Supp. 439 (1953); *United States Cas. Co. v. United States*, 107 Ct. Cl. 46, 68, 67 F. Supp. 950 (1946); *Manufacturers' Cas. Ins. Co. v. United States*, 105 Ct. Cl. 342, 351, 63 F. Supp. 759 (1946); *Cape Ann Granite Co. v. United States*, 100 Ct. Cl. 53, 71 (1943), cert. denied, 321 U.S. 790 (1944).

¹⁶¹ See Final Report of the Administrative Conference of the United States, Summary of Activities of the Conference, December 15, 1962.

studies are being conducted by the Bureau of the Budget on an agency by agency basis seeking means by which improvements can be instituted.

One suggested improvement is the appointment of a single, central board of contract appeals, drawing its members from men experienced in the manifold problems of government procurement. While some objection will be voiced to the creation of another tribunal that would, in effect, be an administrative court, do we not now have a proliferation of such tribunals, each with its own rules and *modus operandi*, not to mention those agencies that have no formal procedures for handling contract disputes?

Another notable weakness under the present system is the lack of an effective subpoena power. As a general practice, all the information necessary to prepare and properly present an appeal can be obtained in prehearing conferences and by written or oral interrogatories. But occasionally the only means by which a party can discover certain information is by subpoena. While the decision did not hinge on them, two significant findings were made in the *Stein Bros. Mfg. Co.* case, which were the result of a subpoena issued by the Court of Claims, and which were not made available to the administrative board that previously decided the case. Strong and liberal discovery might strengthen our contract appeals procedures.

The purposes of administrative procedures for handling contract disputes are thwarted in part when decisions are not rendered expeditiously. Part of the delay is attributable to requiring more than one man to decide a case, imposing unnecessary layers of review upon the decision-making process. Procedures such as those adopted by the Atomic Energy Commission might well be more universally adopted.

Another important delay factor is that frequently a case is not ready for decision once the hearing is completed, because the case has not been briefed prior to the hearing. There is little reason, except when new, unanticipated facts are disclosed in the hearing, why the board should not have trial briefs in advance of the hearing and be prepared to render a decision immediately after the hearing. Chief Justice Vanderbilt, of New Jersey, spoke directly to this problem:

With pretrial procedures to get at the facts, with a pretrial conference to limit the trial to the real points in controversy, and with trial briefs, where necessary, made available to the court in advance of trial, there is no reason why in nonjury cases the trial judge, having studied the trial briefs and having heard the evidence and having listened to the closing arguments of counsel, should not be in a position to decide the case at once. He will never know more about it than he does at

that time. The moment for decision has arrived, before other cases intervene to dull and blur his grasp of the pending case.

The further the judge gets away from the trial and the more matters intervene, the more elusive will the facts and the "feel" of a given case become.¹⁶²

The attitudes of the parties to the administrative handling of contract disputes will influence, as much as anything else, the effectiveness of the proceedings. With full co-operation from the parties, administrative tribunals are generally able to make decisions relatively expeditiously. The competence and experience of most members of administrative tribunals is ample reason for aggrieved contractors to repose their confidence in the boards and to ensure that there is a full disclosure of the facts and of the law. Not the least of the advantages of these administrative proceedings is that by subjecting the dispute to the formality and scrutiny of pleadings and hearings, often the first clear definition of the issues is made, which frequently leads to settlement of the dispute. While Judge Madden, who wrote the Court of Claims' decisions in *Wunderlich*, *Volentine & Littleton* and *Bianchi*, would eliminate the finality of departmental decisions on both the parties and the courts, and would make departmental proceedings a continuation of the negotiations between the parties,¹⁶³ the plain fact is that administrative decisions of contract appeals achieve their intended purposes in an overwhelming majority of cases, and administrative tribunals are appropriate and respected forums for consideration and final determination of contract appeals. Since dispute procedures generally presuppose a breakdown of negotiations, little will be gained by considering contract appeals as an extension of negotiations, without binding effect upon the parties or the courts. The finality of administrative decisions is a reasonable concomitant of the doctrine of exhaustion of administrative remedies, and where weaknesses exist in the administrative process the solution more surely lies in reform and strengthening of those procedures than in their elimination.

¹⁶² Vanderbilt, *The Challenge of Law Reform*, 79-80 (1955). See also, Sass, *A Government Lawyer Looks at the Contract Appeal System*, 8 *Cath. U.L. Rev.* 23 (1959).

¹⁶³ "Bianchi's Ghost" speech of Judge J. Warren Madden to the Division of Public Contracts, Administrative Law Section, American Bar Association, August 11, 1963, Chicago, Illinois.