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COMMENT / Judicial Review of Government Boards of Contract Appeals—Some New Cases

IN JUNE, 1966, THE SUPREME COURT handed down decisions in *United States v. Utah Mining & Constr. Co.*[1] and *United States v. Anthony Grace & Sons, Inc.*[2] Both cases were on certiorari from the Court of Claims and both dealt with the degree of finality which the courts must accord to the decisions of the government boards of contract appeals. The decisions in both cases refined and narrowed the review power of the Court of Claims and in consequence, strengthened the power and authority of agency boards set up to hear and settle disputes between the government and private contractors in the important area of federal procurement. The purpose of this paper is to examine the circumstances and cases leading to these decisions and their effect on the review power of the courts.

The United States Government spends billions of dollars annually in procurement. It contracts for myriad services, from research and development to construction and maintenance. With this great volume of contracting the government has developed a standard clause for government contracts through which disputes may be settled administratively.[3] The contractor has the option of agreeing to these provisions or foregoing the lucrative area of government contracting. In effect, the disputes clause transforms many traditional breach of contract actions into disputes "arising under the contract" which are the subject of equitable adjustment. A contractor who wishes to take advantage of the administrative remedy of equitable adjustment must conform to the procedure which is set out in the contract. This procedure normally requires that a claim under the contract be made to the contracting officer with an appeal within thirty days to the head of the agency or his representative. The Supreme Court has held that a contractor must exhaust his administrative remedy of equitable adjustment, unless that procedure has been shown by clear evidence to be inadequate or unavailable,

[1] 384 U.S. 394 (1966).
[2] 384 U.S. 424 (1966).
[3] A typical disputes clause provides as follows:
Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

before he may proceed in court in an action for damages.[4] The contract clause provides that the decisions of the contracting officer will be final and conclusive. The "disputes" procedure is intended to provide flexibility in government contracting so that the government may change its requirements during performance, and at the same time insure that the work will continue. Also, it is meant to provide a simple and inexpensive means to settle controversies by providing administrative machinery to settle the dispute with finality.

The jurisdiction of the boards of contract appeals has no basis in statute, but is created by contract and a delegation of authority from the agency head. The Supreme Court, as early as 1878,[5] upheld the validity of a contract provision which made an agent of one party the arbiter of disputes, although it was not until World War I that a formal procedure was established in the War Department to decide such questions.[6] At the present time fourteen agencies have established boards to hear their appeals.[7] The boards of contract appeals are not subject to the Administrative Procedure Act[8] since the field has been pre-empted by the Tucker Act.[9] Thus the finality accorded decisions of these boards has become a center of controversy. The decisions of the Supreme Court handed down in June, 1966, were designed to clarify this area. But before reaching them, a discussion of prior judicial guidelines would be helpful.

In *Wunderlich v. United States,*[10] the Supreme Court held that a contract appeals board's decision on a question of fact was conclusive unless fraud could be shown. The court left only one standard for review and that was fraud which the court defined as "... conscious wrongdoing, an intention to cheat or be dishonest."[11] A showing that the decision was arbitrary, capricious, or grossly erroneous was not sufficient. The Court rendered this decision in the face of decisions by the Court of Claims which had eroded the finality which the contract clause provided for and had overturned decisions which it found were arbitrary and capricious.[12]

[4] United States v. Holpuch Co., 328 U.S. 234, 239-40 (1946).

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

[6] For a comprehensive history of the Armed Services Board of Contract Appeals see Sheed, Joel P. Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals,* 29 LAW & CONTEMP. PROB. 39 (1964).

[7] Department of Agriculture, Defense, Atomic Energy Commission, Treasury, District of Columbia Government, Federal Aviation Agency, General Services Administration, Department of Health Education and Welfare, Architect of the Capitol, Department of the Interior, National Aeronautics and Space Administration, Post Office, Department of State, and Veterans Administration.

[8] 60 Stat. 237 (1946), 5 U.S.C. §§ 1000-10 (1964).

[9] 28 U.S.C. § 1346 (a) (2) (1964).

[10] 342 U.S. 98 (1951).

[11] Wunderlich v. United States, *supra* note 10, at 100.

[12] For a review of the judicial interpretation of the disputes clause prior to *Wunderlich,*

In response to this decision, Congress enacted the Wunderlich Act[13] which was expressly designed to overcome the Supreme Court decision.[14] This act provided that a decision by a department or an agency on a question arising under a contract was conclusive unless it was "... fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[15] The Act further provided that no government contract could contain a provision rendering conclusive a decision by an agency on a question of law.

The effect of the Wunderlich Act was to broaden the scope of judicial review available from a decision by the contract appeals board. This right to review which had only been implied before, now had a statutory basis and scope, wider than that which the Supreme Court had granted. Decisions on questions of law still had no finality.

This statute, then, set out the standards for the courts to use in reviewing board decisions. But it left undecided what record the court would use in applying these standards. Thus the next important issue was the scope of the trial in the Court of Claims, *i.e.*, could the court receive evidence which had not been presented to the administrative board. The Court of Claims determined in *Volentine v. Little*[16] that the substantial evidence test of the Wunderlich Act was not limited to the perusal of the administrative record, but that a court had a right to receive evidence de novo to determine whether the decision of the board met the Wunderlich standards.[17] In contrast, the circuit courts had held that courts were limited to a review of the administrative record.[18] In *United States v. Carlo Bianchi & Co.*,[19] the Supreme Court again attempted to clarify the role of the courts in reviewing decisions.

It held that the courts were limited to the administrative record in reviewing decisions of contract appeals boards under the standards of the Wunderlich Act, and that the courts were not to receive new evidence but were to act as an appeals court. Subsequent to the *Bianchi* decision, there were proposals that the Congress enact legislation in the nature of the Wunderlich

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see Schultz, *Wunderlich Revisited: New Limits On Judicial Review Of Administrative Determination Of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115 (1964).

[13] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1964).

[14] The House Report on the bill expressly stated this purpose. H.R. REP. No. 1380, 83rd Cong., 2nd Sess. (1954).

[15] *Supra* note 13.

[16] 144 Ct. Cl. 723, 169 F. Supp. 263 (1959).

[17] The court was speaking of the substantial evidence test.

[18] Allied Paint & Color Works, Inc. v. United States, 309 F.2d 133 (2d Cir. 1962); Lowell O. West Lumber Sales v. United States, 270 F.2d 12 (9th Cir. 1959); Wells & Wells, Inc. v. United States, 269 F.2d 412 (8th Cir. 1959).

[19] 373 U.S. 709 (1963).

Act to overrule, in effect, the Supreme Court.[20] But no such statute has been enacted.

The effect of Wunderlich and *Bianchi* was to make the decisions of the boards of contract appeals, which have no statutory authority, on a par with an administrative tribunal. But there were several issues left unresolved by *Bianchi,* and the Court of Claims attempted to fill in the gaps.

In the same year in which *Bianchi* was decided, the Court of Claims held that the right to a review limited to the administrative record was procedural, not substantive.[21] If the government failed to object to the taking of evidence de novo, it had waived the right to a determination based entirely on the record. Since the jurisdiction of the boards of contract appeals rests on contract, not statute, the Court of Claims in determining that the review limited to the record was procedural, determined in effect that the contract made to render a decision of the contracting office final, would not be enforced unless one of the parties raised it as a bar.

In *National Presto Indus. v. United States,*[22] decided in 1964, the court went one step farther. There, the contractor had not sought any administrative relief under the disputes clause. Instead he commenced his suit in the Court of Claims where all the evidence was taken. Both the government and the contractor introduced evidence before the trial commission, and neither objected nor asked to have the proceedings stayed for an administrative determination of the disputed facts. Only after the commissioner had filed his findings did the government object and move to suspend the proceedings so that the Armed Services Board of Contract Appeals could determine the facts. The motion was denied, the Court of Claims, in a footnote, noting that the government had waived its right to an administrative determination.

In *W.P.C. v. United States,*[23] the doctrine of waiver was affirmed. The case involved the interpretation of contract specifications and, specifically, whether the contractor was bound to supply generators of a named manufacturer or could supply comparable equipment. The board of contract appeals had found, as a matter of fact, that before being awarded the contract

[20] The American Bar Association conducted a survey to study the desirability of enacting legislation. 16 AD. L. BULL 1 (1963). Congressman Cellar, on April 9, 1964, introduced a bill "to provide for full adjudication of rights of Government contracts in courts of law." This bill, H.R. 10765, was referred to the Committee on the Judiciary, but it was never enacted. It would have provided for a trial of all issues de novo, but with a rebuttable presumption of the correctness of the administrative decision which could be overcome by a prepondrance of the evidence. Nothing in the bill would have relieved the party of the duty to exhaust his administrative remedies.

[21] Stein Bros. Mfg. Co. v. United States, 162 Ct. Cl. 802, 337 F.2d 861 (1963).

[22] 167 Ct. Cl. 749, 338 F.2d 99 (1964), *cert. denied,* 380 U.S. 962 (1965).

[23] 163 Ct. Cl. 1, 323 F.2d 874 (1963).

the contractor had been informed that only generators manufactured by a named company would be acceptable. It also found that the contractor had assented to this requirement. As stated above, the court received de novo evidence on the theory that the government had waived its right to object. Then the court posed another issue:

> . . . whether an administrative determination of this character is entitled in court to any special weight under the Bianchi ruling and the Wunderlich Act . . . even if reasonable and supported by substantial evidence.[24]

The court held no. Although it found that the board's determination that the contractor had acquiesced in the government's interpretation of the contract was a " 'factual' finding in one sense,"[25] it stated that this determination was intimately related to the legal question, *i.e.*, what was the contract made between the parties? It further held that:

> . . . under the Act [Wunderlich] all legal questions are to be resolved independently by the court, and under our prior decision subordinate "factual" findings akin to those made here are wholly subsumed in the larger legal problem of contract interpretation.[26]

Through these cases one can see that the Court of Claims was whittling away from the finality of contract appeals board's decision. In interpreting its power to review under *Bianchi,* it had established: (1) that the *Bianchi* decision was not jurisdictional, but procedural, and therefore, the right to review confined to the record was waivable;[27] (2) that, because interpretation of contract specifications was a matter of law, the boards' decisions were not entitled to finality;[28] (3) that a "factual" finding made by the board need be given no weight if it were "subsumed" in a legal question.

Since the dispute procedure is designed to settle any claim "arising under the contract," it is vital to determine if a claim comes within the clause. In *Universal Esco Corp. v. United States,*[29] the contractor had sought additional compensation under the disputes clause. He filed a claim with the con-

[24] *Id.* at 8, 323 F.2d at 878.
[25] *Ibid.*
[26] *Ibid.*
[27] The waiver argument has been used by the Court many times to defend the admission of evidence de novo. See, *e.g.*, Kings Electronics Co. v. United States, 169 Ct. Cl. 433, 341 F.2d 632 (1965); Blanchard v. United States, 171 Ct. Cl. 559, 347 F.2d 268 (1965).
[28] Even where the contractor sought an equitable adjustment under the disputes procedure, the court would not recognize that the decision had any finality where the allowability of the adjustment turned on the interpretation of a contract provision, which it characterized as "ultimately" a question of law. Kaiser Industries Corp. v. United States, 169 Ct. Cl. 310, 340 F.2d 322 (1965).
[29] 170 Ct. Cl. 809, 345 F.2d 586 (1965).

tracting officer, but before the officer issued an order, the contractor filed a petition in the Court of Claims alleging breach of contract. The government moved to dismiss on the grounds that the contractor had failed to exhaust his administrative remedies. The motion was denied, the court holding that the claim made to the contracting officer did not come under the "Changes" provision, even though the contractor had characterized it as such when applying for relief to the contracting officer. In determining that the claim was one for damages for breach of contract, the court reasoned that there was no need to exhaust administrative remedies since no adequate relief could be granted by the administrative agency. Nor was the contractor estopped from alleging breach of contract because of his initial characterization of the claim:

> Whatever estoppel may lie—and we do not decide whether or not estoppel ever lies—against a contractor who proceeds further in the administrative process than plaintiff did, we think that the mere submission of a claim of this type to the contracting officer is not a bar, even though that official has undertaken to sift and consider the claim before action is commenced.[30]

If the Court of Claims may decide that no adequate relief is available under the contract before the agency makes a decision, the contractor is placed in a very vulnerable position. If he wished to bypass the administrative procedure and sue directly in the Court of Claims, he faced the risk of a determination that his claim was cognizable under the disputes clause and that he must exhaust his administrative remedies. Since, in order to take advantage of the administrative remedy, the notice of the dispute must be made within thirty days, the contractor, in effect, would lose his right to any remedy. On the other hand, if he goes through the administrative procedure, and receives a determination that his claim does not come within the disputes clause, he must retry the whole case.

In *Morrison Knudsen Co. v. United States*,[31] the Court of Claims attempted to clarify its role in the whole contract disputes area by distinguishing between the "scope of trial" and "scope of review." It stated that the Wunderlich Act standards concern only the "scope of review," on questions of fact in disputes that arise under the contract; it also sets forth the principle for review of issues of law.[32] In contrast, the *Bianchi* decision was interpreted as applying to the "scope of trial," *i.e.*, "when an issue of fact has been administratively decided on a dispute arising under the contract and within the scope of the Disputes Clause, a de novo trial may not be held on

[30] *Id.* at 813, 345 F.2d at 589.
[31] 170 Ct. Cl. 757, 345 F.2d 833 (1965).
[32] *Id.* at 762, 345 F.2d at 836.

the facts thus determined."[33] The court further determined that when a dispute arises under the contract and complete relief is available under the contract, neither party is entitled to a trial de novo on the factual question. But where the board makes gratuitous findings of fact on a breach of contract action, over which it has no jurisdiction, the Court of Claims held that it may hold a trial de novo on the merits of the claim. Thus only factual findings made pursuant to a claim under the contract had finality, subject to the standards of review in the Wunderlich Act. Denied finality were findings made "gratuitously," *i.e.,* where there was no remedy available under the contract, findings as to contract interpretation, deemed questions of law; and findings made where the parties did not object to de novo evidence. The Court of Claims also developed the practice of retaining the question of damages when it was found that the contractor should be granted relief after being denied compensation by the appeal boards.[34]

Thus between *Bianchi* and *Utah Mining & Constr. Co. v. United States*[35] and *Anthony Grace & Sons v. United States,*[36] the Court of Claims, obviously unhappy with the power of the boards of contract appeals, had learned to live with the decision and had successfully interpreted it so that the finality accorded the decision was not unbearable. In both *United Mining & Constr. Co.,* and *Anthony Grace & Sons, Inc.,* the Supreme Court reversed the Court of Claims broad interpretation of the review power. In *Utah Mining,*[37] the contractor had submitted three claims to the Armed Services Board of Contract Appeals. The first claim, sought an adjustment of price and time extension under the "changed conditions" clause. Although the board found that there was a changed condition, it denied recovery because the increased costs had been incurred by a subcontractor, and that the delay was due to other causes. The second claim was for additional compensation under the "changed conditions" clause. The board denied the extra compensation, but did allow a time extension. The contractor subsequently brought a breach of contract action against the government in the Court of Claims alleging a breach due to the government's unreasonable delay. The Court of Claims held that findings of fact made by a board in deciding these claims were entitled to no finality, and that the court must make its own findings of fact to determine if there were a breach of contract. In reaching this conclusion, the court showed its distrust and dislike of the boards of contract appeals.

[33] *Ibid.*
[34] See, *e.g.,* Schmid v. United States, 173 Ct. Cl. 302, 351 F.2d 651 (1965).
[35] *Supra* note 1.
[36] *Supra* note 2.
[37] 168 Ct. Cl. 522, 339 F.2d 606 (1964).

> It is well known that anyone seeking a contract with the Government must be willing to accept the contract drawn by the Government; indeed, the advertisements for bids so stipulate. These contracts all contain this "disputes" clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employer and whose prime duty is to be diligent in the protection of the Government's interest and to require that the contractor strictly comply with the term of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult.[88]

On certiorari, the Supreme Court posed the issue presented in the case as follows:

> . . . Whether factual issues that have once been properly determined administratively may be retried *de novo* in subsequent breach of contract action for relief that is unavailable under the contract.[89]

The Supreme Court rejected the reasoning on which the Court of Claims had relied, *i.e.,* that the boards have authority only to determine disputes arising under the contract, which could only include rights given by the contract and does not include disputes arising from violation of the contract, so that the findings of fact as to the breach of a contract could not be binding.

In the third claim which the contractor had made to the board he alleged a changed condition. The board rejected the appeal as untimely, but in doing so remarked that if the claim were for unliquidated damages for breach of contract, it had no jurisdiction to grant the relief. In argument on this point before the Supreme Court, the government urged the Court to hold that the disputes clause encompassed all disputes arising between the parties to a contract, so that breach of contract claims would come within the disputes procedure. This the Supreme Court refused to do, noting the long-standing interpretation of the disputes clause by both the government and contractors. Thus "pure breach of contract claims" were held to be exempted from the disputes machinery. But the Court held that if a contractor submits a claim to the contracting officer for an extension of time or for other relief which is available under the contract, the findings of fact made by the administrative agency which are relevant to a subsequent breach of contract action are final and conclusive on the parties and reviewable only under the Wunderlich standards. The court went on to say that

[88] *Id.* at 530, 339 F.2d at 612.
[89] United States v. Utah Mining & Construction Co., *supra* note 1 at 402.

these findings could not be disregarded in a suit for breach of contract by an assertion that the primary question is one of law.

In *Anthony Grace & Sons, Inc. v. United States*,[40] the Court of Claims, with one judge dissenting, had held that where a board of contract appeals had refused jurisdiction in a case, "or where its prior decision demonstrated that it will not entertain jurisdiction of a particular dispute,"[41] the court need not return the proceedings to the board but could retain the action for trial in the court since a return of the case would further delay the final settlement of the dispute. The Supreme Court, rendered its decision in this case on the same day as that in *Utah Mining & Constr. Co.*

The Armed Services Board of Contract Appeals had dismissed the case as untimely. The facts were briefly as follows. The Air Force had issued an invitation for bids on a military housing project. A tentative wage schedule accompanied the invitation for bids with a notice that the schedule would be redetermined by the Secretary of Labor not more than ninety days before the work would begin. The contract price would be adjusted to meet this redetermination. The successful bidder was required to do certain acts to close the contract and to post a $25,000 deposit. Anthony Grace & Sons was successful in bidding, but failed to complete the acts necessary to closing the contract because of a dispute over the wage schedules and adjusted contract price. The contracting officer notified the company that the Air Force was cancelling the bid and retaining the $25,000 deposit as damages. Anthony Grace appealed the decision to the ASBCA, which dismissed it. The Supreme Court stated that the issue in *Anthony Grace, i.e.,* who should make the findings of fact after it had been determined that the board of contract appeals had erroneously dismissed an appeal, had been anticipated in *Bianchi. Bianchi* had said that on the basis of the record, the court might be warranted in granting judgment for the contractor, or it could stay the proceeding pending further action by the administrative agency. The decision determined that the Court of Claims could conduct the evidentiary hearing only after it had been shown that the administrative remedy was inadequate or unavailable. A showing that the procedure would be slower was held insufficient. The court also disapproved of the practice by which the Court of Claims retained the issue of damages after reviewing the board's decision on a finding of no liability.

Through these two decisions, then, the Supreme Court has overthrown the many attempts that the Court of Claims had made to retain wide jurisdiction in government contract disputes. It has left only one area open to the court to receive evidence and make an initial determination—a "pure

[40] 170 Ct. Cl. 688, 345 F.2d 808 (1965).
[41] *Id.* at 695, 345 F.2d at 813.

breach of contract" action. But this area, too, may be pre-empted by the government agencies since the Supreme Court invited the government to expand the scope of the disputes procedure so that it would reach all the disputes between the parties to the contract.[42]

Another area in which the Court of Claims frequently reversed the contract appeals boards also was circumscribed by these decisions. Prior to these cases, the Court of Claims frequently reversed the boards of contract appeals by reasoning that the decision involved the interpretation of contract specifications which was a matter of law and that therefore the decision of the boards was not binding on the court. But in *Anthony Grace,* the Supreme Court pointed out that one of the reasons behind the whole disputes procedure was that:

> reliance upon a few expert agencies to make the records and initially pass on the merits of the claims properly presented to them will lead to greater uniformity in the important business of fairly interpreting government contracts.[43]

Since this quotation shows that one of the goals of the Court in holding the decision of the agencies final was uniformity in "interpreting" government contracts and the Court in *Utah Mining* specifically stated that the decision of the agencies could not be disregarded by an interpretation that the primary question was one of law, the Court of Claims will no longer be justified in reviewing the decision of the boards based on the question of law versus question of fact dichotomy.

Through a long line of decisions the Supreme Court has upheld and enhanced the power of government agencies to provide for a method of settling contract disputes by administrative action. The Court of Claims and the Congress, in one instance, have gone the other way, consistently cutting back on the jurisdiction and finality accorded to agency decisions. One may ask why. It would seem that the Supreme Court sees the disputes procedure as a simple, inexpensive method of settling disputes that the parties may agree to and be thereafter bound by. This view overlooks the fact that the contractor who wishes to be considered for a government contract must agree to these provisions, that they are standard provisions in all government contracts, and that consequently there is no free bargaining for their inclusion. Also, since the procedure is not subject to the Administrative Procedure Act, and in fact has no statutory basis, the various agencies may make their own rules, in all stages of sophistication, and still the court review is limited to the record made before the board.

[42] *Supra* note 1, at 413.
[43] *Supra* note 2, at 429.

Over against these objections, one can place the fact that the government has special needs in contracting and that the traditional method of deciding disputes, which could include work stoppage, would seriously hamper the efficient operation of the government. Since the whole disputes apparatus makes sense from the point of view of the government and the contractor, giving the government the right to have the work continued, and the contractor a speedy and inexpensive determination of disputes, the Supreme Court is justified in limiting judicial review. Two trials are not necessary. The facts, technical and complicated as they usually are, may best be determined by the agencies. And through this interpretation the federal law of contracts, which is board made and court made, may be developed uniformly. In more clearly defining this finality, the contractor will also benefit since he will know that he must present all his evidence at the trial before the board, thus increasing his chances of obtaining a speedy settlement. If the board finds that the government has breached the contract, for which it can presently offer no relief, then the General Accounting Office could settle without the necessity of a lengthy and costly trial.[44]

If the decisions in June follow the pattern of prior decisions in this area, there will probably be agitation in Congress for legislation to overcome their effect. But it is submitted that, given the existence of a disputes procedure, the Supreme Court was correct in clarifying the finality which a decision by a government agency must have and clearing away the fine distinctions which the Court of Claims had developed. Since a contractor faces the prospect of having his dispute dismissed for failure to exhaust his administrative remedies if he fails to present his claim first to the administrative agency most claims are first presented there.[45] Through these decisions, since questions of fact, even in breach of contract action, must be accorded finality, the Court of Claims has been rendered an appellate court in the important area of government contract law. Considering the purpose, and indeed the words, of the disputes clause, this is the correct interpretation.

[44] The GAO will consider breach of contract claims, but it has no administrative machinery to determine the facts if they are in dispute. With the agencies' power to decide disputed questions of fact with finality even in breach of contract actions, it seems likely that more breach of contract actions will now be settled without costly court action. 6 CCH Gov't. Cont. Rep. ¶ 90, 014.

[45] The trend has been toward requiring a full hearing on the merits of a case before the board determines that it has no jurisdiction. Also, the boards have been arresting jurisdiction through a doctrine involving "constructive" acts of the government. 6 CCH Gov't Cont. Rep. ¶90, 027.