Contracting with the Federal Government: The Dispute Resolution Process

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I. INTRODUCTION

Government contracts concerning natural resources are a common and vital part of the West’s economy (i.e., timber sales, road construction, tree planting, fencing, etc.). Attorneys representing parties to these contracts should be aware of the procedural alternatives if a dispute arises from the contract. A knowledge of the dispute process is also helpful for advising clients before they enter into public contracts. The Contract
Disputes Act of 1978 (CDA)\(^1\) and the Federal Courts Improvement Act of 1982 (FCIA),\(^2\) read together, establish a new dispute resolution process for public contracts. These statutes will become increasingly important with the current administration’s “privatization” efforts in contracting out work previously performed by public employees (i.e., trail maintenance, road maintenance, etc.).\(^8\)

This comment provides a brief synopsis of the statutes, a step by step approach to the alternative contract dispute procedures, and a list of factors that should be considered in deciding what procedure, if any, would be most advantageous for the client. Knowledge of the procedures’ time and expense requirements may make settlement the most attractive alternative.

II. **Contract Disputes Act of 1978**

**A. Background**

Government contracts have traditionally been “instruments of adhesion”. The government drafted the contract and the other party was privileged (required) to adhere to its terms.\(^4\) The remedies system that evolved also benefitted the government by allowing the applicable agency party to decide open or ambiguous terms through the use of a “disputes” clause in the same contract.\(^5\) The first instance of this occurred in 1878, when an Army Quartermaster was allowed to determine a question of fact because of such a provision (the distance between two points).\(^6\)

These dispute provisions became increasingly standard in government contracts. In 1950 and 1951, the Supreme Court held that such provisions were not unconscionable and therefore enforceable.\(^7\) Congress responded

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3. *See* 48 Fed. Reg. 37,110 (1983). The Office of Management and Budget (OMB) issued Circular No. A-76 (Revised) to “set forth procedures for determining whether commercial activities should be performed under contract with commercial sources or in-housing using Government facilities and personnel.” The circular requires the government to continue the performance of functions that are “inherently governmental in nature, being so intimately related to the public interest.” However, the “Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.” *Id.* at 37,114.
5. *Id.* at 4.
by passing the "Wunderlich Act of 1954," prohibiting the use of contract provisions making agency decisions final. The original intent of Congress was frustrated, however, because the final version of the Act contained a proviso that such decisions are final, unless found to be fraudulent, capricious, arbitrary, grossly erroneous, or not supported by substantial evidence.⁹

Agencies' "finality" power was expanded by a trilogy of Supreme Court cases\(^ {10} \) concluding that the "substantial evidence" language placed agency decisions on contract disputes in the same posture as decisions of the regulatory agencies under the Administrative Procedures Act.\(^ {11} \) Judicial review was therefore confined to the agency's record, and an agency decision could not be overturned except by "overwhelming evidence to the contrary."\(^ {18} \) This provoked both parties to "sweep out the kitchen," and enter any and all evidence at the agency hearings, no matter how tenuous.\(^ {19} \) In addition, different procedures were required if the claim "arose under the contract" as opposed to a claim for "breach of contract".\(^ {14} \) Not surprisingly, the procedures became "overjudicialized, overformalized, and expensive."\(^ {16} \) Dissatisfaction with the system increased, and in 1969, the Commission on Government Procurement was created to analyze the system and make recommendations.\(^ {10} \)

The need for an efficient and equitable dispute procedure was clear. The methods and forums for handling disputes existed by "executive branch fiat."\(^ {17} \) The government contract remedies system developed in an "unplanned manner" and as a "result of unstructured reactions to various events and decisions."\(^ {18} \) The Commission on Government Procurement was the first attempt to comprehensively examine the dispute procedure.\(^ {10} \)

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15. Spector, supra note 4, at 6.
18. Id. at 3, 1978 U.S. CODE CONG. & AD. NEWS 5237.
Six volumes and 149 recommendations later, Congress began working on legislation culminating with the CDA. The purposes of the Act include: equalizing the bargaining power of the parties when a dispute exists, providing alternative forums to handle the disputes including direct access to courts, and inducing resolutions of more contract disputes by negotiation prior to litigation.

B. Applicability

The CDA applies to any express or implied contract entered into by an executive agency for the procurement of property (other than real property in being), services, construction, or for the disposal of personal property, including timber sale contracts. Because the CDA is self-executing, it applies even when a “disputes” clause is omitted from a contract. In addition, contractors who enter into a contract prior to the CDA’s effective date (March 1, 1979) can elect to proceed under the CDA instead of the disputes clause, as long as the contracting officer (C.O.) did not issue a final decision before the effective date.

C. Submission of a Claim

All claims must be submitted in writing by the contractor to the C.O. for a final decision. In turn, the C.O. issues a written decision with the reasons for the decision, and an enumeration of rights secured to the contractor.

20. Id.
21. Id. at 1, 1978 U.S. CODE CONG. & AD. NEWS 5235.
24. Pleasant Logging & Milling Co., Inc., AGBCA 79-172 CDA, 80-1 BCA ¶ 14,290. Any dispute arising from a public contract, if the contract was awarded after the CDA’s effective date, must be pursued in accordance with the CDA’s provisions. Pine Mountain Lumber Co., AGBCA 83-194-1, BCA ¶ __________.
26. Id. § 601(3). The definition of a contracting officer is “any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority”.
28. 41 U.S.C. § 605(a) (Supp. V, 1981). “The conception of a claim against the government normally connotes a demand for money or for some transfer of public property.” Pine Mountain Lumber Co., AGBCA 83-194-1, BCA ¶ __________, quoting from United States v. McNinch, 356 U.S. 595, 599 (1958). A “claim”, therefore, does not include a request for a declaratory judgment or similar equitable relief. This limit to relief available applies to both the Claims Court (which has pre-award equitable relief however) and the boards, with the exception of the Armed Services Board of Contract Appeals, which can issue declaratory judgments because of that Board’s pre-CDA “Charter authority”. McDonnell Douglas Corp., ASBCA No. 26,747, 83-1 BCA ¶ 16,377.
contractor by the CDA.\textsuperscript{29} If the claim is for more than $50,000, the contractor must "certify" that the claim is "made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."\textsuperscript{30} Certification of a claim has been determined to be a jurisdictional prerequisite in the board of contract appeals,\textsuperscript{31} the United States Claims Court,\textsuperscript{32} and the United States Court of Appeals for the Federal Circuit.\textsuperscript{33}

The C.O.'s decision is considered final unless the contractor files an appeal as authorized by the CDA.\textsuperscript{34} Notwithstanding an appeal, the contractor may be bound to proceed diligently with the performance of the contract in accordance with the contract terms.\textsuperscript{35} After the C.O. has issued the decision, the contractor may elect to appeal the decision to the respective board of contract appeals (board)\textsuperscript{36} within ninety days,\textsuperscript{37} or to the Claims Court within twelve months.\textsuperscript{38} Once a contractor files with a board, however, he is bound to exhaust all administrative remedies before filing with the Claims Court.\textsuperscript{39}

D. Agency Boards of Contract Appeals

1. General powers

Members of agency boards are appointed and serve in the same capacity as administrative law judges.\textsuperscript{40} Each board has the jurisdiction to

\textsuperscript{29} Id.
\textsuperscript{30} Id. § 605(c)(a).
\textsuperscript{32} W.H. Moseley Co., Inc. v. United States, 677 F.2d 850 (Ct. Cl. 1982).
\textsuperscript{33} W.M. Schlosser Co., Inc. v. United States, 705 F.2d 1336 (Fed. Cir. 1983). The Court of Appeals for the Federal Circuit was created by the Federal Court Improvement Act, see infra notes 85-97 & accompanying text.
\textsuperscript{34} 41 U.S.C. § 605(b) (Supp. V, 1981).
\textsuperscript{35} Id. See generally Shedd, Government Contractor's Obligation to Continue Performance in Accordance with Contracting Officer's Decision, 12 PUB. CONT. L.J. 89 (1982).
\textsuperscript{36} Many federal government agencies have their own Board of Contract Appeals, including, but not limited to: the Department of Agriculture, the Department of Interior, the Department of Energy, the U.S. Army Corps. of Engineers, the Department of Labor, and the Department of Transportation.
\textsuperscript{38} Id. § 609(a). Again, the C.O.'s decision is a jurisdictional prerequisite, Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981).
\textsuperscript{39} S.J. Groves & Sons Co. v. United States, 661 F.2d 170 (Ct. Cl. 1981). See also Monro M. Tapper & Assoc. v. United States, 611 F.2d 354 (Ct. Cl. 1979).
decide any appeal relative to a contract,\textsuperscript{41} which seems to abolish the distinction between “disputes arising under the contract” and “breach of contract.”\textsuperscript{44} To the fullest extent practicable, the board must provide an inexpensive and informal resolution of disputes, and issue a written decision.\textsuperscript{48} Claims of $50,000 or less are afforded an “accelerated” appeal procedure at the sole election of the contractor.\textsuperscript{44} Here, the target for resolution is one hundred and eighty days.\textsuperscript{48} Board member’s pre-trial and trial powers include authorizing discovery proceedings, issuing subpoenas for the attendance of witnesses and production of documents, administering oaths, and holding persons in contempt.\textsuperscript{46}

2. \textit{Small claims}

The CDA requires each board to establish simplified rules for disposal of claims worth $10,000 and less.\textsuperscript{47} Here again, the procedure rests within the sole discretion of the contractor, and is to be resolved, whenever possible, within one hundred and twenty days.\textsuperscript{48} Because it is “difficult to be economical, yet thorough; thorough, yet speedy,” the small claims procedure provides the contractor with a forum where the degree of due process is balanced by the time and expense of resolving the dispute.\textsuperscript{49} Decisions from the small claims procedure, however, have no value as precedent for future cases and are not appealable.\textsuperscript{50}

3. \textit{Judicial review of board decisions}

Board decisions are considered final unless appealed to the U.S. Court of Appeals for the Federal Circuit by the contractor within one hundred and twenty days after the date of receipt of the decision.\textsuperscript{51} To prevent an “unfair advantage,”\textsuperscript{52} the C.O. may also appeal the board decision to the Court of Appeals for the Federal Circuit, upon approval from the Attorney

\begin{itemize}
  \item \textsuperscript{41} Id. § 607(d).
  \item \textsuperscript{42} Jacoby, \textit{supra} note 14, at 16.
  \item \textsuperscript{44} Id. § 607(f).
  \item \textsuperscript{45} Id., see also S. Rep. No. 1118, 95th Cong., 2d Sess. 25, \textit{reprinted in} 1978 U.S. CODE CONG. \& AD. NEWS 5259.
  \item \textsuperscript{47} Id. § 608(a).
  \item \textsuperscript{48} Id. § 608(e).
  \item \textsuperscript{50} 41 U.S.C. § 608(e) (Supp. V, 1981). See \textit{supra} notes 157-161 \& accompanying text.
  \item \textsuperscript{51} Id. § 607(g)(1)(A).
\end{itemize}
General. On appeal, the board’s decision on any question of law shall not be final, but the decision on any question of fact remains final unless it is found to be “fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.” The retention of the “substantial evidence” standard of review for board decisions is a heavy burden for the contractor, making the board alternative less attractive than pursuing the claim before the Claims Court. The Commission on Government Procurement recommended that the “finality” standard of board decisions be replaced with another standard (i.e., the clearly erroneous standard), which was incorporated into the originating bills. This recommendation, however, was discarded in the final version of the Act.

E. Miscellaneous provisions

Under the CDA, a contractor unable to support any part of his claim because it is determined to be attributable to fraud or misrepresentation of fact, is liable to the government for the amount of such unsupported part of his claim plus costs. Conversely, judgments against the government must be paid promptly. Contractors are also to be awarded interest from the date the C.O. receives the claim until payment. If the claim requires certification, the contractor is not entitled to interest until such certification occurs.

III. The Federal Courts Improvement Act of 1982

A. Background

The FCIA culminated over ten years of research and debate on changes to the federal appellate court system. Because of the rapid increase in appeals to the federal courts of appeals, the Federal Judicial

54. Id. § 609(b).
55. See generally Spector, supra note 4.
57. 41 U.S.C. § 609(b) (Supp. V, 1981); see also Spector, supra note 4, at 1.
59. Id. § 612.
60. Id. § 611.
61. See supra notes 30-33 & accompanying text.
Center asked Professor Paul Freund of the Harvard Law School to head a committee to study the caseload of the Supreme Court. In 1972, the committee submitted its report, which became known as the "Freund Report," recommending that Congress establish a "National Court of Appeals." This "supercourt," after screening all petitions for review filed with the Supreme Court, would refer the most meritorious of the cases to the Court, and retain for final decision the cases with a genuine conflict between the federal circuits.

Congress established another group to study federal court reform, known as the Commission on Revision of the Federal Court Appellate System, or the "Hruska Commission." Its final report, submitted in 1975, also recommended the establishment of a national court of appeals. This court, however, would have no "screening function" but instead assume jurisdiction by referral (from the Supreme Court) and transferral (from the other federal court of appeals).

A proposal by the Department of Justice, however, became the nucleus of the court reform legislation that Congress ultimately enacted. This proposal recommended the establishment of an appellate court with national geographic jurisdiction, but relatively narrow subject matter jurisdiction (i.e., civil tax, patent, and environmental cases). Lobbying pressure caused the elimination of civil tax and environmental cases from

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66. Id. at 590-95.

67. Id. at 590.


69. Petrowitz, supra note 63, at 546.

70. See Hruska Report, supra note 68, at 236-47.


the new court's subject matter jurisdiction. Patent and tax appeals from the new Claims Court, however, were preserved, and jurisdiction over decisions from the Court of International Trade and the agency boards of contract appeals were added. Both the House and Senate passed their respective versions of the bill, but a final compromise bill was withdrawn without further action because of an attempt to add a "controversial nongermane" amendment.

The following year, Senator DeConcini introduced S. 21, which was similar to the previously passed Senate Bill (S. 1477). The final version eventually passed both Houses and became law on April 2, 1982. The purposes of the FCIA include creating a forum over appeals in areas of the law with a "special need for nationwide uniformity," improving the administration of patent law by centralizing appeals, and providing an upgraded trial forum for government claim cases.

The FCIA brought about three basic changes: the creation of the Court of Appeals for the Federal Circuit, the abolition of the Court of Customs and Patent Appeals and the Court of Claims (transferring most of their appellate functions to the new appeals court), and the establishment of the Claims Court.

B. Court of Appeals for the Federal Circuit

The new Court of Appeals for the Federal Circuit is an Article III court, similar in structure to the other twelve courts of appeals. It is

74. Id. at 50-51.
76. The controversial amendment, which became known as the "Bumpers amendment" was offered by Senator Dale Bumpers (D-Ark.) and would have made rules promulgated by federal administrative agencies more vulnerable to attack in the course of judicial review by eliminating the longstanding presumption of validity established in Udall v. Tallman, 380 U.S. 1 (1965). See 126 CONG. REC. S13,877-80 (daily ed. Sept. 30, 1980).
79. See supra note 75.
81. Id. § 106 (repealing 27 U.S.C. §§ 831-34 (1976)).
82. Id. § 122(a) (repealing 28 U.S.C. §§ 831-34 (1976)).
85. Id. § 101(a), 28 U.S.C.A. § 41 (West Supp. 1983). The U.S. Constitution, Article III, § 1, declares that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Conversely, the Claims Court is an Article I legislative court that can hear congressional reference cases and make recommendations to Congress. The Claims Court, therefore, is not limited to the "cases and controversies" requirement.
composed of the twelve judgeships from the Court of Claims appellate division and the Court of Customs and Patent Appeals. Judges sit in panels of three or more, and can hold either regular sessions in Washington, D.C. or special sessions in other places to provide a "reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable."

Jurisdiction of the new court is limited to a list of ten explicitly designated subject matters, including appeals from a final decision of the Claims Court, or of an agency board of contract appeals. However, the new court has held that it has no jurisdiction over a board decision if the board proceeded under the Wunderlich Act, because the contract claim was not pending before a C.O. on the effective date of the CDA.

The new court published its rules of operating procedure as required by the FCIA. These rules are primarily adopted from the Federal Rules of Appellate Procedure. Attorneys finding themselves involved with an appeal to the court should become familiar with these rules, particularly qualifications for admission to the Bar, format for briefs and oral arguments, and the awarding of attorney fees.

**C. Claims Court**

The FCIA established a new Article I Claims Court to assume the duties of the old trial division of the Court of Claims. The Claims Court

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90. *Id.,* 28 U.S.C.A. § 1295(a)(10) (West Supp. 1983). Jurisdiction over an appeal from a board decision is pursuant to section 8(g)(1) of the CDA (41 U.S.C. § 607(g)(1)).
94. *FED. CIR. R.* 6; *FED. R. APP.* P. 46(a).
96. *FED. CIR. R.* 15; *FED. R. APP.* P. 34.
97. *FED. CIR. R.* 20. The court may award attorney fees, pursuant to the Equal Access to Justice Act, *PUB. L.* 96-481, 84 Stat. 2325 (1980), upon application within thirty days after the date of decision. The application must contain a citation to the statutory provision which authorizes the award and indicates the manner in which the statutory prerequisites have been fulfilled. The application must also contain a statement, under oath, specifying: the nature of each service rendered, the amount of time expended, and the customary charge.
now consists of sixteen judges, appointed by the President and subject to Senate confirmation, who will hear and decide cases individually. The court is based in Washington, D.C., but can hold special sessions in other places for the convenience of claimants.

The Claims Court has jurisdiction to render judgments in all claims against the United States founded on the Constitution, any act of Congress or regulation of an executive department, and any express or implied contract with the United States. This jurisdiction extends over claims by contractors arising under the CDA. The court also has jurisdiction to try cases formerly heard by the Indian Claims Commission, and claims for liquidated or unliquidated damages in cases not sounding in tort. The Claims Court now has exclusive jurisdiction to grant declaratory judgments and equitable relief on contract claims brought before the contract is awarded. This jurisdiction is lost, however, after the contract has been awarded. Neither the boards of contract appeals nor the district courts will have any jurisdiction in resolving pre-award disputes.

The proceedings of the Claims Court are to be conducted in accordance with the Rules of the United States Claim Court and the Federal Rules of Evidence. Familiarity with these Rules is essential if a claim is to be filed with the court. Rules worthy of note include attorneys eligible to practice, application for attorney fees, duplication of filed papers,

105. Federal Courts Improvement Act § 133(a), 28 U.S.C.A. § 1491(a)(3) (West Supp. 1983). This equitable jurisdiction terminates, however, after the contract has been awarded, and thereafter, only claims for monetary relief can be pursued. See Pine Mountain Lumber Co., AGBCA 83-194-1, ___ BCA ___.
briefs,\textsuperscript{113} and time for filing papers.\textsuperscript{114}

IV. THE DISPUTE PROCESS

There are three basic stages to the public contract disputes process: preparing and presenting the claim to the C.O. for a final decision,\textsuperscript{115} appealing an adverse decision to either the appropriate board of contract appeals or the Claims Court,\textsuperscript{116} and if necessary, appealing the board or Claims Court judgment to the Court of Appeals for the Federal Circuit.\textsuperscript{117}

A. The Claim

1. Preparation

After developing theories entitling the claimant to recover, both board and Claims Court case law should be reviewed to determine the most favorable forum and their applicable holdings. Although a contractor may represent himself, or be represented by a proprietor, partner, or corporate officer before a board,\textsuperscript{118} it is advisable to have an attorney handle the claim.\textsuperscript{119} Because interest begins to accrue from the date the C.O. receives the claim (or when certified if applicable) until the date of payment,\textsuperscript{120} the claim should be filed as soon as it is prepared.

2. Submission

Even though a short letter requesting relief is sufficient as a claim, it is advisable to inform the C.O. of the factual and legal basis of the claim. The formal claim should include accounting data, a detailed documentation of damages, and legal citations supporting your position. Persuading the C.O. to decide in your favor at this stage can prevent the time and expense of litigation. Settlement negotiations should also be attempted at this time. If nothing else, these discussions are a good opportunity to discover what evidence the government has. Again, if the claim is over $50,000, be sure to certify it.\textsuperscript{121}

\textsuperscript{113} U.S.C.C.R. 83.1.
\textsuperscript{114} U.S.C.C.R. 83.2.
\textsuperscript{116} Id. §§ 606, 607(d), 609(a)(1), 609(a)(3).
\textsuperscript{117} Id. §§ 607(g)(1)(A)-(B). See generally Perlman & Goodrich, supra note 27.
\textsuperscript{119} See Albert C. Rondinelli, ASBCA 9900, 65-2 BCA ¶ 4897.
\textsuperscript{121} See supra notes 30-33 & accompanying text.
3. Final decision by C.O.

The C.O. is required to issue a final decision for any claim, regardless of whether the claim is initiated by a contractor or the government. The time limit for a decision is sixty days for claims of $50,000 or less, but if the claim is over $50,000, the C.O. has sixty days to either issue a decision or inform the claimant when a decision will be issued. The final decision must be delivered to the contractor in writing, and contain a statement that it is the final decision, with the reasons for the decision. In addition, it must advise the contractor of his rights of appeal.

The C.O.'s final decision is a jurisdictional prerequisite to review by a board or the Claims Court. If the C.O. fails or refuses to issue a decision within a reasonable time, the contractor may file suit just as though an adverse final decision had been issued. The CDA also allows the contractor to request the board to direct the C.O. to issue a final decision in the event of undue delay. Remember, while awaiting the outcome of a board appeal, court action, or final settlement, the contractor has a duty to proceed with performance of the contract.

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123. Id. § 605(c).
124. Id. § 605(a).
125. Id. See generally Perlman & Goodrich, supra note 27, at 4. The standard notice of appeal rights included in the C.O.'s final decision from the Clearwater National Forest, U.S. Forest Service, Northern Region, states:

This notice constitutes a decision that you are in default as specified and that this is the final decision of the Contracting Officer. This decision is made in accordance with the Disputes Clause and shall be final and conclusive as provided therein, unless within ninety (90) days from the date of receipt of this decision, a written notice of appeal is addressed to the Agricultural Board of Contract Appeals. A copy thereof shall be furnished to the Contracting Officer. The Notice of appeal should indicate that an appeal is being taken and should identify the contract by number, the department and agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. In lieu of appealing to the Agricultural Board of Contract Appeals you may elect to commence an action in the U.S. Court of Claims by filing a petition with the Court, within twelve (12) months from the date of receipt of this decision.

The small claims procedure of the Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is $10,000, or less.

The accelerated procedure of the Board shall be applicable at the sole election of the contractor in the event the amount in dispute, as a result of the final decision, is $50,000 or less.

The AGBCA has held, however, that the C.O. need not include every CDA provision affecting the contractor's rights in the notice of appeal rights letter. Big Sky Contractors, Inc., AGBCA 82-143-1, 82-1 BCA ¶ 15,731.

126. Lowell Monument Co., VACAB 1111, 75-1 BCA ¶ 11,341.
129. Id. § 605(b). See supra note 35 & accompanying text. There are justifications for the
B. Appealing The C.O.'s Final Decision

The contractor has the right to choose between the board and the court, but claims are not permitted to be pursued in both forums simultaneously. If analysis of the case law shows that the board is a more favorable forum, the contractor must be sure to file the appeal within the proper time limit of 90 days. This time limit is viewed as a jurisdictional prerequisite, and thus cannot be waived, even upon a showing of good cause.

The time limit for filing with the Claims Court of twelve months (from the contractor's receipt of the C.O.'s final decision), therefore, acts as a "safety net."

Even though the CDA confers jurisdiction on the boards to grant any relief that would be available in the Claims Court, a review of the case law shows a disparity in relief available from each forum. For instance, the Court of Appeals for the Federal Circuit has ruled that boards cannot award attorney fees under the Equal Access to Justice Act (EAJA) but that the Claims Court can award fees. Additionally, boards cannot grant pre-award equitable relief, whereas the Claims Court may do so.

1. Board of Contract Appeals procedure

The Office of Federal Procurement Policy (OFPP) promulgated model rules, as authorized by the CDA, for boards to use as a guideline in revising their own rules. These rules have since been adopted by most boards, including the Department of Agriculture Board of Contract

contractor to discontinue performance, including: causes arising that are beyond the control and without the fault or negligence of the contractor, failure by the government to give instructions or satisfactory interpretations of contract specifications, or a breach of contract by the government (i.e., failure of the government to pay amounts due under the contract).

132. Big Sky Contractors, Inc., AGBCA 82-143-1, 82-1 BCA ¶ 15,731; Western Pacific Enter., ASBCA 25822, 81-2 BCA ¶ 15,217; contra Imperator Carpet & Janitorial Serv., GSBCA 6164, 81-2 BCA ¶ 15,350.
133. Big Sky Contractors, Inc., AGBCA 82-143-1, 82-1 BCA ¶ 15,731; Pleasant Logging & Milling Co., Inc., AGBCA 79-172 CDA, 80-2 BCA ¶ 14,605; Sofarelli Assoc., Inc., ASBCA 24580, 80-2 BCA ¶ 14,472.
135. Perlman & Goodrich, supra note 27, at 6.
139. See supra note 105-07 & accompanying text.
141. Perlman & Goodrich, supra note 27, at 1.
Appeals. The rules include provisions concerning preliminary procedures, hearings, representation, and miscellaneous topics. For simplicity, the rules referenced below are from the Rules of the Board of Contract Appeals for the U.S. Department of Agriculture, rather than from the rules for each board.

Even though there is no standard form for the "notice of appeal," it should at least contain: the identity of the contract (by number), the department and agency involved, the decision from which the appeal is taken, the amount in dispute (if known), and the signature of the appellant (contractor) or the appellant's authorized representative (attorney). The notice of appeal is sent to the board's Clerk (registered mail is recommended), who then issues a docketing notice. At this time, the appellant has thirty days to file a Complaint, which should include all claims (i.e., liability and damages). Bifurcation arises implicitly unless the complaint alleges both liability and damages (both of which must have been already submitted to the C.O. for a final decision). The government has thirty days from receipt of the Complaint to file an Answer, which must include every defense on which it expects to rely. The pleadings may be amended with board approval, including amendments to conform to the proof offered at the hearing.

Within thirty days of receipt of a letter from the board transmitting the Complaint, the C.O. is required to submit to the board a "Rule 4" file. This file consists of documents (in triplicate) pertinent to the appeal, including: the C.O.'s final decision, the contract, all relevant correspondence between the parties, any transcripts of testimony made prior to the filing of the notice of appeal, and any additional information. The appellant is then forwarded a copy, and must submit any relevant material. Unless an objection is made, the documents become part of the board's record.

142. AGBCA Rules - Introduction.
143. AGBCA Rules 1-16.
144. AGBCA Rules 17-25.
145. AGBCA Rules 26-27.
146. AGBCA Rules 28-34.
147. AGBCA Rule 2.
148. AGBCA Rule 3.
149. AGBCA Rule 6(a).
150. AGBCA Rule 6(b).
152. AGBCA Rule 7.
153. AGBCA Rule 4(a).
154. Id.
155. AGBCA Rule 4(b).
156. AGBCA Rule 4(e).
The CDA provides two optional hearing methods to reduce the time of obtaining a decision by the board. Both methods are available solely at the election of the contractor, and must be requested by written notice within sixty days. The "small claims" (expedited) procedure has no precedential value and is non-appealable. Neither of these optional methods are available, however, in the Claims Court.

2. Claims Court procedure

The Claims Court Procedure, governed by the Court's own Rules, is more formal than the boards' procedure. Suit is initiated by filing a complaint with the court and paying a fee. The applicable government agency then files an answer within sixty days of receipt of the notice of suit from the Clerk of Court. The pleadings may be amended under guidelines similar to the Federal Rules of Civil Procedure. The discovery rules are also similar to the Federal Rules of Civil Procedure.

A "Pretrial Submission" is usually ordered by the Court. This requires the parties to submit a statement containing: the evidence to be offered, the facts and legal conclusions to be established, the legal authorities supporting the positions, the disputed facts, the legal issues, the witnesses to be called, and the estimated date when the case will be ready for trial.

The trial, which can be held outside of Washington, D.C. for the convenience of the parties, is similar to that before a U.S. District Court. Transcripts are taken by a court reporter, and copies are available to the parties for a charge. The Federal Rules of Evidence apply. Post-trial briefs may be filed, which include a version of the facts the party would like the Court to find. The judge then files the findings of

158. AGBCA Rule 12.1.
159. AGBCA Rule 12.2; see also supra notes 47-50 & accompanying text.
160. AGBCA Rule 12.3; see also supra notes 44-45 & accompanying text.
161. Big Sky Contractors, Inc., AGBCA 82-143-1, 82-1 BCA ¶ 15,731.
162. See generally U.S.C.C. RULES.
168. Perlman & Goodrich, supra note 27, at 15.
171. Perlman & Goodrich, supra note 27, at 16.
fact and conclusions of law with the Clerk, who enters a judgment. A dissatisfied party may file a notice of appeal to the Court of Appeals for the Federal Circuit after the service of the judgment.

C. Appeals to the Court of Appeals for the Federal Circuit

Appeals from either a board or the Claims Court proceed to the Court of Appeals for the Federal Circuit. A notice of appeal from the Claims Court must be filed within thirty days, but an appeal from a board has a 120 day time limit. This is strictly enforced, and appeals that are not filed in a timely manner are dismissed. The appeals are divided into two categories, questions of law and questions of fact.

Board decisions on questions of law are not final, and the Court of Appeals can decide the question anew (e.g., de novo hearing). Questions of law include: contract interpretation, breach of contract, and timeliness of an appeal from the C.O.’s decision.

Conversely, questions of fact are subject to a more limited standard of review. A board's finding of fact can only be overturned if it is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to imply bad faith, or not supported by substantial evidence. This places a heavy burden on the contractor, who must show that the board's decision was not reasonable. Additionally, the Court of Appeals only reviews the same evidence that was presented before the board.

The CDA also authorizes the government to appeal a board’s decision, subject to the Attorney General's approval. The time limit of 120 days for filing the appeal also applies, and the standard of review is the same.

The Court of Appeals has the power to remand a case to the board with

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180. 41 U.S.C. § 609(b) (Supp. V, 1981); see also supra notes 51-57 & accompanying text.
181. Richardson Camera Co., Inc. v. United States, 530 F.2d 878 (Ct. Cl. 1976).
184. See supra note 180.
185. Id.
188. Id.
189. Id. § 609(b).
instructions to take particular action.\textsuperscript{191} Remand is appropriate when the Court is unsure of the exact findings of the board and the legal standards which were applied, or finds that the evidence is insufficient for the Court to make its own finding.\textsuperscript{192}

V. FACTORS TO CONSIDER IN PURSUING A CLAIM

This Comment serves as a brief outline of the public contract dispute system, and the authority it is based on. From the earliest stages of the dispute claim, the following factors are important to consider also. There appears to be no inexpensive procedural alternative. Both the board of contract appeals and the Claims Court (and beyond) become costly.\textsuperscript{193}

—Accessing the Law: Federal Contract law has developed into a separate body of law. Reviewing decisions from the Claims Court and the Court of Appeals for the Federal Circuit does not present a big problem (if West Publishing Company's "Federal Reporter" system is available). Decisions by an appropriate board, however, are more difficult to access. Reviewing these decisions requires access to one of the commercial reporting systems,\textsuperscript{194} or to a computer system with public contract database capabilities.\textsuperscript{195}

—Distance Problems: Appealing a C.O.'s decision will eventually involve officials in Washington, D.C. If the appeal is filed with an appropriate board, the government attorney will most likely be a local (regional) agency representative.\textsuperscript{196} The administrative law judge (e.g. board member), however, will be based in Washington, D.C., making communications concerning rulings or discovery costly. If the appeal is filed with the Claims Court, both the judge and the government attorney (usually a member of the Department of Justice staff) will be based in Washington, D.C.

—Multiple Hearings: Multiple hearings, to determine first liability, then damages, are very possible—thus increasing the dispute procedure cost. If the damages are ascertainable, the contractor should get a C.O.'s final decision on the question, so as

\textsuperscript{191} Id. § 609(e); 28 U.S.C. § 1491.
\textsuperscript{192} Ordnance Research, Inc. v. United States, 609 F.2d 462 (Ct. Cl. 1979).
\textsuperscript{193} Spector, supra note 4, at 9.
\textsuperscript{194} Reporter systems containing government contract case law include "Board of Contract Appeals Decisions" from Commerce Clearing House (CCH), and "Government Contracts Law Administration and Procedure" from Matthew Bender and Co.
\textsuperscript{195} Computer systems with government contract databases include WESTLAW (West' Publishing Co.) and LEXIS (Mead Data Central).
\textsuperscript{196} For instance, should a contract dispute arise between a contractor and the U.S. Forest Service (Northern Region), a staff member from the U.S. Department of Agriculture, Office of General Counsel, Missoula, Montana would represent the government's position.
to include both the question of liability and damages in the claim. Preparation of the claim is critical.
—Rules: Familiarity with the rules of the applicable forum (i.e., board, Claims Court, or the Court of Appeals for the Federal Circuit) is essential in pursuing a claim. Time limits, pre-trial requirements, allowable jurisdiction, etc., differ among the forums.
—Standard of Review: Appellants from board decisions have a heavy burden in overturning questions of fact.197
—Accelerated Procedures: Only the boards of contract appeals offer accelerated procedures in resolving contract disputes. Although these procedures can save the contractor time, they can also limit due process safeguards.198
—Attorney Fees: Boards have no authority to award attorney fees pursuant to the EAJA. The Claims Court and the Court of Appeals for the Federal Circuit, however, can award fees.199
—Relief Available: Equitable relief before the contract is awarded is only obtainable from the Claims Court. After the contract is awarded, neither the Claims Court nor the applicable board has jurisdiction to grant equitable relief.200 Equitable doctrines may only be employed incidentally to fashion a monetary judgment.201 Therefore, if a conflict arises over the interpretation of contract terms, the contractor must first perform the work as directed by the C.O., and then file a monetary claim for the extra costs. This rule, albeit harsh, has been recently applied in a timber contract dispute.202

VI. Conclusion

Public contracts dealing with natural resources are commonplace in the West. Additionally, an increase in government contracting is inevitable with the recent attempt to involve the private sector in a more active management role of our public lands. The process for resolving public contract disputes is unique, and a working knowledge of the procedure is essential when representing a party to a public contract. The process, regardless of the alternative chosen, appears to be costly. Considering all the factors in the process, settling the dispute prior to litigation may be the most attractive alternative.

197. See supra notes 54-57, 180-187 & accompanying text.
198. See supra notes 47-50, 157-161 & accompanying text.
199. See supra notes 97, 111, 137-138 & accompanying text.
200. See supra notes 28, 105-107 & accompanying text.
201. See Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483 (1966); Quinault Allottee Assn. v. United States, 453 F.2d 1272 (1972); Pine Mountain Lumber Co., AGBCA 83-194-1, ___ BCA ¶ ___.
202. See Pine Mountain Lumber Co., AGBCA 83-194-1, ___ BCA ¶ ___.