Remedies of Contractors with the Government

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ARTICLES

SYMPOSIUM ON GOVERNMENT CONTRACTS

REMEDIES OF CONTRACTORS WITH THE GOVERNMENT*

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I. INTRODUCTION

The assertion of a remedy by a contractor usually leads to a dispute, or to a lawsuit; and there are two basic situations in which it is incumbent upon the contractor to assert a remedy. These are:

A. Where the contractor has the initiative or burden of going forward, if he is going to recover moneys due him; and

B. Where the Government has taken action, and the contractor has to do something effective to work his way out of trouble.

These will be dealt with separately.

II. THE FIRST SITUATION; WHERE THE CONTRACTOR HAS THE INITIATIVE OR BURDEN OF GOING FORWARD IF HE IS TO RECOVER MONEYS DUE HIM; THE PRESENTATION OF CLAIMS

Here we deal essentially with the subject of the presentation and collection of claims.

The Vital Need for an Early Analysis; Types of Claims

Where a substantial loss has been or is being incurred under the contract, and the contractor has no clear idea of the reason for the loss, a loud bell should ring in his mind, tolling the urgent message, "Do I have a claim"? The contractor may not know, at this point, that he has any

* (Adapted from a lecture given at the College of William and Mary in February 1967)

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claims at all; but this situation requires that he find out—and find out early. Here legal analysis is fundamental; someone must identify the cause of the loss, and see whether a claim can be developed—and do it early, if he wants to be sure of taking all the steps necessary to recover moneys possibly due him.

One of the principal purposes of an early analysis is to distinguish between claims which arise under the contract, and claims for breach of it, for they require different procedure. To a large extent, these claims are mutually exclusive. That is, a claim arising under the contract cannot be presented as such to a judicial tribunal such as the Court of Claims; and a claim for breach of contract cannot be presented with confidence to a contracting officer or to a board of contract appeals, although it may be settled by a contracting officer.

Coextensively, there is also the requirement that administrative remedies for claims arising under the contract must be exhausted. This means carrying all available administrative remedies through the Contracting Officer level, and also through the board of contract appeals level. If a board of contract appeals should decide adversely to the contractor, the latter may then bring judicial review of the board's decision in the Court of Claims under the Wunderlich Act, 41 U.S.C. 321, 322. This review is on the theory that the Government has breached the contract by failing to accord the contractor all the compensation to which the contract legally entitles him.

Thus, you will be in serious error if you have a claim arising under the contract and start to present it to the Court of Claims or to a federal district court. The claim will bounce back, and you will be told that you must first exhaust your administrative remedies. By then it may be too late to effectively do so, and it may be gone forever. Thus, you should present a claim arising under the contract in timely fashion, in the first instance to the Contracting Officer, and, if necessary, then to a board of contract appeals.

If you have a claim arising under the contract and you elect to present it to the Comptroller General rather than to proceed under the Disputes clause, and the Comptroller General acts on it, you have probably waived your right to proceed under the Disputes clause. In that event, the Comptroller General's decision will be binding. And bear in mind that the Comptroller General does not lack courage and

enterprise. His tendency is not to refuse requests for relief, but to take
on projects and to give them muscular treatment.

However, if a department or agency of government submits a claim
arising under the contract to the Comptroller General, without your
consent or acquiescence, such action of the agency or department is a
"nullity," and your right to proceed under the Disputes clause is not
waived. For the fact is that the contractor has bargained for a de-
cision, not of the Comptroller General, but of the Contracting Officer
and, on appeal, by a board of contract appeals as the representative of
the secretary or head of the department.

You may try to settle a claim for breach of contract with the Con-
tracting Officer. If he refuses to settle on terms acceptable to you, you
may then consider whether the claim should be presented to a board
of contract appeals with the hope that it may dismiss the claim for
lack of jurisdiction on the ground that it is a claim for breach of con-
tract over which the Board of Contract Appeals has no jurisdiction,
and so establish that fact before bringing suit in the Court of Claims,
or perhaps presenting it to the Comptroller General. See page 477. For,
whenever there is the slightest chance of success, the Department of
Justice, representing the United States in the Court of Claims, will
undoubtedly plead that you have not exhausted your administrative
remedy as a prerequisite to bringing suit in the Court of Claims. These
are legal problems on which the advice of a lawyer is essential.

Claims for Equitable Adjustment Arising Under the Contract

Now we have largely left the area of preliminary study and analysis;
and we come to the area of action. First on the agenda is what to do
about change orders—for the "Changes" clause is perhaps the most
important, the most far-reaching clause, the one of greatest practical
importance, in government contracts generally.

Formal change orders are easy to identify because they are labelled
"Change Order," or something similar. Thus, these labels carry an ad-
mission by the Government and a very interesting message to the con-
tractor—the message that the contractor is probably entitled to some
money, or to an extension of time, or both. And he ordinarily should

3. United States Casualty Company v. United States, 107 Ct. Cl. 46 (1946); Conti-
nental Aviation and Engineering Corp., ASBCA No. 9894, 65-1 BCA par. 4660; Ray-
laine Worsted, Inc., ASBCA No. 1842, 57-1 BCA para. 1300; Birnbaum, Government
then have enough sense to proceed to prepare and present a claim for his increased costs, etc.

However, the contractor may not have any formal change orders. Yet, at the same time, he may have a feeling of uneasiness, a feeling that a substantial loss has been suffered, and without quite knowing why. This should be a warning gun to the contractor, a signal that he may have some constructive change orders. He should then put on a program to find out whether he does. And the earlier, the better.

A constructive change order is an informal, as distinguished from a formal, request for additional work; and its distinguishing feature is that it is not labelled or identified as a "Change Order." It carries no admission by the Government of willingness to pay compensation for work requested or directed. Indeed, constructive change orders are usually written so as to give the contractor no idea at all that he may be entitled to compensation for performing the additional work. They are often very subtle documents and may be very perplexing to contractors. They are treated in a briefing paper entitled "Constructive Change Orders," prepared by the writer, issued by The Government Contractor, published by Federal Publications, Inc., RCA Building, Washington, D. C. 20006, in October 1965.

Moreover, constructive change orders necessarily present the contractor with a crucial, indeed a terrible problem, and this is the problem of identification. The constructive change order itself carries no indication of any willingness by the Government to pay any compensation. Moreover, if queried the Contracting Officer may well strongly deny that any change was ever intended. Thus, unless the contractor can identify a particular document or act of the Government as a constructive change order, nothing useful or interesting—for him at least—is ever going to happen. That is, he will never know that he has a claim; no claim will ever be filed; no compensation will ever be received by him; and he will, in effect, be making a charitable contribution to the American taxpayer for the increased costs of additional work required by the Government.

Constructive change orders include such things as acceleration required by the Contracting Officer; a direction to proceed in accordance with defective specifications; a direction to use defective government furnished property; a direction to proceed in accordance with an erroneous interpretation of the contract requiring additional work; a limitation of the contractor's work method; excessive inspection re-
quirements; improper rejection and rework; and a miscellaneous group. (See the briefing paper on constructive change orders, supra)

However, there is a technique for uncovering and identifying constructive change orders, and they involve certain broad problems of organization and administration. First, it is desirable to put on an education campaign for contractor, personnel, engineers, and accountants as well as contract administrators, as to the legal principles which give rise to constructive change orders, and the crucial need for their identification. Engineers are deeper in the technical work and more familiar with the specifications than anyone else. If properly educated, they can often be the first to identify a constructive change order and to bring it to the attention of management and counsel. Accountants may similarly be educated to listen for warning bells which may lead to the identification of constructive change orders, from the perusal of books and figures.

Second, it will be necessary to comb the files for documents which may constitute constructive change orders. These will include letters, telegrams, teletype messages, etc., from technical people and others in the Government, as well as from the Contracting Officer or his representatives.

In addition, search for oral requests for additional work—they may be compensable—as well as constructive change orders also.

The last sentence of the Changes clause provides that, "However, nothing in this Clause shall excuse the Contractor from proceeding with the work as changed." There is a comparable provision in the standard "Disputes" clause.

This is a vital provision. It means what it says. That is, after receipt of a change order—or constructive change order—the contractor is legally required by the contract to proceed with the work as changed, and to fight out the question of compensation later through the Disputes clause, no matter how long that may take or how difficult it may be. This is a critical function of the Disputes clause which is not always recognized. For if the contractor doesn’t proceed with the work as changed, he may well be terminated for default. Indeed, every year there are decisions of boards of contract appeals in which some contractor, probably in ignorance, got on his high horse, stood on his dignity—or ran out of money—and refused to perform the changed work. Result: termination for default; and perhaps disaster.

Thus, it is noteworthy from the Changes clause that the contractor may be required to finance, in the first instance, the performance of
the change orders issued within the scope of the contract, and fight out the question of compensation later, even if this means going to a board of contract appeals. This can be a very expensive course, particularly because boards of contract appeals do not presently appear to recognize the expensive character of this excursion, or the fact that the excursion is required of the contractor as part performance of the contract.

The "Changes" clause, and other clauses, require the contractor to "assert" a claim within a specified time period, usually 30, 45 or 60 days; or to give "prompt" notice thereof. And the contractor should always do his best to assert his claims as promptly as possible, and to give any required notice as promptly as possible. In the government contract field he should always strive to keep up his membership in the "Do-It-Now Club."

There are several important reasons. First, the prompt assertion of a claim will protect him if done within the specified time period. Second, it will protect him if the specified time period has expired and the Government has not been prejudiced by the late assertion.\(^4\) Third, it is only fair to the Government to give it prompt notice of claims so that it may make a prompt investigation or take other appropriate action. Fourth, it will help your general communications with the Government, and may get it into the frame of mind of expecting to make payment when a fully documented or final claim is presented.

However, it is not legally necessary—and indeed it is usually impossible, as a practical matter—to assert a constructive change order claim within the 30-day or similar period.\(^5\) And there is no legal necessity to file a claim until a change order has become fully effective.\(^6\)

Nevertheless, it is desirable to assert a constructive change order claim, or other claim arising under the contract, as soon as it is discovered. Among other things, this will negate a possible claim by the Government that the contractor did the work voluntarily rather than as a result of a direction or request from the Government.\(^7\) And re-


\(^5\) Aerodex, Inc., ASBCA No. 7121 62 BCA para. 3492; Skidmore, Owings & Merrill, ASBCA No. 8346, 63 BCA para. 3727; R. W. Borrowdale Co., ASBCA No. 9905, 65-1 BCA para. 4853.

\(^6\) Burton Rodgers, Inc., ASBCA No. 5438, 60-1 BCA para. 2558.

\(^7\) Ramsley Silk & Woolens, Ltd., ASBCA No. 10035, 65-2 BCA para. 5107; Rogers & Higgins, VACAB No. 537, 66-1 BCA para. 5525.
member this discouraging precept for contractors—volunteers are not entitled to be compensated.

Claims should, in any event, be asserted before final payment, under applicable contract provisions. However, this may not be fatal if the Government has actual knowledge of the claim; or of the facts which gave rise to the claim, such as the unsuitability of government furnished property and the incurring of increased costs in efforts to cope with its deficiencies.

No magic language is necessary to assert a claim. Any simple or general language will do. The filing of a completely documented claim is not necessary in order to assert it. And oral notice of a claim may be enough. Forms for asserting claims are attached hereto.

Thus, if the 30-day or other time period set forth in the Changes clause for the assertion of a claim has expired, take the bull by the horns and write a claim assertion letter anyway—immediately. Don’t let time go by. It is not fair to the Government, which may want to make an investigation of the situation at an early stage, before the facts have changed or evidence has disappeared forever. And it is the very best protection you can give to yourself—the common sense thing to do.

Other clauses providing for equitable or other types of adjustment include the following:

a. Changes, ASPR 7-103.2, 7-203.2, 7-304.1, 7-404.1, and 7-602.3.
b. Inspection, ASPR 7-103.5, and 7-302.4.
c. Price Reduction for Defective Pricing Data, ASPR 7-104.29.
d. Liquidated Damages, ASPR 7-105.5.
e. Stop Work Order, ASPR 7-105.8c.
f. Price Escalation, ASPR 7-107c.
g. Incentive Price Revision, ASPR 7-108.
h. Price Redetermination, ASPR 7-109.
i. Inspection of Supplies and Correction of Defects, ASPR 7-203.5.
j. Default, ASPR 8-707.
l. Military Security Requirements, ASPR 7-402.24b, 7-504.1.
m. Termination for Convenience of the Government, ASPR 8-701.

10. Artisan Electronics Corp., ASBCA No. 9122, 63 BCA para. 3975; Skidmore, Owings & Merrill, ASBCA No. 8346, 63 BCA para. 3727.
11. Emerson Sack Warner, ASBCA No. 9164, 64 BCA para. 4483.
n. Changed Conditions, ASPR 7-602.4.

o. Price Adjustment for Suspension, Delays or Interruption of Work, ASPR 7-602.46.

The contractor should bear in mind, in connection with these other clauses that directions by the Government under them may, like constructive change orders, be very subtle and informal. They may also present the problem of identification. For instance, there is a government contract animal known as a “constructive suspension of work” similar to a constructive change order. Claims should be asserted promptly under each of the clauses set forth above.

These clauses which provide for the making of an equitable adjustment in the contract price all revolve around the theme of causation. The result has been that boards of contract appeals have treated equitable adjustment as essentially a single concept under the various clauses. That is, equitable adjustment under the various contract clauses is governed by the same rules, and the basic theme is the theme of causation. That is, “there must be a cause and effect relationship between the extra duty and the expense for which appellant seeks reimbursement,” or the increased costs to which the contractor is entitled must be “caused by,” or, phrased otherwise, “result from” the act of the Government in question. (Emphasis added.)

Among other things, this means that, in the presentation of claims, no stone should be left unturned which will help to portray to the Contracting Officer and to the Board, if necessary, that the increased costs claimed were caused by, or were the result of an act of the Government. Sometimes a chain of causation may be long, complex and intricate, but nevertheless solid. This should be no deterrent to the preparation of a claim. The contractor should look this problem squarely in the eye, and develop, build up and articulate the chain of causation in words, photographs, diagrams, charts, and every visual aid possible.

Other Claims Arising Under the Contract

The contractor should of course appropriately present, in accordance with the ASPR, all costs claimed under a termination for convenience;


and he may appeal to a board of contract appeals from an adverse determination by a contracting officer.

Under cost type contracts, the procedure usually is for the contractor to incur a cost and pay it; for the Government to reimburse the contractor; and then, occasionally, for a subsequent auditor to disallow a particular cost and demand that the contractor repay the sum involved to the Government. On this subject the Government has the burden of proof or something like it.\(^{15}\)

**Claims for Breach of Contract**

Claims for breach of contract may be presented through one of three channels.

1. **Presentation to the Contracting Officer.** Contracting Officers have power to settle claims for breach of contract,\(^{16}\) although the Comptroller General takes a dim view of this.\(^{17}\) But if the Contracting Officer refuses to settle a breach of contract on your terms, you cannot successfully appeal to the Board of Contract Appeals. You can only go to one of two other places; (1) to the Comptroller General or (2) to the Court of Claims.

2. **Presentation to the Comptroller General.** Claims for breach of contract can be presented to the Comptroller General.\(^{18}\) There is, however, some doubt. In *Coates v. St. Louis Clay Products Co.*,\(^{19}\) the Court said that the Comptroller General was not empowered to award damages for breach of contract. In any event, the statute of limitations for the presentation of a claim to the Comptroller General is ten years.\(^{20}\)

Whether a claim for breach of contract should be presented to the Comptroller General is a question of judgment. As a rule, it is harder to persuade the Comptroller General than it is to persuade the Court of Claims in this type of case. First, if there is a factual dispute between your version of the facts and a government report, the Comptroller General will accept the Government version in the absence of very convincing evidence to the contrary.\(^{21}\) Second, you can usually make

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17. 44 Comp. Gen. 353.
a fuller presentation of the facts to the Court of Claims than to the Comptroller General. Third, the Comptroller General cannot compromise a claim. However, if the Comptroller General denies your claim, you can always sue the Court of Claims.

When a claim is presented to the Comptroller General, the essential thing to remember is that you are doing the same things that you would be doing in trying a lawsuit, that is, presenting facts and arguing questions of law. Accordingly, a full, rather than a cryptic presentation is essential.

The government department or agency involved will of course file an opposing document on the facts and the law. The question to be decided is—which of the two documents presents the best case?

On denial of the claim by the Claims Division of the GAO, the claimant, in an appropriate case, may request and obtain a review by the Comptroller General. Note, however, that unless the request for review is submitted within a reasonable time, it will be treated as a new claim and be subject to the applicable statute of limitations. The submission of a document may ordinarily be followed by an oral interview or hearing, if requested.

(3) *Suit in the Court of Claims*. This is the main forum for suits for breach of contract. You can also sue in a United States District Court for sums less than $10,000. In either event, when you sue in either tribunal, you plunge into a lawsuit in a court vested with judicial power. There you must be represented by a lawyer.

There are essentially two types of suits in the Court of Claims for breach of contract: (1) those where the claim involved has never arisen under the contract; and (2) where a claim arising under the contract has been decided adversely to the contractor by a board of contract appeals, and the contractor claims that such decision breaches the contract.

**Claims Based on Mutual Mistake**

Contracts may be reformed for mutual mistake by presentation: (1) under Part XVII of the ASPR, see page 479; (2) to the Comptroller General; or (3) to an appropriate court of equity.

22. 22 Comp. Gen. 821 (1943).
24. 28 U.S.C. § 1346(a) (2).
Formalization of Informal Commitment

Here the situation involved may be the following: A government official has informally requested you to perform certain work, which you are not obligated to perform under any formal written contract. This work increases your costs; you want to get paid; what can you do about it?

Here are two possibilities, and the contractor has an option or election. He may (1) treat the informal request for additional work as a constructive change order and file such a claim with the Contracting Officer; or (2) he may proceed under Section XVII of the ASPR to formalize an informal commitment. This may involve going to a contract adjustment board. See page 480.

The constructive change order route is probably as good as any. It has the advantage of providing for an appeal to a board of contract appeals, and later, on the theory of breach of contract, to the Court of Claims.

Claims Under Public Law 85-804 and ASPR Section XVII; Extraordinary and Duplicative Relief

This Public Law and ASPR Section have perhaps generated more comment than useful action. Publicity concerning it appears to have been overblown; and many contractors appear to have been disappointed by what they consider to be an easy route to monetary return. However, these provisions do provide occasions for relief in situations of an unusual character—provided the ASPR is carefully followed.

The Act provides for an amendment without consideration in two main situations. First, such an amendment may be made to prevent the impairment of the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is essential to the national defense. However, the contract may be adjusted only to the extent necessary to avoid such impairment to the contractor's productive ability. Second, such an amendment may be made where a loss is sustained as the result of Government action. Such relief for Government action may be appropriate when the claim is not covered by the terms of the contract and the Contracting Officer is unwilling to settle on the basis of government breach of contract.

One thing that is specially noteworthy about requests for an amendment without consideration is that such amendments are (1) only spar-
ingly granted; (2) only upon a compelling factual showing; and (3) with a mass of safeguards which will circumscribe the contractor's actions and bank account. Nevertheless, if you really fit the standards of the ASPR for the granting of such an amendment, they may help you when perhaps nothing else will.

The Act allows for corrective action in cases of contract ambiguity, mutual mistake, or a mistake of the contractor where the Government knew or should have known of the mistake.

The Act also provides for formalizing an informal commitment where the contractor has shown a good-faith reliance upon the apparent authority of an official of the military department to issue the instruction concerned.

A contract adjustment board has been established within each military department by the Secretary thereof. Each board consists of a chairman and not less than two or more than six other members. The concurring vote of the majority of the total board membership constitutes the action of the board. These boards make all determinations and findings which are necessary and appropriate, and may authorize any appropriate action not precluded by specific limitations. The decisions of the boards are final; but the boards may reconsider and modify, correct or reverse any of their previous decisions.

Certain officials of the military departments have been granted, within specified limitations, the authority to deny any request for contractual adjustment; the authority to make determinations and findings which are necessary or appropriate in cases of mistake and informal commitment; and the authority to refer to the Contract Adjustment Board any case where the official recommends a specific adjustment which he does not have the authority to approve, or in any doubtful or unusual case.

A series of general limitations prescribes the area within which the authority granted by the Act is to be utilized. A six-month time limitation on a request to formalize informal commitments is included among the limitations.

The authority delegated to officers and officials below the secretarial level does not extend to: action submitted to GAO; actions involving amounts in excess of $50,000; actions involving the disposal of government surplus property; actions for the correction of mistakes involving amounts in excess of $500, where notice was not given the Contracting Officer prior to the completion of the contractor's work; and actions for the correction of the contract due to a mistake in its mak-
ing where the corrected amount exceeds the amount of the next lowest
bid or proposal.

ASPR 17-204 and 205.1(b)(2)(i) provides that no relief may be
granted under the Act "unless legal authority in the department con-
cerned is deemed to be lacking or inadequate." Thus, if you have an
available change order or any more orthodox type of claim, which can
be presented, in relation to the same subject matter, relief under the Act
will not be granted.

All is not gold that glitters—and this is true of the Act. Many con-
tractors have thought that the Act provides an easy and dazzling
route to compensation. But it does not, except perhaps where it dupli-
cates simple types of relief sometimes obtainable in other forums by
lengthier and more expensive proceedings. Also, many contractors have,
in the past at least, felt that proceeding under the Act was somehow
easier than proceeding under the changes or other applicable clause.
And this has been complicated by the widespread ignorance of the legal
principles providing for compensation for constructive change orders.

But the lesson of all this is clear. If you have an orthodox claim—
assert it; then prepare it with care; and then present it. **Lead from
strength rather than weakness.** Don’t think that you can successfully
dash in with a claim under this Act as a substitute for an ordinary
claim. It will get you nowhere.

Requests for relief are generally filed in duplicate with the Con-
tracting Officer and should include the precise adjustment requested,
the essential facts in narrative form, the contractor’s reasoning in sup-
port of the request, plus other information concerning the status of
the contracts; the real party in interest; and any alternate sources of
relief.

The contract adjustment boards have no rules of practice, and their
hearings are completely informal. However, the contractor may present
his evidence by having witnesses present and questioning them in-
formally at least; and by the submission or authentication of documents.
In addition, the Contract Adjustment Board or any officer having au-
thority to act on a contractor’s request may require the contractor to
furnish any information or material pertinent to the question involved.

Whether the request is handled by an authorized officer or official or
by a contract adjustment board, a deciding authority will sign a
memorandum of decision which will include a statement of the cir-
cumstances justifying the decision. Sometimes a more fully written
decision is also prepared for internal use within the military department
involved. With regard to procedure, follow Section XVII of the ASPR meticulously.

**Miscellaneous Claims**

Under the Budget and Accounting Act of 1921, 31 USC 71;

“All claims and demands whether by the government of the United States or against it, and all accounts whatever in which the government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the general accounting office.”

Claims which may be upheld by the Comptroller General include, in addition to those mentioned: (1) a release of excess costs of reprocurement; (2) adjustment for additional transportation costs; and (3) a remission of accrued liquidated damages on recommendation of the agency head.

### III. The Second Basic Situation: Where the Government Has Taken Action and the Contractor Has to Take the Initiative to Work His Way Out of Trouble

**Termination for Default**

Avoid a termination for default like the plague if you can. A termination for default which is sustained means that not only (1) you recover none of your costs, but that also (2) you have to repay progress payments; and in addition (3) you may be tapped for excess costs of reprocurement. Each of these items may run to substantial sums of money. So if you think you are about to be terminated for default, do what you can to prevent it; or if you have been so terminated, do what you can to convert it to a termination for convenience.

**Assessments of Liquidated Damages**

Claims for a remission of an assessment of liquidated damages can be presented to a contracting officer, together with an application for an extension of time; and then to a board of contract appeals. For an assessment of liquidated damages is improper where an appropriate extension of time should be granted or there is excusable delay or where there has been substantial performance.

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27. Paul A. Teegarden, IBCA No. 5273, 65-2 BCA paras. 5011, 5273.
In addition, the Comptroller General has a statutory authority to pass on such claims, and he has granted some of them. In any event, you do run the risk, on questions of fact, as described above in connection with the presentation to the Comptroller of claims for breach contract. On balance, it may be better to present them to the Contracting Officer, and, if necessary, to a board of contract appeals.

Administrative Set Off

It is not unusual for the Government to unilaterally determine that a contractor is indebted to it for a certain sum under contract A, on which final payment may have been made; and then to set off the claimed sum from amounts due the contractor under pending contract B. The contractor may appeal this action to a board of contract appeals, There the Government has the burden of proof.

IV. Dealing With the Contracting Officer in the Various Situations

An Overall Exercise in Communications

The practical techniques outlined hereinafter are generally applicable to the two basic situations described above.

Easily looming above all the factors involved is the overall and vital factor of communications. Many contractors pay this scant attention. Many have been terminated for default, and many claims have been denied, merely because of some unnecessary failure in communications. Sometimes these decisions have been reversed on appeal mainly because of the better communications afforded by a full dress trial before a board of contract appeals.

In any event, if you have a claim, or a contract is in trouble, remember that your main problem may be somewhere in the field of communications. Do not fail to look this problem squarely in the eye at the Contracting Officer level.

As pointed out above, page 470, whenever you discover a claim, regardless of when that is, give notice to the Contracting Officer immediately. Don't wait.

Not infrequently, a contractor gets what might perhaps be described as a vague feeling that sometimes is wrong. He may sense an abruptness

in responses of the Contracting Officer. Or there may just be a vague feeling in the air that all is not right. Watch out for these sensations. They usually portend that the Contracting Officer is disturbed about something—even that the axe is about to fall!

What should you do? There is a technique which appears to work. First, some knowledgeable person, a contract administrator or counsel, should—immediately—analyze the status of the contract. Is a delivery overdue? Are you failing to make progress? Are the inspectors having trouble with your hardware? Are you performing more work than you think you should be performing? Are you suffering a heavy loss? Above all, what facts and arguments do you have in support of your position? Get your facts and your law straight; and then, second, ask for a meeting with the Contracting Officer.

The purpose of a meeting is (1) to smoke him out to see if there are any real problems of which you are unaware; and in any event (2) to present your case to him to your best advantage, to make sure he knows what you are doing, and that he understands your problems, your efforts, and your legal rights.

As a result of all this you may find that you are entitled to an extension of time as a result of change orders formal or constructive, which may not have previously occurred to you, and which the Contracting Officer knew nothing about. These may explain a delay in delivery, and entitle you to an extension of time and to present a claim for your increased costs. Or you may have other good reasons to present to the Contracting Officer. Most of the time, at least, you will find contracting officers and their representatives to be very reasonable people, and often they have constructive suggestions. But you can only expect them to be reasonable if they know all the facts which support you. Hence, don’t risk a misunderstanding, a gap in communications, with contracting officers.

Moreover, always be objective in your meetings with contracting officers and their representatives. Avoid personal accusations, charges of unfairness; and emotional outbursts. If there have been a number of change orders, formal or constructive, or delays by the Government, don’t complain about them or say that the Government has been unfair. Just stick to your right to be paid, or to an extension of time, or both. These are usually the only things you really want. And you can usually get better results from contracting officers if meetings are kept on an harmonious and an objective plane. And as will be set forth
later, lead from strength rather than weakness. Argue from solid facts and correct legal principles.

On the other hand, you should effectively answer every wrongful charge or accusation made by a government official. Do not let one go by, unanswered. It may leave a grossly erroneous impression and lead to disaster. But while it is perfectly proper for you to be forceful in your answer where the facts support you, and to place the responsibility on acts of the Government where it belongs there, you should also be courteous and objective. In addition, if you cannot effectively answer an erroneous or wrongful accusation made orally at a meeting, go back to your office and, with considerable care, prepare and mail promptly an effective written answer. Be sure your facts are stated with absolute accuracy. You will find that contracting officers and their counsel tend to respect facts, and where facts support you, the Government probably will also.

Avoid an Appeal if Possible

An appeal is time consuming and costs money. Your basic objective in dealing with the Contracting Officer should be to avoid an appeal if at all possible.

There is a basic technique for avoiding an appeal. This consists of making a strong and comprehensive presentation to the Contracting Officer in the first instance, and keeping up your communications with him fully; and if he has already acted, asking him for reconsideration if you feel you have some new material to present. Do not plan on going to the board until you feel that you have fully exhausted your opportunity to persuade the Contracting Officer and his staff. They will nearly always permit you to present new material, and will usually even listen to a rerun or amplification of an earlier presentation.

That Strong and Comprehensive Presentation

Thus, there is a basic technique which has worked successfully in the past for persuading contracting officers with respect to the merits of disputes. This technique consists of (1) solid documentation, plus (2) one or more meetings to discuss and analyze the documentation, and the situation.

This technique is applicable whether you have a claim to present; or whether you are in trouble because you are in danger of being terminated for default or have been defaulted, or have been assessed liquidated
damages, etc. It applies whenever you have a case to present to a contracting officer—concerning any dispute.

You should realize, when you are in the position of presenting a claim of any consequence, or your contract is in trouble, that, in broad outline, you are either in a lawsuit or very close to one. A practical burden is on you to present facts and evidence and to argue correct legal principles. As a result, a full, rather than a sketchy presentation of your facts and legal argument is essential.

The best type of documentation known to this writer is the type of documentation similar to that which lawyers use in preparing a brief or memorandum of law. This method deals carefully and meticulously with the facts, for it is facts which win lawsuits and which can obtain the support of favorable legal principles. Thus the facts should be presented carefully. They should be organized into sequential or related compartments, usually following the magic principle of chronology. If they are complicated, each segment of the facts should be initiated by an argumentative heading. And legal argument should be similarly organized and presented. In complex cases, this may result in the generation of a formidable document, and rightfully so. But such a document should, and can, nevertheless, be made readable, interesting and entertaining through the factor of organization—structuralization and headings. Thus, even a very long document can be made readable and easy to understand, and can often be turned into a fairly dramatic story. See the writer's article, "How to Look up Law and Write Legal Memoranda-Revisited," published in The Practical Lawyer, May 1965, Volume 11, Number 5.

Again, solid documentation is needed in order to provide an adequate exercise in communications. Many contracting officers, and their counsel, are extremely busy. They may not have had any real chance to learn the precise points, perhaps complex facts of your case, or the law applicable to them, in the early stages of the dispute. For instance, many contracting officers do not appear to be tuned up on the principles of constructive change orders. Often they appear to find it necessary to consult their counsel in order to ascertain the applicable rules, once you have brought the facts and law to their attention. In any event, do not take a chance on failing to educate them as to what your case is all about. Your best weapon for doing this is solid documentation.

In preparing a solid document, include photographs, pictorial charts and diagrams, and other exhibits which, using the old principle that a picture is worth ten thousand words, will dramatize and illuminate what
you are trying to prove. Put in anything reasonable that will get your story over. Add copies of letters and other key documents as exhibits.

In order to prepare a good document in a case of any complexity, it may be necessary to build up a team spirit and morale in your organization which will enthusiastically support and drive ahead the preparation of the document and enable it to reach its true potential. There is a technique for doing this, and it consists, generally, of putting on an education campaign, and getting everyone into the act early.

In particular, obtain the participation of the engineers from the outset. They are key people in this kind of program. If they are properly educated on the applicable legal principles—and they can be through an education campaign—they can often come up with some new, and sometimes startlingly helpful ideas, which may be controlling. In addition, get the accountants or fiscal people also into the act early. For there should be a section in the document setting forth the dollars which you are claiming with appropriate breakdowns. The role of the accountant is also very important, for every claim will be closely audited by the Government.

Thus, there is a basic philosophy to the preparation of this solid document, and that is to lead from strength rather than weakness. Don’t make foolish or doubtful statements which you cannot support and fight for. Always attach copies of letters, etc., as exhibits to prove the statements you make in your narrative text, or set exhibits forth in a separate volume. Substantiate everything you assert to the fullest extent possible. Your objective should be to back the reader into a corner on each fact or item of evidence; to cause him, because your statements are accurate and have been established as such, to agree with you on each building block. Then as he tends to agree with you, building block by building block, he will tend to agree with you on the whole architectural structure.

Bear in mind also that a solid document, leading from strength rather than weakness, is important for another reason. This is the fact that if you persuade the Contracting Officer that your position is supportable, he in turn, must usually justify his position to a higher level. The more written ammunition you give him to do this, and the easier you make it for him to do so, the better.

After you have prepared your solid document, send plenty of copies—at least 3, perhaps 6 or a dozen—to the Contracting Officer. The more people within the Government who read your document, the better. For this means that they will discuss it among themselves, and, if your
document is sound, tend to work out your argumentation and to agree with its conclusions.

Then keep in touch with the Contracting Officer by telephone; and after he has had a chance to read the document, ask for a meeting with him and his staff, including his counsel, if appropriate.

At the meeting, it may possibly be desirable for you to make a brief oral presentation, summarizing the contents of the document. Usually, however, this should not be necessary. You will already have the advantage of having provided a solid document containing all the necessary nuts and bolts in organized form. Thus, there should be little need for you to try to discuss each building block all over again at the meeting, when you have presented it so well in writing. You should bear in mind, however, that the Contracting Officer or some of his people may have been too busy to fully read the document in advance of the meeting.

In any event, it will usually be best for you to open the meeting, when your turn to speak comes, by saying that a full presentation has been made to the Government by means of a comprehensive document; that there is no point in repeating orally what has already been stated at great length in the document; and then ask if there are any questions or points that are not clear. This will at least tend to bring out any points of disagreement.

If the document is a good one, you may find that it alone will have gone far to persuade the Contracting Officer and his staff. On the other hand, they may have questions, in which event the nuts and bolts of the document bearing on the questions, should be thoroughly discussed. In this way, hopefully at least, you will be able to answer all the Contracting Officer's questions, and in substance, to back him into that corner where he will have to agree—again on the basis of solid building blocks in the document that your facts and law are correct.

Sometimes you will find, however, that there are gaps in the document. Questions or problems may arise which you may not have anticipated. If these are serious, then the best thing to do is to request an opportunity to submit a supplemental memorandum. This should be prepared along the same lines as the first one.

In any event, a meeting to discuss such a document or documents will give you a chance to thrash out any questions or objections that the Contracting Officer and his staff may have. And if your answers are good ones, the area of disagreement will diminish and you will find that there will be a general gravitation toward your position. This in
turn, should lead to the allowance of legitimate claims and to the con-
version of terminations for default which may have been erroneously
made, etc.

Sometimes one meeting is not enough, and you will find that discuss-
ing the merits of the dispute will move on in stages, each one more
advanced than the last, and with the areas of disagreement narrowing
as they proceed. Sometimes counsel for the Contracting Officer may
not be initially present; and sometimes it may be advisable for your
counsel to meet separately with the Government counsel, before an-
other meeting is held with the Contracting Officer.

Ordinarily, you will find that contracting officers will welcome giv-
ing the contractor a chance to be heard and to present his case. There
are, however, very exceptional cases where relations may be strained, or
where, for other reasons, the Contracting Officer may refuse to meet
with you. Here there are two techniques.

First, if the Contracting Officer is in a government bureau or its equiv-
alent, you can appeal to the chief of the bureau, to a deputy assistant
secretary for procurement, or to an assistant secretary. It is ordinarily
useful to follow the chain of command upward. Here the basic message
that should be conveyed to higher levels is a very simple one: The
contractor would like an opportunity to present his case, and the Con-
tracting Officer has refused to give the contractor an opportunity to do
so. This is a highly persuasive argument. Ordinarily it will get action
quickly.

This sort of a request can ordinarily be best made by a telephone
call or a personal visit. Sometimes a letter may be needed. In any event,
if successful, this will ordinarily result in a direction from higher levels
in the department to the Contracting Officer to meet with you and
hear your case. Or the case may be referred upward to a higher level
which may be even better. This also means that that strong document
which you will have submitted will have an additional or increased use-
fulness at the higher levels consulted.

This technique is also useful if you are a subcontractor of a prime
contractor with the Government, and you feel that the prime con-
tractor is acting unreasonably. Sometimes a telephone call to the ap-
propriate government level will result in a more reasonable attitude
of the prime contractor.

Second, as a last resort—indeed, when no other alternative is available
—the help of a senator or congressman can be enlisted for substantially
one purpose only—to obtain a fair hearing.
There is seldom any other reason for getting congressional help, and I suggest that you avoid it otherwise completely. If you try to get a congressman to bring pressure on a government department with respect to the merits of your case, this will be deeply resented by people in the Government, and will seldom bring constructive results. Indeed, it may stiffen their backbone against you. The best way to deal with Government officials with respect to the merits of your case, is by the technique described above—that is, a solid document, plus a meeting—and leading from strength rather than weakness.

In the rare case where you cannot get a fair hearing in which to discuss your case, then in my judgment, it is perfectly legitimate to request congressional help for this one objective—to set up an appointment and to get the appropriate government official to listen to you. For if there is one thing that is fundamental in our form of government, it is the right to procedural due process, to an opportunity to be heard.

Releases and Settlement

If you have been successful in presenting your side of the dispute, the results of the agreement reached will usually be embodied in what is generally called supplemental agreement or contract modification.

Here the matter of language, of the art of phraseology is crucial; for what is stated in words in these documents will be legally binding and final. Hence, you should scrutinize the language with great care.

In particular, be sure that you do not state that you are releasing anything that you do not want to release and on which there has been no real meeting of the minds. If necessary, carve out of the supplemental agreement as exceptions any matters on which agreement is not reached.

There are many cases before the Armed Services Board of Contract Appeals in which the Government has claimed that a contract modification has released claims which the contractor says were never intended to be released. In these cases, the Government has usually gone too far, and the Board has usually sided with the contractor. The basic rule is that a supplemental agreement or contract modification will not be construed to release a claim on which there has been no real meeting of the minds, even if its language appears to cover such a claim.29

29. Aircraft Armaments, Inc., ASBCA No. 9076, 63 BCA para. 3934; Radio Condenser Company, ASBCA No. 8149, 63 BCA para. 3931.
V. Appeals to Board of Contract Appeals

Now we leave remedies of the contractor with the Contracting Officer, and come to them at the board of contract appeals level. Contractors should bear in mind that they have remedies at essentially three main levels: (1) the Contracting Officer level; (2) the board of contract appeals level; and (3) the judicial level in the Court of Claims or a United States District Court; with (4) an occasional detour possible to the Comptroller General, usually around the Contracting Officer level.

The Standard Disputes Clause

The current Standard Disputes clause, designated for use in Department of Defense contracts to be performed in the United States, is set forth in ASPR 7-103.12 (a). It provides as follows:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer’s decision.

Background of Contractor Remedies at the Board Level

In 1861 the Secretary of War appointed a Board of Commissioners who, with the approval of the contractor, was vested with authority to finally decide the amount owing under the contract.30 Thereafter, until about 1900, such single-stage disputes clauses were the rule. For instance, in a leading case the contract provided for

transportation to be paid . . . according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the District of New Mexico.\textsuperscript{31}

About 1900, a two-stage type of disputes clause began to appear in government contracts. This provided, not only for an initial determination by a contracting officer, but also for an administrative review of that decision by the secretary or head of the department, or other appropriate official.\textsuperscript{32}

The first Board of Contract Appeals was set up during World War I. During that war, considerable experience in administrative review of decisions of contracting officers by boards of contract appeals was developed. After the war, however, nearly all these boards were washed out and disappeared.

World War II, however, brought enormous developments and pressures in the Disputes field. At the same time, certain loose procedures of contract people in the military were struck hard by the thunderbolt decision of the Court of Claims in Penker Construction Co. v. United States.\textsuperscript{33} That case upset a decision by an assistant secretary of war on the ground that he had not properly handled an appeal under the Disputes clause. This resulted in the making of several studies, and in a decision by Under Secretary of War Patterson to set up a Board of Contract Appeals whose members would be selected by the Secretary.

A monumental event then took place when it was also decided that the contractor would be entitled to a hearing and to the right to present evidence before such a board. From this decision, our present system of board practice has developed.

It is also noteworthy that, in the early days of World War II, Under Secretary of War Patterson, who had formerly been both a federal trial and appellate judge, personally heard some appeals from decisions of Contracting Officers. He would sit in his office in a quasi-judicial capacity; and counsel for the appellant and for the Government would call witnesses and present evidence, much as they would in a court. Finally he decided he could not both do this sort of thing and run a war at the same time. This was one of the developments which led to the appearance, on a noteworthy scale, of boards of contract appeals as "the duly authorized representative" of the Secretary. Gradually these

\textsuperscript{31} Kihlberg v. United States, 97 U.S. 398 (1878).
\textsuperscript{32} Barlow v. United States, 35 Ct. Cl. 514, 520, aff'd. 184 U.S. 123 (1902); Ripley v. United States, 223 U.S. 695 (1912); United States v. Wunderlich, 342 U.S. 98 (1951).
\textsuperscript{33} 96 Ct. Cl. 1 (1942).
boards have become semi-autonomous. And the secretaries of the departments do not tell boards of contract appeals how to decide cases.

Matters Embraced Within the Disputes Clause; Questions of Fact and Questions of Law

In practical terms, virtually any difference of opinion in a dispute can be presented to the Contracting Officer in the first instance, and on appeal to a board of contract appeals. From the practical standpoint, the differences between questions of fact on the one hand and questions of law on the other, are not particularly important. Thus, the boards will decide any question of fact on which there is a difference of opinion, and they necessarily have to decide any related questions of law. All in all, they will decide any question involved in a dispute cognizable under a contract clause.34

Questions of fact which most commonly appear in board cases include the question whether an act of the Government was a change or is otherwise compensable under a particular clause providing for an equitable adjustment in the contract price; whether the particular act of the Government caused the contractor to incur increased costs; the amount of equitable adjustment or increased costs to which the contractor may be entitled; whether an extension of time should have been granted; whether a default termination was proper; and what costs are reimbursable under a cost-plus-fixed-fee contract.35 In addition, boards of contract appeals consider questions of contract interpretation as questions of fact,36 although the Court of Claims treats them as questions of law.37

The Proof of the Success of the Disputes Clause; The Gradual Transformation From the Classic Cause of Action for Breach of Contract to Claims Arising Under the Contract

The history of government procedure has been, in part, a history

34. Trico Electric Cooperative, Inc., ASBCA No. 10038, 64 BCA par. 4384; Rogers Construction Company, ASBCA No. 4125, 58-1 BCA par. 1657.
37. WPC Enterprises, Inc. v. United States, 323 F.2d 874 (Ct. Cl. 1963), 5 GC 480; Gerhard F. Meyne Co. v. United States, 76 F.Supp. 811 (Ct. Cl. 1948); United States v. Lundstrom, 139 F.2d 792 (CCA 9, 1943).
of increasing complexity of hardware, costing greater sums of money; an increased complexity of the subject matter of disputes; and greater administrative problems for both contractors and the Government. Yet in the face of this increase in problems and friction, the last few decades have also been a history of markedly successful operation of the Disputes clause. For the Disputes clause has been so successful that there has been a gradual transformation, generated by the creation of new contractual provisions from the classic cause of action for breach of contract into a considerable variety of new claims which now, by agreement, arise under the contract to become subjects of the Disputes clause. The reason is that experience has shown that controversies may be handled and settled much more expeditiously and satisfactorily under the Disputes clause than by relegating the parties to traditional remedies in the courts.

One example is the transformation effected by the Suspension of Work clause. In the absence of a Suspension of Work clause or a Stop Work clause authorizing a suspension of work by the Contracting Officer, if the Government delays or interferes with the contractor's work, the contractor's only remedy is a suit in the Court of Claims or a district court for breach of contract. However, if the contract contains a Suspension of Work or Stop Work clause, then the contractor may present the claim administratively to the Contracting Officer as a claim arising under the contract. The great bulk of such claims appear to be settled there. And he may appeal to a board of contract appeals from a contracting officer's unilateral determination denying the claim. In addition, it takes as a rule some fifteen months or less, where a contractor will proceed expeditiously, to process a case through the major boards of contract appeals.

There is, however, one disturbing exception to the generally successful operation of the Disputes Clause, and this is the development, occurring over the last few years, of increasing delays by contracting officers in the consideration of claims. It has now become not uncommon for certain contracting officers to fail to get around to the rendering of a decision on some claims, until after a year or more—sometimes two years or more—have passed on into the distance. Meanwhile, the Government has the benefit and use of the hardware produced by the moneys expended by the contractors; but, under current contract provisions, the contractor can usually not receive interest for the period of these delays by the Government.
Another significant result of the disputes procedure developed in World War II has been the emerging of the major boards of contract appeals, at least, as a stabilizing influence on contracting officers and on the entire system of government procurement. In practical terms, the Court of Claims ordinarily seems to be far removed from the operating world, and the appropriations of the average Contracting Officer. Conversely, however, boards of contract appeals loom up very close to them. Thus, the actions of these boards appear to have a direct impact. Indeed, without the moderating and restraining influence of boards of contract appeals, erroneous or unreasonable action by contracting officers would be far more likely to occur than it does today. For the major boards of contract appeals, staffed with capable men and acting with true judicial impartiality, have now developed over twenty-five years of workmanlike decisions which, on the whole, have been written with reassuring care, and which compare favorably with the decisions of the federal courts. These decisions now exert a wide influence. With the publication of these decisions in book form by the Commerce Clearing House, beginning in July, 1956, these decisions have become generally available to contracting officers and their counsel, and also to contractors and their counsel. Indeed, a single decision of one of these boards will now be widely read, discussed, and followed by contracting officers and contractors in related cases, thus providing a unifying and harmonizing force which has gone far to stabilize the ground rules for deciding disputes by the entire government contract community. In addition, these boards decide a far greater number of cases than are decided by the Court of Claims, and thus cover a large number of disputed questions.

The Claim Must Arise "Under This Contract"

Now we start to analyze the Disputes Clause. The jurisdiction of contracting officers and boards of contract appeals, is ordinarily contractual, rather than statutory, in character. The Comptroller General cannot deprive the board of jurisdiction to proceed under the Disputes clause. However, the contractor may waive his right to resort to the board under the Disputes clause, if he voluntarily submits his

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39. 40 Comp. Gen. 674, 3 GC 16.
claim to the Comptroller General, or consents to such a submission by the Government.

The parties may contract, as set forth above, for the Disputes and appeals procedure. But once the contract has been entered into they cannot stipulate to confer on, or to deprive, the boards of jurisdiction. Where a board has jurisdiction, however, the parties may effectively stipulate that a related issue, such as the propriety of an assessment of excess costs on an appeal from a default termination, may be decided by the board.

The "Decision of the Contracting Officer"

Ordinarily there must be a decision. But suppose a contracting officer refuses to decide a dispute? What can the contractor do? He can appeal from the refusal of a contracting officer to decide a dispute. Also, the contractor may appeal from the refusal of a contracting officer to put a decision in writing. But the Interior Board of Contract Appeals, however, has a somewhat different view, holding that the Contracting Officer's failure to decide may make an appeal premature.

The Contracting Officer, in reaching a decision, sits in a quasi-judicial capacity and has a fiduciary function. His decision must represent his own "independent judgment." He may not merely sign or write a decision dictated to him by someone else. For under the contract, the authority to decide a dispute is given to him and to him only. Thus, it is not for him to be merely a Charlie MacCarthy or a facade for someone else.

Finality of the Contracting Officer's Decision

The finality of a contracting officer's decision, in the absence of an appeal, is ordinarily absolute; and the finality of such a decision is in no sense diminished because a new decision on the dispute is requested.

To be final, a contracting officer's decision must state that it is final.

40. Trico Electric Cooperative, Inc., ASBCA No. 10038, 7 GC 239(b).
44. Bay Hardware Co., ASBCA No. 7119, 61-2 BCA para. 3114.
47. The Tire Mart, ASBCA No. 5671, 60-1 BCA para. 2582.
as required by ASPR 1-314. Otherwise it is not final and the time to appeal does not run.\textsuperscript{48} However, a contracting officer may extend the 30-day period in which an appeal is possible; and an appeal taken in accordance with such an extension of time is just as valid as if taken within the original 30-day period.\textsuperscript{49}

Where, before the time to appeal has expired, the Contracting Officer reconsiders a previous decision, or expressly agrees to reconsider it, there is no need to appeal from the original decision in order to preserve appeal rights.\textsuperscript{50} Thus, a reconsideration undertaken by the Contracting Officer within the 30-day appeal period is itself appealable.\textsuperscript{51} But a decision made by reconsideration after the 30-day appeal period has expired, is not appealable.\textsuperscript{52}

Due to the wording of the default article, the issue of excusability of the contractor's default can be raised on an appeal from an assessment of excess costs, even though the contractor failed to file an appeal from the default termination itself;\textsuperscript{53} and the contractor has the burden of proving excusability.\textsuperscript{54}

However, the contractor may not challenge a failure to perform asserted by the default termination, in the absence of an appeal from the default termination itself. He may only challenge the excusability of the default by appealing the excess costs.\textsuperscript{55}

In addition, where there is an appeal from a default termination, a subsequent assessment of excess costs may be contested in the default appeal without filing an additional notice of appeal from the assessment of excess costs. Indeed, an appeal from a default termination encompasses any action by the Government under the default clause.\textsuperscript{56} The Comptroller General has been meditating this rule.\textsuperscript{57}

The Comptroller General tends to circumvent the finality of the Contracting Officer's decision by labelling a question, such as whether an unsatisfactory condition existed, as a question of law reviewable by him.

\textsuperscript{48} United Microwave Co., ASBCA No. 7947, 63 BCA para. 3701.
\textsuperscript{49} Central Slipper Co., Inc., (1950) ASBCA No. 269, 4 CCF para. 60,858.
\textsuperscript{50} Tech Labs, Inc., ASBCA No. 3447, 52 BCA para. 1362.
\textsuperscript{51} Central Slipper Co., Inc., ASBCA No. 269, 4 CCF para. 60,858 (1950).
\textsuperscript{53} Fulford Manufacturing Co., ASBCA 2143 (1955); Raycon Electric Co., Inc., ASBCA 8020, 1962 BCA para. 3528, 5 GC 262.
\textsuperscript{54} Raycon Electric Co., Inc., \textit{supra}.
\textsuperscript{55} Virginia Dare Extract Co., Inc., ASBCA No. 4916, 59-1 BCA para. 2188.
\textsuperscript{56} Eltronics, Inc., ASBCA No. 5437, 61-1 BCA para. 2961.
\textsuperscript{57} 6 GC 421.
This may give the contractor an escape hatch when no appeal has been taken.  

Subcontractor

There is usually an absence of privity between the Government and a subcontractor. Accordingly, subcontractors usually have no legal right to appeal to a board of contract appeals. Under unusual contractual provisions, however, usually those establishing some privity of contract between the Government and the subcontractor, subcontractors have been given a direct right of appeal. ASPR now prohibits the giving of approval by a contracting officer to a contract providing for a direct appeal by subcontractors. [ASPR 3-903.4(a).]

The usual method for a subcontractor to reach a board of contract appeals is to persuade the prime contractor to sponsor an appeal by him on behalf of the sub. This means, in practical terms, that the sub can do all the work, have his counsel prosecute the appeal, etc. But the paper work must be done in the name of the prime contractor. And the Atomic Energy Board of Contract Appeals will hear appeals by subcontractors if (1) the Disputes clause in the subcontract provides for a direct right of appeal, and (2) has been approved by the Contracting Officer.

Severin v. United States held that a prime contractor cannot appeal on behalf of the subcontractor when the subcontract contains an exculpatory clause which frees the prime from any liability to the sub with respect to the particular claim asserted. This rule was, for a time, followed by the Armed Services Board. Now, however, under the requirements of clauses requiring an equitable adjustment in the contract price, the Board holds the requirements of the Severin rule inapplicable. And rightly so, or otherwise the Government, which has the benefit of the additional work performed, would be unjustly enriched.

Assignees, under the Assignment of Claims Act of 1940, 31 U.S.C.

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60. United States v. Blair 321 U.S. 730 (1944); J. A. Jones Construction Co., ASBCA 91 (1950); Murray Corp. of America WDBC 1141 (1945).
61. Carpenter Steel Co., AECBCA No. 5-65, 65-1 BCA para. 4795, 7 GC 153 (C), 235.
No technical form of notice of appeal is required. Indeed, the board has been liberal in construing various documents as notices of appeal where an intention to appeal is evident. This appears to be only fair, for the Government should not take a technical advantage of a contractor, particularly on so fundamental a step, where the substance is clear. As a minimum, however, the Notice of Appeal should identify the contract by number, and the decision from which the appeal is taken.

A Notice of Appeal which has been successfully used in relation to claims is as follows:

REGISTERED MAIL, RETURN RECEIPT REQUESTED

The Secretary of the Navy
Washington 25, D. C.

Care of: I. Mean Business, Contracting Officer
Supervisor of Shipbuilding, U. S. Navy
Major Seaport, U. S. A.

Dear Sir:

Re: Contract #

The X Company hereby appeals from the decision of I. Mean Business, Contracting Officer under said contract, dated 13 May 1965, insofar as said decision denied claims referenced therein.

Yours truly,

THE "X" COMPANY

by __________________________

Contract Administrator
(or, Attorney for the "X" Company)

CC: Armed Services Board of Contract Appeals
Washington 25, D. C.

NOTE: The envelope enclosing the Notice of Appeal should be addressed to the Contracting Officer, not to the Secretary of the Navy; that is, to "I. Mean Business, Contracting Officer, Supervisor of Shipbuilding, U. S. Navy, Major Seaport, U. S. A."

The contractor should appeal within 30 days from the actual receipt of the decision. If he does not so appeal, the Government obtains a vested right in the Contracting Officer's decision which cannot be waived by any government official. 67

Under applicable board rules, mailing stops the running of the 30-day period. That is, if the notice of appeal is mailed within the 30-day period, that is enough. See ASBCA Rule 1. Accordingly, care should be taken with the mailing process, and a record should be made of the mailing. Indeed the notice of appeal should be sent by registered or certified mail, if at all possible.

The date of receipt of the decision is excluded but the 30th day is included. 68 If the last day falls on a Sunday or a holiday, the period for appeal is extended for another day. 69 Saturday, however, is not a holiday. 70

Discovery is possible and appears to be increasing in usefulness. Indeed, boards of contract appeals must apparently make discovery as available as in the federal courts, as a consequence of the Bianchi decision, infra. Under the holding of that case, judicial review of board decisions is confined to the board record, probably subject to all the requisites of procedural due process. 71 See the new Veteran’s Administration Rule 19, 7 GC 537.

Written interrogatories and an inspection of documents are possible. 72 And depositions are being allowed with increasing liberality. 73 Requesting admissions of facts are also possible. See Federal Rule of Civil Procedure 36. The modern trend appears to be that the boards will tend to follow court guidelines on discovery proceedings. 74

In case of doubt as to how to proceed with discovery, a letter to the board requesting the relief desired, will usually be sufficient.

The “hearing” before a board of contract appeals is merely a muted way of describing what takes place in the courts vested with judicial power as a “trial.” Proof is adduced through the examination of witnesses, and the proving of documents. Trial experience is highly desir-

68. Schroeder Tool and Engineering, Inc. ASBCA 851 (1952).
69. JGB Maintenance Specialists, ASBCA No. 8866, 63 BCA para. 3766, 5 GC 399; Northrop Aircraft, Inc. ASBCA 391, 400 (1950).
72. Landers, Frary, and Clark, GSBCA 1460, 7 GC 545, 560.
able; and as careful preparation for this type of trial is as essential as in any comparable type of case. Indeed, many of these cases are highly complicated on the facts, and meticulous preparation is essential.

Hearings before the board are completely *de novo*, and on appeal there is no presumption of validity attaching to the Contracting Officer’s decision.76

In addition, the board must apply equitable principles in determining matters over which it has jurisdiction; and technical advantages are not to be taken over contractors.76

Subpoenas are obtainable under 5 U. S. C. 94 and have been used in Armed Service Board of Contract Appeals cases. 5 U. S.C. 94 has also been used by the Interior Board.77 There is also specific statutory authority for the issuance of subpoenas in cases pending before the Atomic Energy Board of Contract Appeals, and the District of Columbia Board of Contract Appeals.

*All in all*, when you are in an appeal before a board of contract appeals, you are in a lawsuit. Moreover, the record which is made before the board of contract appeals will be the only record made in the case. If you should eventually go to the Court of Claims, that record will be the only one that will be reviewed by that Court.78

VI. SUIT IN THE COURT OF CLAIMS

As set forth above, if you have lost out in a dispute with the Contracting Officer, you may appeal to a board of contract appeals. If you are unsuccessful there you may then sue the United States of America in the Court of Claims on the theory of breach of contract, that is, that the effect of the decision of the Board of Contract Appeals does not afford you all the relief that you are entitled to under the terms of your contract.

Under *United States v. Carlos Bianchi & Co.*,79 *United States v. Utah Construction and Mining Co.*,80 and *United States v. Grace & Sons, Inc.*,81 there is no right to a trial *de novo* in the Court of Claims

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78. 373 U.S. 709 (1963).
on factual questions which have been heard and determined by a board of contract appeals.

However, the Court of Claims will judicially review the decision of the Board of Contract Appeals as to whether it is based on erroneous legal principles; whether it is arbitrary or capricious; and whether any of its findings of fact are not supported by substantial evidence, etc. A result of the review by the Court of Claims may be that the case may be remanded to the Board of Contract Appeals for further proceedings, such as to make further findings of fact.

VII. PRIVATE BILLS

Where there is no available relief under existing provisions of law, relief may nevertheless be obtained through passage of a private bill. A private bill may either appropriate a sum of money as relief, directly; or it may send the case to the Court of Claims (1) to hear and determine whether the plaintiff has a legal or equitable claim and enter judgment; or (2) to refer the case to the Commissioners of the Court of Claims to hear, and report back to Congress.

An "equitable" claim, in the Congressional Reference sense, in the Court of Claims, is not confined to claims defined in the context of equity jurisprudence. It includes claims which are "merely moral or honorary."

APPENDIX

SAMPLE FORM: FORM FOR ASSERTING A FORMAL CHANGE ORDER CLAIM

(To the Contracting Officer):

Dear Sir:

Re: Contract No. ________;

Change Order(s) No. _________

This is to advise that, as soon as the necessary data becomes available, the Contractor will submit a claim for an extension of time and for his increased costs resulting from the above described Change Order(s).

Yours truly,

THE "X" COMPANY

By ____________________________

Form 1

Contract Administrator

SAMPLE FORM: FORM FOR ASSERTING A CONSTRUCTIVE CHANGE ORDER CLAIM

Date ____________

(To the Contracting Officer)

Re: Contract No. ____________

Dear Sir:

The Contractor has been requested by the Contracting Officer or his representative to perform the following additional work not required by the original contract:

(Here describe the additional work requested.
If orally requested by some Government official, be sure you describe it clearly. If the additional work was requested in a letter or other document, say "work described in letter from B. Technical, Government Engineer, Dated _______.")

The Contractor considers that the above described action of the Government constitutes a Constructive Change Order or extra, and is proceeding with the additional work requested. As soon as the necessary data becomes available, the Contractor will present a claim for an equitable adjustment for an extension of time in contract performance and for his increased costs.

Yours truly,

THE "X" COMPANY

By ____________________________

Contract Administrator

Copies to:
Form 2

NOTE:

1. Copies of this letter should be sent to every Government official possibly having an interest, such as (a) the Contracting Officer; (b) an Administrative Contracting Officer, if there is one; (c) "B. Technical", the Government engineer, actually requesting the additional work; (d) any inspector who may be involved, etc. The objective is to give notice to everybody and anybody possibly involved, that you have a claim.

2. Be sure to use the phrase "Constructive Change Order." This
Table: Chart of Boards of Contract Appeals

<table>
<thead>
<tr>
<th>Board Name</th>
<th>Full Time</th>
<th>Part Time</th>
<th>Ad Hoc</th>
<th>Percent of Lawyers</th>
<th>Board Chosen From Within Agency</th>
<th>Subpoena Power</th>
<th>Accelerated Procedure</th>
<th>Direct Appeal by Subs</th>
<th>Decisions Published</th>
<th>Board Decision Final</th>
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Notes:
1. These boards have full-time chairmen and vice chairmen.
2. Subcontractor appeals are very limited.
3. In certain cases, the decisions of these boards are advisory only.
4. This is a special-purpose board.


May have a strong, educational effect by causing the people involved to find out what it is.