ARMED SERVICES BOARD OF CONTRACT APPEALS
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332-0700

31 October 1985

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 1985

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, 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 1985 (Including 32 reinstatements)	1638
B.	Appeals disposed of during FY 1985	1293
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
Number of Cases Pending October 1, 1982	1594
Number of Cases Pending October 1, 1983	1695
Number of Cases Pending October 1, 1984	1729
Number of Cases Pending October 1, 1985	2074
Net Increase in Docket, FY 1985	345

D. Source of Appeals Docketed During FY 1985:

Army	606
Navy	430
Air Force	366
DLA	152
Other DoD	4
	1558

Special

State	1
HHS	33
AID	3
Office of Personnel Management	1
Defense Mapping Agency	6
Defense Nuclear Agency	4
Reinstated	32

E. Of Appeals Disposed of:

Withdrawn	25
Sustained, Denied, Compromised, or Dismissed after Substantial Board Proceedings	1268
	1293

F. Status of Cases Pending End of FY 1985:

Complaint Due	540
Answer Due	217
Reply Due	0
Discovery Start	281
Prehearing Conference	13
To Be Set	441
Hearing Set	152
Transcript & Briefs Due	152
Suspense	131
Ready to Write	147
TOTAL	2074
Rule 12	122

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

Docketed	31,802
Reinstated	640
	32,442
Disposed of	30,368
	2,074

The conclusion of Fiscal Year 1985 reflects that once again the ASBCA has received a record number of new appeals. For the first time in the history of the Board the number of pending appeals exceeds two thousand. The magnitude of the workload leads to two inescapable conclusions. First, additional personnel must be authorized. Second, the Board must develop internal procedures which permit the parties under appropriate appeals to opt for "Prompt Procedures".

In June of 1985, a comprehensive "ASBCA Management Improvement Plan" was prepared by an ASBCA committee as justification for additional resources and submitted by the then Acting Chairman to the General Counsel of the Department of Defense. The plan discussed the current staffing of the Board, provided justification for additional personnel positions and associated space and equipment, analyzed the status of the Board's docket, detailed internal controls to better manage the docket, and calculated future work load projections based on historical data. The plan further detailed steps already taken or in the process of being taken to change methods of processing appeals to improve productivity. Emphasis was placed on disposing of the oldest ready-to-write appeals on our docket. This goal has now largely been accomplished. However, this has resulted in a large build-up of pending appeals which must be heard. The plan uniformly received positive comments and indicated efforts to implement the Columbia Technology management study recommendations made in December 1983. However, the plan was held in abeyance pending the completion of the process for selecting a new ASBCA Chairman.

On 1 October 1985, the undersigned was appointed as the new Chairman. As chairman, I have, amongst other actions, initiated the following changes:

- revised the docket assignment system to more evenly balance the work load and have begun intense docket reviews and docket adjustments;

- redefined the Commissioners work assignments to help relieve the Judges from numerous administrative docket functions;

- revised the Rule 12 docket processing system to balance the work load and to continue to insure substantial compliance with time deadlines;

- reassigned computer terminals to improve efficiency; (in the immediate future a new, expanded computer system will be installed which will permit each Judge access to a terminal including capability for automated legal research); and

- initiated procedures on a trial basis, subject to the approval of both parties, for prompt processing of appropriate cases.

Many of the above mentioned "changes" are cosmetic, temporary stop-gap measures, preliminary or experimental steps designed to immediately improve working conditions and productivity. However, insufficient number of personnel and inadequate office space are limiting constraints which severely restrict any significant improvement in productivity. I have every reason to believe that needed resources will be approved as soon as a management plan is formally submitted to DOD for approval. The filling of existing vacant billets, which includes three Administrative Judge positions, and the submission of a revised management plan are the Board's top priorities. Nominations for at least two of the vacant judge positions and the management plan will be submitted by 1 December 1985.

On 23 September 1985, the General Accounting Office issued its final report [GAO/NSIAD-85-102] on its review of the ASBCA. GAO concluded:

> Although the Board is not organizationally independent of the Department of Defense, no centralized control over the Board's activities is exercised within the Department. Further, the Board is perceived by members of the contracting community to be independent in its decision-making process.
>
> However, members of contract appeal boards are not as insulated as they could be from agency control. Members are appointed and the Office of Personnel Management maintains can be removed by the agencies which bring disputes before the boards. Other employees who perform quasi-judicial functions like board members are selected from a government-wide register and can be removed only by the Merit Systems Protection Board. Legislation should be considered if the Congress wants to insulate board members from agency control to the same degree as other quasi-judicial employees.

The Board has issued Interim Procedures for processing applications for attorney fees filed pursuant to the Equal Access To Justice Act (Section 504 of Title 5 of the United States Code). The EAJA imposes strict jurisdictional deadlines for the filing of applications and for the data required to be filed with the application. The EAJA includes numerous procedural and substantive issues which are not clearly resolved and may initially cause an undue burden on the Board's limited resources.

While the statistical data on its face doesn't appear to bode well for the Board, there are a number of positive signs that are very encouraging to me. Since the effective date of the Contracts Disputes Act of 1978, the number of docketed appeals has nearly doubled. There were 1221 pending appeals as of October 1979. During this same time, the number of ASBCA judges, which was recognized in 1978 as being too low, as well as the size of the Board's staff has not substantially changed. The merely administrative functions associated with the increased workload have had a tremendous impact on the Board's resources. We have literally been buried with paper and are bursting at the seams. Despite the necessity for the Judges to absorb a significant amount of these additional administrative functions, the judges' productivity has remained relatively stable. I am convinced that when we acquire adequate additional personnel, the situation will improve. The fact that productivity has remained as high as it has reflects that the Board is blessed with quality people, who are dedicated to maintaining the Board's excellent reputation.

Paul Williams

PAUL WILLIAMS
Chairman

Attachment

Data re Appeals Disposed of by the
Armed Services Board of Contract Appeals
During FY's 1981 - 1985

1. Origin of Appeals:	FY 1981	FY 1982	FY 1983	* FY 1984	** FY 1985
Air Force	199	188	255	234	258
Army	322	341	425	524	463
DLA	154	139	157	218	232
Navy	206	198	212	267	251
Other (non-DOD)	34	72	82	63	61
2. Average amount of Claims (where Amount is stated):					
Prime Contractor	$335,983	$420,115	$173,058	$241,096	$294,304
Government	$114,920	$380,718	$198,629	$137,371	$803,406
Sub-Contractor	$124,118	$271,128	$286,606	$238,968	$102,762
3. Business Size:					
Small Business Contractor	544	644	781	966	994
Small Business Set Aside	128	180	177	302	371
4. Real Party in Interest					
Prime Contractor	832	814	1,013	1,120	1,165
Sub-Contractor	82	103	91	110	49
Both	1	12	5	23	18
Other		9	22	53	33
5. Method of Award					
Advertised	453	551	720	781	735
Negotiated	419	353	329	396	366
Other	43	34	31	-----	
Unknown			51	129	164

* 29 cases were cancelled as docketed in error or duplicates.
** 28 cases were cancelled as docketed in error or duplicates.

	FY 1981	FY 1982	FY 1983	FY 1984	FY 1985
6. Contract Type:					
Basic Agreement	2	5	3	20	5
CPFF	29	19	42	24	21
CPIF	10	6	2	8	6
FFP	737	738	918	1,059	1,031
FPIF	24	13	7	5	11
Requirements	36	57	37	32	50
Other	77	100	122	158	141
7. Kind of Procurement:					
Construction	338	358	427	515	504
R&D	22	34	13	18	16
Service	135	212	236	246	247
Supply	380	299	401	437	427
Surplus Sale	21	20	24	16	5
Other	19	15	30	74	66
8. Principal Contract Clause(s) or issue(s) involved in Dispute:*					
Actual Damages (Govt claim)	1	4	-	8	6
Allowable Costs	29	53	55	33	65
Basic Agreement			1	-	1
Bid Mistake	12	11	11	15	20
Bid Protest		9	8	3	-
Breach		8	6	6	35
Changes	266	236	285	243	244
Cost Acctg Standards		6	4	2	-
Cost or Pricing Data	9	14	17	19	21
Cost Principles	20	15	3	9	25
Default	235	210	250	253	256
Delivery	1	-	2	8	7
Differing Site Conditions	33	27	25	38	68
Discounts	-	1	-	1	11
All Disputes	-	-	-	-	8
Disputes (CDA)	-	18	13	93	150
Disputes (Juris.)	6	1	-	1	19
Economic Price Adj.			11	1	-
Equal Access to Justice			18	1	-
Estimated Quantity		6	3	9	13
Excess Costs	21	28	21	16	35

	FY 1981	FY 1982	FY 1983	FY 1984	FY 1985
8. Principal Contract Clause(s) involved in Dispute:*					
(continued)					
Excusable Delay	2	1	1	7	36
First Article	1	-	4	10	19
Freight Charges	3	1	-	1	-
G.F.P.	8	5	8	6	16
General Average	1	-	-	-	2
Government Delay	12	12	18	17	-
Guaranteed Descriptions	7	14	12	5	5
Inspection	11	19	20	19	53
Insurance	2	-	-	-	3
Intellectual Properties		3	-	-	1
Interest	5	9	5	6	25
Labor	8	5	7	5	4
Liability for HHG Damages	6	7	2	14	15
Limitation of Costs			9	8	1
Liquidated Damages	18	17	15	29	62
Miller Act	1	-	-	-	1
Mutual Mistake		1	1	4	7
Option to Renew		2	2	2	8
Payments	25	22	36	24	36
Price Escalation	6	2	1	4	4
Progress Payments		6	6	13	29
Property Disposal	7	1	1	1	3
Requirements	4	6	3	4	31
Risk of Loss		5	6	4	9
Shipment	1	-	-	-	-
Specifications	81	97	152	160	100
Storage	-	-	-	-	1
Suspension of Work	3	2	4	10	51
Taxes	2	3	7	6	7
Termination for Convenience	14	17	18	21	31
Value Engineering	5	6	6	4	16
Warranty	12	13	10	49	36
Other	37	15	10	32	2
Unknown			34	82	83

*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 1981	FY 1982	FY 1983	FY 1984	FY 1985
9. Hearings and Days of Hearing:*					
Hearings:					
In Washington, D.C	38	36	56	46	58
Outside Washington, D.C.	147	136	151	169	181
Percentage outside Washington, D.C.	79%	79%	73%	79%	76%
Days of Hearing:					
In Washington, D.C.	61	94	142	100	175
Outside Washington D.C.	304	286	278	349	393
Percentage outside Washington, D.C.	83%	75%	66%	78%	69%
10. Pre-Hearing Discovery (cases in which ruling sought):	58	77	148	137	300
11. Pre-Hearing Conferences:	120	56	49	114	228
12. Rule 12 Proceedings:					
Number of Proceedings	183	187	205	229	262
13. Record only Dispositions:	58	79	73	75	168
14. Disposition:					
Settled	478	459	489	522	506
Dismissed (no reason given)	17	14	23	28	15
Dism/Rule 30	28	78	123	124	118
Dism/Rule 31	90	88	107	184	41
Lack of Jurisdiction	3	4	35	31	45
Dism/Withdrawn					121
Req. CO/Decision	---	---	---	56	47

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

	FY 1981	FY 1982	FY 1983	FY 1984	FY 1985
Denied	169	168	192	205	226
Sustained	130	127	162	158	146
(Remand)	77	81	116	99	87
(Not Stated)		4	-	-	
(Amount Determined)*	53	42	46	59	59
15. Time on Docket (days from date of docketing to date of decision):					
All cases:					
Average	458	438	422	450	484
Median	287	278	263	297	299
Rule 12 cases:					
Average	171	173	156	151	149
Median	151	148	137	149	130
16. Time from date appeal ready for decision to date decision filed (days):					
All cases:					
Average	33	34	49	50	72
Median	1	1	1	4	7
Cases in which formal opinion filed:					
Average	65	78	114	105	193
Median	21	27	29	19	53
All Rule 12 appeals:					
Average	13	17	14	16	13
Median	5	7	3	8	7

*Total dollars determined during FY 81 was $ 4,820,958.
*Total dollars determined during FY 82 was $35,142,367.
*Total dollars determined during FY 83 was $ 6,258,134.
*Total dollars determined during FY 84 was $19,104,775.
*Total dollars determined during FY 85 was $ 1,952,442.