ARMED SERVICES BOARD OF CONTRACT APPEALS
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332

30 October 1981

MEMORANDUM FOR: THE SECRETARY OF DEFENSE
THE SECRETARY OF THE ARMY
THE SECRETARY OF THE NAVY
THE SECRETARY OF THE AIR FORCE

SUBJECT: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1981

1. This report is furnished pursuant to paragraph 9 of Charter for the Armed Services Board of Contract Appeals, 1 July 1979. The statistics hereinafter set forth reflect the hearing, consideration and determination of appeals originating in the Army, Navy, Air Force and DLA and other Defense agencies. They also include appeals docketed by ASBCA for and at the request of the Department of State, the Agency for International Development, the Department of Health & Human Services, the International Communication Agency and the Office of Personnel Management, all on a full-time basis; and some other agencies on an ad hoc arrangement.

2. The following statistics cover activities of the Board during the report period, and the current reserve of pending matters:

A.	Appeals docketed during FY 1981 (Including 26 reinstatements)	974
B.	Appeals disposed of during FY 1981	932
C.	Number of Cases Pending July 1, 1961	1040
	Number of Cases Pending July 1, 1962	894
	Number of Cases Pending July 1, 1963	838
	Number of Cases Pending July 1, 1964	822
	Number of Cases Pending July 1, 1965	807
	Number of Cases Pending July 1, 1966	875
	Number of Cases Pending July 1, 1967	873
	Number of Cases Pending July 1, 1968	911
	Number of Cases Pending July 1, 1969	899
	Number of Cases Pending July 1, 1970	1123
	Number of Cases Pending July 1, 1971	1265
	Number of Cases Pending July 1, 1972	1254
	Number of Cases Pending July 1, 1973	1197
	Number of Cases Pending July 1, 1974	1127
	Number of Cases Pending July 1, 1975	1065

Number of Cases Pending July 1, 1976	1031
Number of Cases Pending October 1, 1977	1134
Number of Cases Pending October 1, 1978	1163
Number of Cases Pending October 1, 1979	1221
Number of Cases Pending October 1, 1980	1259
Number of Cases Pending October 1, 1981	1301
Net Increase in Docket, FY 1981	42

D. Source of Appeals Docketed During FY 1981:

Army	310
Navy	207
Air Force	210
DLA	148
Other DoD	0
	875

Special

State	9
HEW	51
AID	4
Office of Personnel Management	8
Railroad Retirement Board	1
Reinstated	26

E. Of Appeals Disposed of:

Withdrawn	0
Sustained, Denied, Compromised, or Dismissed after Substantial Board Proceedings	932
	932

F. Status of Cases Pending End of FY 1981:

Pending Administrative Disposition	1
Pending Agency or Court Action	0
Pending Prehearing Conference	6
Pending Action by Appellant	580
Pending Action by Government	372
Set for Hearing	139
Pending Transcripts or Briefs	51
Opinions Being Prepared	69
Being Processed Under Optional Accelerated and Expedited Procedure	83
	1301

G. Summary since May 1, 1949 (date of creation of ASBCA from predecessor boards)

Docketed	26,410
Reinstated	496
	26,906
Disposed of	25,605
	1,301

3. New appeals docketed and the number of disposals were both down from Fiscal Year 1980. A number of appeals actually received in late September were not docketed until October, due to personnel vacancies, thus are not reflected in these statistics. Some of the abnormally high numbers of appeals docketed in FY 80 were due to the impact of unexpected high interest rates and inflation on lump sum contracts. These factors were recognized and bid in later contracts, reducing the incentive to appeal in FY 81. Widespread discussion of whether the Board has the authority to award costs and fees under the Equal Access to Justice Act has increased the number of direct access cases in the Court of Claims. Also, contracting officers may be settling more cases before appeal.

4. The reduction in the number of dispositions can be largely attributed to fewer settlements and to a substantial increase in discovery and interlocutory motions which delay the processing of an appeal. The Contract Disputes Act and implementing rules place new emphasis on discovery, especially on oral depositions, and contractor and agency attorneys seek it in most cases with factual issues. Whatever the merits of discovery in the judicial process, it increases costs and delays disposition of cases, sometimes for several years. Fiscal Year 1981 has seen an unusually high number of motions which do not dispose of an appeal. Many of these relate to unresolved questions about the Contract Disputes Act, but are time consuming. The current contract for reporting services is unfortunate. There have been and continue to be lengthy delays in delivery of transcripts. This, in turn, delays briefs and opinions. The ASBCA has suffered from vacancies in clerical and professional staff throughout the year.

5. The Board is reaching substantial numbers of appeals to which the Contract Disputes Act applies by its terms, and contractors are increasingly electing to proceed under the Act in appeals under older contracts. Among the appeals disposed of, 77 were processed under the Accelerated Procedure of the Contract Disputes Act (Rule 12.3) and in 57 the Expedited Procedure (Rule 12.2) was elected. These procedures are quite successful in achieving faster dispositions of small dollar appeals. They do increase travel time and costs, for it is often not possible to combine hearings with those on other appeals and meet the time constraints of the Act.

6. A contract to establish a method of examining and rating applicants for a register from which administrative judges may be appointed has been completed. The report recommends a procedure which appears to well meet the requirements of the Contract Disputes Act and of the various equal opportunity

and other personnel acts and regulations. It is, however, time consuming and will require expertise to administer. Logically, the Office of Personnel Management should administer it for all agencies having boards, with the assistance of the boards, on a reimbursable basis if necessry. OPM participated in the study and has approved it, it has not responded to inquiries as to whether it will administer it. For DoD to administer the system for the ASBCA and Engineer Board, one additional personnel allowance would be needed by the Administrative Office of the Secretary of the Army, and possibly authority to use retired board members on an as needed basis.

7. The ASBCA has installed a mini-computer. The word processing program is in place and in use. Data processing should be available for the docket functions by mid-January 1982, and fully operational by April. Additional temporary operators or contract assistance will be needed to insert the data on 1,300 pending appeals to implement the system. The word processing ability is already showing increased efficiency. I expect similar results from the data processing function.

8. The Contract Disputes Act required that the boards of contract appeals furnish workload studies to the Secretaries, upon which they would determine if a board of contract appeals should be established or continued, after consultation with the Office of Federal Procurement Policy. The Act also directs that these studies be updated every three years. Attachment 2 hereto is a report of the data requested by OFPP covering the operations of the ASBCA during the past three fiscal years. This has been furnished to OFPP. It should be noted that items 9 and 10, substantive written decisions, include interlocutory and non-dispositive opinions as well as those which dispose of an appeal. OFPP has two functions under the Act. One is to consult with the Secretary as to whether the workload studies justify the continuation of the board; and, the other is to suggest the number of administrative judges each board should have. OFPP has not yet decided how to evaluate these studies, as this can only be done on a comparison basis, using means and averages to determine what the minimum workload should be for an administrative judge, then applying this to the requirement that, to exist, a board should justify a minimum of three full time members. The data for the ASBCA clearly justify its continuance and at least the number of administrative judges it now has. While I have not yet seen the reports of the other boards, I am confident that comparison of the ASBCA workload with that of the other boards of contract appeals will support this opinion.

Harris J. Andrews Jr.
HARRIS J. ANDREWS, JR.
Chairman

Attachments

Data re Appeals Disposed of* by the
Armed Services Board of Contract Appeals
During FY's 1977 - 1981

1. Origin of Appeals:	FY 1977**	FY 1978	FY 1979	FY 1980***	FY 1981****
Army	363	311	295	440	322
Navy	241	223	231	230	206
Air Force	212	178	206	222	199
DLA	159	130	168	174	154
Other (non-DOD)	36	31	70	54	34
2. Average amount of Claims (where Amount is stated):					
Prime Contractor	$225,271	$459,042	$3,025,596	$398,412.10	$335,982.81
Sub-Contractor	141,507	108,545	69,727	66,297.24	$124,117.84
Government	123,502	328,126	286,388	109,265.66	$114,920.01
3. Business Size:					
Small Business Contractor	697	575	598	716	544
Small Business Set Aside	168	167	196	167	128
4. Real Party in Interest:					
Prime Contractor	952	796	898	1037	832
Sub	59	73	64	74	82
Both	-	4	8	9	1
5. Method of Award:					
Advertised	558	527	593	655	453
Negotiated	453	346	377	465	419
Other	-	-	-	-	43

* Unless otherwise indicated.
** Covers the period from 1 July 1976 through 30 September 1977.
*** 12 cases were cancelled as docketed in error or duplicates.
****17 cases were cancelled as docketed in error or duplicates.

Attachment 1

	FY 1977	FY 1978	FY 1979	FY 1980	FY 1981
Negotiated					
2304(a)(1)	80	52	58	135	194
2304(a)(2)	29	30	15	28	52
2304(a)(3)	16	12	19	20	13
2304(a)(4)	-	2	-	2	3
2304(a)(5)	1	1	1	3	1
2304(a)(6)	20	12	32	27	17
2304(a)(7)	2	1	3	3	2
2304(a)(8)	1	-	-	1	-
2304(a)(9)	1	5	-	-	3
2304(a)(10)	61	41	47	67	82
2304(a)(11)	26	14	9	18	22
2304(a)(12)	-	-	-	-	3
2304(a)(13)	2	-	-	-	-
2304(a)(14)	1	4	5	9	9
2304(a)(15)	6	7	-	-	-
2304(a)(16)	5	2	6	8	3
2304(a)(17)	9	7	4	58	14
2304(a)(18)	-	-	-	-	1
6. Contract Type:					
FFP	877	756	777	872	737
Requirements	17	16	24	94	36
CPFF	37	18	15	25	29
CPIF	5	4	10	8	10
FPIF	19	9	18	13	24
Basic Agreement	3	8	-	5	2
Other	73	62	126	103	77
7. Kind of Procurement:					
Supply	437	380	391	426	380
Construction	323	321	319	421	338
R&D	37	21	24	29	22
Service	162	125	148	190	135
Surplus Sale	8	5	8	19	21
Other	44	21	80	35	19

	FY 1977	FY 1978	FY 1979	FY 1980	FY 1981
8. Principal Contract Clause(s) involved in Dispute: ****					
Changes	275	280	286	374	266
Default	301	273	296	283	235
Inspection	23	19	20	10	11
Excess Costs	25	14	14	14	21
Cost Principles	18	17	29	22	20
Cost & Pricing Data	14	7	2	4	9
Termination for Convenience	31	31	23	13	14
G.F.P.	19	17	11	5	8
Liquidated Damages	20	17	19	11	18
Actual Damages (Gov't claim)	7	2	-	3	1
Warranty	18	10	18	11	12
Payments	48	41	45	25	25
Disputes (Juris.)	88	104	137	69	6
Labor	2	4	8	10	8
Requirements	2	1	-	4	4
Suspension of Work	16	18	18	4	3
Insurance	1	-	-	3	2
All Disputes	29	8	-	1	-
Shipment	1	-	-	1	1
Delivery	2	1	-	2	1
Property Disposal	3	-	-	3	7
Differing Site Conditions	25	26	19	18	33
1st Article	5	18	8	1	1
Taxes	2	-	-	4	2
Discounts	1	-	1	1	-
Specifications	44	37	34	54	81
Price Escalation	13	5	7	9	6
Freight Charges	1	2	1	2	3
Interest	-	-	-	3	5
Miller Act	-	-	-	1	1
Storage	1	-	-	2	-
General Average	-	-	-	-	1
Mistake in Bid	-	-	-	-	12
Liability for HHG	-	-	-	-	6
Government Delay	-	-	-	-	12
Guaranteed Descriptions	-	-	-	-	7
Excusable Delay	-	-	-	-	2
Allowable Costs	-	-	-	-	29
Value Engineering	-	-	-	-	5
Other	126	84	147	145	37

**** The statistics on this page are no longer truly representative of the subject matter of the Board's cases, especially under the Contract Disputes Act. Changes in categories will be made as practical.

	FY 1977	FY 1978	FY 1979	FY 1980	FY 1981
9. Hearings and Days of Hearing:*****					
Hearings:					
In Washington, D.C.	101	61	49	60	38
Outside Washington, D.C.	189	136	128	151	147
Percentage outside Washington, D.C.	65%	69%	72%	72%	79%
Days of Hearing:					
In Washington, D.C.	336	257	245	166	61
Outside Washington, D.C.	508	354	244	317	304
Percentage outside Washington, D.C.	60%	61%	50%	66%	83%
10. Pre-Hearing Discovery (cases in which ruling sought):	46	26	48	27	58
11. Pre-Hearing Conferences:	82	72	56	75	120
12. Rule 12 Proceedings:					
Number of Proceedings	196	176	198	224	183
13. Record only Dispositions:	123	102	104	88	58
14. Disposition:					
Settled	343	342	369	633	478
Dismissed (no reason given)	164	125	167	40	17
Rule 30	31	40	48	83	28
Rule 31	47	39	53	60	90
No jurisdiction	-	-	-	11	3

***** Relates to hearings in appeals disposed of during a particular FY.

	FY 1977	FY 1978	FY 1979	FY 1980	FY 1981
14. Disposition: (continued)					
Denied	236	198	155	199	169
Sustained	190	129	153	94	130
(Remand)	90	84	82	64	77
(Amount Determined)******	100	45	70	30	53
15. Time on Docket (Days from date of docketing to date of decision):					
All cases:					
Average	444	453	420	413	458
Median	327	318	267	265	287
Rule 12 cases:					
Average	246	253	272	190	171
Median	213	214	223	154	151
16. Time from date case ready for decision to date decision filed (days):					
All cases:					
Average	52	48	30	33	33
Median	6	5	3	4	1
Cases in which formal opinion filed:					
Average	99	94	62	40	65
Median	44	29	19	17	21
All Rule 12 cases:					
Average	16	14	17	14	13
Median	10	8	7	8	5

****** Total dollars determined during FY 77 was $ 6,816,931.
Total dollars determined during FY 78 was $52,058,649.
Total dollars determined during FY 79 was $ 9,147,657.
Total dollars determined during FY 80 was $11,095,383.
Total dollars determined during FY 81 was $ 4,820,958.

ASBCA WORKLOAD STUDY: FY 79-FY 81

1.	Appeals on docket at begining of reporting period	1163
2.	Appeals docketed during reporting period	3172
3.	Appeals disposed of during reporting period	3034
4.	Appeals of docket at end of reporting period	1301
5.	Average number of appeals on docket during reporting period	1232
6.	Administrative Judge (AJ) years during reporting period	88.87
7.	Average number of appeals disposed of per AJ year	34.14
8.	Average number of appeals on docket per AJ year	41.58
9.	Substantive, written decisions rendered during reporting period	4078
10.	Average number of substantive, written decisions per AJ year	45.89
11.	Appeals disposed of under Rule 12 during reporting period	605
12.	Average number of appeals disposed of by substantive, written decisions per AJ year with stated claim in excess of $500,000	0.832
13.	Total number of hearing days during reporting period	2990
14.	Average number of hearing days per AJ year	33.64

Attachment 2