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

29 October 1980

IN REPLY REFER TO

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 1980

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 1980 (Including 16 reinstatements)	1170
B.	Appeals disposed of during FY 1980	1132
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
Net Increase in Docket, FY 1980	38

D. Source of Appeals Docketed During FY 1980:

Army	406
Navy	234
Air Force	232
DLA	247
Other DoD	1
	1120

Special

State	5
HEW	25
AID	4
Reinstated	16

E. Of Appeals Disposed of:

Withdrawn	0
Sustained, Denied, Compromised, or Dismissed after Substantial Board Proceedings	1132
	1132

F. Status of Cases Pending End of FY 1980:

Pending Administrative Disposition	1
Pending Agency or Court Action	0
Pending Prehearing Conference	2
Pending Action by Appellant	673
Pending Action by Government	337
Set for Hearing	74
Pending Transcripts or Briefs	56
Opinions Being Prepared	26
Being Processed Under Optional Accelerated and Expedited Procedure	90
	1259

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

Docketed	25,462
Reinstated	470
	25,932
Disposed of	24,673
	1,259

3. The ASBCA disposed of 1132 appeals in Fiscal Year 1980, an increase of 162 over Fiscal Year 1979 disposals. The new appeals docketed in FY 1980, however, totaled 1170 for a net increase of 38, bringing the total cases on the docket to 1259 at the end of the fiscal year. This is the largest number of appeals on the docket since 1971.

4. Fiscal Year 1980 represents the first full year of the Board's operations under the Contract Disputes Act of 1978. In the early part of the period, most of the Disputes Act cases were those in which the contractor elected to proceed under the Act. Now we are receiving a number of appeals under contracts awarded on or after 1 March 1979 to which the Act applies under its terms. As anticipated, the Act has increased the number of appeals docketed by the Board, partly because of the widened jurisdiction of the contracting officer and the Board and partly due to the extensive publicity of the Act and disputes generally throughout the contracting community. The Board received about 900 new appeals each year for a number of years through Fiscal Year 1978. In Fiscal Year 1979 the new appeals rose to 1,028 and in Fiscal Year 1980 to 1,170. Of course, some of the increases resulted from inflation and high interest rates impacting upon fixed price contracts. On 30 September 1980, 255 pending appeals were being processed under the Contract Disputes Act (information not known as to about the last 200 docketed), of which, 13 were being processed under the Expedited Procedures of Rule 12.2 and 37 under the Accelerated Procedures of Rule 12.3. During Fiscal Year 1980 the ASBCA disposed of 59 appeals under each of these small claims procedures.

5. The number of cases settled by the parties after docketing with the ASBCA rose sharply in Fiscal Year 1980. The legislative history of the Contract Disputes Act emphasizes settlement of disputes and strengthened contracting officers' authority to do so. The interest provision of the Disputes Act is an incentive for early settlement of meritorious claims. The ASBCA has encouraged settlements through prehearing proceedings. There is evident improved competence and professionalism in the procuring agencies and in the trial attorneys who represent them before the ASBCA.

6. The European boards of contract appeals of the Army and Air Force were disestablished during Fiscal Year 1980 and most of the appeals on their dockets were transferred to the ASBCA. A concerted effort is being made by the contracting agencies and the Board to bring this docket to a current status.

7. Board of contract appeals members are required by the Contract Disputes Act to be appointed and serve in the manner of administrative law judges under the Administrative Procedures Act, with the additional requirement of five years' experience in public contract law. The Office of Personnel Management was of the opinion board members were not in the same status as administrative law judges but remained Schedule A attorneys. OPM announced that it would issue regulations to insure the independence of administrative judges in the decision making process, through appeal rights from adverse actions and other safeguards. Regulations were drafted which were acceptable to the undersigned as DoD representative, although not entirely to some of the other agencies. These regulations have not been published, but are being held hostage to insistence upon a two-step performance appraisal system patterned generally after that of the Senior Executive Service. Neither the bonus for superior performance nor transfer for less than adequate performance are consistent with the independence of board members, for either action could influence decision making. For this reason board members are not in the SES. Any appraisal of judicial or quasi-judicial performance should not include the carrot and stick approach, but should have as its purpose recognition of strengths and improvement of weaknesses, through training if necessary. This can best be accomplished through a confidential relationship of the chairman and the administrative judge. The unfit can be removed through means other than periodic performance appraisals. OPM has asked the Department of Justice for an opinion of the status of board members under the Disputes Act, but none has been issued.

8. The OPM is prohibited from examining attorneys. Consistent with its opinion that BCA members are attorneys, it has refused to establish a register of applicants within its own organization. A contract was awarded to establish a system for rating applicants for a government-wide register and is nearing completion. It is still not known whether this will be administered by OPM or by one of the agencies having a board of contract appeals.

9. Training programs to increase efficiency of the clerical staff were successfully completed in Fiscal Year 1980. All of the newer judges will attend courses at the National Judicial College in Fiscal Year 1981. Continuing education courses will be offered to the more experienced members as funds permit.

10. There is increasing difficulty in securing suitable hearing rooms for out-of-town hearings. The special courts have lost control of a number of courtrooms which we formerly used, and the substantial recent increase in the number of U.S. District Court judges has reduced availability of regular federal courtrooms. This problem applies to a number of agencies holding hearings under the Administrative Procedures Act as well as the boards of contract appeals. A committee under the sponsorship of the Administrative Conference of the United States is addressing this difficulty. It may be necessary to establish courtrooms in several large cities on a cost sharing arrangement among the using agencies.

11. Title II of Public Law 96-481, entitled the "Equal Access to Justice Act," approved 21 October 1980, contains the following provision:

> "(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Party is defined as an individual having a net worth not exceeding $1,000,000 or the sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed or who did not have more than 500 employees at the time the action was filed. This provision takes effect on 1 October 1981. Section 204 (d)(1)(A) applies to all civil actions except torts, thus covers contract cases in the Court of Claims. Under Section 8(d) of the Contract Disputes Act of 1978, the boards of contract appeals may grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims. This would appear to authorize the boards to grant costs and attorney's fees in appropriate cases. This remedy will probably not materially increase the board's docket, but it should be considered for the Fiscal Year 1982 and later budgets.

12. The ASBCA has a sufficient number of administrative judges to process the increased docket, mentioned above and reduce the backlog of old cases, but the supporting staff is not adequate under present procedures. Recognizing manpower constraints imposed by Congress, we have purchased combination automatic data and word processing equipment which should be delivered about mid-December 1980. When this equipment is properly programmed it will afford significant time savings, particularly in word processing, so that the present clerical staff will be adequate except for one person to manage the equipment. The data processing feature will permit current and accurate data for docket management and more meaningful statistics.

Harris J. Andrews Jr.

HARRIS J. ANDREWS, JR.
Chairman, Armed Services
Board of Contract Appeals

Attachments

Data re Appeals Disposed of* by the
Armed Services Board of Contract Appeals
During FY's 1976 - 1980

1. Origin of Appeals:	FY 1976	FY 1977**	FY 1978	FY 1979	FY 1980***
Army	293	363	311	295	440
Navy	222	241	223	231	230
Air Force	190	212	178	206	222
DLA	181	159	130	168	174
Other (non-DOD)	32	36	31	70	54
2. Average amount of Claims (where Amount is stated):					
Prime Contractor	$1,464,388	$225,271	$459,042	$3,025,596	$398,412.10
Sub-Contractor	105,851	141,507	108,545	69,727	66,297.24
Government	122,212	123,502	328,126	286,388	109,265.66
3. Business Size:					
Small Business Contractor	587	697	575	598	716
Small Business Set Aside	129	168	167	196	167
4. Real Party in Interest:					
Prime Contractor	865	952	796	898	1037
Sub	43	59	73	64	74
Both	-	-	4	8	9
5. Method of Award:					
Advertised	544	558	527	593	655
Negotiated	374	453	346	377	465

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

	FY 1976	FY 1977	FY 1978	FY 1979	FY 1980
Negotiated					
2304(a)(1)	57	80	52	58	135
2304(a)(2)	41	29	30	15	28
2304(a)(3)	2	16	12	19	20
2304(a)(4)	2	-	2	-	2
2304(a)(5)	-	1	1	1	3
2304(a)(6)	19	20	12	32	27
2304(a)(7)	2	2	1	3	3
2304(a)(8)	-	1	-	-	1
2304(a)(9)	3	1	5	-	-
2304(a)(10)	65	61	41	47	67
2304(a)(11)	18	26	14	9	18
2304(a)(12)	-	-	-	-	-
2304(a)(13)	-	2	-	-	-
2304(a)(14)	5	1	4	5	9
2304(a)(15)	2	6	7	-	-
2304(a)(16)	6	5	2	6	8
2304(a)(17)	17	9	7	4	58
6. Contract Type:					
FFP	757	877	756	777	872
Requirements	24	17	16	24	94
CPFF	29	37	18	15	25
CPIF	9	5	4	10	8
FPIF	24	19	9	18	13
Basic Agreement	-	3	8	-	5
Other	75	73	62	126	103
7. Kind of Procurement:					
Supply	488	437	380	391	426
Construction	234	323	321	319	421
R&D	20	37	21	24	29
Service	106	162	125	148	190
Surplus Sale	8	8	5	8	19
Other	62	44	21	80	35

	FY 1976	FY 1977	FY 1978	FY 1979	FY 1980
8. Principal Contract Clause(s) involved in Dispute: ****					
Changes	271	275	280	286	374
Default	306	301	273	296	283
Inspection	15	23	19	20	10
Excess Costs	25	25	14	14	14
Cost Principles	35	18	17	29	22
Cost & Pricing Data	14	14	7	2	4
Termination for Convenience	32	31	31	23	13
G.F.P.	23	19	17	11	5
Liquidated Damages	12	20	17	19	11
Actual Damages (Gov't claim)	-	7	2	-	3
Warranty	22	18	10	18	11
Payments	44	48	41	45	25
Disputes (Juris.)	60	88	104	137	69
Labor	21	2	4	8	10
Requirements	25	2	1	-	4
Suspension of Work	15	16	18	18	4
Insurance	9	1	-	-	3
All Disputes	21	29	8	-	1
Shipment	-	1	-	-	1
Delivery	1	2	1	-	2
Property Disposal	15	3	-	-	3
Differing Site Conditions	26	25	26	19	18
1st Article	6	5	18	8	1
Incentive	3	-	-	-	2
Taxes	10	2	-	-	4
Discounts	15	1	-	1	1
Specifications	27	44	37	34	54
Price Escalation	2	13	5	7	9
Award Fee	-	5	-	-	-
Freight Charges	-	1	2	1	2
Utility Rates	3	-	-	-	-
Interest	-	-	-	-	3
Miller Act	2	-	-	-	1
Storage	2	1	-	-	2
General Average	-	-	-	-	-
Other	38	126	84	147	145

**** 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 1976	FY 1977	FY 1978	FY 1979	FY 1980
9. Hearings and Days of Hearing:*****					
Hearings:					
In Washington, D.C.	68	101	61	49	60
Outside Washington, D.C.	126	189	136	128	151
Percentage outside Washington, D.C.	65%	65%	69%	72%	72%
Days of Hearing:					
In Washington, D.C.	306	336	257	245	166
Outside Washington, D.C.	284	508	354	244	317
Percentage outside Washington, D.C.	48%	60%	61%	50%	66%
10. Pre-Hearing Discovery (cases in which sought):	42	46	26	48	27
11. Pre-Hearing Conferences:	68	82	72	56	75
12. Rule 12 Proceedings:					
Number of Proceedings	148	196	176	198	224
13. Record only Dispositions:	125	123	102	104	88
14. Disposition:					
Settled	401	343	342	369	633
Dismissed (no reason given)	132	164	125	167	40
Rule 30	50	31	40	48	83
Rule 31	45	47	39	53	60
No jurisdiction	-	-	-	-	11

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

	FY 1976	FY 1977	FY 1978	FY 1978	FY 1980
14. Disposition: (continued)					
Denied	163	236	198	155	199
Sustained	127	190	129	153	94
(Remand)	36	90	84	82	64
(Amount Determined)******	91	100	45	70	30
15. Time on Docket (Days from date of docketing to date of decision):					
All cases:					
Average	387	444	453	420	413
Median	284	327	318	267	265
Rule 12 cases:					
Average	217	246	253	272	190
Median	179	213	214	223	154
16. Time from date case ready for decision to date decision filed (days):					
All cases:					
Average	29	52	48	30	33
Median	3	6	5	3	4
Cases in which formal opinion filed:					
Average	71	99	94	62	40
Median	27	44	29	19	17
All Rule 12 cases:					
Average	13	16	14	17	14
Median	7	10	8	7	8

****** Total dollars determined during FY 76 was $23,020,314.
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.