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

31 October 1983

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 1983

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 now known as the United States Information Agency, the Office of Personnel Management, the Small Business Administration, the Securities & Exchange Commission and the Central Intelligence Agency, 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 1983 (Including 32 reinstatements)	1256
B.	Appeals disposed of during FY 1983	1155
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
Net Increase in Docket, FY 1983	101

D. Source of Appeals Docketed During FY 1983:

Army	466
Navy	221
Air Force	275
DLA	203
Other DoD	11
	1176

Special

State	2
HHS	35
AID	3
Office of Personnel Management	2
US Information Agency	1
Small Business Administration	1
Securities & Exchange Commission	2
Central Intelligence Agency	1
Reinstated	32

* One appeal directed to this Board was docketed and subsequently transferred to another agency board.

E. Of Appeals Disposed of:

Withdrawn	11
Sustained, Denied, Compromised, or Dismissed after Substantial Board Proceedings	1144
	1155

F. Status of Cases Pending End of FY 1983:

Pending Administrative Disposition	2
Pending Agency or Court Action	0
Pending Prehearing Conference	15
Pending Action by Appellant	575
Pending Action by Government	554
Set for Hearing	200
Pending Transcripts or Briefs	81
Opinions Being Prepared	160
Being Processed Under Optional Accelerated and Expedited Procedure	108
	1695

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

Docketed	28,847
Reinstated	588
	29,435
Disposed of	27,740
	1,695

The 1256 new and reinstated appeals docketed during Fiscal Year 1983 indicates a continuation of the higher new caseload first noticed in FY 1982. Approximately 1250 new appeals a year must now be considered the norm. The ASBCA disposed of a record 1155 appeals during FY 1983, but this was 101 fewer than input. There were 1695 pending appeals at the close of the fiscal year.

The slight decrease in new cases from the prior fiscal year may be partly due to a decision of the U.S. Court of Appeals for the Federal Circuit that the boards of contract appeals may not award costs and attorney's fees under the Equal Access to Justice Act. I am informed that the number of new suits filed directly in the U.S. Claims Court has increased. There was an increase in the numbers of settlements and appeals withdrawn, largely due to the fact that a number of test cases were decided by the ASBCA during the year, which also disposed of related appeals. This may also partly account for the reduction in new appeals from the Office of Personnel Management and the Department of Health & Human Services. Also the large construction contract of the latter, mentioned in last year's report, is nearing completion.

The number of motions filed continues to increase. Computerized data show that the ASBCA issued 105 nondispositive written decisions on motions during FY 1983. This is a substantial additional burden on the judges.

A contract has been awarded for a management analysis of the ASBCA with a firm having experience in court management. The contractor is examining the organization, structure, procedures, and personnel mix of the Board, and will suggest methods for more efficient and expeditious disposition of appeals. Delays attendant upon an unmanageable docket of 1700 appeals is intolerable to the Board's mission, and expensive to both the Government and the contractor. Increased interest and loss of the use of money affect all parties. It is obvious that additional personnel, and office space to accommodate them, are needed. The contractor is expected to suggest manpower needs and classifications. A draft report is due on 15 November and a final report by 31 December 1983.

The Senate Committee on Governmental Affairs conducted hearings in April and May 1983 on Defective Pricing under the Truth in Negotiations Act and on Cost Accounting Standards, respectively. With respect to defective pricing it was charged that decisions of the ASBCA and the Court of Claims have led contracting officers to believe that it is virtually impossible for the Government to win a defective pricing appeal or suit; and that, consequently, such disputes are settled at a lesser price reduction than is warranted by the audit report. During the May hearings it was alleged that certain decisions of the ASBCA, whose members are nonaccountants, on the allocation of certain state taxes from home office to segments under CAS 403 were contrary to the intent of the CAS Board. The issue in three CAS 403 cases is again before us, thus it would be improper to comment on them. I may say that there are certain basic rules for the interpretation of statutes and regulations. If the wording is clear, it is to be followed. If it is unclear, resort may be made to the legislative history as shown in the relevant deliberations prior to and upon promulgation of the statute or regulation. Alleged subjective intent disclosed after promulgation may not be considered.

The Committee staff has requested an investigation of the ASBCA by the General Accounting Office. This has been underway several months. It has entailed the organization and structure of the ASBCA, and methods of appointment and retention or severance of Board members; of the independence of the Board and its members. Study has been made of the education and experience of all of the members of the Board, with emphasis on specialized qualifications, especially accounting expertise. There will be a workload study.

The investigation will entail study of the appeals process and the availability of checks and balances, i.e. systems and mechanisms for altering or contravening principles announced in ASBCA decisions. There will be a statistical analysis of ASBCA decisions, including the ratio of appeals sustained to those denied. There have been changes in the scope of the study and others may be made.

The principal reason given by the Committee staff for the GAO investigation is to determine if there should be a division of the ASBCA whose members are accountants or if certain cost cases should be decided by a board of accountants. Taken with the accountant testimony at the Committee hearings, there seems to be a presumption that if the decisions are made by accountants, they would agree with the position of DCAA and not with that of the expert accountants who support the contractor's position. This suggestion was first made in the defective pricing hearings. Defective pricing cases very seldom involve accounting principles. The duty of the auditor, the contracting officer, and the ASBCA is principally a fact finding mission. Moreover, the Charter of the ASBCA requires that its members decide appeals on the record of the appeal. It is fundamental to due process that judges do not substitute their own technical knowledge, e.g. engineering or accounting, for the expert testimony or other evidence of record.

The attached statistical data are based upon the cases disposed of during the fiscal year. We started keeping this data in 1970 at the request of the Commission on Government Procurement. Much of it would be more representative of the Board's workload if kept on new and pending appeals. This has been started 1 October 1983 on new cases, but it will be several years before it is fully useful. It would not be cost effective to search the files on pending appeals to enter the information in the data bank.

Some comments on the attached statistics are noted. Paragraph 2: the lower average amounts claimed result from an increase in small construction and service contract claims and from test cases where the amount of the case decided is not representative of the true impact. Paragraph 4: the number of appeals in service contracts continues to increase as more mess hall service and janitorial service contracts are awarded to small businesses inexperienced with work on military posts. Paragraph 10: the reduction in prehearing conferences in the past two fiscal years results from increased use of more cost effective conference telephone calls. Paragraph 14: the increase in dismissals without prejudice (Rule 30) resulted in part from a greater number of bankruptcies and fraud prosecutions, and failure of contractors to certify their claims as required by the Contract Disputes Act.

Harris J. Andrews, Jr.
Chairman

Attachment

Data re Appeals Disposed of* by the
Armed Services Board of Contract Appeals
During FY's 1979 - 1983

1. Origin of Appeals:	FY 1979	FY 1980	FY 1981	FY 1982	FY 1983**
Air Force	206	222	199	188	255
Army	295	440	322	341	425
DLA	168	174	154	139	157
Navy	231	230	206	198	212
Other (non-DOD)	70	54	34	72	82
2. Average amount of Claims (where Amount is stated):					
Prime Contractor	$3,025,596	$398,412	$335,983	$420,115	$173,058
Government	286,388	109,266	114,920	$380,718	$198,629
Sub-Contractor	69,727	66,297	124,118	$271,128	$286,606
3. Business Size:					
Small Business Contractor	598	716	544	644	781
Small Business Set Aside	196	167	128	180	177
4. Real Party in Interest					
Prime Contractor	898	1,037	832	814	1,013
Sub-Contractor	64	74	82	103	91
Both	8	9	1	12	5
Other				9	22
5. Method of Award					
Advertised	593	655	453	551	720
Negotiated	377	465	419	353	329
Other	-	-	43	34	31
Unknown					51

* Unless otherwise indicated.
** 21 cases were cancelled as docketed in error or duplicates and 3 cases were transferred to other agencies.

	FY 1979	FY 1980	FY 1981	FY 1982	FY 1983
Negotiated					
2304(a)(1)	58	135	194	134	111
2304(a)(2)	15	28	52	24	23
2304(a)(3)	19	20	13	13	22
2304(a)(4)	-	2	3	6	4
2304(a)(5)	1	3	1	16	-
2304(a)(6)	32	27	17	37	15
2304(a)(7)	3	3	2	3	1
2304(a)(8)	-	1	-	-	3
2304(a)(9)	-	-	3	-	1
2304(a)(10)	47	67	82	60	94
2304(a)(11)	9	18	22	16	10
2304(a)(12)	-	-	3	1	2
2304(a)(13)	-	-	-	3	-
2304(a)(14)	5	9	9	7	8
2304(a)(15)	-	-	-	3	-
2304(a)(16)	6	8	3	10	1
2304(a)(17)	4	58	14	20	29
2304(a)(18)	-	-	1	-	5
6. Contract Type:					
Basic Agreement	-	5	2	5	3
CPFF	15	25	29	19	42
CPIF	10	8	10	6	2
FFP	777	872	737	738	918
FPIF	18	13	24	13	7
Requirements	24	94	36	57	37
Other	126	103	77	100	122
7. Kind of Procurement:					
Construction	319	421	338	358	427
R&D	24	29	22	34	13
Service	148	190	135	212	236
Supply	391	426	380	299	401
Surplus Sale	8	19	21	20	24
Other	80	35	19	15	30

	FY 1979	FY 1980	FY 1981	FY 1982	FY 1983
8. Principal Contract Clause(s) or issue(s) involved in Dispute:******					
Actual Damages (Govt claim)	-	3	1	4	-
All Disputes	-	1	-	-	-
Allowable Costs	-	-	29	53	55
Basic Agreement					1
Bid Protest				9	8
Breach				8	6
Changes	286	374	266	236	285
Contract Disputes Act				18	13
Cost Acctg Standards				6	4
Cost or Pricing Data	2	4	9	14	17
Cost Principles	29	22	20	15	3
Default	296	283	235	210	250
Delivery	-	2	1	-	2
Differing Site Conditions	19	18	33	27	25
Discounts	1	1	-	1	-
Disputes (Juris.)	137	69	6	1	-
Economic Price Adj.					11
Equal Access to Justice					18
Estimated Quantity				6	3
Excess Costs	14	14	21	28	21
Excusable Delay	-	-	2	1	1
First Article	8	1	1	-	4
Freight Charges	1	2	3	1	-
G.F.P.	11	5	8	5	8
General Average	-	-	1	-	-
Government Delay	-	-	12	12	18
Guaranteed Descriptions	-	-	7	14	12
Inspection	20	10	11	19	20
Insurance	-	3	2	-	-
Intellectual Properties				3	-
Interest	-	3	5	9	5
Labor	8	10	8	5	7
Liability for HHG Damages	-	-	6	7	2
Limitation of Costs					9
Liquidated Damages	19	11	18	17	15
Miller Act	-	1	1	-	-
Mistake in Bid	-	-	12	11	11
Mutual Mistake				1	1
Option to Renew				2	2

	FY 1979	FY 1980	FY 1981	FY 1982	FY 1983
8. Principal Contract Clause(s) involved in Dispute:***					
(continued)					
Payments	45	25	25	22	36
Price Escalation	7	9	6	2	1
Progress Payments				6	6
Property Disposal	-	3	7	1	1
Requirements	-	4	4	6	3
Risk of Loss				5	6
Shipment	-	1	1	-	-
Specifications	34	54	81	97	152
Storage	-	2	-	-	-
Suspension of Work	18	4	3	2	4
Taxes	-	4	2	3	7
Termination for Convenience	23	13	14	17	18
Value Engineering	-	-	5	6	6
Warranty	18	11	12	13	10
Other	147	145	37	15	10
Unknown					34

*** 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 1979	FY 1980	FY 1981	FY 1982	FY 1983
9. Hearings and Days of Hearing:****					
Hearings:					
In Washington, D.C	49	60	38	36	56
Outside Washington, D.C.	128	151	147	136	151
Percentage outside Washington, D.C.	72%	72%	79%	79%	73%
Days of Hearing:					
In Washington, D.C.	245	166	61	94	142
Outside Washington D.C.	244	317	304	286	278
Percentage outside Washington, D.C.	50%	66%	83%	75%	66%
10. Pre-Hearing Discovery (cases in which ruling sought):	48	27	58	77	148
11. Pre-Hearing Conferences:	56	75	120	56	49
12. Rule 12 Proceedings:					
Number of Proceedings	198	224	183	187	205
13. Record only Dispositions:	104	88	58	79	73
14. Disposition:					
Settled	369	633	478	459	489
Dismissed (no reason given)	167	40	17	14	23
Dism/Rule 30	48	83	28	78	123
Dism/Rule 31	53	60	90	88	107
Lack of Jurisdiction	-	11	3	4	35

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

	FY 1979	FY 1980	FY 1981	FY 1982	FY 1983
Denied	155	199	169	168	192
Sustained	153	94	130	127	162
(Remand)	82	64	77	81	116
(Not Stated)				4	-
(Amount Determined)*****	70	30	53	42	46
15. Time on Docket (days from date of docketing to date of decision):					
All cases:					
Average	420	413	458	438	422
Median	267	265	287	278	263
Rule 12 cases:					
Average	272	190	171	173	156
Median	223	154	151	148	137
16. Time from date appeal ready for decision to date decision filed (days):					
All cases:					
Average	30	33	33	34	49
Median	3	4	1	1	1
Cases in which formal opinion filed:					
Average	62	40	65	78	114
Median	19	17	21	27	29
All Rule 12 appeals:					
Average	17	14	13	17	14
Median	7	8	5	7	3

*****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.
*****Total dollars determined during FY 82 was $35,142,367.
*****Total dollars determined during FY 83 was $ 6,258,134.