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Are There Too Many Boards of Contract Appeals?

LOUIS J. FRANA*

I. The Problem

Although the first federal government board of contracts appeals was created in 1861,¹ the present proliferation of boards is largely a post-World War II development, as agency after agency established its own administrative board to hear appeals by contractors from adverse rulings by agency contracting officers.² While a contractor can still seek redress in the Court of Claims if dissatisfied with the decision of a particular board, trial de novo in that court has been virtually impossible under judicial interpretation of the Wunderlich Act.³ The Supreme Court has made this clear in *United States*

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1. *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868).

2. One author has suggested that "they multiply like rabbits." Keffe, 52 A.B.A.J. 883 (1966). Another points out that "[T]he head of nearly every agency of the federal government which engages in contracting to any significant degree has a representative (usually a board of contract appeals) to hear these appeals . . ." Caruso, *The Federal Boards of Contract Appeals*, 33 S. CAL. L. REV. 403, 406 (1960). During construction of the new Court of Claims building, there was talk (more than just a rumor) that the Court of Claims might have need for a board to hear and determine disputes arising under the contracts.

3. 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964). The contracts awarded by all government agencies incorporate Standard Form 32, June 1964 edition, as amended, General Provisions, which contain the Disputes Clause required for use by the Federal Procurement Regulations in government contracts for supplies and nonpersonal services. The disputes clause serves the purpose of preventing the stoppage of contract performance pending the resolution of a dispute while providing a relatively inexpensive and rapid method of settling controversies.

The standard Disputes Clause inserted in government contracts covers all disputes involving a question of fact arising under a contract. It provides that a decision rendered pursuant to that clause by the head of the department or agency, or his duly authorized representatives, such as a board of contract appeals, shall be final and conclusive unless such

v. Carlo Bianchi & Co.,⁴ *United States v. Anthony Grace & Sons, Inc.*,⁵ and *United States v. Utah Construction & Mining Co.*⁶

The importance of adequate administrative machinery at the board level to facilitate development of the record cannot be overemphasized, since any later litigation will be based on that record. Furthermore, if the record is defective or inadequately made, the court will remand the case back to the board. It is questionable, however, whether a large number of boards, many of them part-time and ad hoc, can handle this job to the satisfaction of all parties concerned. Some agencies, furthermore, have no disputes procedure at all. What is needed is a smaller number of boards, preferably two, to handle all government contracts disputes. Such a solution is available within the framework of existing legislation and administrative procedure. What was done recently by the Treasury Department with its own disputes procedure illustrates how this solution can be reached.

Prior to April 1, 1967, the Secretary of the Treasury referred appeals under Treasury contracts (except those of the Comptroller of Currency) to the Coast Guard Board of Contract Appeals.⁷ When the Coast Guard was transferred to the new Department of Transportation,⁸ the Secretary had to determine how to replace the former contract disputes procedure.

To fill the void, Treasury decided: (a) that an established full-time board of contract appeals in another agency be utilized; (b) that the General Services Administration (GSA) Board of Contract Appeals would best serve the department; (c) that trial counsel in Treasury's Office of General Counsel would represent the department in all contract disputes.⁹

II. Significance of Treasury Department's Decision

A. Why Use a Full-Time Board?

Recognizing the judicial nature of the administrative proceeding involved in a dispute, the small volume of Treasury's procurement and the small number of appeals filed by contractors in disputes with Treasury,¹⁰ the Secre-

decision is "fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." These standards of review appearing in the Disputes Clause have a statutory basis; they are set forth in the Wunderlich Act.

4. 373 U.S. 709 (1963).

5. 384 U.S. 424 (1966).

6. 384 U.S. 394 (1966).

7. 41 C.F.R. § 10-1.100 (1967).

8. 80 Stat. 931 (1966), 49 U.S.C.A. § 1652 (Supp. 1966). The transfer was put into effect on April 1, 1967. 32 Fed. Reg. 5453 (1967).

9. 41 C.F.R. pt. 10-60 (1967). The above recommendations were based on a memorandum of law dated February 13, 1967, from the author to the General Counsel, Treasury Department.

10. During fiscal year 1967, excluding disputes arising under Coast Guard contracts, only

tary decided to use an established full-time board in another agency rather than establish a board of its own to sit ad hoc. Several of the full-time boards could have fulfilled the Secretary's objectives. At the time of Treasury's decision, there were eighteen functioning boards of contract appeals, only six of them full-time.¹¹ All executive agencies have the authority to purchase and contract,¹² and theoretically, all could establish some type of contract disputes procedure. But the volume of contracts in most agencies is too small for there to be any established procedure,¹³ so they should arrange for a full-time board to handle their disputes.

Many lawyers specializing in government contract practice have high regard for the quality of performance by the full-time boards in recent years. Members of the Armed Services Board of Contract Appeals have been commended for developing high standards of fairness and expedition,¹⁴ and have been said to "... stand somewhere between the hearing examiner and the members of regulatory boards named by the President [in professional reputation]."¹⁵

On the other hand, "... the Bar views Boards of part-time Government

two appeals were filed by government contractors in disputes arising under contracts with the Department. Since there is no correlation between the dollar amount of an agency's procurement and the number of disputes appealed to a board, there might be a slight increase in the number of contract disputes in the near future.

11. Cuneo, *The Administrative Procedure Act Does Not Apply to Boards of Contract Appeals*, 1 A.B.A. PUB. CONTRACT L.J. 18, 22 (1967).

12. 79 Stat. 1303 (1965), 41 U.S.C. § 252 (Supp. I, 1965): "Executive agencies shall make purchases and contracts for property and services. . . ."

13 Miller, *Administrative Determination and Judicial Review of Contract Appeals*, 5 B.C. IND. & COM. L. REV. 111, 117 (1963). This is the most complete listing of agencies that contract, but do not have a formal board procedure. It is noted that there have been changes since date of publication. See PETROWITZ, OPERATIONS AND EFFECTIVENESS OF GOVERNMENT BOARDS OF CONTRACT APPEALS, S. DOC. NO. 99, 89th Cong., 2d Sess. 259 (1966) [hereinafter cited as Petrowitz Report].

Gilbert A. Cuneo, in a speech delivered September 9, 1966, at the Federal Bar Association Convention, related the following incident:

First of all, I look at the Board situation—what do we have? We have at least 17 Boards of Contract Appeals with published rules, and this month, or rather August, I was surprised to learn that in one of our Cabinet Departments we have a situation that is quite serious. One of our clients filed a notice of appeal on August 8. On August 12, he received a notice from the Secretary of that Department that the General Counsel of the Agency would be the Board of Contract Appeals to act as the designated representative under the disputes article to hear the appeal. On that same day the General Counsel called the contractor and said—"Your appeal will be heard on August 18. Be present." No rules, no pleadings, nothing. It is a substantial case and the contractor goes under if the claim is denied. Now is that proceeding comparable to an Interstate Commerce Commission proceeding or Federal Trade Commission proceeding? In my opinion any disputes procedure that makes that possible cannot be compared to a regulatory agency proceeding.

14. Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35, 39 (1966).

15. *Ibid.*

personnel with considerable misgivings."¹⁶ That opinion is supported by the recent Petrowitz Report,¹⁷ which points out that members of part-time boards have regular agency responsibilities as well as board duties. Even worse, the ad hoc boards lack what little continuity the part-time boards have, for their members are convened specifically only to hear a given case.¹⁸ At the time of the Treasury decision, five boards were part-time and seven were ad hoc. Ten of the eighteen boards included non-lawyers; on seven boards, the majority of members were non-lawyers.¹⁹

1. *Full-Time Boards Have More Expertise.* Treasury thus felt that full-time boards are in a better position to develop an adequate administrative record which will support, on review by the Court of Claims or a United States district court, a final determination of a board based upon substantial evidence and meeting standards set by the Wunderlich Act.²⁰ A full-time board is also more likely to be able to develop the expertise needed to resolve government contract disputes in an expeditious and proper manner. Any other approach would probably be more expensive and perhaps increase the risk of compiling an inadequate record. The Supreme Court has made it clear that on appeal by a dissatisfied contractor, the Court of Claims and the district courts have a reviewing function based on the record made before the administrative agency in settling contract disputes. The *Utah*²¹ and *Grace*²² cases illustrate the importance of developing an adequate factual record, since the courts will be bound by that record in a subsequent claim for breach of contract in those cases where the board could not provide an adequate remedy.

Besides meeting the standards of review provided by statute and Supreme Court decisions, there is the problem of a board's record being reviewed by the Comptroller General of the United States. Under the Budget and Accounting Act of 1921²³ and the Budget and Accounting Procedures Act of 1950,²⁴ the Comptroller General, as the agent of Congress, is vested with authority to examine and audit government financial transactions.²⁵ The Comptroller General asserts that the General Accounting Office in fact provides the Government an opportunity for review of an adverse board decision, an "appeal" otherwise unavailable under express contractual provisions. In

16. vom Baur, *A Realistic View of the Bianchi Case*, 3 THE FORUM No.5, 5, 12 (1965). See also Crowell & Anthony, *Practical Problems Facing Contractors' Counsel as a Result of Fragmentation of Remedies*, 18 A.B.A. AD. L. REV. 128, 133-34 (1965).

17. Petrowitz Report, *supra* note 13, at 121, 148.

18. Cuneo, *supra* note 11, at 22. See also Petrowitz Report, *supra* note 13, at 34-35.

19. Cuneo, *supra* note 11, at 23.

20. 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964).

21. *United States v. Utah Constr. & Mining Co.*, *supra* note 6.

22. *United States v. Anthony Grace & Sons, Inc.*, *supra* note 5.

23. Ch. 18, 42 Stat. 20 (codified primarily in scattered sections of 31 U.S.C.).

24. Ch. 946, 64 Stat. 832 (codified primarily in scattered sections of 31 U.S.C.).

25. 42 Stat. 24 (1921), 31 U.S.C. § 71 (1964).

the decision popularly referred to as the "S&E decision," the Comptroller General stated:

Since the primary objective of the Budget and Accounting Act of 1921 was the creation of an authority outside the Executive, responsible only to the Congress, to check and prevent administrative action contrary to statutory fiscal limitation imposed by the Congress, it seems imperative . . . that our Office take the action needed to protect the Government's interest whenever administrative Disputes Clause decisions are brought to our attention which, in our opinion, fail to meet the finality standards of the Wunderlich Act.²⁶

2. *Part-Time Boards Lack Record Making Ability.* Each full-time board of contract appeals is required to develop procedures for establishing an adequate appeal record.²⁷ Part-time and ad hoc boards have published procedures similar to those of the full-time boards; due to the composition of these boards, however, there will always be a serious question whether an agency can fulfill its responsibility of providing a proper disputes procedure, especially in creating a record that may successfully withstand the test of judicial review. As stated in the Petrowitz Report:

One thing this study has made clear is that an agency does not necessarily discharge its obligations to contractors by a mere fiat of set-

26. COMP. GEN. B-153841 at 33 (Dec. 5, 1966), 9 G.C. 31. The Department of Defense disagrees with the general position expressed by the Comptroller General. As stated in a letter from the Assistant Secretary of Defense to Senator Montoya, Chairman, Senate Small Business Subcommittee on Government Procurement: "The references in the Wunderlich Act to 'judicial review' and in the Standard Disputes clause to 'a court of competent jurisdiction' do not describe the General Accounting Office. Its authority is the traditional right under the Budget and Accounting Act of 1921 to take exception to a disbursement deemed by it to be illegal or fraudulent." 167 FED. CONTRACTS REP. D-3 (May 1, 1967).

The contractor in the "S&E decision" has filed in the Court of Claims for payment of claims that were upheld by the AEC Board of Contract Appeals. There are a number of contractors' counsel and Government attorneys who do not agree with the reasoning and result of the "S&E decision." See Spector, *Is It 'Bianchi's Ghost'—Or 'Much Ado About Nothing'?* 29 LAW & CONTEMP. PROB. 87, 102 (1964).

27. The Department of Agriculture—Departmental Board of Contract Appeals, 7 C.F.R. §§ 1.1-1.28, pt. 10 (1967); The Department of Agriculture—Commodity Credit Corporation Contract Disputes Board, 7 C.F.R. pt. 1400 (1967); Armed Services Board of Contract Appeals, 32 C.F.R. § 30.1 (1967); Atomic Energy Commission Board of Contract Appeals, 10 C.F.R. pt. 3 (1967); The Coast Guard Board of Contract Appeals, 41 C.F.R. pt. 11-60 (1967) (discontinued); Department of Commerce Appeals Board, 15 C.F.R. pt. 3 (1967); Army Corps of Engineers Board of Contract Appeals, 33 C.F.R. § 210.4 (1967); Federal Aviation Agency Contract Appeals Panel, 41 C.F.R. pt. 2-60 (1967); General Services Administration Board of Contract Appeals, 29 Fed. Reg. 14928 (1965); Department of Health, Education and Welfare Board of Review, 30 Fed. Reg. 1847 (1965); Interior Department Board of Contract Appeals, 43 C.F.R. pt. 4 (1967); National Aeronautics and Space Administration Board of Contract Appeals, 14 C.F.R. §§ 1209.100 —103 (1967); Office of Economic Opportunity Board of Contract Appeals, 41 C.F.R. pt. 22-60 (1967); Post Office Department Board of Contract Appeals, 39 C.F.R. pt. 955 (1967); Department of State Contract Appeals Board, 41 C.F.R. pt. 6-60 (1967); Veterans Administration Contract Appeals Board, 38 C.F.R. §§ 1.770-1.775 (1967); House Office Building Commission Board of Contract Appeals (Rules available, but not published).

ting up a board of contract appeals. Court decisions have made it clear that these boards must adhere to certain minimum procedural standards. Other court decisions clearly indicate that these standards have not been achieved by all boards, most conspicuously those that are part-time and *ad hoc*.²⁸

Generally, a government contractor is interested only in having one full and fair hearing before an impartial board. In the overwhelming majority of cases, there is no judicial appeal taken from that initial hearing; it should therefore be fair, quick, effective, and inexpensive—attributes most often found in a hearing before a full-time board.

3. *Full-Time Boards Provide Incentive to Settle.* Using a full-time board of contract appeals also acts as an incentive for settling disputes arising under contracts by negotiation with the contracting officer. As pointed out by Louis Spector, Chairman of the Armed Services Board of Contract Appeals: “. . . the presence of a functioning Board deters tens of thousands of claims which are, because of the Board, settled at the Contracting Officer's level.”²⁹ Treasury's prior experience under the full-time Coast Guard Board of Contract Appeals and present experience with the GSA Board of Contract Appeals tends to confirm Mr. Spector's analysis, but an account of the dealings of the Agency for International Development (AID) more dramatically illustrates the point.

Operating with an ad hoc board which it found unsatisfactory, AID dissolved its board in October 1965 and made arrangements with the Armed Services Board to handle its disputes.³⁰ The AID board had 35 appeals pending when it was discontinued. Upon transfer to the Armed Services Board, the number of appeals dropped to six without any action by that board.³¹ AID is charged an hourly rate by the Department of Defense for use of the Armed Services Board; the arrangement has worked to the satisfaction of both agencies.

As Acting General Counsel for the Department of Defense, L. Niederlehner reported on the deterrent effect of a board of contract appeals with decision-making authority:

These procedures have proved to be a highly effective incentive for settlements. Current statistics show that 35 to 40 percent of cases docketed before the Board are being settled at various stages of the Board's proceedings. This is, of course, in addition to the huge number of cases settled at the contracting officer level, because

28. Petrowitz Report, *supra* note 13, at 149.

29. Address by Louis Spector, *Meeting of the A.B.A. Section of Public Contract Law*, National Lawyer's Club, Dec. 6, 1966.

30. 30 Fed. Reg. 13584 (1965).

31. Address by Louis Spector, *supra* note 29.

of [*sic*] the procedures of the Board serve as a deterrent to unnecessary appeals.³²

The evidence indicates that the deterrent effect of a functioning board leads to the settlement of controversies and not to litigation of disputes.

Since all agencies do not have case loads large enough to warrant establishing full-time boards of their own, it has been recommended that they take advantage of existing machinery. The Petrowitz Report states:

If its case-load is 15 or 20 sizable cases a year, however, it may be preferable for the agency to assign its cases to one of the full-time boards that can reasonably accommodate the load. The Departments of Agriculture, Health, Education and Welfare, and State should consider this course of action. By adopting one of these alternatives, agencies that have a small case-load can minimize the cost of maintaining adequate machinery for the administrative handling of contract controversies and still comply with the required procedural standards.³³

In addition to the foregoing advantages, by selecting an existing full-time board the Treasury Department avoided the need to hire additional personnel, set aside space for board hearings, create administrative machinery to handle paper work and dockets, issue regulations and rules for a board, and establish additional library facilities.

B. Why Use the General Services Administration Board?

Use of the General Services Administration Board of Contract Appeals was suggested by the Federal Property Act of 1949.³⁴ The contract disputes procedure has always been considered part of the procurement function.³⁵ With the exception of procurement under the Coinage Act of 1965,³⁶ Treasury's procurement authority is derived from the Federal Property Act. The Act, now directly applicable to all executive agencies except those specifically excluded by other statutes, is implemented by the Federal Procurement Regulations³⁷ issued by GSA. These regulations are binding on the agencies and, for purposes of contracting, have the "force and effect of law."³⁸

As indicated by the Comptroller General, "One of the primary purposes of the Federal Property . . . Act was the establishment of uniform systems and

32. A.B.A. Sec. of Pub. Contract Law, COMMITTEE ON DISPUTES & REMEDIES REP. 1 (Jan. 4, 1967).

33. Petrowitz Report, *supra* note 13, at 149.

34. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, *as amended*, 79 Stat. 1303 (1965) (codified primarily in scattered sections of 40, 41 U.S.C.).

35. Petrowitz Report, *supra* note 13, at 1.

36. 79 Stat. 255 (1965), 31 U.S.C. § 393 (Supp. I, 1965).

37. 41 C.F.R. ch. 1 (1967).

38. *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl.), *motion for rehearing denied*, 320 F.2d 345 (Ct. Cl., 1963), *cert. denied*, 377 U.S. 1010 (1964).

procedures insofar as practicable throughout the various Government agencies. . . ."³⁹ The Treasury Department's use of the GSA Board is consistent with the purpose of the Act of 1949 and regulations issued pursuant thereto.

Contractor appeals from disputes arising under current Treasury contracts involve the same regulations and clauses from which final decisions are appealed under GSA contracts. This is quite appropriate, for the Administrator of General Services is authorized

. . . in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—(1) [to] prescribe policies and methods of procurement . . . including related functions such as contracting . . . (3) . . . and [to] perform functions related to procurement. . . .⁴⁰

Furthermore, regulations governing rules or standards used by the boards of all executive agencies, except agencies specifically exempted from the Federal Procurement Regulations, could be issued by the Administrator of General Services.⁴¹ The existing boards have no statutory basis; they have all been established and are governed by regulations issued by the agencies.

Using the GSA Board not only gives Treasury the ability to submit disputes to a full-time board, but also aids in achieving greater uniformity in rules and interpretation of standard contract clauses; decisions are published and become part of the law of public contracts.

C. Why Not Have All Agencies Except Those Exempted from Federal Procurement Regulations Use the General Services Administration Board?

Since GSA is authorized to prescribe procurement policies and procedures for executive agencies,⁴² it is practicable, although unlikely, for all agencies required to use Federal Procurement Regulations to refer their disputes to the GSA Board. It has been suggested that GSA could at least provide guidance through the Federal Procurement Regulations.⁴³ Although the foundation of the disputes procedure is the agreement of the parties to the contract, the adoption of regulations and standards would achieve greater uniformity and should not be inhibited.

Such authorities as Prof. Arthur S. Miller and Dean Ralph Nash of George Washington University Law School have suggested that the GSA

39. 39 Comp. Gen. 426, 428 (1959).

40. Federal Property and Administrative Services Act of 1949 § 201 (a), 63 Stat. 383, 40 U.S.C. § 481 (a) (1964).

41. 41 C.F.R. § 1-1.001 to -1.005 (1967).

42. *Ibid.*

43. Hiestand & Parler, *The Disputes Procedure Under Government Contracts: The Role of the Appeals Boards and the Courts*, 8 B.C. IND. & COM. L. REV. 1, 25 (1966).

board should handle all non-military contract disputes appeals. In a conference⁴⁴ preliminary to the hearings leading to the Petrowitz Report,⁴⁵ these comments were made:

Mr. NASH. [I]f you have got a situation where you have, let's say, a half dozen smaller agencies that have two cases a year, that probably is the simplest of all to solve. Throw those cases into some other board that has the volume to support full-time members.

Mr. MILLER. Throw them all into GSA.

Mr. PETROWITZ. As you know, there is a trend in this direction.

* * *

Mr. NASH. If we want to focus on some way to improve or some way to get . . . appeals into a judicial or administrative procedure that is more judicialized in our terms, that, it seems to me, is something that might be worth doing, and is a useful first step. For example, I think consideration ought to be given to having a single board of contract appeals, probably under the General Services Administration, since they have a lot of authority in this area, that would handle appeals from all the civilian agencies.

Mr. PETROWITZ. I recommended that 3 years ago.

Mr. Nash. Or at least say an agency could avail itself of this board if they did not have the volume to set up a full-time board.

Mr. FAIRBANKS. Why separate civilian and military, Ralph?

Mr. NASH. Only because I think we have got a pretty good machine working in the military, and I do not see any point in dismantling the machinery.⁴⁶

Since GSA board rules are in substantial compliance with those of the Armed Services Board, such a step would achieve the long-sought uniformity of procedure.

D. Can a Departmental Secretary Lawfully Delegate Authority to a Board in Another Agency?

While Treasury was considering referring its disputes to an extra-departmental board, the question arose, could the Secretary lawfully delegate such authority? Since the boards have their legal basis only in the contract disputes clause and in the agency's authority to contract, this did not pose a problem. The parties to the contract agree to be bound by the decision of a duly authorized representative or board chosen by the Secretary, provided the decision is supported by substantial evidence. The contractor is not bound on a question of law.⁴⁷ "The Supreme Court makes it very clear in the

44. *Hearings Before a Senate Subcomm. of the Select Comm. on Small Business on Boards of Contracts Appeals*, 89th Cong., 2d Sess., app. 5, at 147.

45. Petrowitz Report, *supra* note 13.

46. *Hearings Before a Senate Subcomm. of the Select Comm. on Small Business on Boards of Contracts Appeals*, *supra* note 44, at 153, 167.

47. Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964).

Utah decision that the parties are free to contractually agree to give the appeals boards mandatory jurisdiction over all classes of appeals."⁴⁸ The Secretary is not limited by statute⁴⁹ or by the disputes clause⁵⁰ as to whom he designates as a representative or board; he is not directed to limit his selection to employees of the department.

The question on the delegation of authority was raised in the hearings preliminary to the Petrowitz Report:

Senator MONTROYA. Now, the Armed Services Board has been delegated the authority to hear cases arising in agencies outside of the Department of Defense, in other words, the Agency for International Development, the U.S. Information Agency, Central Intelligence Agency, and the National Science Foundation.

In view of the opposition that the Comptroller General has expressed to the arbitration of cases directly involving the Government, do you think that this delegation is legal in the absence of a statute?

Mr. SPECTOR. I see no resemblance between this and the GAO's displeasure with arbitration, sir.

Every Government contract contains a disputes article which provides for an appeal to the head of the department or his duly authorized representative or board. We are, under our charter, the duly authorized representative of the Secretaries of Defense, Army, Navy, and Air Force.

Now, if the Administrator for the Agency for International Development feels that he does not have sufficient cases to warrant constituting a board of his own, and wishes to designate this Board as the board referred to in his contracts, I think that is in perfect keeping with the terms of the contract and its disputes article. It is just exactly the same as when the Secretary of Defense designates the Board to implement the disputes article in Defense Department contracts.⁵¹

Paul H. Gantt, chairman of the Atomic Energy Commission Board of Contract Appeals stated before the same committee: "If a department or agency does not have a sufficient volume of appeals which would warrant a separate and independent full-time board, then such agency should have their disputes and appeals adjudicated by another appeal board."⁵² Since the Armed Services Board is caring for several outside agencies, Treasury's move is not without precedent.⁵³

48. Nash, *The Disputes Procedure*, 1 No.3 A.B.A. PUB. CONTRACT NEWSLETTER 6 (1966).

49. Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964).

50. 41 C.F.R. § 1-7.101-12 (1967). See *supra* note 3, for general discussion of disputes clause.

51. *Hearings Before a Senate Subcomm. of the Select Comm. on Small Business on Boards of Contracts Appeals*, *supra* note 44, at 30.

52. *Id.* at 61.

53. The General Services Administration Board of Contract Appeals also has decided

Nor is reimbursement a problem. Treasury, in effect, has contracted with GSA to render a service on a reimbursable basis.

Any executive Department . . . if funds are available therefor and if . . . in the interest of the Government so to do, may place orders with any other such department, establishment . . . for . . . services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render. . . .⁵⁴

E. Why Use Trial Counsel to Represent the Department?

To represent the department before the board, Treasury decided to use trial counsel from its Office of General Counsel who were previously unconnected with the dispute, a practice with much to recommend it. Some agencies use a trial attorney from the same office where the dispute originated. This means that he probably participated in negotiations before the contract award, drafted the contract, interpreted clauses during contract administration, advised the contracting officer and technical personnel during periods of contract delay and failure to meet specifications, and prepared memoranda supporting the final decision of the contracting officer.

Such involvement is generally not conducive to the effective handling of the appeal before the board. An impartial trial counsel should be brought in at the appeal stage because a fresh approach would, among other things, facilitate the possibility of a negotiated settlement.⁵⁵ Moreover, governmental establishments at various levels, such as the Department of Justice, the Office of the United States Attorney for the District of Columbia, and the Office of the Corporation Counsel of the District of Columbia have established appellate divisions to handle appealed cases on the theory that attorneys in such divisions can give to the printed record on appeal that objective approach which the appellate body must give to the record.

III. Board Trends and Forecasts

Treasury is not the only department or agency that has taken a step toward board consolidation. A trend toward a further reduction in the number of boards is in the making and has been reported as follows:

A development in contract appeals board reorganization in recent years that has scarcely been of large enough proportion to call

cases occasionally for some independent agencies. Another board, that of the Atomic Energy Commission, even includes employees of other agencies and nongovernment employees in its membership.

54. 31 U.S.C. § 686 (a) (1964). The original language can be found in 41 Stat. 613 (1920). The question of reimbursing another agency for this type of service was checked informally by the author with a top legal official at General Accounting Office, who indicated that, in his opinion, GAO probably would not object, and that the proper authority for such an intragovernment procurement is 31 U.S.C. § 686 (1964).

55. Petrowitz Report, *supra* note 13, at 124, 154.

a trend—the shut-down of contract appeals board machinery in certain agencies with very small caseloads and the transfer of that function to large, well-established boards in other agencies—is suddenly accelerating very rapidly.

At least three such moves are now in the offing. These involve the Department of Health, Education, and Welfare; the Treasury Department; and the State Department.⁵⁶

The State Department has decided to use the Armed Services Board; regulations are scheduled for publication in the Federal Register sometime in the fall of 1967.

Rules establishing the Transportation Department Contract Appeals Board were published in May 1967.⁵⁷ This board will hear appeals formerly heard by the Federal Aviation Agency Contracts Appeals Panel, the Coast Guard Board of Contract Appeals, and appeals from the Bureau of Public Roads which were formerly handled by the Department of Commerce Appeals Board. The new board is full-time; all members are lawyers. Although Transportation has established a separate board, within the next few years it is entirely possible that government reorganization, changes in procurement regulations, and fluctuations in requirements may leave only the Armed Services and General Services Administration boards, the two now handling approximately 90 percent of the appeals.⁵⁸

Proposed legislation might head in this direction. Rep. Chet Holifield (D-Calif.) has introduced a bill to establish a Commission on Government Procurement.⁵⁹ The commission would study and assess the entire government procurement process. Most certainly, a significant commission study area would be contract appeals board operations. In endorsing the proposed commission, the Comptroller General suggested fifteen specific subjects for consideration, including two affecting the boards.⁶⁰ One subject related to the questions: (1) Is there a need for greater uniformity in procedures and decisions of contract appeal boards? (2) If there is such a need, would the establishment of one or two government-wide appeal boards satisfy such a need?

If the commission is established, any other proposals of a statutory nature⁶¹

56. FED. CONTRACTS REP., *supra* note 26, at A-1.

57. 41 C.F.R. pt. 12-60 (1967).

58. *Hearings Before a Senate Subcomm. of the Select Comm. on Small Business on Boards of Contracts Appeals*, *supra* note 44, at 147. In number, dollar amount and complexity, however, the Armed Services Board handles by far the greater proportion of this percentage.

59. H.R. No. 12510, *formerly* No. 157, 90th Cong., 1st Sess. (1967); S. No. 1145, 90th Cong., 1st Sess. (1967). When Senator Jackson introduced the Senate bill, he stated: "The goal to be sought is a unified approach to procurement problems." 160 FED. CONTRACT REP. A-20 (March 13, 1967).

60. 160 FED. CONTRACT REP. A-18 (March 13, 1967); Communiqué No. 67-3 (May 1, 1967).

61. Creyke, *Is a Code of Federal Contracts Claims Procedure Needed?* 1 A.B.A. PUB. CONTRACT, L.J. 2 (1967).

or comprehensive legislation⁶² involving the boards probably would be held in abeyance pending a report by the commission. Practically speaking, this could mean a minimum delay of four to six years for the study, report issuance, hearings and, if recommended, legislation. But there is no need to wait that long in order to mollify board critics and raise the stature of the boards, all within the framework of existing law and regulations.

In the past, serious charges regarding the composition, procedures, and jurisdiction of the boards have often been raised. Gilbert A. Cuneo compiled and summarized the complaints as follows:

... the substantial lack of subpoena power in Boards, unavailability of the use of discovery and deposition, lack of a complete authority in BCAs to decide breach of contract cases resulting in fractionalization of contractual remedies, lack of any form of tenure for Board members, confusion with regard to the finality of BCA decisions, absence of authority in Board members to administer oaths, inability of part-time and *ad hoc* Board members to give sufficient time to performance of Board responsibilities, lack of separation of power in certain situations whereby a BCA is part of General Counsel's office or where Board members serve as a part-time or *ad hoc* basis.⁶³

When the present posture of the boards is analyzed, however, it would appear that all of these complaints, except for the lack of subpoena power, can be corrected within the framework of existing law. Many of them are now in the process of being corrected or have been corrected.

Today nearly all disputes are heard and decided by a full-time board in a fair and expeditious hearing. In fact, Kenneth Culp Davis, who advocates that the Administrative Procedure Act does and should apply to boards of contract appeals,⁶⁴ says, "The truth is that the Armed Services Board and the General Services Administration Board are already in substantial compliance with the APA."⁶⁵ Even more recently, F. Trowbridge vom Baur wrote:

62. Cuneo & Anthony, *Beyond Bianchi: The Impact of Utah and Grace on Judicial Review of Contract Appeals Boards' Decisions*, 55 GEO. L.J. 602, 603 (1967).

63. Cuneo, *supra* note 11, at 36.

64. Davis, *The Administrative Procedure Act Applies to Boards of Contract Appeals*, 1 A.B.A. PUB. CONTRACT L.J. 4 (1967). It appears, however, that any attempt to remove the present exemption for public contracts from the Administrative Procedure Act is impracticable. Frank M. Wozencraft, Assistant Attorney General, testifying before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on May 3, 1967, stated:

I have discussed this question with Chief Judge Wilson Cowan of the Court of Claims as well as with counsel for the major procurement agencies. All of them agree with your consultants, Professor Nathanson of Northwestern Law School and Professor McFarland of Virginia Law School, that it is much more appropriate to make procedural improvements in this highly specialized field by amendment of Title 41.

65. Davis, *supra* note 64, at 10. See Leventhal, *supra* note 14, at 39.

... the major boards of contract appeals, staffed with capable men and acting with true judicial impartiality, have now developed over 25 years of workmanlike decisions which, on the whole, have been written with reassuring care, and which compare favorably with the decisions of the federal courts. These decisions now exert a wide influence.⁶⁶

Furthermore, Louis Spector, chairman of the Armed Services Board, has initiated contact among the various board chairmen to bring about greater uniformity in procedures. A meeting of all chairmen was held on February 23, 1967, at which it was agreed that a continuing series of meetings would be instituted for the purpose of developing a model set of rules.⁶⁷ A number of meetings have been held already.

Although only two boards now have statutory authority to issue subpoenas, the chairman of one of them considers this power unimportant: "We have not as yet utilized this power. Although requests have been made for the issuance of subpoenas, it has been the board's experience that no subpoena was really necessary and that such matters could be handled by agreement of the parties."⁶⁸ This commendable attitude is shared by almost all board chairmen.

The fragmentation of claims problem should be diminished soon. "The Armed Services Procurement Regulations Committee has submitted for industry consideration a form of all 'breaches clause' covering 'Interference with Performance.'"⁶⁹ If adopted, the clause would tend to retain at board level those few breach-of-contract claims that now go to the Court of Claims or district courts. As for the rest of the complaints, all full-time boards, which handle substantially all of the appeals, have been separated from agency general counsel offices;⁷⁰ lawyers and non-lawyers appointed to boards must comply with Civil Service requirements in their respective fields;⁷¹ and for all practical purposes board decisions are final.⁷² Rarely, if ever, has an agency head overruled or influenced a board decision.⁷³ This

66. vom Baur, *Remedies of Contractors with the Government*, 8 WM. & MARY L. REV. 469, 495 (1967).

67. FED. CONTRACTS REP., *supra* note 26, at D-1.

68. Gantt, *The Atomic Energy Commission Board of Contract Appeals*, 4 THE FORUM No. 7, 13 (1966). On a very few occasions, however, agency heads have invoked 5 U.S.C. § 304 (Supp. II, 1966) to subpoena witnesses.

69. 189 FED. CONTRACTS REP. A-14 (Aug. 21, 1967), 9 G.C. 305.

70. Petrowitz Report, *supra* note 13, at 35-121.

71. FED. CONTRACTS REP., *supra* note 67, at S-1. In view of the judicial nature of a board hearing, the fact that not all of the full-time board members are lawyers is one of the major problems that still needs to be corrected.

72. Spector, *Is It 'Bianchi's Ghost'—Or 'Much Ado About Nothing'?* 29 LAW & CONTEMP. PROB. 87, 102 (1964).

73. Sass, *A Government Lawyer Looks at the Contract Appeal System*, 8 CATHOLIC U. L. REV. 23, 24 (1959).

is also true of the General Accounting Office, which has occasionally sought to overrule a board decision.⁷⁴

Not everyone is satisfied with the present board system nor would everyone be satisfied regardless of how it were changed. But before too much momentum develops into a demand for legislative changes, these words should be pondered: ". . . there is an essentially greater procedural flexibility, informality (and informality is sometimes a virtue), and responsiveness to public need in a process which is contractual, rather than statutory, in origin."⁷⁵ The changes in the contract disputes procedure during the last seven years augurs well for the wisdom of that statement. Hopefully, it will still be true during the next seven years.

74. S&E decision, *supra* note 26, at 35.

75. Spector, *Anatomy of a Dispute*, 20 FED. B.J. 398, 400 n.10 (1960).

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